Symbolic Speech

Finbarr J. O’Neill
SYMBOLIC SPEECH

I. INTRODUCTION

While the extent of first amendment protection remains unclarified, political speech has always been protected. The Supreme Court has observed: "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. . . . [D]iscussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes," are included.

In recent years political expression has frequently taken the form of symbolic conduct. This has been defined as the communication of opinion by conduct rather than by the spoken word. Use of symbolic conduct largely has been a result of the participant's lack of access to the government and the media. Although attention may be paid to grievances expressed in street corner speeches, it has been found that dramatic conduct will focus both media and government attention and provide the participant with a wider audience for his grievance.

A recent district court opinion, for example, recognized that by establishing a symbolic campsite on the Capitol Mall, a Vietnam veterans' group "was able to attract considerable media attention which [was] indispensable to the effective dissemination of [its] viewpoints."

That conduct may be sufficiently communicative to enjoy first amendment protection was first recognized by the Supreme Court in Stromberg v.

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California, in which a state statute prohibiting the display of a red flag as a symbol of opposition to organized government was invalidated. Although Stromberg implicitly recognized that communicative conduct was protected, the Court did not face the issue of the protection to be afforded symbolic speech until United States v. O'Brien. In O'Brien, the defendant publicly burned his draft card to demonstrate his opposition both to the Selective Service System and to the war in Vietnam. The defendant intentionally chose this means of expression "to influence others to adopt his antiwar beliefs . . . ." Aware that such conduct contravened federal law, O'Brien argued that the proscription of his action violated his first amendment right of free speech. The Court, assuming that O'Brien's conduct was protected, held that the government's interest in regulating the non-speech element of the conduct justified the incidental proscription of the defendant's freedom of expression.

Conduct amounting to political expression therefore may be regulated under the proper circumstances. Certain symbolic conduct guidelines have been developed to measure the legitimacy of these regulations. This Note will first analyze these guidelines, and then discuss them in terms of a recent case, United States ex rel. Radich v. Criminal Court.

Notwithstanding the fact that symbolic conduct is accorded first amendment protection, not all conduct intended as communicative can be protected. Pouring blood on Selective Service files can be highly com-

7. Id. at 368-69.
9. 391 U.S. at 370.
10. Id. at 369-70.
11. Id. at 376-77.
municative of aversion to war making, but as conduct which collides with a valid statutory proscription it will not be protected.

Moreover, even when communicative conduct falls within the first amendment's ambit, it enjoys a lesser standard of protection than pure speech. "As the mode of expression moves from the printed page to the commission of public acts . . . the scope of permissible state regulations significantly increases." The Court also has decided that, for purposes of the first amendment overbreadth doctrine, regulation of conduct raises fewer questions than regulation of speech, even where both are protected by the first amendment.

A sliding scale has been established by the Court to determine the degree of


15. When a demonstration turns violent it loses its first amendment protection. Grayned v. City of Rockford, 408 U.S. 104, 116 (1972); see Bullock v. Mumford, Civil No. 71-2058, at 5 (D.C. Cir., Oct. 21, 1974); Leahy, "Flamboyant Protest," the First Amendment and the Boston Tea Party, 36 Brooklyn L. Rev. 185, 189 (1970). In Herzbrun v. Milwaukee County, 504 F.2d 1189 (7th Cir. 1974), employees "[methodically interfered with the telephonic communications system at the Welfare Center Building by removing telephone receivers from their cradles and by inserting broken pencils therein . . . resulting in a major backup of incoming calls . . . ."] Id. at 1192. The court noted that "[a]lthough the action taken was concerted response in a dispute with management . . . we think the physical interference with communication and the conduct of public business was too deliberate, substantially disruptive, and prolonged to be classified as symbolic speech and protected expression." Id. at 1193 n.2.


first amendment protection available in the area of speech/conduct. While
protected pure speech is on one end of the scale, and unprotected non-
communicative conduct is on the other, the distinction is obscure in the
middle range where both speech and communicative conduct come within the
first amendment.19 As Justice Brennan has indicated, “it is hard to know
whether the protected activity falling within the [state] Act should be consid-
ered speech or conduct.”20 Moreover, as one commentator noted, there is
little distinction between constitutionally protected vigorous debate with
co-workers and the solicitation of votes which was proscribed by the state
statute in Broadrick v. Oklahoma.21

