Note

Symbolic Speech

I. Introduction

Is freedom of nonverbal expression a *casus omissus* from the first amendment? In 1791[1] when the first ten amendments were adopted as the Bill of Rights of the United States Constitution, no mention was made respecting freedom of expression.[2] Madison,[3] Jefferson,[4] and others[5] had written and discussed the necessity of adding additional items to the Constitution; and although their views were rejected by many,[6] they did manage to prevail. The

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[1]At the first session of the new Congress, a Bill of Rights, including the first amendment, was proposed for adoption by the states and became a part of the Constitution December 15, 1971. *See* W. Hachen, The Supreme Court on Freedom of the Press 1 (1968).

[2]U.S. Const. amend. I.

[3]Madison announced his intention to discuss amendments to the Constitution on May 25th. *See* 2 B. Schwartz, The Bill of Rights: A Documentary History 1006 (1971).

[4]On March 18, 1789, Thomas Jefferson wrote to David Humphreys stating:

> I am one of those who think it a defect that the important rights, not placed in security by the frame of the constitution itself, were not explicitly secured by a supplementary declaration.

14 The Papers of Thomas Jefferson 676-79 (1899).

[5]*See* 1 J. Hare, American Constitutional Law (1889). Hare describes a discussion between Madison and Hamilton as follows:

> Power, so they argued, tends not only to increase in force and volume in its onward course, but to escape through unforeseen breaks and channels from the dikes by which it is confined. The restraints should therefore be so explicit that they cannot be misunderstood.

Id. at 506. *See also* 1 H. Ames, Proposed Amendments to the Constitution of the United States (1895); 1 H. Von Holst, The Constitutional and Political History of the United States (1889).

[6]*See* B. Mitchell & L. Mitchell, A Biography of the Constitution of the United States (1964). An example of the rationale followed by an opponent to the Bill of Rights is seen in Sedgwick's words. He considered the idea of a Bill of Rights a *reductio ad absurdum*. He stated:

> Inherent rights made a long list. Why did not the committee declare a man should have a right to wear his hat, get up, go to bed when he pleases? Government did not intend to violate the right of free speech and press.

Id. at 191. Eldridge Gerry of Massachusetts disagreed with Sedgwick and reproved him for trifling with a serious matter. Another example of the

first amendment as approved by the Founders prohibited Congress from making any law "abridging the freedom of speech, or of the press."[7] But nowhere in the first amendment was there a prohibition of laws abridging freedom of nonverbal conduct, freedom of thought, or freedom of symbolic speech.

Thomas Jefferson, in a letter to David Humphreys dated March 18, 1789, wrote that certain rights needed security by a declaration supplementary to the Constitution. Included within these rights needing protection were the "rights of thinking, and publishing our thoughts by speaking or writing, the right of free commerce, and the right of personal freedom."[8] Jefferson's views on freedom of thought and speech were in a minority when the First Congress assembled in April of 1789.[9] Two hundred and ten different amendments were proposed by the eight states represented, and with duplications omitted, there were almost a hundred different substantive provisions presented. Five of the eight states sought guarantees of freedom of the press, yet only three added freedom of speech as well.[10] Although freedom of speech was included within the Bill of Rights, it is questionable whether it was intended as anything more than a reiteration of freedom of the press. Unlike freedom of religion, assembly, and right to petition the government for a redress of grievances, freedom of speech and press are included within the same clause, without a semicolon separating them as two distinct items.[11] For

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rationale taken by an opponent to the Bill of Rights is displayed in the words of this countryman:

> Of a very different nature, tho' only one degree better than the other reasoning, is all that sublimity of nonsense and alarm, that has been thundered against it in every shape of metaphoric terror, on the subject of a bill of rights, the liberty of the press, rights of conscience, rights of taxation and election, trials in the vicinity, freedom of speech, trial by jury, and a standing army. These last are undoubtedly important points, much too important to depend on mere paper protection. For, guard such privileges by the strongest expressions, still if you leave the legislative and executive power in the hands of those who are or may be disposed to deprive you of them—you are but slaves.

Sherman, *Letters of a Countryman*, in ESSAYS ON THE CONSTITUTION OF THE UNITED STATES 218-19 (P. Ford ed. 1892) (italics omitted).

[7] U.S. CONST. amend. I.

[8] 14 THE PAPERS OF THOMAS JEFFERSON 676-79 (1899).

[9] 2 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 983 (1971).

[10] *Id.*

[11] U.S. CONST. amend. I.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peace-

many years following the adoption of the amendment, the cases centered around freedom of the press.[12] Freedom of speech seemed to be nothing more than a restatement of the written freedoms. In light of the minor role freedom of speech played in the First Congress, it is highly unlikely that the Founders considered nonverbal communication.

Today, however, freedom of speech is seen as distinct from freedom of the press. With this recognition have come restrictions on the absolute wording of the first amendment in cases involving obscenity,[13] loudspeakers,[14] hostile audiences,[15] subversive speech,[16] captive audiences,[17] and slander.[18] Although it might appear that

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ably to assemble, and to petition the Government for a redress of grievances.

