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Heffron v. International Society for Krishna Consciousness Inc.: A Restrictive Constitutional View of the Proselytizing Rights of Religious Organizations

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The persistent efforts of religious organizations to reach their public have consistently been met with governmental limitation due to the often conflicting interests of public order, and free speech and expression. Heffron v. International Society for Krishna Consciousness, Inc. *represents the Court's latest redefinition of the extent of permissible limitations upon the activities of these groups.*

The author examines the decision in light of the traditional criteria for permissible time, place, and manner restrictions upon free speech and evaluates the Court's implementation of these restrictions with respect to the activities of the Krishna group. The impact of the decision upon the limitations involved and upon similar future litigation is also explored.

I. INTRODUCTION

On June 22, 1981, the United States Supreme Court decided the case of *Heffron v. International Society for Krishna Consciousness Inc.*[1] The case involved a challenge by members of the Krishna religion to the constitutional validity of a Minnesota state fair rule[2] which required all commercial, charitable, and religious organizations to sell or distribute literature and solicit donations only from assigned locations on the fairgrounds. The Court ruled that the regulation was a fair time, place, and manner restriction upon the respondent's constitutional rights and, therefore, did not violate the first or fourteenth amendments.[3]

To gain an understanding of the contentions asserted by the International Society for Krishna Consciousness (ISKCON), it is necessary to briefly examine the nature and origin of the Krishna religion and explore the rituals which are relevant to this litigation.[4] The Krishna movement as it exists in this country was

1. 101 S. Ct. 2559 (1981).

2. MINNESOTA STATE FAIR RULE 6.05.

3. Since the case was largely concerned with restrictions upon the dissemination of printed materials, the Court primarily based its analysis on the freedom of speech guarantee of the first amendment. *See* note 24 *infra* and accompanying text.

4. It is clear that Krishna Consciousness is a "religion" for purposes of first amendment analysis. Its members adhere to a strict set of theological doctrines which govern many aspects of their lifestyles and beliefs. Historical evidence also

founded in 1966 by A.C. Bhaktivedanta Swami Prabhupada.[5] His goal was to open a religious center in the United States espousing the theological beliefs of his Spiritual Master in India.[6] The lifestyles and rituals exhibited by members of Krishna Consciousness find their origin in the Chaitanya[7] movement and encompass modifications in physical appearance, diet, and theological beliefs, all reflections of devotion to their Lord.[8] Among the more prevalent rituals performed by members of the Krishna sect and central to this case is the practice known as Sankirtan.[9] The exercise of Sankirtan, as performed by the American Krishna group, involves various forms of public chanting coupled with the distribution or sale of religious literature or the active solicitation of donations for the support of Krishna Consciousness.[10] The goals of this practice are to attract new members to the group, and to strengthen the existing members' faith.[11] It is the practice of Sankirtan which Minnesota State Fair Rule 6.05 (Rule 6.05), the regulation under scrutiny in this case, seeks to restrict.

This article explores the history of constitutional actions regarding the proselytizing rights of religious organizations, and examines the Court's analysis in finding Rule 6.05 constitutionally valid in *Heffron*. Inquiry will be made from the standpoint of first amendment rights and standards applied for permissible restrictions upon those rights. The opposing views taken by the dissenting Justices with regard to their analysis of the application of Rule 6.05 will then be discussed. Finally, the impact of the Court's ruling upon the groups and organizations frequently engaged in solicitation and distribution of literature will be evaluated.

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reveals the roots of the philosophy, which further demonstrates the "religious" nature of the belief. International Soc'y for Krishna Consc., Inc. v. Barber, 650 F.2d 430, 440 (2nd Cir. 1981). *See also* Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development, Part I, Religious Liberty Guarantee*, 80 HARV. L. REV. 1381, 1423-31 (1967); *see* notes 5-8 *infra* and accompanying text.

5. Bhaktiedanta Swami Prabhupada was eleventh in a chain of disciples of Sage Chaitanya, who was believed by his followers to be an incarnation of God or Krishna. 650 F.2d at 433.

6. J. JUDAH, HARE KRISHNA AND THE COUNTERCULTURE 40-43 (1974).

7. Krishna philosophy falls under the broad classification of the Vaishava Tradition of Bhakti Hinduism and is an outgrowth of the Chaitanya movement of Bengal. *Id.* at 18, 37, 38.

8. *Id.* at 36-37; *see generally id.* at 79-97.

9. *Id.* at 177. *See also* 101 S. Ct. at 2562. The development of Sankirtan as a religious ritual can be traced to the Srimad Bhagavatam in the ninth century A.D.. In its original form Sankirtan involved congregational chanting and highly stylized dancing intended to bring the group closer to God and to invoke similar behavior in others. 650 F.2d at 433.

10. 101 S. Ct. at 2562; J. JUDAH, *supra* note 6, at 3, 92-93.

11. J. JUDAH, *supra* note 6, at 36, 37, & 162-163.

II. HISTORY OF THE CASE

A. Factual Background

Objection to Rule 6.05 by ISKCON arose in the context of the Rule's application to a state fair[12] operated by the Minnesota Agricultural Society, a public corporation organized under the laws of Minnesota.[13] The Rule provides that: "Sale or distribution of any merchandise, including printed or written material, except under license issued [by] the Society and/or from a duly-licensed location, shall be a misdemeanor."[14] The policy behind application of the Rule was to restrict the sales and distribution of all literature and the solicitation of gifts and donations to fixed locations on the fairgrounds.[15] The Agricultural Society did not discriminate against any group or organization seeking space for

12. The fair, conducted for the exhibition of Minnesota's resources, including agriculture, stock breeding, mining, etc., is generally recognized as a major public event which attracts visitors from all parts of the State as well as surrounding regions. The average total attendance for the past five-year period, of the twelve-day fair, was 1,320,000 persons. 101 S. Ct. at 2561.

13. *See* MINN. STAT. § 37.01. *See also* MINN. STAT. § 37.16, which authorized the Society to make any rules and regulations which it deemed necessary for the proper operation of the fair.

14. 101 S. Ct. at 2561. Subsequent to this litigation, Rule 6.05 was replaced by MINNESOTA STATE FAIR RULE 1.11 which provides:

> The sale, posting or distribution of merchandise, products, promotional items and printed or written materials except from a fixed location on the fairgrounds approved by the Space Rental Department Superintendent shall be prohibited. Those merchandise, products, promotional items and printed or written materials which are authorized by the Space Rental Department Superintendent for sale or distribution from a fixed location shall not be handed out to any State Fair patron unless requested by that patron.

Id. Although not specifically enumerated in either rule, the regulation has also been applied to restrict solicitation of donations as well. Brief for Petitioner, Heffron v. International Soc'y for Krishna Consc. Inc., 101 S. Ct. 2559 (1981). Telephone interview with Kent G. Harbison, Counsel for petitioners (Sept. 17, 1981). Litigation concerning similar restrictions has frequently ensued. *See, e.g.* 650 F.2d at 434 (RULES AND REGULATIONS OF THE NEW YORK STATE DEPARTMENT OF AGRICULTURE AND MARKETS, § 350.16(j); Edwards v. Maryland State Fair and Agric. Soc'y, 628 F.2d 282, 284 (4th Cir. 1980) (MARYLAND STATE FAIR BOOTH RULE); HYNES v. METROPOLITAN GOV'T. OF NASHVILLE, 478 F. SUPP. 9, 11 (M.D. TENN. 1979) (RULES AND REGULATIONS FOR EXHIBITORS AT TENNESSEE STATE FAIR); International Soc'y for Krishna Consc. Inc. v. Evans, 440 F. Supp. 414, 417 (S.D. Ohio 1977) (OHIO DEPARTMENT OF AGRICULTURE, REG. 901-7-22); International Soc'y for Krishna Consc. Inc. v. Hays, 438 F. Supp. 1077, 1079 n.1 (S.D. Fla. 1977) (FLA. DEPARTMENT OF TRANSPORTATION, REG. 14-61.06).

15. 101 S. Ct. at 2562. The rule is not restrictive, however, of organizational members walking about the fairgrounds and orally publicizing their beliefs among patrons in a reasonable manner. *Id.*

canvassing activities, and booths were rented to all in a nondiscriminatory manner on a first-come basis.

