Acorn v. City of Phoenix: Soliciting Motorists is Off Limits

Marcy K. Weaver

Follow this and additional works at: https://via.library.depaul.edu/law-review

Recommended Citation
Marcy K. Weaver, Acorn v. City of Phoenix: Soliciting Motorists is Off Limits, 37 DePaul L. Rev. 501 (1988)
Available at: https://via.library.depaul.edu/law-review/vol37/iss3/9

This Notes is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact wsulliv6@depaul.edu, c.mcclure@depaul.edu.
ACORN v. CITY OF PHOENIX: SOLICITING
MOTORISTS IS OFF LIMITS

INTRODUCTION

The first amendment protects the right to freedom of speech. While the right to free speech is not absolute, when speech occurs in an area deemed a traditional public forum, the government's ability to restrict it is drastically limited. This is because streets and sidewalks, which are public fora, have

1. The first amendment provides in pertinent part that "Congress shall make no law ... abridging the freedom of speech." U.S. CONST. amend. I.

2. See Konigsberg v. State Bar, 366 U.S. 36, 49-50 (1961) (rejecting argument that first amendment protection is absolute); M. REDISH, FREEDOM OF EXPRESSION 52-55 (1984) (rejecting any form of absolutism in first amendment analysis); Baker, Unreasoned Reasonableness: Mandatory Parade Permits and Time, Place, and Manner Regulations, 78 NW. U.L. Rev. 937 (1983) (rejecting strict absolutist approach). Professor Baker proposes six principles that would provide more protection to first amendment activity against abridgement than the typical balancing approach. Id. at 953. Although these principles lean toward an absolutist approach, they consider the possibility that governmental interests may be more important than first amendment rights in some instances and, therefore, Baker's principles represent somewhat of a balancing approach. But see Beauharnais v. Illinois, 343 U.S. 250, 275 (1952) (Black, J., dissenting) (subscribing to absolutist approach); T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 17-20 (1970) (supporting "full protection" for expression); Meiklejohn, The First Amendment Is An Absolute, 1961 Sup. Cr. Rev. 245 (advocating absolutist approach).

3. The Supreme Court has divided the areas in which speech occurs into three fora. See, e.g., Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983). These categories consist of traditional public fora, limited public fora, and nonpublic fora.

Traditional public fora include streets, sidewalks, and parks. In these places, the government may not prohibit expression. However, regulations on the time, place and manner of communicative activity will be upheld if these regulations are content-neutral, narrowly drawn to achieve a significant government interest, and leave open ample alternative channels of communication. Limited public fora consist of public places that the state has opened for public communication. When a state keeps limited public fora open to the public, the same time, place and manner standards apply as in traditional public fora.

Public places that are not by tradition or designation fora where expressive activity occurs are deemed nonpublic fora. In such places, a state may restrict speech so that the area may be used for its intended activity.

This Casenote is only concerned with speech that occurs in traditional public fora.


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. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. Th[is] privilege ... must not, in the guise of regulation, be abridged or denied.

Id. at 515-16.

By so stating, Hague has carved out a special place where limitations on speech are at a minimum.
been held to be well suited for public speech. While states may place reasonable time, place and manner restrictions on speech in a public forum, these restrictions must be implemented without regard to the content of the speech. The courts will check the government's power to regulate speech by independently determining if the regulation is a narrow means of protecting important interests. Moreover, the courts will not allow the government to place restrictions on speech where no alternative channels for communication are available.

Solicitation of contributions is entitled to first amendment protection since solicitation possesses various speech characteristics such as communicating information, disseminating ideas, and advocating causes. The time, place and manner standard, therefore, applies to cases involving solicitation. In *ACORN v. City of Phoenix*, the Ninth Circuit Court of Appeals upheld a regulation


6. See *Renton v. Playtime Theatres, Inc.*, 106 S. Ct. 925 (1986) (regulation was constitutional since it was not based on content of movies); *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85 (1977) (ordinance banning "for sale" signs was struck down because it was based on content of speech).


9. See *Cornellius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788 (1985) (solicitation is form of protected speech); *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620 (1980) (solicitation is so intertwined with speech that it must be afforded first amendment protection); *Jamison v. Texas*, 318 U.S. 413 (1943) (distributing handbills is not transformed into unprotected activity by soliciting funds); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (solicitation may be regulated, but not to extent that it infringes on protected freedoms). See generally *T. Emerson, supra note 2, at 353* (soliciting funds is expression when essential to communicating ideas); *Steele, Charitable Solicitation*, 13 J. Legis. 149 (1986) (discussing regulation of solicitation and protection it should be afforded).


11. 798 F.2d 1260 (9th Cir. 1986).
that prohibited solicitation from occupants of vehicles in the streets. The Ninth Circuit concluded that the ordinance was a constitutional time, place and manner regulation. Consequently, solicitation from occupants of vehicles is totally banned on the streets, an area where the continuous exchange of ideas occurs most freely.

This Casenote discusses the history of public streets as traditional public fora and the ability of individuals to exercise their first amendment rights in such fora, subject only to minimal degrees of regulation in the form of time, place and manner restrictions. In addition, alternatives to the approach taken in ACORN will be discussed and the Ninth Circuit's decision in ACORN will be analyzed.