An interpretation of the first amendment discloses the view that in spite of its absolute wording it was not intended as such:

> That this amendment was intended to secure to every citizen an absolute right to speak, or write, or print, whatever he might please, without any responsibility, public or private, therefor, is a supposition too wild to be indulged by any rational man. This would be to allow to every citizen a right to destroy, at his pleasure, the reputation, the peace, the property, and even the personal safety of every other citizen.

3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 731-32 (1833).

[12] *See* 1 Z. CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS 34-35 (1947); *See also* 2 T. COOLEY, CONSTITUTIONAL LIMITATIONS 876, 881, 883-86 (1927).

[13] *See, e.g.*, Stanley v. Georgia, 394 U.S. 557 (1969); Ginsberg v. New York, 390 U.S. 629 (1968); Ginzburg v. United States, 383 U.S. 463 (1966); A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts, 383 U.S. 413 (1966); Roth v. United States, 354 U.S. 476 (1957).

[14] *See, e.g.*, Kovacs v. Cooper, 336 U.S. 77 (1949); Saia v. New York, 334 U.S. 558 (1948).

[15] *See e.g.*, Gregory v. City of Chicago, 394 U.S. 111 (1969); Feiner v. New York, 340 U.S. 315 (1951); Terminiello v. City of Chicago, 337 U.S. 1 (1949); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[16] *See, e.g.*, Communist Party v. Whitcomb, 414 U.S. 441 (1974); Brandenburg v. Ohio, 395 U.S. 444 (1969); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Dennis v. United States, 341 U.S. 494 (1951); Whitney v. California, 274 U.S. 357 (1927); Gitlow v. New York, 268 U.S. 652 (1925); Abrams v. United States, 250 U.S. 616 (1919); Debs v. United States, 249 U.S. 211 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Schenck v. United States, 249 U.S. 47 (1919).

[17] *See, e.g.*, Public Utilities Comm'n v. Pollack, 343 U.S. 451 (1952); Martin v. City of Struthers, 319 U.S. 141 (1943). *See also* Black, *He Cannot Choose But Hear: The Plight of the Captive Auditor*, 53 COLUM. L. REV. 960 (1953).

[18] *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Meyer v. Teamsters Joint Council 53, 416 Pa. 401, 206 A.2d 382, *cert. denied*, 382 U.S. 897 (1965); Fenstermacher v. Indianapolis Times Pub. Co., 102 Ind. App. 189, 1 N.E.2d 655 (1936).

the courts have continually restricted the broad wording of the first amendment, there is one area in which they have expanded it—symbolic speech.

The concept of symbolic speech emanates from the 1967 case of *United States v. O'Brien.*[19] On March 31, 1966, David Paul O'Brien burned his draft card on the steps of the South Boston Courthouse. He was subsequently convicted of violating a federal statute which made the knowing destruction or mutilation of such a certificate a criminal offense.[20] The Court of Appeals for the First Circuit reversed O'Brien's conviction, holding that the federal statute violated the freedom of speech clause of the United States Constitution.[21] The Supreme Court, however, reinstated the district court's conviction.[22] Despite the fact that O'Brien's conviction

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[19]391 U.S. 367 (1968). Many people feel that symbolic speech really emanates from three cases prior to *O'Brien.* The initial case may have been Stromberg v. California, 283 U.S. 359 (1931). In this case appellant was convicted for violating the California Penal Code, which prohibited the public display of "any flag, badge, banner or device . . . as a sign, symbol or emblem of opposition to organized government." *Id.* at 361. The action was clearly conduct and not a verbal form of communication. Although the Court mentioned that there was a necessity for free political discussion, it overturned Stromberg's conviction on fourteenth amendment grounds. A second case involving conduct as opposed to "pure" speech arose in 1943. In Board of Educ. v. Barnette, 319 U.S. 624 (1943), students were expelled from a school for refusing to pledge allegiance to the flag. Here again, the activity was nonverbal expression. In this case, the Supreme Court resorted to the first amendment. However, the Court held the expulsion to be a violation of freedom of religion and not freedom of speech. A third case preceding *O'Brien* was Brown v. Louisiana, 383 U.S. 131 (1966). Brown, in opposition to the segregationist policy practiced by a local library, sat down in a silent protest. He was convicted of breach of peace in violation of a Louisiana statute. The Supreme Court reversed Brown's conviction. Basing the decision on the first amendment right to peaceably assemble, the Court stated that :

> [T]hese rights are not confined to verbal expression. They embrace appropriate types of action which certainly include the right in a peaceable and orderly manner to protest by silent and reproachful presence, in a place where the protestant has every right to be, the unconstitutional segregation of public facilities.

Id. at 141-42. Although the Court referred to the first amendment in these three cases, *O'Brien* is the first case in which symbolic speech is analyzed in detail as an outgrowth of the first amendment.

[20]50 U.S.C. § 462(b)(3) (1965), *amending* 50 U.S.C. § 462(b)(3) (1948). The statute reads in part: "[W]ho forges, alters, knowingly destroys, knowingly mutilates, or in any manner changes any such certificate or any notation duly and validly inscribed thereon . . . ."

[21]376 F.2d 538 (1st Cir. 1967).

[22]*See* Alfange, *Free Speech and Symbolic Conduct: The Draft-Card Burning Case*, 1968 SUP. CT. REV. 1 (1968).