In August of 1977, the respondents, on behalf of themselves and all members of ISKCON, brought suit under the United States Code[16] and the Minnesota Statutes.[17] ISKCON sought a declaratory judgment that Rule 6.05 violated the first and fourteenth amendments of the Constitution. The repondents also sought injunctive relief to prohibit the enforcement of the Rule against ISKCON members claiming that it suppressed the group's practice of Sankirtan.[18]

B. Lower Court Treatment

At the trial court a temporary restraining order was issued which prohibited the appellants from preventing members of ISKCON from soliciting donations or distributing literature on the fairgrounds. However, the court also enjoined members of ISKCON from selling or attempting to sell any literature within the fairgrounds except from designated locations rented for that purpose. Upon a subsequent motion for summary judgment by both parties to the litigation, the court found in favor of the appellants,[19] thus upholding the constitutionality of Rule 6.05.[20]

On appeal, the Minnesota Supreme Court reversed the lower court ruling and held that the rights asserted by the members of ISKCON were unconstitutionally restricted by Rule 6.05 and its application.[21] The court reasoned that less drastic measures could adequately have protected the State's interest in providing an orderly public fairground, and concluded that Rule 6.05 was

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16. 42 U.S.C. § 1983 (1979) states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory. . .subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id. Nearly all suits attacking state regulations similar to Rule 6.05 are brought under 42 U.S.C. § 1983. Jones, *Solicitations—Charitable and Religious*, 31 BAYLOR L. REV. 53, 61 (1979).

17. MINN. STAT. § 555.01 states in relevant part: "No action or proceeding shall be open to objection on the ground that a declaratory judgment is prayed for."

18. 101 S. Ct. at 2562.

19. *See* International Soc'y for Krishna Consc. Inc. v. Heffron, 299 N.W.2d 79, 82 n.4 (Minn. 1980).

20. The trial court relied upon the case of International Soc'y for Krishna Consc. Inc. v. Evans, 440 F. Supp. 414 (S.D. Ohio 1977), where it was held that a system of rented booths for canvassing purposes was the most efficient method of easing the conflict between the free speech interests of ISKCON and the state interest of providing controlled and organized crowd movement. 101 S. Ct. at 2562-63.

21. 299 N.W.2d 79 (Minn. 1980).

simply too restrictive of constitutional rights.[22]

Recognizing the need for a workable solution to the lingering question of the proper implementation of restrictions upon the first amendment rights of organizations frequently engaged in practices involving public contact, the United States Supreme Court granted the petition for writ of certiorari. As a further basis for accepting the writ, the Court noted the importance of the troublesome constitutional issues presented and the necessity for immediate reconciliation of the wide array of conflicting proposed solutions as found in the various lower court decisions on the subject.[23]

III. THE SUPREME COURT'S ANALYSIS

It is clear that the distribution and sale of literature together with the active solicitation of donations is protected by the concepts of freedom of speech and freedom of religion set forth in the first amendment.[24] Nevertheless, such constitutionally protected

22. The court stated:

> Even if we assume the importance of the state's interest in preventing the disorder that will result from allowing members of ISKCON to distribute or sell religious literature and receive donations in public areas of the fairgrounds, we are not persuaded that application of Rule 6.05 to members of ISKCON is essential to the furtherance of that interest. The state's interest can be adequately served by means less restrictive of first amendment rights.

Id. at 84. *See* note 61 *infra*.

23. 101 S. Ct. at 2563. The uncertainty of the courts in dealing with the issue is clearly illustrated by a comparison of such cases as International Soc'y for Krishna Consc., Inc. v. Barber, 650 F.2d 430 (1981) (ruling that confinement of canvassing activities to a booth is an invalid restriction); Edwards v. Maryland State Fair and Agr. Soc., 628 F.2d 282 (1980) (same); International Soc'y for Krishna Consc., Inc. v. Colorado State Fair and Indus. Expos., 610 P.2d 436 (Colo. 1980) (same); with Hynes v. Metropolitan Govern. of Nashville, 478 F. Supp. 9 (1979) (ruling that confinement of canvassing activities to a booth is a valid restriction); International Soc'y for Krishna Consc., Inc. v. Evans, 440 F. Supp. 414 (1977) (same). Although these cases deal primarily with members of the Krishna religion it must be noted that the rulings may not be narrowly construed so as to apply solely to that organization. It is clear that in choosing to hear the case, the Supreme Court anticipated the creation of standards which apply to a wide range of groups and activities. *See* notes 140-43 *infra* and accompanying text.

24. 101 S. Ct. at 2563. The first amendment to the Constitution is made applicable to the states through the fourteenth amendment, Cantwell v. Connecticut, 310 U.S. 296, 303 (1940), and provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U. S. CONST. amend. I. *See* Schneider v. State, 308 U.S. 147, 160 (1939), where the Court proclaimed that the individual liberties to speak, write, print, or circulate information or opinion must remain paramount to government regulation of such forms of communication even in the interest of health, safety, and other public needs. *See*

expression has traditionally been subject to reasonable time, place, and manner restrictions.[25] The requirement that such restrictions be implemented in a reasonable manner by the government entity involved is often the decisive issue in determining the outcome of disputes involving such regulations. Indeed, this issue is determinitive to the effective scrutiny of the case under present analysis.

In holding that Minnesota State Fair Rule 6.05 did not place an unreasonable restraint upon the respondent's constitutional rights, the *Heffron* Court recognized that first amendment protections are not absolute guarantees functioning under every possible circumstance.[26] The Court relied upon the case of *Cox v. New*

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310 U.S. at 303-04. The *Cantwell* Court expounded upon the fundamental nature of the freedom to act in the pursuit of first amendment rights and the delicate manner in which regulation of these rights must be implemented. "In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." *Id.* at 304. The Supreme Court has interpreted *Cantwell* to suggest that the practice of soliciting donations involves interests protected by the first amendment's guarantee of freedom of speech. Schaumburg v. Citizens for a Better Envir., 444 U.S. 620, 629 (1979).

A large majority of the cases which form the constitutional thinking related to literature distribution and sales, and solicitation of funds involve litigation instituted by members of the Jehovah's Witnesses faith. Giannella, *supra* note 4, at 1397; Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1 n.2. This fact is due in part to the readiness of the group to resort to the courts for the protection of their rights, and their ability to finance such litigation. P. KURLAND, RELIGION AND THE LAW, 50 (1962).

25. 101 S. Ct. at 2563. *See also* Cantwell v. Connecticut, 310 U.S. at 304. *See* Niemotko v. Maryland, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring). Justice Frankfurter in his concurring opinion stated: "While the court has emphasized the importance of 'free speech,' it has recognized that 'free speech' is not unmindful of other important interests, such as public order. . ." He then considered four questions which the decisions implementing time, place, and manner restrictions appear to turn upon:

1) What is the interest deemed to require the regulation of speech?
2) What is the method used to achieve the protection of these interests?
3) What mode of speech is being regulated?
4) Where does the speech which is being regulated take place?

Implementation of such restrictive measures has often manifested itself in the form of licensing schemes requiring an individual to first apply for a permit before exercising first amendment rights in a public forum. *See, e.g.*, Thomas v. Collins, 323 U.S. 516 (1945) (statute requiring labor organizers to register with a state official before soliciting members); Lovell v. City of Griffin, 303 U.S. 444 (1938) (permit granted by city manager required before distributing printed material). Such ordinances have generally not withstood constitutional attack. *See, e.g.*, Shuttlesworth v. Birmingham, 394 U.S. 147, (1969); Staub v. Baxley, 355 U.S. 313 (1958); Thomhill v. Alabama, 310 U.S. 88 (1940); Cantwell v. Connecticut, 310 U.S. 296 (1939). *See* Giannella, *supra* note 4, at 1397. *But see* Poulos v. New Hampshire, 345 U.S. 395 (1953), where the defendant applied for a license which was denied. There, the Court found that although the city's refusal to grant the license was arbitrary and unreasonable, the licensing ordinance itself was valid nonetheless. *Id.* at 409.

26. 101 S. Ct. at 2563. "Freedom of speech . . . does not mean that one can talk or distribute where, when and how one chooses. Rights other than those of the

Hampshire[27] and other similar decisions[28] to illustrate its recognition of the above mentioned time, place, and manner restrictions with reference to the necessity of first amendment limitations in certain situations.

With respect to Rule 6.05, the Court's task was to determine whether the Agricultural Society could constitutionally confine ISKCON's practice of Sankirtan to fixed locations within the fairgrounds as a reasonable restriction of the communication of Krishna beliefs. The approach which the Court adopted is clearly stated in the opinion as a preface to Justice White's in-depth analysis. Quoting *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,[29] the *Heffron* Court stated: "We have often approved restrictions of that kind provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication of the information."[30] Thus, the Court clearly delineated the substantive standards to be applied in determining the constitutionality of the restraint in question.