I. BACKGROUND

Access to streets and parks for the communication of information was originally recognized in Hague v. Committee for Industrial Organization. The ordinance in Hague prohibited distributing literature on the streets or conducting meetings in public halls without first obtaining a permit from the chief of police. Speaking for a plurality of the Court, Justice Roberts explained that streets have always been used for public speech and should remain open for such expression. Consequently, this ordinance which granted city officials the power to deny such access, was incompatible with the first amendment. Hague provided the foundation for the development of the Supreme Court's decisions concerning a speaker's first amendment access claims to public fora. Traditional public fora are places which, by their very

---

12. Id. at 1273.
13. This Casenote is concerned specifically with solicitation in the streets. The Phoenix ordinance prohibits anyone from soliciting people who are in their cars stopped at traffic lights in the streets. See infra note 73, PHOENIX, ARIZ., ORDI NANCE §36-101.01 (1984). While this ordinance may appear to ban only one form of solicitation in the streets, in reality, soliciting from motorists is the only kind of solicitation that can occur in the streets. Consequently, one form of speech is completely prohibited in an area where speech is to occur most freely.
14. "A street is continually open, often uncongested, and constitutes not only a necessary conduit in the daily affairs of a locality's citizens, but also a place where people may enjoy the open air or the company of friends and neighbors in a relaxed environment." Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 651 (1981). See also Note, supra note 5, at 555-62 (discussing characteristics that make streets and parks adaptable to public expression). But see ACORN v. City of Phoenix, 798 F.2d at 1267 (sidewalks are more conducive to speech than streets that are congested with traffic).
15. 307 U.S. 496 (1939).
16. Id. at 501.
17. Id. at 515-16. For the full text of Justice Roberts's often quoted statement, see supra note 4.
18. 307 U.S. at 515-16.
19. Cases decided in the years following Hague consistently struck down statutes restricting expression in public places. See, e.g., Niemotko v. Maryland, 340 U.S. 268 (1951) (meetings in public parks); Kunz v. New York, 340 U.S. 290 (1951) (meetings in streets); Jamison v. Texas, 318 U.S. 413 (1943) (distributing handbills in streets and sidewalks); Cox v. New Hampshire, 312
nature, are well suited for public assembly and debate. Streets and parks were thought to be especially well designed for free speech purposes because such places offer the capacity for large crowds who can receive a speaker's message at little or no cost. This is essential to the public who cannot afford to finance media exposure.

The Supreme Court recognized a right of access to public places for public speech purposes. However, many cities continued to enact ordinances to regulate access to public property in an attempt to keep order and peace and to minimize community disturbances. This forced the Supreme Court to define the extent of first amendment protection. The Court provided the boundaries for first amendment protection by deciding the constitutionality of ordinances on a case-by-case basis. The Court used a balancing test that weighed first amendment rights against government interests in establishing necessary protection in public places. In Schneider v. State, the Supreme Court, confronted with four ordinances that regulated the distribution of literature in public places, recognized that cities had legitimate interests in keeping the streets free from congestion. However, the Court balanced these legitimate government interests against the individuals' interest in speaking freely. Justice Roberts, writing for the Court, found the right to speak freely fundamental. Building upon the foundation he laid in Hague, Justice Roberts stated that mere legislative convenience was insufficient to outweigh the importance of first amendment rights that were "vital to the maintenance of democratic institutions." As a result, the Court found that when cities attempt to regulate, and in the process abridge constitutional rights, such regulations

U.S. 569 (1941) (parading in streets); Schneider v. State, 308 U.S. 147 (1939) (distributing literature in streets).

For an historical overview of the public forum doctrine and first amendment rights, see Werhan, The Supreme Court's Public Forum Doctrine and the Return of Formalism, 7 CARDOZO L. REV. 335 (1986).


21. Martin v. Struthers, 319 U.S. 141 (1943). Martin involved a statute forbidding door-to-door distribution of literature. The Court recognized that this method of expression was widely used and necessary for those organizations that could not reach large audiences through more expensive means. Id. at 146.

22. See supra note 19.

23. See supra note 5, at 27-28 (interest in using public fora for speech must be balanced against interest in using public fora for other reasons).


25. Id. at 160. Justice Roberts explained, "[A] person could not exercise this liberty [to distribute literature] by taking his stand in the middle of a crowded street contrary to traffic regulations, and maintain his position to the stoppage of all traffic." Id.

26. Id. at 161.

27. Id.
cannot stand. Although the cities' asserted interests were valid, the regulations cannot deny constitutional rights to those who are rightfully upon the streets.

The Supreme Court, however, found that a statute which restricted speech only in the context of time, place or manner did not unduly infringe upon first amendment freedoms. Time, place and manner regulations originated in *Lovell v. Griffin*. In *Lovell*, an ordinance prohibited the distribution of literature within the city without first obtaining a permit from a city official. Alma Lovell was convicted for violating this ordinance when she distributed Jehovah's Witness pamphlets. In reversing Lovell's conviction, the Supreme Court held that the ordinance did not limit the time, place or manner of her speech. Rather, the ordinance was a complete ban on the distribution of literature. The city argued that its interests in maintaining sanitation and public order were the basis for this ordinance. Although the Court in *Lovell* recognized that these were valid concerns, it found that the ordinance did not restrict the time, place or manner of the speech in such a way as to achieve the stated city interests. The Court found that the ordinance, in one broad sweep, tried to regulate the distribution of literature and if upheld, would have had the effect of subjecting all speech to censorship. The Court explained that the first amendment was adopted to prevent the existence of such a broad restraint. Consequently, the Court held the ordinance void.

While *Lovell* was a first amendment challenge based on freedom of the press and the free exercise of religion, the Supreme Court also has applied the time, place and manner standard to free speech challenges concerning public fora. Solicitation is encompassed in first amendment free speech rights.