Even when the Court recognized the wearing of a black armband by a high
school student to protest the Vietnam war as a “primary First Amendment
[right] akin to ‘pure speech,’”22 it maintained the distinction between com-
municative conduct and pure speech.23 In a recent case concerning a
defendant's conviction for wearing a miniature flag on the seat of his pants,
Justices White and Rehnquist found a substantial state interest in regulating
flag use, but could not agree on whether the regulation limited conduct or
speech.24

II. SYMBOLIC SPEECH—WEIGHING THE GOVERNMENT INTEREST

Since communicative conduct can be as expressive as pure speech, and
since there is often no clear distinction between these two modes of expres-
sion, it is an inadequate solution to hold that as the mode of expression
moves from pure speech towards conduct, first amendment protection at-
tenuates. In the words of Professor Emerson, “the Court has adopted such a
narrow view of ‘expression’ that important sectors of the system [of freedom
of expression] are removed from any First Amendment protection.”25

19. “The Court has, as yet, not established a test for determining at what point
conduct becomes so intertwined with expression that it becomes necessary to weigh the State’s interest in
proscribing conduct against the constitutionally protected interest in freedom of expression.”
omitted).
21. See 34 Ohio St. L.J. 949, 953 n.28 (1973).
23. Id. at 515 (White, J., concurring).
24. Compare “I would affirm Goguen’s conviction, therefore, had he been convicted for
mutilating, trampling upon, or defacing the flag . . . . [But] [t]o violate the statute in this respect,
it is not enough that one ‘treat’ the flag; he must also treat it ‘contemptuously,’. . . . To convict
on this basis is to convict not to protect the physical integrity . . . . but to punish for
J., concurring), with “[s]ince the statute . . . punishes a variety of uses of the flag which would
impair its physical integrity, without regard to presence or character of expressive conduct in
connection with those uses, I think the governmental interest is unrelated to the suppression of
free expression.” Id. at 599 (Rehnquist, J., dissenting).
25. Emerson 718. Communicative conduct is a pragmatic means of communication See notes
3 & 4 supra and accompanying text. The Court has avoided coming to grips with the first
Communicative conduct clearly may be reasonably regulated as to time, place and manner. The Court has recognized, for example, that a college administrator may require a student group seeking official recognition to "affirm in advance its willingness to adhere to reasonable campus law." There was no right to "flout" these regulations, and the requirement to agree not to interrupt class was a "reasonable [regulation] with respect to the time, the place, and the manner in which student groups conduct their speech-related activities [which] must be respected."

The first step in determining the reasonableness of a governmental regulation in this area is to examine the interests involved. When individual and governmental interests conflict under the first amendment, "a reconciliation must be effected" and the interests must be balanced against one another.
The Court has utilized three methods of weighing the government interest in regulating communicative conduct.

The first, set forth in *O'Brien*, establishes that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.\(^3\)

Implicit in this test is the assumption that the conduct is divisible into communicative and non-communicative elements.\(^3\) *O'Brien* emphasizes that a regulation must be addressed to the non-communicative aspect of the conduct; the message itself may not be the focus of the restriction.\(^3\)

The First Circuit applied this test to a violation of a Massachusetts statute proscribing conduct which "treat[ed] contemptuously the flag of the United States." The defendant had been prosecuted for wearing a replica of the flag on the seat of his pants. The court found that the statute violated the third *O'Brien* standard because it was "an effort to isolate and chastise an attitude said to be contemptuous."\(^3\) Concurring in the affirmance of this decision, insignificant self-seeking in derogation of the public good." Alfange, The Balancing of Interests in Free Speech Cases: In Defense of an Abused Doctrine, 2 Law in Trans. Q. 35, 59 (1965). However, "[t]here would appear to be no satisfactory alternative other than to place one’s faith in the judiciary . . . ." Id. at 63.


32. See 391 U.S. at 382. But see Henkin, The Supreme Court—1967 Term, Foreword: On Drawing Lines, 82 Harv. L. Rev. 63, 80 (1968) ("O’Brien’s [conduct] was one activity, and it was all speech."); see page 605 infra.

33. See 391 U.S. at 377; Grayned v. City of Rockford, 408 U.S. 104, 115 (1972); Cohen v. California, 403 U.S. 15, 18 (1971) (defendant was convicted of “offensive conduct” for wearing a jacket with the legend “F— the Draft.” The Court found the conviction invalid since the only conduct which the state sought to punish was the communication.); cf. Papish v. University of Mo., 410 U.S. 667 (1973) (per curiam) (content of college newspaper may not be proscribed unless obscene); Kols v. Wisconsin, 408 U.S. 229 (1972) (per curiam).