A. Restriction without Regard to Content of Speech

It is generally understood that reasonable time, place, and manner restrictions upon free speech may only be implemented on a non-discriminatory, content-neutral basis.[31] The *Heffron* Court

advocates are involved." Breard v. Alexandria, 341 U.S. 622, 642 (1951). *See also* Cox v. Louisiana, 379 U.S. 536, 554 (1965); Kovacs v. Cooper, 336 U.S. 77, 87-89 (1949); Hague v. C.I.O., 307 U.S. 496, 515-16 (1939).

27. 312 U.S. 569 (1941); *Cox* involved a constitutional attack upon the validity of a state law prohibiting parades or processions upon public streets without a special permit. The Court upheld the provision as promoting "the public convenience in the interest of all . . . ." *Id.* at 574.

28. Grayned v. City of Rockford, 408 U.S. 104 (1972); Adderley v. Florida, 355 U.S. 39 (1966); Kovacs v. Cooper, 336 U.S. 77 (1949).

29. 425 U.S. 748, 771 (1976); *Virginia State Bd. of Pharm.* stands for the proposition that commercial speech (in this case advertisements of prescription drugs by a licensed pharmacist) is not wholly outside the protection of the first and fourteenth amendments.

30. 101 S. Ct. at 2564.

31. *Id.* Madison School Dist. v. Wisconsin Empl. Rel. Comm'n, 429 U.S. 167, 176 (1976); Police Dep't of Chicago v. Mosley, 408 U.S. 92, 96 (1972) where the Court stated: "[G]overnment 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." *But see* Young v. American Mini Theatres, 429 U.S. 50 (1976). The *Young* Court held that an ordinance regulating the location of adult movie

adopted this limitation upon speech restraints as its first criterion for finding that Rule 6.05 was not an unconstitutional restriction.

In examining the facts and the specific language of Rule 6.05, the Court observed that the restrictions placed upon the members of ISKCON by the Rule were applied and enforced equally against all organizations and groups wishing to espouse their beliefs at the fair.[32] Each group was similarly required to conduct any commercial or charitable canvassing from designated booths rented for that purpose, and violation of this requirement was dealt with in the same manner regardless of which particular organization happened to be involved.[33]

Equally persuasive to the Court was the fact that the method of space allocation among those wishing to sell or distribute literature or solicit donations at the fair was on a first-come system.[34] For this reason, the Court stipulated that Rule 6.05 could not be attacked as being a capricious or otherwise unfair restraint of the type which has so often been struck down as a discriminatory limitation on free speech.[35]

The Court intimated that Rule 6.05 appeared to show no preference for the beliefs or ideology of any organization against which it was applied. The cases on the subject are replete with regulations attempting to give state officials the unfettered discretion to determine solely on the basis of content which forms and manner of speech should be tolerated and which should not.[36] Such regulations have almost uniformly been invalidated as overly suppres-

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theaters was a valid restriction notwithstanding the argument that the classification was predicated upon the content of material shown in the respective theaters.

32. Among the other groups and organizations affected by Rule 6.05 at the 1978 Minnesota State Fair were: Abortion Rights Council of Minnesota, American Association of Retired Persons, American Heart Association, American Party of Minnesota, Christian Business Men's Association, Church of Christ, D.F.L. State Central Committee, and Faith Broadcasting Network, Inc., 101 S. Ct. at 2562 n.5.

33. The Rule makes no delineation as to application or punishment according to the nature of the organization involved. *See* note 14 *supra* and accompanying text.

34. 101 S. Ct. at 2562.

35. *See, e.g.*, Cox v. Louisiana, 379 U.S. 536 (1964) (local officials given unfettered discretion to regulate public streets for parades and meetings); Staub v. City of Baxley, 355 U.S. 313 (1958) (solicitation for union, organizational, or societal membership restricted at the discretion of mayor and council); Kunz v. New York, 340 U.S. 290 (1951) (discretionary power given to administrative official to control the right of citizens to speak on religious matters); Largent v. Texas, 318 U.S. 418 (1943) (dissemination of religious publications contingent upon content approval by mayor); Jones v. Opelika, 316 U.S. 584 (1942) (Stone, C.J., dissenting), *adopted per curiam on rehearing*, 319 U.S. 103 (1943) (restrictions on the sale of religious literature on city streets in the form of a license, revocable at the unrestrained discretion of administrative officers).

36. 101 S. Ct. at 2564-65. *See* note 35 *supra* and accompanying text.

sive of a particular point of view.[37]

The Court concluded that Rule 6.05 operated in an unbiased fashion, restricting all organizations at the fair in the same manner in which members of ISKCON were restricted, and that respondent's contentions stating arguments to the contrary were unpersuasive.[38]

B. Rule 6.05 and the Governmental Interest

The second test utilized by the *Heffron* Court in its constitutional analysis of Rule 6.05 was the requirement that a valid time, place, and manner restriction serve a significant governmental interest.[39] The primary governmental interest recognized by the majority as necessitating some form of speech restraint was the "need to maintain the orderly movement of the crowd given the large number of exhibitors and persons attending the Fair."[40]

Significant to the Court's determination of the legitimacy of the governmental interest involved, was the character of the particular forum where the asserted regulation was intended to have its effect.[41] The Minnesota State Fair was held in a relatively small

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37. *Id.*

38. The Court rejected an argument by respondents that the Rule, as applied to them, was not in fact content-neutral because it required ISKCON members to await an approach from an interested party before they would be permitted to distribute, sell, or solicit. The force of the argument was intended to show that the Rule preferred listener-initiated exchanges to those originating with the speaker. 101 S. Ct. at 2564 n.12.

39. *Id.* at 2565.

40. *Id.* The Court also noted two additional State interests asserted by the petitioners. The first involved a claim that Rule 6.05 was necessary for the protection of fairgoers from fraudulent solications, false or misrepresentative speech, and undue annoyance. The second included contentions that the regulation offered fairgoers protection from general harassment on the premise that they were essentially a captive audience. *Id.* at 2565 n.13. Although the Court may have recognized these interests as valid governmental objectives, it did indicate that its decision was primarily based upon the crowd control interest. *Id.*

A somewhat related point was raised in a class of cases in which recipients of information claimed a right not to hear a particular message. *See, e.g.*, Rowan v. Post Office Dep't, 397 U.S. 728 (1970) (sexually provocative mail sent out to public); Public Utils. Comm'n v. Pollak, 343 U.S. 451 (1952) (broadcast of music, news, and commercials on public transit buses); Martin v. Struthers, 319 U.S. 141 (1943) (unwanted door-to-door solicitors). *See generally* Black, *He cannot Choose but Hear: the Plight of the Captive Auditor* 53 COLUM. L. REV. 960 (1953).

41. 101 S. Ct. at 2565. The special attributes of the place in question are always relevant to a determination as to the need for regulation. Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027, 1042 (1969).

area comprised of buildings, lots, and temporary structures.[42] During the course of the fair, a multitude of displays exhibited by over 1400 concessionaires[43] were open to the public. In light of the enormous array of exhibits and the necessary space constraints involved, the large crowds attracted to the function[44] had to be afforded an orderly plan of movement. The Court recognized that absent restrictions upon the proselytizing rights of individuals representing the various groups in attendance, the goal of providing order and control of fair patrons could not be accomplished.