---

28. *Id.* at 160. Cities "may enact regulations in the interest of the public safety, health, welfare or convenience, [but] these may not abridge the individual liberties secured by the Constitution to those who wish to speak, write, print or circulate information or opinion." *Id.*

29. *Id.*

30. See, e.g., Kovacs v. Cooper, 336 U.S. 77 (1949) (statute prohibiting loud and raucous noises on streets upheld as reasonable time, place and manner regulation); Cox v. New Hampshire, 312 U.S. 569 (1941) (statute forbidding street parades without a license upheld as reasonable time, place and manner regulation).

31. 303 U.S. 444 (1938).

32. *Id.* at 447. The *Lovell* ordinance prohibited the distribution of "circulars, handbooks, advertising, or literature of any kind" within the city "without first obtaining written permission from the City Manager." *Id.*

33. *Id.* at 451. The *Lovell* Court stated with respect to the ordinance: "It is not limited to ways which might be regarded as inconsistent with the maintenance of public order, or as involving disorderly conduct. . . . The ordinance prohibits the distribution of literature of any kind at any time, at any place, and in any manner without a permit from the City Manager." *Id.*

34. *Id.* at 445.

35. *Id.* at 451.

36. *Id.* at 451-52.

37. *Id.* at 452.

38. See Cox v. New Hampshire, 312 U.S. 569 (1941). *Cox* was a free speech challenge to a state law prohibiting a "parade or procession" upon a public street without a special license obtained from a licensing authority. Several Jehovah's Witnesses violated this law and the Court
Solicitation, as a form of expression, conveys an idea and asks for money in exchange. The speech component, however, does not lose its protection because it is accompanied by a request for monetary contributions. When the main purpose behind the speech is to propose a commercial transaction, and thus gain through private profit, the speech is considered commercial and will not receive the same heightened level of protection as non-commercial speech. However, solicitation of contributions by charitable organizations does not fall into the commercial speech category.

Solicitation involves many of the speech characteristics that justify protection, including communicating ideas, disseminating information, and advocating causes. Thus, many solicitation statutes have been struck down using the time, place and manner standard. One of the earliest cases to address the issue of permissible restrictions on charitable solicitation was Cantwell v. Connecticut. In Cantwell, several Jehovah's Witnesses were convicted for violating a statute that prohibited soliciting money for religious or charitable causes. Cantwell challenged the ordinance on free speech and free exercise grounds. The Court acknowledged that the state may regulate the time, place or manner of solicitation on the streets as long as it is done in a nondiscriminatory manner. However, in Cantwell, the statute did not even attempt to regulate time, place or manner, but instead, totally prohibited solicitation without a permit. Although a state's interest in protecting its citizens from fraud disguised as religion was found valid, this interest was not achieved by the statute's blanket prohibition. To be valid, the statute must be drawn narrowly with respect to the time, place or manner of the solicitation in light of the city's asserted interest. The regulation in Cantwell failed because it was not drawn narrowly enough to restrict only the conduct that presented a

upheld their convictions. The Court relied on the state supreme court's interpretation of the law which provided that the licensing authority could consider only the time, place and manner of the speech in issuing licenses. This was an objective standard and did not give the local authority unfettered discretion. It also prevented confusion and chaos that might occur if two parades wanted to use the streets at the same time.

42. See supra note 9.
43. 310 U.S. 296 (1940).
44. Id. at 301-02. The statute provided: "No person shall solicit money, services ... or any valuable thing for any alleged religious, charitable or philanthropic cause, from other than a member of the organization for whose benefit such person is soliciting ... ." Id.
45. Id. at 304.
46. Id.
47. Id. at 304-05.
48. Id. at 311.
conflict with the city's asserted interests. The Supreme Court continues to use the time, place and manner test when balancing an individual's interest in free speech against a government's interest in maintaining an orderly and safe community. The time, place and manner test remains the proper standard in first amendment cases, and therefore, in the solicitation area. Thus, the Court will uphold a regulation on speech in the public fora if the regulation is content-neutral, if it is drawn narrowly to achieve a significant government interest, and if there are ample alternative channels of communication left open. When all three requirements are met, the statute is a proper time, place and manner regulation of the speech.

The first prong of the time, place and manner test requires the regulation to be content-neutral. Early speech regulations vested authority in a city official to permit or deny speech to occur. Courts soon found that such a scheme allowed a city official to base his choice on whether or not he approved of a speaker's views. Thus, speakers were being regulated according to the content of their speech. Although other statutes did not place the authority to allow or disallow speech in the hands of a city official, the language of the statutes denied individuals the right to speak based solely on the content of the speech. The Supreme Court recognizes that when speech is banned because of its content, the states are not concerned with the safety or order of the community. States can only regulate speech when it conflicts with a significant government interest, not because of its message or subject matter. Therefore, if a time, place and manner regulation is to be held valid, then it must be content-neutral.