> Despite the Warren Court's record of defending the civil liberties of the political dissenter against legislative attack, it coyly chose in this case to accept the law uncritically on its face and to avoid

was reinstated, the Court characterized the burning of a draft card as speech and applied a strict scrutiny test to determine whether the federal statute could stand.[23] The Court stated "that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."[24] In requiring a "sufficiently important governmental interest," the Court closely examined the federal statutes and required the Government to show a strong necessity for infringing upon the first amendment freedom. In *O'Brien*, the Court decided that the Government's responsibility to raise and support armies constituted a sufficiently compelling reason[25] for holding valid the federal statute which prohibited the burning of a draft card.[26] Thus, despite the fact that O'Brien's conviction was reinstated, this case stands as the precursor of all symbolic speech cases.

One definition of speech is "communication or expression of thoughts in spoken words."[27] A second definition is "something

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recognition of the manifest congressional purpose. Perhaps the episode serves largely as another reminder of Justice Holmes' observation that "many things that might be said in time of peace . . . will not be endured so long as men fight."

Id. at 52. *See also* Schenck v. United States, 249 U.S. 47, 52 (1919).

[23]Strict scrutiny, as opposed to a rational basis test, involves a careful examination by the Court of the state interest. Only if the state interest is of a compelling nature will the Court accept the infringement of a basic right. The Court will apply this strict scrutiny test in cases where a suspect class or a fundamental right is involved. For cases in which the high scrutiny test was triggered by the Court's finding of a suspect class, *see, e.g.*, Graham v. Richardson, 403 U.S. 365 (1971) (alienage); Loving v. Virginia, 388 U.S. 1 (1967) (race); McLaughlin v. Florida, 379 U.S. 184 (1964) (race); Oyama v. California, 332 U.S. 633 (1948) (national origin); Korematsu v. United States, 323 U.S. 214 (1944) (national origin). For examples of cases employing a high scrutiny test based upon fundamental rights, *see, e.g.*, Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (freedom of association); Dunn v. Blumstein, 405 U.S. 330 (1972) (right to vote); Kramer v. Union Free School Dist., 395 U.S. 621 (1969) (right to vote); Shapiro v. Thompson, 394 U.S. 618 (1969) (interstate travel); Griswold v. Connecticut, 381 U.S. 479 (1965) (right af marital privacy); NAACP v. Alabama, 357 U.S. 449 (1958) (freedom of association); Griffin v. Illinois, 351 U.S. 12 (1956) (the right to appeal a criminal conviction).

[24]391 U.S. at 376.

[25]For further discussion and development of the compelling governmental interest doctrine, *see, e.g.*, Sherbert v. Verner, 374 U.S. 398, 406 (1963); NAACP v. Button, 371 U.S. 415, 438 (1963); Bates v. City of Little Rock 361 U.S. 516, 524 (1960); NAACP v. Alabama, 357 U.S. 449, 464 (1958); Thomas v. Collins, 323 U.S. 516, 530 (1945).

[26]391 U.S. at 377.

[27]WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1961).

that is spoken: an uttered word."[28] Speech involves the encoding and decoding of sounds verbally produced through a manipulation of one's mouth.[29] The definition of speech, however, does not include expression communicated through body language, conduct, or thought. The *O'Brien* case changed the definition of speech for constitutional purposes to include these types of nonverbal communication. It stands as a landmark of expanding the scope of the word speech, not only as interpreted by the First Congress, but also as it is used in everyday language.

The *O'Brien* case was merely a beginning for the protection of symbolic speech. The extension of the first amendment has gone beyond draft card burning to include flag desecration,[30] grooming and dress codes,[31] nude entertainment,[32] buttons and badges,[33] and musical expression.[34] In these areas the courts have found conduct with a definite message to be speech and thus protected by the first amendment guarantee. Many commentators have termed this type of conduct to be "speech-plus."[35]

In these later cases, however, the courts have employed a different level of review from the strict scrutiny applied in *O'Brien*. In the majority of cases arising subsequent to the *O'Brien* decision, the courts have only required a showing of a rational basis for state action which infringes on symbolic speech. The following discussions of flag desecration, grooming and dress codes, nude entertainment, buttons and badges, and musical expression show that the courts place symbolic speech in different strata from verbal communication.

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[28] *Id.*

[29] R. JEFFREY & O. PETERSON, SPEECH 44-46 (1971).

[30] *See* discussion of flag desecration cases at text accompanying notes 36-69 *infra*.

[31] *See* discussion of grooming and dress code cases at text accompanying notes 70-87 *infra*.

[32] *See* discussion of nude entertainment cases at text accompanying notes 88-113 *infra*.

[33] *See* discussion of buttons and badges cases at text accompanying notes 114-36 *infra*.

[34] *See* discussion of musical expression cases at text accompanying notes 137-63 *infra*.

[35] *See* KALVEN, THE NEGRO AND THE FIRST AMENDMENT 206-07 (1966); Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 U.C.L.A.L. REV. 29 (1973); Weber, *Clashing Symbols in the First Amendment Arena, The Growing Implications of Street v. New York*, 17 ST. LOUIS U.L.J. 433 (1973); Yarbrough, *Justice Black and His Critics on Speech-Plus and Symbolic Speech*, 52 TEXAS L. REV. 257 (1974).