35. 471 F.2d at 102. The statute in question also failed the fourth prong of the O’Brien test. “[O]ur analysis of the Massachusetts statute has revealed that those burdens are heavy and direct,
Justice White noted that although the defendant could have "been convicted for mutilating, trampling upon, or defacing the flag," the statute punished him for being contemptuous—"communicating ideas about the flag unacceptable to the controlling majority in the legislature." The Court may not be totally satisfied with the O'Brien test. Both Smith v. Goguen and Street v. New York clearly raised the issue of how much first amendment protection is accorded political speech in the form of communicative conduct; in both, the Court opted for narrower grounds of decision. A further criticism of the O'Brien test, as Professor Nimmer points out, is that it is not enough that the burden on the communication further a non-speech interest. Rather, it should be shown that, without such a burden on the conduct, the significant government interest is materially and substantially obstructed.

The Court has adopted such a standard, but only in the context where the communicative conduct is akin to pure speech. For example, the Court has held that the wearing of a black armband as an antiwar protest could not be prohibited without a showing that the proscribed conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school . . . ."

The Fifth Circuit recently applied this second test where a psychotherapist was dismissed from a Veterans Administration hospital for his refusal to stop wearing a peace pin while on duty. The court explained that defendant's right to engage in symbolic conduct "could not be infringed upon, absent a showing that the exercise of such rights 'materially and substantially' interfered with the government interest. After considering expert testimony as to the psychological condition of the Vietnam war veteran patients, and the deleterious effect a controversial peace pin would have upon them, the court found that the proscription of the psychotherapist's conduct was valid. The wearing of the peace pin materially and substantially interfered with the government interest in rehabilitating the patients.

rather than incidental, and are consequently more extreme than necessary to prevent breaches of the peace." Id. at 103.

37. Id. at 588.
40. See note 25 supra. In Street, the Court construed the conviction under the New York flag statute as invalid because it punished the words that the defendant had uttered as he burned the American flag on a street corner: "We don't need no damned flag' . . . 'If they let that happen to Meredith we don't need an American flag'." 394 U.S. at 590. In Smith, the Court avoided the symbolic speech issue by finding the flag statute void for vagueness. 415 U.S. at 572.
41. Nimmer 43.
43. Id. at 509 (citation omitted).
44. Smith v. United States, 502 F.2d 512 (5th Cir. 1974).
45. Id. at 516 (citation omitted).
46. Id. at 517-18.
The implication of this standard is that it is the conduct itself which is communicative. Unlike the O'Brien standard, under this test there is no significant non-speech element within the conduct which the government may safely regulate. Consequently, the weighing of the government interest is more exacting. There must be a showing of an imminent threat to the valid governmental interest before the communicative conduct may be proscribed. The decisive question according to a recent case is "how imminent must a breach of the peace be, before [the state] can validly act to punish an individual for exercising his First Amendment rights." In this case, a district court concluded that a fair reading of the case law demanded that "objective evidence which demonstrates the imminence of public unrest or a clear and present danger that a breach of the peace is likely must be adduced before a state may constitutionally act in a given case." Merely because an expressed idea may be offensive to an onlooker is not grounds for its regulation. A "mere speculative or hypothetical possibility" is an insufficient demonstration of government interest.

The third test which has been applied to communicative conduct requires that where the legislative scheme "broadly stifles" exercise of the first amend-

47. See Tinker v. Des Moines Indep. School Dist., 393 U.S. at 508. In O'Brien the Court distinguished its case from one in which the conduct was wholly communicative. "The case at bar is therefore unlike one where the alleged governmental interest in regulating conduct arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful." 391 U.S. at 382. "[W]hile the ordinance [proscribing nude entertainment] is not directed to pure speech but is limited only to the 'conduct' of nudity, it may result in an infringement upon free expression when such conduct is an integral part of a communicative dance or play." Salem Inn, Inc. v. Frank, 381 F. Supp. 859, 863 (E.D.N.Y. 1974); cf. Denno, Mary Beth Tinker Takes the Constitution to School, 38 Fordham L. Rev. 35, 43-44 (1969).