49. *Id.*
51. See, e.g., Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984) (test used to uphold regulation on camping in public parks; camping in this context was intended as expressive activity); United States v. Grace, 461 U.S. 171, 177 (1983) (ordinance prohibiting display of signs on sidewalk across from Supreme Court Building was struck down using test).
54. *Id.* at 560-61. The chief of police had uncontrolled discretion to arbitrarily suppress the expression. *Id.*
55. See Chicago Police Dept. v. Mosley, 408 U.S. 92, 92-93 (1972) (statute prohibited all picketing except peaceful labor picketing near school building while school was in session).
57. The Supreme Court stated that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Mosley, 408 U.S. at 95.
58. *Consolidated Edison*, 447 U.S. at 537; *Erznoznik*, 422 U.S. at 212.
The second prong of the test is whether or not the regulation is drawn narrowly to achieve a significant government interest. The Supreme Court has held some government interests significant. These include controlling traffic, preventing crime and fraud, and avoiding traffic distractions. Although such concerns may be valid government interests, a regulation must precisely control the problems it is designed to protect. Moreover, a regulation must be the least restrictive means available. When a statute is designed to completely prohibit speech instead of only regulating it, less restrictive alternatives generally exist. Therefore, such a statute will probably fail this part of the test.

However, even if a statute satisfies the first two prongs of the test, it must still leave ample alternative channels of communication open. While there may always be another way to get a speaker's message out to an audience, these alternatives must be adequate ways of communicating. Furthermore, the existence of alternative channels in which to communicate alone is not enough to justify regulating speech that occurs in a public forum. A statute

59. Clark, 468 U.S. at 293; Grace, 461 U.S. at 177; Perry Educ. Ass'n, 460 U.S. at 45; Heffron, 452 U.S. at 648.
60. See Heffron, 452 U.S. at 650 (ordinance restricting distribution and solicitation on fairgrounds upheld in interest of controlling orderly movement of fair-goers); Cox v. New Hampshire, 312 U.S. 569, 574 (1941) (ordinance requiring parade or procession license was upheld in interest of traffic control).
61. See Hynes v. Mayor of Oradell, 425 U.S. 610, 616-17 (1976) (interest in protecting citizens against crime valid, but statute not sufficiently narrow); Martin v. Struthers, 319 U.S. 141 (1943) (although asserted interest in preventing fraud was valid, ordinance banning door-to-door solicitation was invalidated).
62. See Kovacs v. Cooper, 336 U.S. 77, 87 (1949) (interest in avoiding traffic distractions sufficient to uphold ban on use of amplification devices in public places); Erznoznik, 422 U.S. at 214-15 (asserted interest in preventing traffic distractions was significant, but Court found that it was not served by the ordinance).
63. See Steele, supra note 9, at 167 (time, place and manner standard requires narrowly drawn regulations to combat problems presented).
64. See Clark v. Community for Creative Non-Violence, 468 U.S. 288, 299 (1984) (less restrictive means for maintaining aesthetics of park were not available); Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 637 (1980) (methods less restrictive than total prohibition were available); Martin v. Struthers, 319 U.S. 141, 147 (1943) (less intrusive methods of regulation were available).
66. Clark, 468 U.S. at 293; Grace, 461 U.S. at 177; Perry Educ. Ass'n, 460 U.S. at 45; Heffron, 452 U.S. at 648. See generally M. Redish, supra note 2, at 88-89. Professor Redish suggests that the opposite of a time, place and manner regulation is an absolute prohibition on expression because no alternatives are available when speech is absolutely prohibited. Id.
68. See generally Baker, supra note 2, at 967-69 (to satisfy time, place and manner standard alternative channels must be available, but this alone is insufficient).
regulating speech in a public forum, therefore, will be upheld only if it satisfies all three parts of the time, place and manner test.

II. THE ACORN DECISION

Against this background, the Ninth Circuit, in ACORN v. City of Phoenix, considered whether an ordinance prohibiting the solicitation of funds from occupants of vehicles stopped at intersections was a valid time, place and manner regulation. The Association of Community Organizations for Reform Now (ACORN) is a nonprofit political action organization working to promote the concerns of low and moderate income citizens. ACORN members generate funds through the practice of "tagging." "Tagging" requires a member to step into the street and approach an automobile that is stopped at a traffic light. The member provides the occupant of the car with a piece of paper or "tag" which explains ACORN's organization and activities in return for a contribution from the motorist.

A local chapter of the ACORN organization engaged in the "tagging" procedure on the streets of Phoenix, Arizona. However, a Phoenix ordinance prohibited anyone from standing in the street and soliciting contributions from occupants of vehicles. Phoenix police officers informed ACORN that its conduct was illegal and any members that continued this conduct would be subject to citation. ACORN and its members filed suit against the City of Phoenix, claiming that the ordinance was unconstitutional. The city argued that the ordinance was necessary to maintain public safety and to minimize disruptions in the flow of traffic.

The United States District Court for the District of Arizona upheld the ordinance as constitutional on the grounds that streets were not public fora designated for the exercise of free speech and that the ordinance was a reasonable, content-neutral regulation to promote public peace, health, and safety. The district court recognized that the Supreme Court held that streets were public fora, but thought that this did not include intersections. As a
result of finding no public forum, the district court held that the only considerations were whether the statute was content-neutral and reasonable. 80

On appeal, the Ninth Circuit Court of Appeals found that the ordinance was a reasonable time, place and manner regulation. 81 The appellate court declined to decide if the streets, while being used by motor vehicles, remain perpetual traditional public fora. 82 The court assumed for the purpose of deciding this case that such streets were public fora. 83 As a result, the standard used was whether the regulation was content-neutral, narrowly tailored to serve a significant government interest, and left open ample alternative channels of communication. 84

The court found that the ordinance was content-neutral. 85 The regulation applied to every individual or organization without regard to the content of the speech. The ordinance flatly banned all solicitation on the streets from occupants of vehicles, regardless of the speech involved or the people attempting to solicit. Therefore, the regulation was not content-based. 86