In addition to the goal of providing orderly crowd flow, the Court relied upon the interest of the State in protecting the " 'safety and convenience' of persons using a public forum. . . ."[45] The Court inferred that not only did Rule 6.05 promote ease of movement in an extremely compact area, but that such a degree of order furthered the safety and comfort of all who were in attendance. The Court used this to justify its conclusion that the State's interest in providing organized movement of the fairgoers was legitimate and worthy of protection.[46]

An argument asserted by the respondents in *Heffron*, which was noted by the Court to be unfounded, is relevant to a study of the nature and function of the State's interest and focused upon an analogy between the fairgrounds and city streets.[47] An oft cited quote from the case of *Hague v. C.I.O.*,[48] illustrates the thrust of the assertion. The *Hague* Court stated: "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[49] Utilizing the facts of the instant case to show discrepancies in an analogy between public streets and the fairgrounds, the *Heffron* Court discarded the argument as "necessarily inexact."[50] The Court pointed out that city streets are basically a "relaxed environment," often "uncongested," and "continually open,"[51] and inti-

42. 101 S. Ct. at 2565.
43. *Id.* *See* note 32 *supra*.
44. *See* note 12 *supra*.
45. 101 S. Ct. at 2565.
46. *See* note 112 *infra* and accompanying text.
47. 101 S. Ct. at 2565.
48. 307 U.S. 496 (1939).
49. *Id.* at 515. The *Hague* Court went on to hold, however, that such privileges of citizens to speak in public streets and parks must necessarily be subordinate to the general needs of the public. *Id.* at 515-16.
50. 101 S. Ct. at 2566.
51. *Id.* at 2565. *But see* Cox v. New Hampshire, 312 U.S. 569 (1941), where the Court found necessary the regulation of parades or processions upon the public

mated that restrictions upon free speech in such a context would be unnecesssary. However, a state fair, the Court stressed, presented a more pressing situation than a public highway because of the urgent demand for safety, the extent of crowd flow, and the temporary nature of the activity.[52] The Court concluded that in light of all the circumstances Rule 6.05 did support a valid governmental interest.

C. *An Alternative View of the State Interest Measured by the Sole Exemption of ISKCON from Rule 6.05*

In examining the Minnesota Supreme Court's opinion, the *Heffron* Court noted that the significance of the State's interest in the safety and orderly control of the fairgoers was recognized, as was the necessity for protection of that interest.[53] The Minnesota Supreme Court's decision, however, stressed that the case did not in fact turn upon the importance of the State's interest in providing order and safety, but upon the significance of the State's interest in avoiding whatever disorder would likely result from granting *only* members of ISKCON an exemption from the rule.[54] Accordingly, that court concluded that a disruption of the kind resulting from such an exemption was not sufficient to justify the restriction in question.[55]

In reversing the Minnesota Supreme Court, the *Heffron* majority discarded that court's analysis of the problem, insisting that a view of the State's interest based solely upon ISKCON's activities was too narrowly formulated. The Court reasoned that measuring the validity of the Rule simply by the disorder resulting from an exemption granted solely to ISKCON would be paramount to granting that group and its activities special constitutional protections not available to other organizations utilizing similar methods of expression.[56] The Court rejected claims that because the

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streets as applied to a band of Jehovah's Witnesses who marched along city streets. "Manchester had a population of over 75,000 in 1930 . . . . [O]n Saturday nights in an hour's time 26,000 persons passed . . . [through] the intersection . . . ." *Id.* at 573.

52. 101 S. Ct. at 2565-66.

53. *Id.* at 2566. "We agree that these facts suggest a situation in which the State's interest in maintaining order is substantial. We have no doubt that Rule 6.05's requirement . . . furthers that interest significantly." International Soc'y for Krishna Consc., Inc. v. Heffron, 229 N.W.2d at 83.

54. *Id.*

55. *See* note 22 *supra*.

56. 101 S. Ct. at 2566.

practice of Sankirtan is included in the Krishna religion as a church ritual and duty, the members of ISKCON should receive canvassing rights beyond those of organizations which do not ritualize the process.[57]

The Court's opinion also recognized that solicitation rights of religious organizations should not be given preference over similar rights asserted by social, political, or other nonreligious groups. These secular groups, the Court stated, were entitled to the same liberties and treatment granted to religious organizations.[58]

The Court concluded that the State's interest in ensuring the steady and safe flow of the crowd at the fair must be viewed from the standpoint of the overwhelming disruption which could conceivably result if *all* of the organizations represented at the fair were allowed the exemption from Rule 6.05 to which ISKCON asserted it was entitled.[59]

D. The Validity of Rule 6.05 in Light of Less Restrictive Alternatives

Utilizing the same reasoning employed to reject the alternative view of the State's interest asserted by the Minnesota Supreme Court,[60] the *Heffron* Court similarly discarded arguments that, in light of the existence of a variety of less restrictive measures available to the State, Rule 6.05 became an unnecessary and overly intrusive regulation of ISKCON's first amendment rights.[61] In reaching this conclusion, the Court conceded the availability of such alternative measures as the penalization of disorder or disruption, the possibility of more narrowly drawn restrictions on the location and movement of canvassing, and limitations on the number of canvassing participants.[62] The opinion reasoned, how-

57. However, the Minnesota Supreme Court accepted the argument that, since Sankirtan is a fundamental aspect of the Krishna religion, it would be a violation of the free exercise clause of the first amendment to interfere with its practice. 299 N.W.2d at 83 n.7. *But see* Cox v. State of New Hampshire, 312 U.S. 569, 574 where the Court intimated that one is not justified in breaking the law simply because a particular act happens to be included as a ritual or duty of his religion. *See* notes 128-38 *infra* and accompanying text.

58. 101 S. Ct. at 2566. Thomas v. Collins, 323 U.S. 615, 531 (1945).

59. 101 S. Ct. at 2567.

60. *See* notes 56-59 *supra* and accompanying text.

61. 101 S. Ct. at 2567. The requirement that a governmental restriction upon free speech be no more restrictive than is absolutely necessary is well established. *See* Village of Schaumburg v. Citizens for a Better Environ., 444 U.S. 620, 637 (1980); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 786 (1978); Buckley v. Valeo, 424 U.S. 125 (1976); United States v. O'Brien, 391 U.S. 367, 377 (1968); Shelton v. Tucker, 364 U.S. 479, 488 (1960); Richardson, *Freedom of Expression and the Function of the Courts*, 65 HARV. L. REV. 1, 6, 23-24 (1951).

62. 101 S. Ct. at 2567. Some further less intrusive means to accommodate the

ever, that in the same way that analysis of the State's interest in crowd control necessitated consideration of *all* organizatons in attendance at the fair, so also must examination of the consequences of imposing less intrusive measures consider all the possible parties who would be affected. Analyzing the problem in this way, the Court concluded that implementation of less restrictive measures than Rule 6.05 could not adequately deal with the problems associated with the disruption which could result from the free movement of, not only members of ISKCON but, individuals representing all of the organizations attending the fair.[63] The Court noted the usefulness of such measures under the proper circumstances, but recognized the futility of similar application to the instant case.[64]

E. Other Forums Presenting an Opportunity to Be Heard

The Court cited as a final requirement to the constitutionality of a time, place, and manner restriction, the availability of alternative locations in which the regulated speech or expression might be communicated.[65] As to this requirement, the Court stressed that although Rule 6.05 regulated the activities of ISKCON within the confines of the fairground, it had no force or effect outside of this context.[66] It was noted that notwithstanding the existence of the Rule, ISKCON members were not prevented from carrying on their religious practices outside the fairgrounds.[67] The ultimate result of this narrow application of the Rule was that ISKCON members were free to contact the same group of people at the gates, walkways, or parking lots surrounding the fairgrounds.[68]

State's interest such as the identification check of all organizational members and the imposition of civil and criminal penalties for fraud or physical abuse, were suggested by the Minnesota Supreme Court. 299 N.W.2d at 85. The members of ISKCON, although unwilling to confine their activities to a booth, did agree to limitations upon their numbers in the fairgrounds. 299 N.W.2d at 84 n.9.

63. 101 S. Ct. at 2567.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *See* Breard v. Alexandria, 341 U.S. 622 (1951), where the Court upheld a "Green River ordinance" in a municipality which prohibited the practice of door-to-door commercial solicitation without the prior consent of homeowners. The Court found the ordinance to be prohibitory insofar as it restricted house-to-house canvassing but gave more weight to the fact that it left open other conventional mediums for communication such as newspapers, periodicals, mail, and radio. *Id.* at 631-32.

The fact that Rule 6.05 did not represent an exclusion of ISKCON members from the fairgrounds further persuaded the Court.[69] Not only were these individuals free to walk about the surrounding area communicating their views to the crowd,[70] but they were also permitted to conduct sales, solicitation, and distribution practices from specified locations on the fairgrounds.[71]

Taking into consideration the limited function of the fair and the nature of the area in which it is operated, the Court expressed its unwillingness to conclude that Rule 6.05 deprived ISKCON members of an adequate means to carry on their canvassing activities.[72] The Court found that the availability of rented booths presented all organizations sufficient opportunity to espouse their religious beliefs through sales, distribution, and solicitation and that the Rule could be totally avoided by conducting these restricted activities outside of the fairgrounds.