II. Flag Desecration

Cases involving flag desecration statutes have been numerous and have generated much discussion by commentators.[36] The first and most renowned case is *Street v. New York*.[37] Mr. Street burned the American flag[38] on a New York City street corner after learning that civil rights leader James Meredith had been shot.[39] This act resulted in his arrest for violating a New York statute which prohibited desecration of the American flag.[40] At the time Street burned the flag, there were approximately forty persons observing him. Further, he could be heard saying, "If they let that happen to Meredith we don't need an American flag."[41]

Street was convicted and given a suspended sentence. The United States Supreme Court reversed the conviction of the lower courts[42] and remanded the case. In so doing the Court analyzed four lines of inquiry,[43] one of which involved whether the burning

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[36]*See, e.g.*, Mittlebeeler, *Flag Profanation and the Law*, 60 Ky. L.J. 885 (1972); Rosenblatt, *Flag Desecration Statutes: History and Analysis*, 1972 Wash. U.L.Q. 193 (1972); Note, *Freedom of Speech and Symbolic Conduct: The Crime of Flag Desecration*, 12 Ariz. L. Rev. 71 (1970); Comment, *Constitutional Law—Symbolic Speech—Colorado Flag Desecration Statute*, 48 Denver L.J. 451 (1972); Note, *Exploiting the American Flag: Can the Law Distinguish Criminal from Patriot?* 30 Md. L. Rev. 332 (1970); Note, *Flag Desecration—The Unsettled Issue*, 46 Notre Dame Law. 201 (1970); Note, *Flag Desecration Under the First Amendment: Conduct or Speech*, 32 Ohio S.L.J. 119 (1971); Note, *Symbolic Expression: Flag Desecration—Attitudes and the Law*, 5 Suffolk U.L. Rev. 442 (1971); Comment, *Flag Desecration Statutes in Light of United States v. O'Brien and The First Amendment*, 32 U. Pitt. L. Rev. 513 (1971); Note, *Flag Desecration: A Constitutionally Protected Activity?*, 7 U. San Francisco L. Rev. 149 (1972); 5 Akron L. Rev. 157 (1972); 22 Case W. Res. L. Rev. 555 (1971); 1970 Wash. U.L.Q. 517 (1970); 73 W. Va. L. Rev. 179 (1970).

[37]394 U.S. 576 (1969).

[38]Appellant burned a 48 star American flag which he had displayed on national holidays. A possible argument for the appellant, unmentioned in the case, is that in 1966 a 48 star flag was not the American flag. Alaska and Hawaii, the 49th and 50th states respectively, were admitted in 1959.

[39]394 U.S. at 578.

[40]This statute makes it a misdemeanor "publicly to mutilate, deface, defile, or defy, trample upon or cast contempt upon either by words or act any flag of the United States." N.Y. Penal Law § 1425, subd. 16, par. d (1909). In 1967, § 1425, subd. 16, was superseded by § 136 of the General Business Law, which in par. d defines the offense in similar language. *See* N.Y. Gen. Bus. Law § 136 (McKinney 1968).

[41]394 U.S. at 579.

[42]20 N.Y.2d 231, 229 N.E.2d 187, 282 N.Y.S.2d 491 (1967).

[43]The four lines of inquiry examined by the Court were:

> (1) whether the constitutionality of the "words" part of the statute was passed upon by the New York Court of Appeals; (2) whether, if appellant's conviction may have rested in whole or in part on his utterances and if the statute as thus applied is unconsti-

of the flag is a form of expression entitled to protection. The Court noted that a conviction on the words alone could not be upheld, because Street was not inciting anyone to do any unlawful act.[44] Nor could a conviction be justified on the possible tendency of appellant's words to provoke violent retaliation.[45] Further, the conviction could not be sustained on the premise that the words used by appellant would likely shock passersby.[46] This left the issue of whether the burning of the flag was a form of expression protected by the Constitution. On this issue, the Court concluded that although disrespect for the flag should be deplored, it was necessary to see whether there was an infringement of the constitutional guarantee of "freedom to be intellectually . . . diverse or even contrary" and the "right to differ as to things that touch the heart of the existing order."[47] Since Street's conviction may have rested upon his words rather than the burning of the flag, it could not be upheld.[48]

If faced with a flag desecration case in 1971 or 1972 one could best predict the result by tossing a coin.[49] Jurisdictions differed on

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tutional, these factors in themselves require reversal; (3) whether Street's words may in fact have counted independently in his conviction; and (4) whether the "words" provision of the statute, as presented by this case is unconstitutional.

394 U.S. at 581.

[44]*Id.* at 591. *See also* Yates v. United States, 354 U.S. 298, 318-19 (1957); Terminiello v. Chicago, 337 U.S. 1, 4-5 (1949).

[45]394 U.S. at 592. *See also* Chaplinsky v. New Hampshire, 315 U.S. 568, 574 (1942), in which the "fighting words" doctrine is discussed.

[46]394 U.S. at 592. *See also* Cox v. Louisiana, 379 U.S. 536, 546-52 (1965); Edwards v. South Carolina, 372 U.S. 229, 237-38 (1963); Cantwell v. Connecticut, 310 U.S. 296 (1940).

[47]394 U.S. at 593.