Next, the Ninth Circuit considered the validity of the city's interests and whether the regulation was narrowly drawn to achieve those interests. The first interest the city asserted was in the substantial risk of disruption to the orderly flow of traffic. 87 The court stated that a similar interest was recognized by the Supreme Court in the setting of a state fair in Heffron v. International Soc'y for Krishna Consciousness, Inc. 88 This interest is a valid concern in crowded urban areas because one disruption in the flow of traffic can cause backups and delays which extend down the roadway. 89 Solicitation is more apt to cause such disruptions because it requires an involved response from the audience. 90 The receiver must offer money in exchange for the information distributed. 91 The ACORN court found the ordinance was aimed narrowly at this specific disruptive conduct because it banned only solicitation of vehicle occupants. 92 Moreover, the ordinance only prohibited vehicle solicitation and not other forms of communication such as dispensing literature to occupants.

80. Id. at 871.
81. ACORN v. City of Phoenix, 798 F.2d 1260 (9th Cir. 1986).
82. Id. at 1267.
83. Id.
84. Id. (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).
85. Id.
86. Id. The parties stipulated in a pretrial order that the ordinance was adopted to promote the city's interests in public peace, health, and safety and not to suppress the views of those wishing to solicit in the streets. Id. at 1267-68. Therefore, any arguments that the ordinance was content-based would not stand. Id.
87. Id. at 1268.
89. 798 F.2d at 1268.
90. Id.
91. Id.
92. Id.
of vehicles.\textsuperscript{93} The ordinance, therefore, was narrowly tailored to serve the interest in avoiding disruption to traffic.\textsuperscript{94}

The second interest to which the test was applied was the city's concern for traffic and public safety.\textsuperscript{95} In addressing this issue, the ACORN court relied on a Seventh Circuit case\textsuperscript{96} that upheld a similar ordinance. The Ninth Circuit found that the Phoenix regulation "appears to be a narrowly drawn regulation to address these safety concerns."\textsuperscript{97} ACORN argued that there were several locations where solicitation from motorists would not present traffic hazards.\textsuperscript{98} In addition, ACORN presented safety conditions which they contended, if followed, would minimize safety problems.\textsuperscript{99} These arguments, however, were rejected. The court found that the mere presence of solicitors in the streets presented potential safety hazards.\textsuperscript{100} In addition, the court stated that the "multiplied effect" of other organizations wanting to engage in this solicitation activity and the potential safety problems of such a situation could be considered in determining the validity of the ordinance.\textsuperscript{101} Thus, it was found that "widespread disorder" and disruption would be the result of such activity.\textsuperscript{102} The appellate court also rejected ACORN's argument that the city could achieve these interests through a less restrictive ordinance that only prohibits solicitation which disrupts traffic or presents safety hazards.\textsuperscript{103} Relying on the district court's factual finding that the mere presence of solicitors in the streets

\textsuperscript{93} Id.
\textsuperscript{94} Id.
\textsuperscript{95} Id. at 1269.
\textsuperscript{96} United States Labor Party v. Oremus, 619 F.2d 683 (7th Cir. 1980). \textit{Oremus} involved the validity of a state statute that prohibited standing on a highway to solicit contributions from the occupants of vehicles. The \textit{Oremus} court found the statute was narrowly drawn because it "only modestly restricts solicitation by prohibiting it only on highways." \textit{Id.} at 688. The ACORN statute is much broader than the one at issue in \textit{Oremus} because it prohibited soliciting in all streets as well as highways.
\textsuperscript{97} 798 F.2d at 1269 (footnote omitted).
\textsuperscript{98} Id.
\textsuperscript{99} Id. at 1270 n.10. ACORN's expert witness suggested a list of conditions to minimize traffic hazards:

1. require solicitors to wear high visibility clothing; 
2. impose a limit on the number of solicitors working at an intersection; 
3. limit solicitation to 'the left side of one-way streets, where there is no curbed parking' and 'on the median side of streets that have barrier type medians, with raised curbing on the approach to signal lighted intersections' where the median is at least six-feet wide; 
4. require solicitors to return to a neutral area when the traffic signal changes to yellow for cross traffic; 
5. require soliciting organizations to post a supervisor with a whistle at each intersection to monitor the traffic light; 
6. limit solicitation to daylight hours; and 
7. prohibit solicitors from going into the street between cars that are backed up.

\textit{Id.} The court stated that even if such conditions were complied with, the mere presence of people on the streets presented traffic hazards. \textit{Id.}
\textsuperscript{100} Id. (citing the district court opinion, 603 F. Supp. at 871).
\textsuperscript{101} 798 F.2d at 1270 (citing Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 652-54 (1981)).
\textsuperscript{102} Id. (quoting \textit{Heffron}, 452 U.S. at 653).
\textsuperscript{103} 798 F.2d at 1270.
presented potential safety hazards, the regulation was upheld as narrowly
drawn to achieve the city's interests in traffic and public safety.104

Finally, the court addressed the third prong of the test.105 This last prong
requires that ample alternative channels of communication be left open when
a public forum is involved.106 ACORN argued that soliciting motorists is an
especially effective way of fundraising for which no alternative method of
communication existed.107 However, the court found that ACORN had access
to other modes of fundraising.108 The Ninth Circuit proposed alternative
methods of solicitation and did not agree that ACORN was left with no
alternative approach because this "one questionable approach to soliciting
contributions"109 was prohibited.