IV. The Minority Opinions

The separate opinion of Justice Brennan[73] centered upon the governmental interests asserted by the petitioners and the legitimacy of Rule 6.05 in upholding that interest.[74] The opinion expressed agreement with the majority's conclusion that the interest of crowd control was indeed a significant state aim.[75] It also stipulated that the State had a legitimate interest in protecting fairgoers from fraudulent or deceptive solicitation practices.[76] The opinion differed, however, with respect to its analysis of Rule 6.05 as a protection of those interests.[77]

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69. 101 S. Ct. at 2567.

70. *Id.* The language of Rule 6.05 narrowly defines the type of behavior to be restricted. The Rule expressly restricts only the sale and distribution of literature and in no way can be construed to limit ISKCON's right to freely move about the crowd and speak to fair patrons in any reasonable manner. *See* notes 14 and 15 *supra* and accompanying text.

71. 101 S. Ct. 2567. ISKCON claimed that the restriction imposed by Rule 6.05 was in effect a total ban of its first amendment rights. 101 S. Ct. at 2568 n.16. The Court rejected this argument stating that, since the Rule did provide a means for ISKCON members to carry on their activities, albiet from a fixed location, it could not be said that the Rule acted as a blanket restriction on all expression. *Id.*

72. 101 S. Ct. at 2567.

73. Justices Marshall and Stevens joined in the opinion. 101 S. Ct. at 2568 (Brennan, J., dissenting in part).

74. *See generally id.* at 2568-72.

75. *Id.* at 2568.

76. *Id.* The minority placed great weight on this justification while the majority merely cited it in passing, making no determination as to its constitutional sufficiency with regard to Rule 6.05. *See* note 40 *supra*. With regard to the "captive audience" justification mentioned by the Court, the minority asserts that the freedom of the fairgoer to simply say "no" to canvassers minimized the legitimacy of this interest. 101 S. Ct. at 2569 n.1 (Brennan, J., dissenting in part).

77. 101 S. Ct. at 2569.

Emphasis was placed upon examination of Rule 6.05 from the standpoint of each separate first amendment activity that was restricted and the majority's failure to pursue such analysis.[78] The opinion cited the existence of three types of restricted activity with regard to the Rule: distribution of literature, sale of literature, and solicitation of donations.[79] It was then stated, that although the justification of preventing fraud and deception was furthered by limitations upon sales and solicitations,[80] similar restrictions upon the distribution of literature could not be as easily justified.[81]

In relation to the majority's approval of the restriction upon distribution activities proposed by Rule 6.05, the dissent termed the regulation "an overly intrusive means of achieving the State's interest in crowd control. . . ."[82] The dissent noted that, contrary to the Court's conclusion, effective alternative measures of a less restrictive nature were available to further the State's interest of crowd control.[83]

The dissenting opinion highlighted the fact that each fairgoer, regardless of affiliation with an organization or group, was free to wander throughout the grounds campaigning, advocating causes or giving speeches.[84] It hypothesized that on any given day 5,000 ISKCON members could attend the fair as patrons and be permitted to communicate with whomever they wished.[85] The natural implication of this, the dissent intimated, was the arbitrariness of a restriction designed to promote crowd control which allowed individuals to freely speak and move about yet prohibited the mere act of handing out literature to fairgoers.[86] The dissent concluded

78. *Id.*

79. *Id.* at 2568. *See* note 14 *supra* and accompanying text.

80. 101 S. Ct. at 2569. The dissent reasoned that if sales and solicitation practices were confined to a booth, the State would have the opportunity to police these areas for evidence of fraud or deception. *Id.*

81. 101 S. Ct. at 2569.

82. *Id.*

83. *Id. See* notes 61-62 *supra* and accompanying text.

84. 101 S. Ct. at 2569. *See* notes 14-15 *supra* and accompanying text. The opinion noted that a state fair is certainly a proper forum for individuals and groups to propagate views and information. 101 S. Ct. at 2569 n.2. "A state fair is truly a marketplace of ideas and a public forum for the communication of ideas and information." *Id.*

85. 101 S. Ct. at 2569.

86. *Id.* at 2570. The petitioners contended, however, that the distinction was valid:

[O]n a fairgrounds with thousands of people even a few roving solicitors

that the added confusion, if any, resulting from the distribution of literature could not possibly magnify the problem of crowd control to an extent necessary to justify the Rule in question.[87]

It was conceded by the minority, however, that if the State had recognized a reasonable concern that distribution of literature would cause disorder in certain areas of the grounds, such as entrances and exits, then a narrowly drawn regulation to meet this concern may have been justified.[88] It was also noted that limitations on the number of persons conducting distribution activities could have been imposed within reason.[89] The dissent concluded, however, that a total ban on all distribution activities of ISKCON outside the confines of a rented booth was a clear violation of their first amendment rights.[90]

The separate opinion of Justice Blackmun asserted the same conclusion reached by the first dissent, that Rule 6.05 is unconstitutional as applied to the distribution of literature but valid with regard to sales and solicitations. However, his rationale for this latter conclusion differed from that of Justice Brennan.[91]

Justice Blackmun's dissent relied upon the case of *Village of*

> would stand out and attract curious crowds disproportionately large to their numbers. Such random gatherings would occur more frequently when it becomes known that the person who is the center of attention is giving away or selling some products. In contrast, mere discussions among people are not unique on the fairgrounds. Fairgoers would be much more inclined to gather around a person who is giving away or selling products. . .than if that same person were merely carrying on a conversation with someone else.

Brief for Petitioner at 31, 101 S. Ct. 2559.

The dissent concluded that these assertions were unsupported in light of the already "robust and unrestrained" atmosphere created by thousands of wandering fairgoers. 101 S. Ct. at 2570.

87. 101 S. Ct. at 2751. The opinion also noted the irony of the fact that the State itself seemingly engaged in the same distribution practices expressly forbidden by Rule 6.05. *Id.* at 2571 n.5. Various affidavits stated that the individual who received tickets at the fair gates, an employee of the fair, handed out to patrons fliers alerting them to the possibility of being approached by roving solicitors. The minority found it difficult to believe that the State could be concerned about an activity which they themselves engage in also. *Id.*

88. 101 S. Ct. at 2571.

89. *Id. See also* note 62 *supra* and accompanying text.

90. 101 S. Ct. at 2571-72. The dissent relied upon such cases as Village of Schaumburg v. Citizens for a Better Envir., 444 U.S. 620 (1979) and NAACP v. Button, 371 U.S. 415 (1963) for the proposition that broad prophylactic rules restricting first amendment rights are suspect, and that such regulations must be drafted with precision.

The dissent also took exception to the majority's assertion that ISKCON's practice of Sankirtan deserved no special constitutional protection. 101 S. Ct. at 2569 n.3. *See also* note 57 *supra* and accompanying text. It was noted that regulation of religious rituals such as Sankirtan should be given a high level of scrutiny. 101 S. Ct. at 2569 n.3. *See* notes 127-37 *infra* and accompanying text.

91. 101 S. Ct. at 2572.

Schaumburg v. Citizens for a Better Environment[92] to stress his dissatisfaction with the State's interest in protecting fairgoers from fraud and deception as justification for Rule 6.05's restriction on sales and solicitations.[93] Justice Blackmun referred to the *Schaumburg* holding which proclaimed that a state interest in preventing fraud or deception in solicitation practices may only be protected by narrowly drawn regulations which do not neglect the existence of less intrusive measures.[94] Applying this principle to the instant case, the opinion inferred that measures such as policing the fairgrounds for fraud could be implemented as an alternative to the harshness of Rule 6.05.[95] The opinion stressed further, however, that restrictions upon sales and solicitation activities, although not supportive of a fraud prevention rational, do maintain the State's interest in crowd control and safety.[96] A distinction between sales, solicitation and distribution in terms of the degree of crowd disruption caused by each, led the dissent to hold that a restriction upon distribution of literature would not be justified, but that such a restriction upon sales and solicitation would be warranted.[97]

V. THE AUTHOR'S ANALYSIS

A. Standard of Review

The *Heffron* majority proclaimed that in order for Rule 6.05 to be sustained under constitutional scrutiny it must be found to be necessary for the protection of a *significant* governmental interest.[98] Traditionally, a variety of terms used to characterize the nature of the interest sought to be maintained, have been employed

92. 444 U.S. 620 (1979). *Schaumburg* involved an attack upon an ordinance which prohibited door-to-door or on-street solicitation of funds by organizations which did not use a minimum of 75% of their receipts for charitable purposes.