[48]In a strong dissent, Justice Fortas claimed the flag to be a special kind of personalty. He said, "Protest does not exonerate lawlessness. And the prohibition against flag burning on the public thoroughfare being valid, the misdemeanor is not excused merely because it is an act of flamboyant protest." *Id.* at 617. The other justices dissenting were Warren, Black, and White. *See* Weber, *Clashing Symbols in the First Amendment Arena, The Growing Implications of Street v. New York,* 17 ST. LOUIS U.L.J. 433 (1973).

> Finally, destruction of symbols is serious business akin to book burning. It tears away at the shared basic meaning structure of a nation's people which makes democracy possible. It does this precisely by bypassing rational discourse about political issues. Harlan was admirable in his desire to protect this individual; he was wise and a more realistic defender of first amendment freedoms than Black, Fortas, or Warren in his refusal to set a precedent before the issue had matured. But he missed the import of the symbolic expression issue.

Id. at 455.

[49]*See* Note, *The Flag Defilement Statutes Defiled,* 5 MEMPHIS ST. U.L.

whether the enforcement of a flag desecration statute was based upon a legitimate state interest. For example, in *Radich v. New York*,[50] the United States Supreme Court affirmed the defendant's conviction for displaying in his art gallery a sculpture depicting "the flag . . . in the form of the male sexual organ, erect and protruding from the upright member of a cross."[51] Although the sculptures involved were alleged to be a protest against the Vietnam War, the Court did not permit the first amendment argument to prevail.[52] In a case involving a defendant who wore an American flag vest,[53] the Court affirmed the conviction under the California desecration statute[54] because the defendant had failed to show "a recognizable communicative aspect" in the wearing of the vest.[55] Yet in another flag-vest case with a similar statute, the Second Circuit found the statute void for overbreadth.[56]

The two leading cases of 1974, *Smith v. Goguen*[57] and *Spence v. Washington*,[58] failed to clarify the discrepancies in prior decisions. In the *Smith* case, the defendant had worn trousers which had a small United States flag sewn to the seat. He was convicted of violating a Massachusetts statute,[59] which made it a crime to treat the United States flag with contempt in public. The Court in this case failed to reach the first amendment issue and

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REV. 396 (1975). The author of this law review note summarized the status of flag desecration cases in the statement:

> It appears that flag-wearing may or may not be 'symbolic speech' per se; nevertheless, adornment with the 'Stars and Stripes' is protected, no matter how debased the position of the flag might be on one's apparel. If the banner is in any way adjunct to an expression of opinion, its use is protected by the First Amendment, no matter how insulting such use may be. The only exception is that if violent response is forthcoming from the public, or an intent to debase the flag can be proven, then a defilement conviction may be upheld.

Id. at 405.

[50]401 U.S. 531 (1971), *aff'g per curiam by an equally divided Court* 26 N.Y.2d 114, 257 N.E.2d 30, 308 N.Y.S.2d 846 (1970).

[51]26 N.Y.2d at 117, 257 N.E.2d at 31, 308 N.Y.S.2d at 847.

[52]The decision was 4-4, and thus the lower court was affirmed. Justice Douglas did not participate in the decision.

[53]People v. Cowgill, 274 Cal. App.2d 923, 78 Cal. Rptr. 853 (1969), *appeal dismissed*, 396 U.S. 371 (1970).

[54]The California statute read that a person was guilty of a misdemeanor who "publicly mutilates, defaces, defiles or tramples upon any . . . flag (of the U.S.)". CAL. MIL. AND VET. CODE § 614(d) (West 1955). The statute was declared unconstitutional in 1970, after the decision in *Cowgill*.

[55]396 U.S. at 371.

[56]Thoms v. Smith, 334 F. Supp. 1203 (D. Conn. 1971), *aff'd sub nom.* Thoms v. Hefferman, 473 F.2d 478 (2d Cir. 1973).

[57]415 U.S. 566 (1974).

[58]418 U.S. 405 (1974).

[59]MASS. GEN. LAWS ANN. ch. 264, § 5 (1968).

affirmed the district court's decision[60] that the Massachusetts statute was unconstitutionally vague and overbroad.[61] However, Justice Powell's opinion implied that a law which punished mistreatment of the flag could be valid. He stated that "certainly nothing prevents a legislature from defining with substantial specificity what constitutes forbidden treatment of United States flags."[62]

In the *Spence* case, defendant hung a United States flag from the window of his apartment in Seattle, Washington. The flag was upside down, and a peace symbol was attached to the front and back.[63] The defendant was arrested for violating Washington's improper flag use statute, which prohibits placing "any word, figure, mark, picture, design, drawing or advertisement" upon a flag of the United States or the State of Washington.[64] Unlike *Smith*, the Court in this case reached the first amendment issue, but in doing so took a position contrary to the one presented by Justice Powell in *Smith*. The per curiam decision[65] in *Spence* rested upon a recognition of communicative connotations from the use of flags.[66] It was clear that the defendant intended to convey a particularized message and it was likely that a viewer would understand that message.[67] Thus, the prohibition of this message would conflict with the first amendment's guarantee of free expression.[68]

Where flag desecration statutes stand today is uncertain.[69] If one looks solely to the last Supreme Court decision, *Spence*, then it would appear that a defendant with a clear message would prevail on a freedom of expression basis if he desecrated his own personal flag. However, Justice Powell's statements in *Smith*, and prior cases suggest that states do have a legitimate interest in protecting the United States flag. It is conceivable that a future court will distinguish the *Spence* case from *Smith* and prior decisions by holding that a defendant's right to freedom of expression is only applicable if the desecration is performed within one's

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[60]471 F.2d 88 (1st Cir.), *aff'g* 343 F. Supp. 161 (D. Mass. 1972).