Consequently, the ACORN court found that the ordinance was a reasonable
time, place and manner regulation.110 The regulation was content-neutral and
furthered important city interests in safety and the orderly flow of traffic. In
addition, ample alternative methods of communicating with others were avail-
able to the members of ACORN.111

III. Analysis

The Ninth Circuit correctly followed the Supreme Court's method of ap-
plying the time, place and manner test which balances the competing interests
in the context of a first amendment claim. However, the weight given to the
individuals' free speech rights by the ACORN court fell far short of what is
required. The Supreme Court has continually permitted expressive activity to
occur in traditional public fora, subject only to narrow regulations that are
necessary to achieve significant government concerns.112 The ACORN court
failed to fully scrutinize the ordinance at issue under the applicable time, place
and manner test.

The ACORN court properly concluded that the ordinance was content-
neutral because it restricted solicitation in an even-handed manner.113 It does
not automatically follow, however, that the ordinance is constitutional. Even
content-neutral statutes are capable of unconstitutionally restricting protected
expression.114 The level of scrutiny, therefore, should not be decreased after a

104. Id.
105. Id. at 1271.
106. Id. (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).
107. 798 F.2d at 1271.
108. Id.
109. Id.
110. Id. at 1273.
111. Id.
112. See supra notes 60-63 and accompanying text.
113. 798 F.2d at 1267-68.
114. See United States v. Grace, 461 U.S. 171, 180-83 (1983) (ordinance found content-neutral,
but unconstitutional since it did not narrowly fit government interest); Schneider v. State, 308
U.S. 147, 162 (1939) (Court held state's interest in preventing litter was insufficient to justify
ordinance, even though it was content-neutral).
finding of content-neutrality. The ACORN court, however, assumed that the balance struck by the Phoenix City Council was deserving of deference since the ordinance did not appear to be based on the content of the speech. This is evident from the lack of analysis in which the Ninth Circuit engaged when considering the fit of the ordinance to the achievement of the city's interests. Unfortunately, the court did not continue to analyze the ordinance so that first amendment rights would be preserved.

The ACORN court relied on Heffron for the proposition that solicitation presents a "substantial risk of disruption in crowd or traffic control." It is true that the Heffron Court prohibited solicitors from walking among the fair-goers and soliciting contributions because of concerns for safety and traffic flow. These concerns were held to be significant enough to restrict the free speech activities. However, unlike the ordinance in ACORN, the regulation in Heffron did not totally ban solicitors from the forum. The Heffron regulation only restricted the place within the forum where the solicitors could not go. In upholding the regulation, the Heffron Court found it significant that the solicitors were not completely denied access to the public forum. Since it was only a certain area within the forum which was off limits, the solicitors were still able to exercise their rights in this forum, but in a regulated manner. The obvious distinction between the Heffron regulation and the ACORN ordinance is that the latter prohibited free speech activity while the former merely regulated it. Thus, an ordinance attempting to merely regulate, and not prohibit solicitation within the forum, would not improperly infringe on constitutional rights and would be a valid time, place and manner regulation. Improperly, however, the Ninth Circuit relied solely on Heffron to reach its conclusion that the ordinance was narrowly tailored to serve the city's interest and it thus met the second prong of the test. While this may have been a convenient way to satisfy the second prong, it is not sufficient to justify a prohibition on first amendment activity in a public forum. In addition, the Heffron Court found any analogies between fairgrounds and public streets to be imprecise because safety and crowd control are more compelling in the context of a fairground than in the streets. A further

---

116. 798 F.2d at 1268.
117. 452 U.S. at 655 n.16. Those wishing to distribute and solicit were not prohibited from doing so everywhere in the fair. They had the opportunity to engage in the first amendment activity from booths set up on the fairgrounds. Id.
118. Id. at 655. In addition, the forum involved in Heffron was only a limited public forum. In such fora, the government's ability to restrict speech and related activity is not as limited as in traditional public fora. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). A state is not required to keep open limited public fora, and thus, may even-handedly deny access to such places, unlike traditional public fora. Id. at 46.
119. Heffron, 452 U.S. at 655.
120. Governmental convenience is insufficient to justify a restriction on free speech in public fora. Schneider v. State, 308 U.S. 147, 161 (1939).
121. 452 U.S. at 651. The Supreme Court noted that fairgrounds are more compact and the ability to move around freely is not as great as when streets are involved.
distinction between *Heffron* and *ACORN* is the forum involved in each. *Heffron* dealt with a fairground which was found to be a limited public forum. Consequently, the level of protection afforded the speech was lower. The *ACORN* court, therefore, should have afforded the speech that occurred in the street, a less regulatable forum, more protection than was given in *Heffron*.

Not only did the statute in *Heffron* regulate solicitation, it also restricted the distribution of literature. Handbillers were required to remain in the prescribed booths and not wander among the people at the fair. It can be inferred from *Heffron* that solicitation presents no more potential for congestion than does distribution of literature. However, the court in *ACORN* held that the ordinance, which completely banned vehicle solicitation, would alleviate the possible disruption of traffic flow, but continued to allow individuals to distribute literature to occupants of vehicles. Such a holding is inconsistent. The Ninth Circuit hoped to avoid the disruptions in traffic flow by completely prohibiting one form of expression on the streets, regardless of the safety measures that might be taken while engaging in the expression. A much more narrowly focused and less restrictive solution would be to regulate the solicitation of vehicle occupants that presents traffic hazards instead of upholding a blanket prohibition of one form of speech. The *ACORN* court, however, improperly found that the ordinance was narrowly tailored to achieve the government interests in preventing disruptions in the orderly flow of traffic and in maintaining traffic safety.