93. 101 S. Ct. at 2572.

94. *Id.* The less drastic measures emphasized in *Schaumburg* included disclosure provisions and penal laws designed to thwart fraudulent misrepresentations. 444 U.S. at 637-38.

95. 101 S. Ct. at 2572. In the instant case, the task of policing the fairgrounds to insure against fraudulent practices would have been easier since members of ISKCON had offered to wear identification tags. *Id.*

96. 101 S. Ct. at 2572.

97. *Id.* at 2572-73. The opinion explained that the mere act of distribution did not require the recipient to stop in order to receive literature. In contrast, sales and solicitation practices require the fairgoer to stop and exchange money, which could result in unforseen confusion. *Id.*

98. 101 S. Ct. at 2565. *See* notes 39-40 *supra* and accompanying text.

by the Court.[99] Whatever the description utilized, it has been generally understood that in the case of regulating first amendment rights, a higher level of judicial scrutiny is required.[100] Recognition of crowd control and public safety objectives as supportive of this elevated standard is found in many of the cases cited by the *Heffron* Court[101] and is utilized to illustrate the compelling nature of the problem. It is clear that when the safety and control of a public body appears to be in jeopardy, regulations upon free speech and expression may be employed to remedy the problem.[102] It is also evident, however, that such hazards clearly must be seen to exist and that mere risks of public inconvenience, annoyance, or unrest will not justify the implementation of free speech restrictions.[103]

The *Heffron* Court concluded that a policy of confining sales, solicitation, and distribution activities to designated areas furthered the State's objective of control and safety of fair patrons, and, thus, served a significant state interest.[104] It appears that the Court recognized and applied the correct standard of review to the case, yet inappropriately concluded that the asserted govern-

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99. NAACP v. Button, 371 U.S. 415, 438 (1963) (*compelling* state interest); Sherbert v. Verner, 374 U.S. 398, 408 (1963) (*strong* state interest); Thomas v. Collins, 323 U.S. 516, 530 (1945) (*paramount* state interest).

100. The Court has stated that:

> There are various "liberties," . . . which require that infringing legislation be given closer judicial scrutiny, not only with respect to existence of a purpose and the means employed, but also with respect to the importance of the purpose itself relative to the invaded interest. Some interests would appear almost impregnable to invasion, such as the freedoms of speech, . . . and religion. . . .

Moore v. E. Cleveland, 431 U.S. 494, 548 (1977) (White, J., dissenting).

See also Doe v. Bolton, 410 U.S. 179, 211 (1972) (Douglas, J., concurring); Bates v. Little Rock, 361 U.S. 516, 524 (1959).

101. *See* Grayned v. City of Rockford, 408 U.S. 104, 115 (1971); Kunz v. New York, 340 U.S. 290, 301-02 (1950); Hague v. C.I.O., 307 U.S. 496, 515-16 (1938).

102. *Id.*

103. It is clear that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." Tinker v. Des Moines Indus. Comm'n School Dist., 393 U.S. 503, 508 (1969). "Particular expressive activity could not be prohibited because of a 'mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint . . . .'" Grayned v. City of Rockford, 408 U.S. 104, 117 (1971) (quoting 393 U.S. at 508). *See also* Terminiello v. Chicago, 337 U.S. 1 (1948) in which an ordinance prohibiting activity which could result in public anger, dispute, unrest, or disturbance was found to be violative of the petitioner's first amendment rights. In *Terminiello*, the petitioner was "vigorously, if not viciously, criticiz[ing] various political and racial groups." *Id.* at 3. This conduct did in fact create crowd disturbance. *Id.* at 1. The Court, however, concluded that the restriction upon such behavior was invalid. By contrast, in the *Heffron* case, a far less provocative form of expression resulted in a finding that such expression may be restricted.

104. 101 S. Ct. at 2567.

mental interests in support of that standard necessitated the retention of Rule 6.05.

B. Significance of the State's Interest

As the facts of the opinion clearly indicate, the Minnesota State Fair is a diverse marketplace with a robust and generally unrestrained atmosphere.[105] With an average of 160,000 patrons attending the fair on any given weekend day[106] and their movement restricted to a relatively small area,[107] it is obvious that the event is marked by an air of confusion and disorder which clearly could not be any more complicated by the relaxation of the booth restriction.

As Justice Brennan pointed out in his separate opinion,[108] all individuals attending the fair were free to move about the crowd in an unrestricted manner, speaking and communicating in any reasonable fashion, yet the moment these individuals began selling or distributing literature, or soliciting donations within the crowd, they became subject to arrest for violating Rule 6.05.[109] It seems that the Court has delineated a clearly arbitrary means to justify its interest in crowd control by recognizing a contact with a person marked by a transfer of money or materials as promoting disruption or danger.[110]

The *Heffron* Court seemed to neglect the element of free will of the fair patron. It is clear that a person who is not willing to be subjected to the speeches and chants characterizing the practice of Sankirtan is not likely to be interested in obtaining literature or making donations.[111] In this situation the patron will simply pass by showing little interest. In the same light, one who is receptive to the spoken message conveyed by the Krishnas will more than likely be interested in obtaining further information on

105. *See* notes 12, 84-85 *supra* and accompanying text. 101 S. Ct. 2570.
106. 101 S. Ct. at 2561.
107. *Id.*
108. 101 S. Ct. 2568.
109. *Id.* at 2570. *See* note 86 *supra* and accompanying text.
110. Justice Blackmun's assertion that sales and solicitation practices promote crowd disruption while distribution activities do not, solely on the basis of the fact that the former activities require a person to stop and exchange literature or money, 101 S. Ct. at 2572-73 (Blackmun, J., dissenting), appears to be unfounded. A patron may, while stopping to receive and/or examine literature being handed out, cause just as great of a disruption as if he were paying for such literature.
111. *See* 101 S. Ct. 2569 n.1.

the group. The moment an interested patron stops to listen, the feared "disruption" occurs. The degree of disruption in both situations would be unaltered by the fact that the individual relating the message is also selling or distributing literature or soliciting funds. The important factor is that the fair patron has stopped. Whether it be to exchange money or ideas has little to do with the degree of crowd disruption. No facts were presented in *Heffron* which would indicate that actual congestion of the crowd flow would result from allowing sales, solicitation, and distribution practices to prevail in the mainstream of the fair. Without a showing of such facts, the Rule in question should not have been upheld.[112]

The *Heffron* Court further stipulated that the State's interest in providing for the safety of fair patrons supported the retention of Rule 6.05.[113] The Court's justification for this conclusion was a consideration of the special attributes of the fairgrounds[114] and a conclusion that safety demands viewed in light of such characteristics required that canvassing practices be restricted to designated areas.[115] However, the Court stopped there. Similar to its relatively unsubstantiated analysis of crowd control as a valid government interest, the opinion offered little or no discussion of how, in light of the special attributes of the fairgrounds, the practice of offering literature or soliciting donations presented a substantial threat to public safety.[116] It is difficult to understand how

112. International Soc'y for Krishna Consc. Inc. v. Barber, 650 F.2d 430, 444 (2nd Cir. 1981).

The facts merely pointed to the number of people in attendance at the fair and the size of the area to which they were confined. The Court drew the inference that such conditions would promote crowd congestion and danger should the booth restriction be relaxed, but offered no relevant facts to substantiate its assertion, such as evidence of generally unrestrained or dangerous characteristics of ISKCON members or particular activities or customs of the fair itself which could result in danger or disruption if canvassing groups were allowed free movement. *See* 101 S. Ct. at 2570.

113. 101 S. Ct. at 2565. *See* notes 45-46 *supra* and accompanying text. In this context, the Court also asserted the interest of crowd convenience as further justification for the Rule. The cases clearly refute the validity of this interest with reference to first amendment restrictions. *See* note 103 *supra* and accompanying text.

114. 101 S. Ct. at 2565. *See* notes 41-44 *supra* and accompanying text.

115. In relation to this assertion, the Court's rejection of respondent's analogy of city streets and the fairgrounds involved, *see* notes 47-52 *supra* and accompanying text, must be questioned. The majority inexplicably based its treatment of the analogy on the idea that the State Fair presented a greater safety hazard than would the nation's highways. *See* note 51 *supra*. It is difficult to understand how the urgent need for order and organization on city streets and the drastic implications of traffic disruption can be downplayed in such a manner.