49. Id. at 21-22 (footnote omitted); see Healy v. James, 408 U.S. 169, 190-91 (1972) (substantial evidence of disruption needed); Butts v. Dallas Indep. School Dist., 436 F.2d 728, 731 (5th Cir. 1971); Chafee 35; cf. Eaton v. City of Tulsa, 415 U.S. 697, 698 (1974) (per curiam) (use of characterization "chicken s-" by a court witness did not present such an imminent threat to the administration of justice as to warrant contempt charges); Hess v. Indiana, 414 U.S. 105, 108 (1973) (per curiam).


ment freedom, the court may determine whether the government interest could be preserved by a less drastic regulation.\textsuperscript{52} While this mode of analysis is arguably part of the \textit{O'Brien} test,\textsuperscript{53} it is of sufficient importance to warrant separate consideration.

When legitimate legislative concerns are expressed in a statute which imposes a substantial burden on protected First Amendment activities, Congress must achieve its goal by means which have a "less drastic" impact on the continued vitality of First Amendment freedoms. . . . The Constitution and the basic position of First Amendment rights in our democratic fabric demand nothing less.\textsuperscript{54}

Underlying this analysis is the recognition that when both interests are substantial, it is "inappropriate for this Court to label one as being more important or more substantial than the other."\textsuperscript{55} When first amendment rights are involved, the regulation may be no more restrictive than necessary.

The appropriate application of these three standards for measuring the government interest depends on the extent of the communicative element involved in the regulated conduct. Whichever test is the most appropriate appears to depend upon where the conduct lies on the court's sliding scale of first amendment protection. However, no mechanism has been provided to place an individual's conduct on that scale. A major criticism of the Court's approach to the symbolic speech issue in \textit{O'Brien} was that it provided no means of deciding whether the individual's conduct was so communicative as to come within the ambit of first amendment protection.\textsuperscript{56} The Court merely assumed that draft card burning was communicative.\textsuperscript{57} Because of the attenuated nature of first amendment protection, consideration must be given to the extent of the communicative element in the conduct. Otherwise there


\textsuperscript{53} A government regulation is justified according to the fourth standard of the \textit{O'Brien} test "if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." 391 U.S. at 377. The Court "perceive[d] no alternative means that would more precisely and narrowly assure the continuing availability of issued Selective Service certificates than a law which prohibits their willful mutilation or destruction." Id. at 381.

\textsuperscript{54} United States v. Robel, 389 U.S. 258, 268 (1967). The legislation must have "constituted a 'substantial restraint' and a 'significant interference' " with a first amendment right, Kusper v. Pontikes, 414 U.S. 51, 58 (1973), or unfairly and unnecessarily burden it. Lubin v. Panish, 415 U.S. 709, 716 (1974). For instance the requirement that any new political party must present petitions signed by qualified voters totalling 15% of the number of ballots cast in the previous gubernatorial election is such a substantial burden on first amendment rights that the government must accomplish its goal by a less drastic means. Williams v. Rhodes, 393 U.S. 23 (1968).


\textsuperscript{57} 391 U.S. at 376.
can be no adequate measure of the impact of the regulation upon an individual's first amendment rights.

The Court recently adopted a mode of analysis to determine whether conduct is protected. In *Spence v. Washington, 58* a college student hung an American flag upside down from his apartment window and taped a peace symbol to each side. At trial for violation of the state flag statute, Spence argued that he had attached the symbol to the flag to protest the contemporaneous invasion of Cambodia and the killings at Kent State. 59 In its inquiry as to whether the conduct was protected by the first amendment, the Court considered two factors—"the nature of [Spence's] activity, . . . [and] the factual context and environment in which it was undertaken . . . ." 60 Noting the presence of an intention to convey an idea which in all likelihood would be understood by others, 61 the Court found that Spence's conduct was "a pointed expression of anguish by appellant about the then-current domestic and foreign affairs of his government" which did not significantly impair any valid state interest, and thus was protected by the first amendment. 62

III. RADICH—THE TWO-STEP APPROACH

This analytical model was recently applied in *United States ex rel. Radich v. Criminal Court, 63* which involved a violation of a flag desecration statute. The defendant Radich had displayed in his art gallery certain antiwar sculptures which were composed of American flags. Among other things, the flag was used in objects which resembled a gun caisson and a human figure hanging from a noose. 64 Although the defendant argued that the flag was used as a means of political expression, 65 the state trial court found that he

59. Id. at 408. Spence testified at trial that: "I felt that there had been so much killing and that this was not what America stood for. I felt that the flag stood for America and I wanted people to know that I thought America stood for peace." Id. In *Cline v. Rockingham County Super. Court*, 502 F.2d 789 (1st Cir. 1974), the defendant penned in ink a peace symbol on an American flag which was sewn on a blanket. Defendant wore the blanket to a public beach for the purpose of protesting war in general and Vietnam in particular. The court found such communicative conduct to be within the ambit of the first amendment.