The Ninth Circuit was correct in recognizing that alternative channels for communication must remain open in order for the ordinance to be a valid time, place and manner regulation. However, the *ACORN* court failed to analyze the adequacy of the alternatives. The court merely stated that there were other ways for *ACORN* to convey its message. How well these alter-

122. 452 U.S. at 655.
123. See supra note 118.
124. 452 U.S. at 643-44.
125. *Contra* 452 U.S. at 665 (Blackmun, J., concurring in part and dissenting in part) (solicitation presents greater problems with crowd control than does distribution).
126. *ACORN*, 798 F.2d at 1268. "Direct communication of ideas, including the distribution of literature to occupants of vehicles, is not restricted." *Id.*
127. The right to engage in expressive activities rests on the principle that "one who is rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion." Jamison v. Texas; 318 U.S. 413, 416 (1943).
128. Several locations where solicitation would not present traffic hazards were advanced by *ACORN*. In addition, the organization offered safety conditions that would protect against traffic disruption and hazards. See supra note 99 and accompanying text.
129. See supra notes 66-68 and accompanying text.
130. 798 F.2d at 1271. The court stated that ample alternatives such as "solicitation on the sidewalk from pedestrians, canvassing door-to-door, telephone campaigns, or direct mail" were available to *ACORN*. *Id.* However, *ACORN* argued that soliciting the occupants of vehicles was much more effective than any other method of communication. *Id.*
natives served the purpose for which ACORN engaged in this speech was not considered. Although the trend by the Supreme Court has been to find alternatives readily available, the adequacy of such alternatives should still be reviewed or this part of the test will become meaningless.

In addition, the ACORN court was unwilling to consider seriously the solicitation claim as one that falls within first amendment protection. The reference made to this one form of solicitation as a "questionable approach" to expressive activity, reflects a lack of willingness to accept solicitation's constitutional nature. However, the fact that an exchange of money accompanies the distribution of a message does not take this mode of expression out of first amendment protection. The main purpose of charitable solicitation is to inform society about issues of public interest and seek support for these important concerns. Unlike those who engage in commercial speech, which proposes a commercial transaction, charitable solicitors are not concerned with private profit. The first amendment was not adopted to further the profit-makers of society, but to protect and encourage those who take a minority view to speak out and share their ideas. Solicitation, therefore, as a form of speech, is fully entitled to constitutional protection. The Supreme Court explicitly stated in Village of Schaumburg v. Citizens for a Better Env't that solicitation shares many of the same characteristics as pure speech. Thus, solicitation should be afforded the same degree of protection as speech that is not accompanied by an exchange of money. The Ninth Circuit should have readily recognized such a well-established principle. Yet it is not clear that the court accepted this proposition in its analysis.

131. See City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984). Although the alternatives that were open to the taxpayers were not as convenient or inexpensive as posting signs on street poles, the Vincent Court noted that adequate alternatives were available. Id. at 812. But see City of Watseka v. Illinois Pub. Action Council, 796 F.2d 1547 (7th Cir. 1986), aff'd mem., 107 S. Ct. 919 (1987). Watseka involved a statute prohibiting solicitation before 9 a.m. and after 5 p.m. The city of Watseka argued that alternative means, such as soliciting during the day, by mail, or over the phone, were available. However, the Watseka court accepted IPAC's unrebuttable argument that these alternatives were "more expensive and less effective than in-person solicitation." 796 F.2d at 1558. As a result, the court found insufficient alternatives available. In doing so, the court looked at the adequacy of the alternatives, not merely the existence of alternatives. Id.

132. 798 F.2d at 1271.

133. Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620 (1980). The Court stated with regard to those engaging in charitable solicitation:

"Canvassers in such contexts are necessarily more than solicitors for money. Furthermore, because charitable solicitation does more than inform private economic decisions and is not primarily concerned with providing information about the characteristics and costs of goods and services, it has not been dealt with in our cases as a variety of purely commercial speech."

Id. at 632 (footnote omitted).

134. See supra note 9 and accompanying text.


136. Id. at 632.
The Ninth Circuit also was hesitant to accept the long established constitutional principle that public streets fall into the category of public fora. Consequently, only an assumption was made that streets are traditional public fora. Streets have long been considered traditional public fora. Such fora may be subject to some regulations, but these regulations cannot unduly infringe upon first amendment rights. As a result of this assumption, the ACORN court avoided close examination of ACORN's claim. A court must engage in a thorough analysis, based upon the nature of the forum, to determine if first amendment rights are being unconstitutionally denied. Since the decision was not based on a specific finding but only on a mere assumption that a public forum was involved, the ACORN court glossed over the analysis of whether or not the ordinance was narrowly drawn to effectuate the concerns advanced by the city. If the ACORN court had correctly recognized that streets fit into the category of traditional public fora, then the proper analysis might have been undertaken in its decision. A court must undertake a thorough analysis of the fit between the government interests and the manner in which the ordinance regulates this interest when a public forum is involved. However, the Ninth Circuit simply accepted the city's interests as sufficient to deny ACORN members the ability to exercise their rights in a public forum, without explaining why the scale tipped in favor of the city.