116. *See* note 112 *supra* and accompanying text. One can infer from the majority opinion that the Court perceives stops initiated by such practices as resulting in a dangerous situation created by crowd congestion. Yet the Court offers no sug-

such activities, even when conducted amidst thousands of fairgoers, could create a kind of public hazard not already present in such a context.[117]

C. *Less Intrusive Measures*

As previously noted, the *Heffron* majority assigned little weight to the fact that various less drastic alternatives to the booth restriction existed.[118] The opinion simply concluded that in light of the size of the group seeking free movement within the fairgrounds, such measures would be ineffective.[119] The Court seemed to ignore the significance of the requirement[120] and neglected the alternatives without examining their effectiveness in dealing with the asserted problem.

It seems clear that one proper and justifiable alternative to the booth restriction would have been a limitation on the number of persons given access to the fair for purposes of distributing or selling literature or soliciting donations.[121] This measure would have directly attacked the problem of overzealous individuals causing disruptions of various kinds at the fair and would automatically have remedied the matter cited by the Court as its rationale for finding such measures ineffective: the inability of less restrictive alternatives to adequately cope with a group of the size considered.[122] These and other less drastic means have been either implemented or judicially imposed in various cases dealing with ISKCON members[123] and for this reason could have been

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gestion as to the types of risks or dangers faced, or other substantiation for these fears.

117. *See* note 105 *supra* and accompanying text.

118. *See* notes 61-64 *supra* and accompanying text.

119. 101 S. Ct. at 2567. *See* notes 63-64 *supra* and accompanying text.

120. *See* note 61 *supra*. There are many cases which provide an analogous factual situation to the instant case yet which conclude that less restrictive measures should in fact be imposed in place of the broad restriction under attack. *See, e.g.*, 444 U.S. 620, where a statute aimed at prohibiting fraudulent practices, *see* notes 92 and 94 *supra*, was held to be overbroad in light of various less drastic means to deal with the problem. In this situation it could just as easily have been argued by the Court that these alternatives could not have effectively been implemented in light of the large numbers of solicitors in the area and the difficulty in locating and prosecuting violators. *See* 101 S. Ct. at 2572.

121. International Soc'y for Krishna Consc. Inc. v. Heffron, 299 N.W.2d 79, 84 (1980). *See also* note 62 *supra* and accompanying text.

122. 101 S. Ct. at 2567.

123. *See, e.g.*, International Soc'y for Krishna Consc. Inc. v. Bowen, 600 F.2d 667 (7th Cir. 1979) (injunction granted to ISKCON provided: 1) all members wore identification cards; 2) all members refrained from physical contact of patrons; and

utilized in the instant case.[124] If implemented in a reasonable manner, the overriding benefit of these less intrusive means is the accomplishment of the government purpose without a substantial impairment to first amendment protections.[125] Therefore, in light of the high level of protection traditionally afforded free speech guarantees,[126] the implementation of such measures must always be given proper consideration.

D. Freedom of Religion

In its analysis of the State's interest in providing safe and orderly movement of the crowd, the Court emphasized that the inclusion of the practices associated with Sankirtan as an integral part of the Krishna religion did not entitle its members to an exemption from Rule 6.05.[127] Examination of this assertion entails recognition of the two aspects of the freedom of religion guarantee of the first amendment. The first aspect concerns an individual's conscious choice to adhere to certain religious convictions, the freedom to believe.[128] The second aspect involves the free exercise of conduct pursuant to these beliefs, the freedom to act.[129] The Court has recognized the sanctity of the first concept and has not permitted its restriction.[130] It has, however, authorized the regulation of the free exercise of religious beliefs when such conduct or action poses some clear and substantial threat to public safety, peace, or general welfare.[131] In the same respect, it has

3) all members refrained from contacting unconsenting persons waiting in lines); International Soc'y for Krishna Consc. Inc. v. McAvey, 450 F. Supp. 1265 (S.D.N.Y. 1978) (rule restricting the number of ISKCON members to ten and prohibiting various activities within 15 feet of certain areas); International Soc'y for Krishna Consc. Inc. v. Rochford, 585 F.2d 263 (7th Cir. 1978) (upholding restrictions on distribution and solicitation practices of ISKCON in certain areas of an airport and prohibiting such activity during emergency situations).

124. The Minnesota Supreme Court pointed out, however, that the measures taken will, of course, depend upon the nature of the forum involved. 299 N.W.2d at 84 n.10. It appears that placing limitations on numbers of people in the present situation would be the most logical and equitable measure, as the problem sought to be remedied originates from overcrowding.

125. "[A] city should aim its regulation at the *act* of obstruction itself rather than prohibiting solicitations . . . based on its desire to prevent obstruction and provide for the free flow of traffic." Jones, *supra* note 16, at 57.

126. *See* note 100 *supra* and accompanying text.

127. *See* note 57 *supra* and accompanying text. There was no dispute in this case over the validity of the claim that Sankirtan is in fact a religious ritual of Krishna Consciousness. 101 S. Ct. at 2569 n.3.

128. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

129. *Id.*

130. *Id.* Sherbert v. Verner, 374 U.S. 398, 402 (1963).

131. *Sherbet*, 374 U.S. at 402-03; *Cantwell*, 310 U.S. at 303-04. In his separate opinion in *Heffron*, Justice Brennan seemed to infer that the free exercise of religious convictions is protected from government regulation to the same extent that the freedom to believe is protected. 101 S. Ct. at 2569-70 n.3. He cited Wisconsin v.

been stated that interests of mere public comfort and convenience will not, by themselves, justify intrusion upon the pursuit of important religious objectives.[132]

It is evident that the *Heffron* Court recognized the fundamental nature of the freedom to exercise religious beliefs with respect to the practice of Sankirtan,[133] but it concluded that the urgent interests asserted by the State precluded the interest of ISKCON members to conduct their activities. As previously noted, however, it appears that the Court exaggerated the immediacy of the interests sought to be protected by the curtailment of ISKCON's religious expression[134] and erroneously concluded that the practice of Sankirtan should not be protected from government regulation.[135] The difficulty in the assertion that Sankirtan substantially threatens the proposed interests to be protected has already been demonstrated.[136] Therefore, it must be concluded that the free exercise of the practice may, at most, be viewed as a minor inconvenience or imposition of a nature which could not rightfully justify its restriction.[137] For these reasons, it appears that the Court misapplied the principles associated with the free exercise of religious beliefs to the relevant facts of this case.

VI. Impact of the Case

The ruling announced in *Heffron* puts to rest the unbounded confusion in the realm of restrictions upon sales, distribution, and solicitation activities of organizational members in public places.[138] The significance of the decision in resolving an unsettled area of the law is clearly illustrated by the extensive media coverage surrounding the case[139] and the far reaching effects of

Yoder, 406 U.S. 205 (1971) as support for the proposition that there are certain areas of religious conduct which are beyond the scope of government intrusion. *Id.* However, a careful reading of *Yoder* will reveal the Court's recognition of the fact that under certain circumstances where public health and safety are involved, the free exercise of religion may validly be curtailed. 406 U.S. at 220.

132. Giannella, *supra* note 4, at 1398.

133. "[First amendment] protection is [not] lost because . . . contributions or gifts are solicited in the course of propagating the faith." 101 S. Ct. at 2563.

134. *See* notes 116-17 *supra* and accompanying text.

135. *Id. See* 101 S. Ct. at 2566.

136. *See* notes 116-17 *supra* and accompanying text.

137. *See* note 132 *supra* and accompanying text.

138. *See* note 23 *supra* and accompanying text.

139. On the evening of the Court's ruling, the issue was the topic of discussion on the ABC television network news program *Nightline*.

its holding. It is clear that the reach of the decision will extend to most public areas and will serve to limit representatives of all groups involved in practices similar to those conducted by ISKCON members.[140] The general effect of the case will be that, subject to certain specific criteria,[141] the states may constitutionally allow the confinement of literature sales and distribution, and fund solicitation to designated areas within a public forum.

The conditions which necessitated the imposition of the booth restriction at the Minnesota State Fair will likely be viewed by the Court to exist in a variety of public forums. The objectives of providing adequate crowd movement and safety can be valid considerations in almost all places which are open to the general public. The decision's impact will surely be felt in such areas as airports,[142] highway rest stops[143] and various other centers of activity. It is within these settings that the need for regulation is most often asserted[144] and that the Court's ruling will have certain impact.