61. State v. Farrell, 209 N.W.2d 103, 105 (Iowa 1973), vacated, 94 S. Ct. 3198 (1974) (mem.) (intent to communicate is necessary); see People v. Vaughn, 514 P.2d 1318, 1321 (Colo. 1973) (content of speech depends on viewers' perception); Emerson 81; Symbolic Conduct 1109; cf. United States v. Cerone, 452 F.2d 274, 286 (7th Cir. 1971), cert. denied, 405 U.S. 964 (1972) (communication may lose its constitutional protection because of intent of speaker).

62. 418 U.S. at 410, 415.

63. Civil No. 71-2738 (S.D.N.Y. Nov. 7, 1974).


65. Record at 80a-81a, Radich v. New York, 401 U.S. 531 (1971) (trial court testimony of Radich). Art has had a long tradition as a media of protest. Michelangelo painted a cardinal and
was not entitled to first amendment protection and that the statute was a valid exercise of the state's police power. The conviction was affirmed by the New York Court of Appeals, and subsequently by an equally divided Supreme Court. Radich then sued for habeas corpus, and the Second Circuit, reversing the district court, remanded the case for a trial on the merits.

After reviewing recent Supreme Court cases in the area of flag desecration, Judge Cannella on remand found that the two-step analysis adopted by the Court in Spence was the most appropriate one to be applied in Radich. "First, [under this test] a determination [is made] of whether flag related conduct is within the protections of the First Amendment, and, second, whether, upon the record of the given case, the interests advanced by the state are so substantial as to justify infringement of constitutional rights." In its initial inquiry as to whether the sculptures displayed by Radich were within the ambit of first amendment protection, the court considered the context and environment of the showing. It applied the Spence requirements that there must be an "intend to convey a particularized message" and a future pope in hell. During the sixteenth and seventeenth centuries many artists were deeply concerned with religious injustice and the moral and spiritual decay of the clergy." Hieronymus Bosch, for instance, expressed his opposition to the worldly ways of the clergy in "The Floating Conch." Brief for John B. Hightower (Director of the Museum of Modern Art), Karl Katz (Director of The Jewish Museum) and Kenneth G. Dewey (Member, N.Y. State Comm'n on Cultural Resources) as Amicus Curiae at 5-6, Radich v. New York, 401 U.S. 531 (1971). American artists have protested such things aslynchings and bombings in the south (see Paul Cadmus' "To the Lynching" and Charles White's "Birmingham Totem") and legal injustice (see Ben Shahn's "Passion of Sacco and Vanzetti"). Id. at 7. War has also been a subject of artistic protest (see Picasso's "Guernica" and Chaim Koppelman's "Vietnam"). Id. at 8. Finally, flags have been featured in a great number of American works of art (e.g., Jasper John's "Flags"). Id at 15. Concerning the artistic value of the sculptures displayed in Radich's gallery, Hilton Kramer, Art News Editor of the New York Times, testified that even the construction representing the flag as a phallus had "much substance." Record at 91a, Radich v. New York, 401 U.S. 531 (1971) (trial court testimony). See generally, R. Shiker, The Indignant Eye: Artist as Social Critic in Prints and Drawings from Fifteenth Century to Picasso (1969).

66. "We cannot find that the freedom of speech guarantee of the First Amendment includes a license to desecrate the flag. It is inconceivable to us that the authors of the Bill of Rights could have intended that the protection of the First Amendment could or should be stretched so far." People v. Radich, 53 Misc. 2d 717, 720, 279 N.Y.S.2d 680, 684 (N.Y.Crim. Ct. 1967), aff'd, 26 N.Y.2d 114, 257 N.E.2d 30, 308 N.Y.S.2d 846 (1970), aff'd by an equally divided Court, 401 U.S. 531 (1971) (per curiam).

67. Id.

68. People v. Radich, 26 N.Y.2d 114, 257 N.E.2d 30, 308 N.Y.S.2d 846 (1970), aff'd by an equally divided Court, 401 U.S. 531 (1971) (per curiam). The Court of Appeals, unlike the trial court, implicitly recognized that Radich's conduct was protected by the First Amendment. Id. at 120, 257 N.E.2d at 33, 308 N.Y.S.2d at 850.


70. United States ex rel. Radich v. Criminal Court, 459 F.2d 745 (2d Cir. 1972), cert. denied, 409 U.S. 1115 (1973) (the lower court decision was unreported).