IV. IMPACT

The time, place and manner standard has stood for the proposition that, sometimes, speech protected by the first amendment must be regulated in public places because government interests are more important. In formulating the requirements that make up the time, place and manner standard, the Supreme Court retained as much protection as possible for free speech, while allowing the government to regulate speech activity in the interest of valid community concerns. When deciding if the speech should be suppressed in various situations, courts must engage in a balancing test to determine whether the government regulated the speech in a valid manner. Only speech that conflicts with a valid government interest may be regulated by a restriction on the time, the place or the manner of the activity. When a statute completely prohibits one form of speech, it is not a proper regulation of the time, place or manner of the expression. An absolute ban does not narrowly suppress speech that is in conflict with the government interest.

137. 798 F.2d at 1267.
138. See supra notes 4-5 and accompanying text.
139. See supra notes 25-29 and accompanying text.
140. See Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788 (1985). Cornelius did not involve a traditional public forum, but the Court noted that the appropriate analysis depends on the nature of the forum involved. Id. at 797.
141. Id.
142. 798 F.2d at 1268-69.
The Ninth Circuit in ACORN distinguished between solicitation and other forms of speech such as oral advocacy and distribution of literature. In doing so, the court decreased the amount of protection previously afforded solicitation. Even if those wishing to engage in solicitation on the streets took all possible precautionary measures, ACORN denies them access to the streets. Following ACORN, the focus is not on the adverse effect of the expression in the community; it is instead strictly on the label given to the expression. A court following the holding in ACORN, therefore, is not required to grant solicitation the same degree of protection as other forms of speech. Moreover, the lower courts will find no guidance in ACORN for analyzing an ordinance under the time, place and manner test. The Ninth Circuit's decision lacks the appropriate analysis and upholds a ban against constitutionally protected speech.

In addition, the relevance of the speech occurring in a traditional public forum falls by the wayside. Streets previously were characterized as places well designed for the free exchange of ideas. This is no longer true if those ideas are accompanied by an exchange of money. Suddenly, the streets become ill-equipped to handle such activity. Those seeking to express themselves are no longer assured a place on the streets to do so. Streets originally were characterized as traditional public fora because they are open and provide space to reach many people. These factors now are irrelevant when solicitation is involved.

As an alternative to upholding the complete prohibition of solicitation from occupants of vehicles, the ACORN court should have found that the ordinance was not drawn narrowly enough to achieve the significant city interests. Concerns for traffic safety and control are important. However, by prohibiting such solicitation only during times when many cars are on the streets and by requiring strict compliance with safety regulations, the court could protect government interests and still allow ACORN and other groups to exercise their first amendment rights. As a result of upholding this ordinance, it is extremely unlikely that local legislatures will attempt to draft ordinances that are narrowly tailored to restrict only the speech that conflicts with the concerns of the city. In light of the ACORN decision, a complete prohibition on solicitation from occupants of vehicles is sufficiently narrow and will be upheld by courts following ACORN. As a result, an individual's free speech rights are curtailed. Those who desire to express themselves through solicitation on the streets will be relegated to places that are not as compatible with these first amendment activities.

Since the ACORN decision, however, the Supreme Court has upheld the Seventh Circuit opinion of City of Watseka v. Illinois Public Action Council. This decision found an ordinance that restricted the time when door-to-door

143. See supra note 5 and accompanying text.
144. 796 F.2d 1547 (7th Cir. 1986), aff'd mem., 107 S. Ct. 919 (1987).
solicitation could occur unconstitutional. The time, place and manner test was applied to the *Watseka* ordinance. The ordinance failed to meet the second and third prongs of the test. The Seventh Circuit found that the ordinance was not tailored narrowly to achieve the city's interests in preventing crime and protecting citizens' privacy. The city of Watseka wanted to prohibit all door-to-door solicitation during the hours of 5 p.m. and 9 a.m., not just that solicitation which presented problems of crime and invasion of privacy. In addition, the ordinance did not leave open any adequate alternative channels of communication. The court found that the alternative solicitation measures proposed by the city were more expensive and not as effective as door-to-door solicitation. By affirming the Seventh Circuit's decision in *Watseka*, the Supreme Court sent a message that regulations which infringe on first amendment rights, and more specifically the right to express oneself through solicitation, will not be upheld in the future. Moreover, solicitation is still entitled to full first amendment protection.

### V. Conclusion

The *ACORN* court's analysis ignores the rationale behind the need to regulate narrowly only speech that conflicts with significant government interests. In our society the free exchange of ideas is encouraged. Without narrowly tailored statutes, it is possible and probable that a great deal of protected speech will be prohibited. Consequently, if the right to speak freely is increasingly restricted, the strength behind the first amendment will soon disappear.

*Marcy K. Weaver*

---

145. *Id.* The ordinance made it unlawful to solicit "prior to 9:00 o'clock A.M. or after 5:00 o'clock P.M. of any weekday, or at anytime on a Sunday or on a state or national holiday." *Watseka, Ill., Rev. Ordinance* ch. 19, §19-9 (1979).
146. 796 F.2d at 1552.
147. *Id.* at 1555-56.
148. *Id.* The city of Watseka was concerned with crime that accompanies door-to-door solicitation. The majority of Watseka's evidence on this issue focused on criminal acts that happen when it is dark outside. *Id.* The court recognized Watseka's interests, but stated that if the city was indeed concerned with preventing crime, then the hours during which solicitation should be banned are those hours when it is dark and not simply from 5 p.m. to 9 a.m. *Id.*
149. *Id.* at 1557. The city of Watseka argued that the Illinois Public Action Council still had the option to "canvass in public places, canvass during the daytime (9 a.m. to 5 p.m.), and canvass by mail or over the phone." *Id.*
150. *Id.* at 1558.
151. *Id.*