To further comprehend the ramifications of the decision, it may be helpful to consider a hypothetical situation analogous to the one presented by *Heffron* and to venture a prediction as to the Court's probable reaction to the circumstances in question. Consider the plight of the hypothetical West International Airport. For several years, the directors and administrators of West have been bombarded with hundreds of complaints concerning the overzealous and annoying practices of the association known as the National Organization for the Repeal of Gambling Restrictions (NORGR). Concern over nationwide statutes which criminalize the act of gambling has led the members of NORGR to flood American airport facilities. Their goal is to communicate their point of view to as many travellers as possible and to persuade these people to contribute to, or join their crusade. In pur-

140. There is no indication that the ruling will be narrowly applied to only religious orgnizations. The case specifically proclaims equality of treatment of commercial and noncommercial groups. 101 S. Ct. at 2566.

141. The traditional requirements that the regulation serve a significant government interest, be content-neutral in its application, and be narrowly tailored to achieve the interests asserted, are still required.

142. *See, e.g.*, International Soc'y for Krishna Consc. Inc. v. Eaves, 601 F.2d 809 (5th Cir. 1979); International Soc'y for Krishna Consc. Inc. v. Rochford, 585 F.2d 263 (7th Cir. 1978).

143. *See, e.g.*, International Soc'y for Krishna Consc. Inc. v. Hays, 438 F. Supp. 1077 (S.D. Fla. 1977).

144. "[W]e are not unmindful, as anyone cannot be who has travelled through a major airport facility in recent years, that practitioners of Sankirtan have been regarded as annoying and often downright irritating by those they approach." International Soc'y for Krishna Consc. Inc. v. Bowen, 600 F.2d 667, 670-71 (7th Cir.), *cert. denied*, 444 U.S. 963 (1979). The *Heffron* decision sought to allow these public facilities to remedy this problem.

suit of their objectives, NORGR members have been known to move freely in airports greeting unsuspecting individuals with pamphlets which espouse their beliefs and distributing small gifts such as playing cards and dice. Other reported practices of the group include the fastening of pins and buttons upon members of the public and persistent and often unruly physical contact. In response to the public outcry for alleviation of the often bothersome practices associated with the members of NORGR, the State authorities operating West Airport have enacted Airport Order Regulation 14-77. The regulation provides in relevant part:

> Any person who, upon entering West International Airport, confronts or otherwise subjects any individual to promotional activities involving distribution or sale of any merchandise or written materials, or solicits any form of financial contribution within such airport shall be guilty of a misdemeanor and subject to prosecution. Such enumerated activities shall not be considered a misdemeanor and shall not require prosecution where such are conducted from designated areas within the airport approved by the airport commission.

The members of NORGR have brought a class action suit against the airport commission on behalf of themselves and the various other organizations similarly situated, alleging that Airport Order Regulation 14-77 violates the first and fourteenth amendments.

In reviewing this hypothetical case, the Court will undoubtedly take notice of the nature of the public forum involved and relate this observation to the governmental interests to be supported by Regulation 14-77.[145] Recognition of the generally crowded and confused environment of an international airport and concern over the need to protect the public in such an atmosphere from undue crowd congestion and disruption will certainly persuade the Court to uphold the regulation.[146] The Court will necessarily consider less restrictive measures to combat the problem,[147] but in light of *Heffron*, the Court will inevitably conclude that the only viable action to be taken is the confinement of NORGR's activities to a limited area.[148] With respect to the nature of the organization involved, the Court will find no basis for ruling differently than it did in *Heffron* simply because NORGR is not a religious organization and its activities are not founded upon religious convic-

145. *See* note 41 *supra* and accompanying text.
146. *See* notes 40-46 *supra* and accompanying text.
147. *See* note 61 *supra* and accompanying text.
148. *See* notes 63 and 64 *supra* and accompanying text.

tions.[149] The general effect of these activities upon the public at large, the Court will conclude, is substantially the same as that of nonsecular practices.

With its *Heffron* decision, the Court has at its disposal a workable standard by which to rule upon the regulation in question, with regard to organizational practices similar to that of ISKCON. Prior to the *Heffron* ruling, no such standard existed.

Viewing the impact of *Heffron* from the perspective of the parties whose activities will be curtailed by the ruling, it becomes clear that the most resounding effect of the decision will be felt by organizations who, like ISKCON, purport to ritualize the canvassing process as an important religious activity. With respect to these groups, it appears that confinement of their practices, as authorized by the ruling, will create in effect a virtual circumvention of the organizational purposes behind the practices involved,[150] and possibly signal the termination of such conduct in public places.[151]

The decision will additionally impact upon secular organizations involved in canvassing practices. Although the activities practiced by these groups are not related to asserted religious beliefs, their members depend upon crowd contact in public forums to raise funds or communicate an idea.[152] *Heffron*'s extension of reasonable time, place, and manner restrictions allowing the total confinement of these activities will certainly impede achievement of the objectives of these organizations and seriously restrict the effectiveness of their efforts in the public forum.

With respect to the Court's treatment of the freedom of religion issue presented by ISKCON's practice of Sankirtan,[153] the Court's

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149. *See* note 38 and 40 *supra* and accompanying text.

150. In the case of ISKCON members for example, it was asserted that the proper performance of Sankirtan necessarily involves the close proximity to and free movement among large numbers of individuals. 101 S. Ct. 2567. *See also* International Soc'y for Krishna Consc., Inc. v. Evans, 440 F. Supp. 414, 418-19 (S.D. Ohio 1977). In allowing such activity to be confined to a small area, the Court imposes severe limitations upon the exposure necessary to properly achieve the objectives of the practice. *See* note 71 *supra*.

151. One is led to believe that in cases such as *Heffron*, where the proper pursuit of conduct is tied to essential beliefs of the organization, other more amicable forums will be sought by the group to conduct their activities, rather than to submit themselves to the confinement regulations now authorized. "[S]ankirtan cannot be practiced from a booth." Hynes v. Metro. Gov't of Nashville, 478 F. Supp. 9, 11 (M.D. Tenn. 1979).

152. It is evident that charitable organizations such as the American Red Cross and the American Cancer Society, whose very existence depends to a large extent upon public donations, will be gravely affected by the ruling, as it may serve to severely limit the numbers of people who may be contacted by these groups at public gatherings.

153. *See* notes 127-37 *supra* and accompanying text.

conclusion may reasonably be construed as creating a new standard by which the extent of regulation of the freedom to act pursuant to religious convictions may be determined. It appears that in future cases involving activities of religious organizations, the courts will be authorized to accord a lower level of significance to the religious nature of organizational activities and allow less substantial interests to demand governmental regulation of these activities.[154]

From a practical standpoint, the *Heffron* decision will necessarily signify the reduction of what has come to be regarded by many as an irritating and annoying distraction.[155] Ultimately, however, the choice of whether or not to be subjected to an offered message or to engage in any form of exchange with organizational representatives is necessarily a decision to be made by individuals and cannot be affected by the persistence of such representatives.

VII. CONCLUSION

Heffron represents the expansion by the Court of the permissible limits of time, place, and manner restrictions upon organizations asserting the right to free crowd contact in a public forum. The decision marks the Court's continued unwillingness to sacrifice substantial government objectives for the free exercise of first amendment rights. The prevalent recognition of the overriding interests presented by the need to protect the public welfare illustrates the basis for the decision and the expectation of its continued validity.

This article has explored the necessary criteria for valid time, place, and manner restriction upon first amendment protections and has examined their validity with respect to the members of the Krishna religion. Through this analysis, it has been the author's intention to provide an overview of similar constitutional actions and to explore their application to the instant case as well as to provide some indication as to the circumstances necessary to sustain such regulations.

Insofar as this article has dealt primarily with an organization

154. The *Heffron* Court authorized the restriction of the first amendment activities of ISKCON to uphold what clearly seemed to be an interest of mere public comfort and convenience. *See* note 137 *supra* and accompanying text.

155. *See* note 144 *supra*.

which is clothed with a certain degree of public controversy, the processes utilized by the Court in reaching its decision appear to reflect, to some extent, that controversy and the public's attitude toward the proselytizing activities of that group.[156] In the author's opinion the decision proclaimed in *Heffron* must be carefully scrutinized in light of these attitudes to ascertain the fairness and objectivity of the Court's conclusion.[157]

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156. *Id.*

157. "Distaste for what is being expressed, and often absolute revulsion, appear to be the hallmarks of the exercise of First Amendment rights and probably are the necessary contexts in which the preservation of those rights can be firmly assured." 600 F.2d at 671.