[61]415 U.S. at 567.

[62]*Id.* at 581-82.

[63]418 U.S. at 406.

[64]WASH. REV. CODE ANN. § 9.86.020 (1961).

[65]Justices Blackmun and Douglas concurred in the result. Chief Justice Burger and Justices Rehnquist and White dissented.

[66]The Court stated: "On this record there can be little doubt that appellant communicated through the use of symbols. The symbolism included not only the flag but also the superimposed peace symbol." 418 U.S. at 410.

[67]*Id.* at 411.

[68]*Id.* at 415.

[69]*See* Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975).

own home. Although *Spence* deals extensively with freedom of expression as a first amendment guarantee, it can easily be limited as a right to express freely and do as one pleases only in one's own home. The confusion of this area leaves open for courts a variety of possible resolutions in future flag desecration cases.

III. Grooming and Dress Codes

Symbolic speech has also been dealt with in cases involving grooming and dress codes.[70] The issue presented is whether wearing a specific hair style, such as long hair, or a type of dress, such as the mini skirt, is a form of expression protected by the first amendment.[71] With regard to hair length codes, the courts lean toward accepting them as legitimate regulations.[72] The invalidations which have been made have resulted from the courts' finding alternative rationales for unconstitutionality other than freedom of expression.[73] The problem with using the first amendment in

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[70]*See, e.g.*, Note, *The Schools Versus the Long Hairs: An Exercise In Legal Gobbledygook*, 1971 Wash. U.L.Q. 89; 38 Brooklyn L. Rev. 802 (1972); 38 Tenn. L. Rev. 593 (1971).

[71]Prior to the *O'Brien* case, leading constitutional authority Alexander Meiklejohn discussed at length speech in relation to action. He concluded that:

> The distinction between speech-actions and speech-thoughts is not, then, the distinction which we need for the proper interpretation of the First Amendment. The fire-shouting illustration given by Mr. Holmes tells us of one type of action, viz., criminal action, which is not protected by the principle of freedom of speech. It does not follow that all speech-acts are to be denied the freedom guaranteed by that principle.

A. Meiklejohn, Political Freedom 40 (1965).

[72]*See, e.g.*, New Rider v. Board of Educ., 480 F.2d 693 (10th Cir. 1973); Karr v. Schmidt, 460 F.2d 609 (5th Cir. 1972); Freeman v. Flake, 448 F.2d 258 (10th Cir. 1971), *cert. denied*, 405 U.S. 1032 (1972); King v. Saddleback Jr. College Dist., 445 F.2d 932 (9th Cir. 1971), *cert. denied*, 404 U.S. 1042 (1972); Rumler v. Board of School Trustees, 327 F. Supp. 729 (D.S.C. 1971); Jeffers v. Yuba City Unified School Dist., 319 F. Supp. 368 (E.D. Cal. 1970); Carter v. Hodges, 317 F. Supp. 89 (W.D. Ark. 1970); Livingston v. Swanquist, 314 F. Supp. 1 (N.D. Ill. 1970); Brownlee v. Board of Educ., 311 F. Supp. 1360 (E.D. Tenn. 1970); Brick v. Board of Educ. 305 F Supp. 1316 (D. Colo. 1969); Montalvo v. Madera Unified School Dist. Bd. of Educ., 21 Cal. App. 3d 323, 98 Cal. Rptr. 593 (1971).

[73]*See, e.g.*, Stull v. School Bd., 459 F.2d 339 (3d Cir. 1972) (due process); Massie v. Henry, 455 F.2d 779 (4th Cir. 1972) (due process); Bishop v. Colaw, 450 F.2d 1069 (8th Cir. 1971) (9th Amendment); Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970) (due process); Sear v. Mertz, 338 F. Supp. 945 (M.D. Pa. 1972) (due process); Berryman v. Hein, 329 F. Supp. 616 (D. Idaho 1971) (due process); Axtell v. LaPenna, 323 F. Supp. 1077 (W.D. Pa. 1971) (due process); Martin v. Davison, 322 F. Supp. 318 (W.D. Pa. 1971) (due process); Miller v. Gillis, 315 F. Supp. 94 (N.D. Ill. 1969) (equal protection); Sims v. Colfax Community School Dist., 307 F. Supp. 485 (S.D. Iowa 1970)

such cases appears to be in finding that there is a message that can be expressed and interpreted from hair length and style.[74] With respect to dress codes, the decisions are numerous and conflicting. The conflicts within the courts with respect to dress and grooming codes result in what has been termed "legal gobbledygook."[75]

On the side of permitting the regulations is the argument of avoiding decline of academic performance.[76] Other interests include health,[77] safety,[78] aesthetic considerations,[79] and discipline problems.[80] The students contesting dress and grooming codes have used a wide variety of arguments. These include: equal protection,[81] due process (expulsion without proper procedural safeguards),[82] due process (vagueness),[83] the right to privacy,[84] the ninth amendment right,[85] and, finally, the right to free speech.[86]

The freedom of speech argument is tenuous. The problem remains that a style of dress or hair, although a means of conveying the message that a person is a part of the counterculture, a "hippie," or revolutionary, does not convey a specific message to the observer sufficient to qualify as communication, other than classifying the individual in a category. In addition to the lack of communication on a particular subject, there seldom exists an

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(due process); Westley v. Rossi, 305 F. Supp. 706 (D. Minn. 1969) (equal protection).