71. Slip Opinion at 10.
"likelihood . . . that the message would be understood by those who viewed it." 72

Analyzed in this manner, the court found that the constructions not only conveyed the artist's protest against the Vietnam War, but were displayed in such a fashion—with antiwar songs played in the background—that the viewer understood the message. 73 The court found Radich's conduct to be symbolic speech protected by the first amendment. Furthermore, it noted that had the "case not been presented to the State Courts as a 'symbolic speech' case . . . [this] Court might well be persuaded to analyze Radich's activity in terms of 'pure speech' alone." 74

This analysis differs from the approach taken in other symbolic speech cases in that an initial determination was made of the individual's first amendment interests involved. Other cases merely assumed a first amendment interest was involved and concentrated the analysis on the nature of the government interest. 75 This stemmed from the Supreme Court's failure—until Spence—to provide a standard under which to determine the individual's interest. 76 An advantage of this analysis is that it clarifies the relationship between the government regulation and the first amendment rights involved. In addition, a more exact balancing is possible when both interests are articulated.

In the second step of its analysis, the court considered whether the state's interest in regulating flag use was so significant as to justify regulating the defendant's symbolic speech. Judge Cannella discussed the three principal state interests which had been advanced by the Court in Spence: "(1) prevention of breach of the peace; (2) protection of the sensibilities of passersby; and (3) preservation of the American flag as an unalloyed symbol of our country," 77 as well as the fact that the flags involved in Radich were privately owned and displayed on private property. 78

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72. Id. at 12; see notes 60 & 61 supra and accompanying text.
73. "In such an environment, in the context and tenor of those times, 'it would have been difficult for the great majority of citizens to miss the drift of [petitioner's] point at the time that he made it' by the display of the sculptures." Slip Opinion at 13.
74. Id. at 12 n.34. This parallels the dissenting opinion in the New York Court of Appeals; see 26 N.Y.2d 114, 127, 257 N.E.2d 30, 37, 308 N.Y.S.2d 846, 856 (1970) (Fuld, C.J., dissenting), aff'd by an equally divided Court, 401 U.S. 531 (1971) (per curiam). In Long Island Vietnam Moratorium Comm. v. Cahn, the Second Circuit found that buttons using the flag (e.g., campaign, peace and slogan buttons) were akin to pure speech and that the state had no demonstrated interest in prohibiting them. 437 F.2d 344, 349 (2d Cir. 1970), aff'd, 92 S. Ct. 3197 (1974) (mem.).
75. See note 57 supra and accompanying text.
76. See Slip Opinion at 8; note 56 supra.
77. Slip Opinion at 14. These interests were originally spelled out in Street v. New York, 394 U.S. 576, 591 (1969) (defendant burned flag on street corner in frustration upon hearing of the attempted assassination of James Meredith).
78. Slip Opinion at 15. In Spence v. Washington, the Court distinguished Spence's privately owned flag from the situation in which the government could proscribe misuse of a flag that was public property. 418 U.S. at 411.
79. Slip Opinion at 15. In Spence, the Court found it significant that the conduct "occurred
Beginning with the third justification, the court reasoned that the flag, as used in the sculptures, still retained its universal symbolism, since the only difference was the context in which it was used—for protest and dissent. Moreover, had the flag not been used, the protest value of the constructions would have been meaningless. The use of the flag was integral to the expression of antiwar sentiment. Distinguishing this case from those in which the flag was burned, the court held that "[t]he symbol was not consumed by the sculptures, but rather, flourished in all of its communicative majesty, unalloyed and undiminished. 'It is the character, not the cloth, of the flag which' the State of New York has interest in preserving and, here, the symbolic character of the flag was neither trammeled upon nor dimmed." The court acknowledged that this symbolism might revolt some, but it observed that others might be more concerned with the fundamental right to diversity of opinion which underlies our democracy.

In answer to the argument that the sensibilities of a passerby are a valid state interest, the court noted that expression may not be proscribed because some might find it offensive. Moreover, the court found that the sculptures were privately displayed, and that there was no captive audience problem.

Finally, the court ascertained that the state interest in preserving public peace, though otherwise valid, could not be established by a mere hypothetical assertion of danger. Objective evidence such as a crowd gathering outside the gallery or an altercation within the premises must be found to demonstrate the imminence of public unrest. The court found only an undifferentiated fear of disturbance which was insufficient to justify proscription of the conduct involved.

on private property, rather than in an environment over which the state by necessity must have certain supervisory powers unrelated to expression." 418 U.S. at 411.