[74]*See* Comment, *The Legality of Dress Codes for Students*, 20 DE PAUL L. REV. 222 (1971).

[75]Note, *The Schools Versus the Long Hairs: An Exercise In Legal Gobbledygook*, 1971 WASH. U.L.Q. 89.

[76]*See* Dunham v. Pulsifer, 312 F. Supp. 411 (D. Vt. 1970); Reichenberg v. Nelson, 310 F. Supp. 248 (D. Neb. 1970).

[77]*See, e.g.*, Bishop v. Colaw, 316 F. Supp. 445 (E.D. Mo. 1970); Westley v. Rossi, 305 F. Supp. 706 (D. Minn. 1969).

[78]*See, e.g.*, Gfell v. Rickelman, 313 F. Supp. 364 (N.D. Ohio 1970); Cash v. Hoch, 309 F. Supp. 346 (W.D. Wis. 1970).

[79]*See, e.g.*, Brownlee v. Board of Educ., 311 F. Supp. 1360 (E.D. Tenn. 1970).

[80]*See, e.g.*, Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969); Prichard v. Spring Branch Independent School Dist., 308 F. Supp. 570 (S.D. Tex. 1970).

[81]*See* Miller v. Gillis, 315 F. Supp. 94 (N.D. Ill. 1969).

[82]*See, e.g.*, Dixon v. Board of Educ., 294 F.2d 150 (5th Cir. 1961); Davis v. Ann Arbor Pub. Schools, 313 F. Supp. 1217 (E.D. Mich. 1970); Vought v. Van Buren Pub. Schools, 306 F. Supp. 1388 (E.D. Mich. 1969).

[83]*See* Gfell v. Rickelman, 313 F. Supp. 364 (N.D. Ohio 1970).

[84]*See* Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969), *cert. denied*, 398 U.S. 937 (1970).

[85]*See* Comment, *The Legality of Dress Codes for Students*, 20 DE PAUL L. REV. 222, 234 (1971).

[86]*See, e.g.*, Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969); Jeffers v. Yuba City Unified School Dist., 319 F. Supp. 368 (E.D. Cal. 1970).

intentional meaning that the speaker is attempting to convey. If there is no communication of a specific message, there is no first amendment ground for opposing suppression of nonspeech activities. The first amendment prohibits state regulation of such activities only when there is communication of a specific message and the state's purpose is to suppress the communication.[87]

IV. Nude Entertainment

A third aspect of symbolic speech centers around cases involving nude entertainment. One of the first cases to discuss nonverbal conduct in this field is *California v. LaRue*.[88] The first amendment freedom of expression was weighed against the twenty-first amendment privilege to control the manner and circumstances under which liquor is dispensed, and the twenty-first amendment prevailed.[89] The Court looked solely for a rational basis to uphold the California Department of Alcoholic Beverage Control Regulations.[90] Appellant Kirby, Director of the Department of Alcoholic Beverage Commission, opposed the "sexual conduct between dancers and customers" resulting from "topless" and "bottomless" dancing.[91] To curtail the increased prostitution and corruption, the Department instituted rules prohibiting certain conduct. The district court found many of these rules to be unconstitutional.[92]

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[87]*See* United States v. O'Brien, 391 U.S. 367 (1968); Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 U.C.L.A.L. Rev. 29, 38-39 (1974).

[88]409 U.S. 109 (1972).

[89]Repeal of Prohibition Amendment

Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

U.S. Const. amend. 21.

[90]California Dep't. of Alcoholic Beverage Control Regulations—Rules 143.3 and 143.4 (Aug. 10, 1970).

[91]409 U.S. at 110-11.

[92]326 F. Supp. 348, 358 (1971). The court found the portions of the statute which regulated the content of the live entertainment did not satisfy the *O'Brien* test or the Supreme Court's obscenity tests. Those portions of the regulations found unconstitutional were:

> (a) The performance of acts, or simulated acts, of 'sexual intercourse, masturbation, sodomy, beastiality, oral copulation, flagellation or any sexual acts which are prohibited by law';

In reversing the district court's decision, the Supreme Court discussed the role of expression where conduct and not speech is involved. The majority commenced by quoting *Schact v. United States*[93] in which the Court had held that "[a]n actor, like everyone else in our country, enjoys a constitutional right to freedom of speech, including the right openly to criticize the Government during a dramatic performance."[94] However, the Court then went on to qualify this broad language. It noted that according to *O'Brien,* constitutional protection of an individual's conduct is limited to situations when a "communicative element" is present.[95] Although the *LaRue* Court found that some of these regulations were within the limits of the constitutional protection of freedom of expression, it noted that the California Alcoholic Beverage Board did not completely forbid these performances.[96] The crucial factor was that the performances were in establishments with licenses to sell liquor.[97] Restriction of nude entertainment was thus rationally linked to the right of the board to control the serving of liquor under the twenty-first amendment.[98]