80. Slip Opinion at 17.
81. Id. at 18 (footnote omitted).
82. Id. This is akin to the "marketplace of ideas" philosophy of Justice Holmes in Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); see note 2 supra and accompanying text.
84. Radich's gallery was on the second floor; anyone who was offended could readily pass by. See Slip Opinion at 4.
85. See Schenck v. United States, 249 U.S. 47, 52 (1919) (clear and present danger); note 50 supra and accompanying text.
86. Slip Opinion at 20; see note 48 supra and accompanying text. In People v. Keough, the New York Court of Appeals reversed a lower court decision which had relied on Radich in finding that pictures of a nude model provocatively draped in the flag published in a college newspaper had presented a danger to public peace which could be regulated. 31 N.Y.2d 281, 290 N.E.2d 819, 338 N.Y.S.2d 618 (1972).
87. At the base of the court's opinion is the recognition that while "[e]very idea is an incitement" and that every antisocial idea may hypothetically result in violence, if robust and unfettered debate is to be insured, expression may not be regulated without a showing of imminent threat to the government interest. See Slip Opinion at 22-23. First amendment rights "are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect." West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943)
The court did not specifically analyze the government interests involved in terms of the three tests, \textit{i.e.}, \textit{O'Brien},\textsuperscript{88} material and substantial interference,\textsuperscript{99} and less drastic means.\textsuperscript{100} However, its discussion, especially in the area of the government's interest in preserving the peace, closely approximates the standards set forth in the material and substantial interference test.\textsuperscript{91} The use of this test would be appropriate for a situation similar to \textit{Radich}, because it applies to conduct whose aim is communication.\textsuperscript{92} Moreover this test requires, as does the court in \textit{Radich}, evidence that the threat to the government interest is imminent.\textsuperscript{93}

Although the \textit{O'Brien} test has been used in other flag cases,\textsuperscript{94} the court in \textit{Radich} did not apply it. The reason may be that the court viewed the conduct involved as akin to pure speech. Distinguishing the use of a flag as a vehicle for expression, the court stated that "the flag as displayed by petitioner . . . was itself the idea, the \textit{sine qua non} for the artist's endeavors."\textsuperscript{95} Since a communicative and a non-speech element must exist in the conduct involved in order to apply the \textit{O'Brien} test, its use would have been inapposite in \textit{Radich}.\textsuperscript{96}

\textsuperscript{88} See notes 31-37 supra and accompanying text.
\textsuperscript{89} See notes 43-46 supra and accompanying text.
\textsuperscript{90} See notes 51-55 supra and accompanying text.
\textsuperscript{91} The court compared the undifferentiated fear of public unrest with another case in which the fear of a material and substantial interference with the government interest in rehabilitating war veterans was sufficient to justify proscription of wearing a peace pin by the hospital staff. Slip Opinion at 23 n.65; see notes 43-45 supra and accompanying text.
\textsuperscript{93} Compare text accompanying notes 86 and 87 supra with text accompanying notes 47 and 48 supra.
\textsuperscript{94} State v. Farrell, 209 N.W.2d 103, 105 (Iowa 1973), vacated and remanded, 94 S. Ct. 3198 (1974) (mem.) (citing a comprehensive list of cases utilizing the \textit{O'Brien} test).
\textsuperscript{95} Slip Opinion at 18.
\textsuperscript{96} The New York Court of Appeals, in its opinion, applied the \textit{O'Brien} test, and found that the state's interest in preserving the peace was unrelated to the suppression of free expression and therefore did not present a first amendment problem. 26 N.Y.2d at 124, 257 N.E.2d at 36, 308 N.Y.S.2d at 854; see notes 31-33 supra and accompanying text. The dissent in the New York Court of Appeals argued, however, that "[i]t is evident that the only reason why these works . . . were singled out for prosecution was not because the flag was used in the sculptures but solely because of the particular political message which these sculptures were intended to convey." 26 N.Y.2d at 128, 257 N.E.2d at 38, 308 N.Y.S.2d at 857 (Fuld, C.J., dissenting). \textit{Radich} was convicted for "contemptuous use of the flag of the United States." 53 Misc. 2d at 719, 279
Radich, in effect following the dissent in the New York Court of Appeals, argued to the Supreme Court on the basis of the less drastic means test, that "[a]ny sensible construction of the first amendment would forbid a legislature to go out of its way to inhibit expression, either by design or accident, and the choice of the harsher of equally effective means suggests that suppression of speech was the legislature's real purpose from the start." Because Radich's first amendment right is so substantial, even if the government interest in regulation is compelling, it must be sustained by a less drastic means which does not substantially or unnecessarily interfere with the individual interest.

The significance of Radich lies in its two-step analysis, the first inquiry being whether the individual's conduct comes within the ambit of first amendment protection. A determination of the first amendment protection accorded the individual interest should indicate the test to be used in establishing the legitimacy of the government interest. If the conduct is wholly communicative, the material and substantial interference test is appropriate. If the conduct has both a communicative and a non-communicative element, then the O'Brien test is appropriate. Finally, if the substantial individual interest is broadly stifled by the regulation, then the government interest must be sustained by a less drastic means.

Radich, however, dealt with art, which is wholly communicative in itself. The court specifically distinguished the case from one in which the conduct is not in itself communicative, but is a vehicle for the communicative element. Such an activity therefore has a communicative and a non-communicative element. Whether the conduct is almost entirely communicative or has a minimal communicative element, however, the same O'Brien test applies. Consequently, the line which denotes lesser first amendment protection is transferred from speech/conduct to communicative conduct combined with a non-communicative element. While this does bring more expression into the area of freedom of speech, it is still an arbitrary cut-off. It accords lesser first

N.Y.S.2d at 683. The Supreme Court has struck down a Massachusetts statute which proscribed conduct which "treats contemptuously" the American flag. Smith v. Goguen, 415 U.S. 566 (1974). Justice White, in his concurring opinion, however, distinguished a statute which proscribed casting contempt (similar to New York's) from those reaching acts such as mutilation and not expression of ideas. Id. at 588-9 n.3 (White, J., concurring).


98. See note 51 supra and accompanying text. "[T]hough the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved," Shelton v. Tucker, 364 U.S. 479, 488 (1960) (statute which required teachers in state schools to file lists of organizations of which they were members found invalid); Hodsdon v. Buckson, 310 F. Supp. 528, 532 (D. Del. 1970) (finding state flag statute unconstitutional), rev'd on other grounds sub nom. Hodsdon v. Stabler, 444 F.2d 533 (3d Cir. 1971). "Even when a compelling interest exists, if the statute protects that interest by a needless infringement of First Amendment rights, it must be struck down." United States v. Boyle, 482 F.2d 755, 763 (D.C. Cir.), cert. denied, 414 U.S. 1076 (1973).
amendment protection to communicative conduct simply because a non-communicative element is found.

IV. COMMUNICATIVE VS. NON-COMMUNICATIVE: A DISTINCTION WITHOUT MERIT

Conduct does not lend itself to arbitrary division into communicative and non-communicative elements. Theoretically at least, all conduct is to some degree communicative. The act of political assassination for example, is, in itself, communicative. It is the consequences of murder of a citizen and disruption of the political process which require proscription of the conduct, not the existence of a non-communicative element. Similarly, draft card burning is, in itself, wholly communicative. The gravamen of the Supreme Court's reasoning in O'Brien was that the deleterious impact upon the Selective Service System caused by the destruction of draft cards justified regulation, notwithstanding the communication involved. Regulation of symbolic speech does not depend upon the existence of a non-communicative element. The real inquiry is whether there is an unacceptable interference with the public interest. Positing a non-communicative element merely obscures the question.

Freedom of expression may be exercised in many ways and the mode chosen should not automatically indicate the degree of first amendment protection. Relegating symbolic conduct to lesser first amendment protection takes a too narrow and technical view of protected expression. If the initial inquiry establishes, as in Radich, that the particular form of expression is protected by the first amendment, then the question of whether the regulation is justified should depend upon the relative interference with the governmental interest. For this reason, the material and substantial interference test seems most appropriate. As Meiklejohn has pointed out, "some preventions are more evil than are the evils from which they would save us." By demanding objective evidence of interference, and not merely an undifferentiated fear, the material and substantial interference test, perhaps subject to a "less drastic means test" review, would require a demonstration of the evil sought to be prevented. Under this more exacting test, it would be less likely that a frivolous or prejudicial abrogation of freedom of expression would be found valid.

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99. See note 32 supra and accompanying text.
100. See 391 U.S. at 377-82. For criticism of the Court's reasoning in this regard, see Alfange, Free Speech and Symbolic Conduct: The Draft-Card Burning Case, 1968 Sup. Ct. Rev. 1, 15.
101. See text accompanying note 48 supra.
102. See text accompanying note 25 supra.
104. See text accompanying notes 41-43 supra.
* As this Note went to press, Radich was reported in 385 F. Supp. 165.