In the *LaRue* case, as in the original flag desecration cases[99] the Court found that freedom of expression was a valid interest of an individual but not to the extent of being a fundamental right. Thus, although "free speech" is considered a fundamental right, when conduct alone is involved the courts will be satisfied if a rational basis for the state's action is found.[100]

(b) The actual or simulated 'touching, caressing or fondling on the breast, buttocks, anus or genitals';

(c) The actual or simulated 'displaying of the pubic hair, anus, vulva or genitals';

(d) The permitting by a licensee of 'any person to remain in or upon the licensed premises who exposes to public view any portion of his or her genitals or anus'; and, by a companion section,

(e) The displaying of films or pictures depicting acts a live performance of which was prohibited by the regulations quoted above.

California Dep't of Alcoholic Beverage Control Regulations—Rules 143.3 and 143.4 (Aug. 10, 1970). For a complete listing of the regulations involved, see 326 F. Supp. at 358-60.

[93]398 U.S. 58 (1970).

[94]*Id.* at 60.

[95]"We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." United States v. O'Brien, 391 U.S. 367, 376 (1968).

[96]409 U.S. at 118.

[97]*Id.*

[98]*Id.* at 118-19.

[99]*See* text accompanying note 36 *supra.*

[100]This rational basis test was elaborated upon in the decision of Crownover v. Musick, 9 Cal.3d 405, 509 P.2d 497, 107 Cal. Rptr. 681 (1973). In a factual situation similar to that found in *LaRue*, the court concluded that the

The most recent case involving nude entertainment, *Doran v. Salem Inn, Inc.*,[101] indicates the Court may apply a strict scrutiny test to statutes which regulate such activities in places which do not serve liquor. The plaintiffs in *Doran* were bar operators who provided entertainment in the form of topless dancing for their customers.[102] The Town of North Hempstead, New York, passed a local law which prohibited this form of nude entertainment in any public place.[103] The district court issued a preliminary injunction, finding the statute to be an infringement of the first amendment, because it applied to public places other than bars and thus was overbroad.[104] Since no question of obscenity was at stake there was no rationale for maintaining the statute.[105] The court further reasoned that if this ordinance were maintained then the "Ballet Africains" and "Hair" would be prohibited.[106]

The invalidation of the North Hempstead ordinance was affirmed by the United States Court of Appeals for the Second Circuit.[107] The court distinguished this strict approach from that of *LaRue*. In *LaRue*, the Supreme Court upheld a regulation forbidding the sale of liquor by the drink where sexually provocative entertainment was performed. But the Second Circuit specifically noted that the statute involved in the *LaRue* case did not forbid all nude performances "across the board," but only those in places serving liquor. The North Hempstead statute in the *Doran* case was an "across the board" type statute prohibiting nude entertainment regardless of whether a bar was involved, and as such was clearly an infringement upon freedom of speech.[108]

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case did not involve either a "suspect class" or a "fundamental right." As such the rules were valid under the police power. Present was a rational relationship to the conceivable governmental purpose of furthering "public order, morals and welfare." *Id.* at 415, 509 P.2d at 514, 107 Cal. Rptr. at 691.

[101]422 U.S. 922 (1975).

[102]*Id.* at 924.

[103]Town of North Hempstead Local Law No. 1-1973 enacted July 17, 1973. The district court summarized the regulation as follows:

> [M]aking it unlawful (i) for any person conducting or operating any bar, lounge or other public place to permit a waitress, bar maid or entertainer to appear with uncovered breasts, or (ii) for any person to appear in any bar, lounge or public place with uncovered breats (sic) or to appear in any entertainment or sketch with uncovered breasts. The maximum penalty for a violation is a fine of $500 or imprisonment for fifteen days, or both, each day's violation constituting a separate violation.

364 F. Supp. 478, 479-80 (E.D. N.Y. 1973).

[104]364 F. Supp. at 483.

[105]Nudity is not per se obscene, even as to minors. *See* Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975).

[106]364 F. Supp. at 483.

[107]501 F.2d 18 (2nd Cir. 1974).

[108]*Id.* at 20-21.

One of the three *Doran* plaintiffs, M & L, had disobeyed the North Hempstead ordinance and had been prosecuted shortly after the action was filed in the district court. The Supreme Court held that *Younger v. Harris*[109] and its progeny required dismissal of the action as to M & L. However, it held that *Younger* did not compel dismissal as to the other two plaintiffs, Salem Inn and Tim-Rob.[110] The first amendment analysis in *Doran* is limited to a discussion of whether the district court abused its discretion in granting a preliminary injunction based on a likelihood the plaintiffs would succeed on the merits—whether the statute was likely to be declared unconstitutional.[111] The Court agreed with the district court that the North Hempstead statute could restrict protected activity:

> [E]ven though a statute or ordinance may be constitutionally applied to the activities of a particular defendant, that defendant may challenge it on the basis of overbreadth if it is so drawn as to sweep within its ambit protected speech or expression . . . .[112]

The North Hempstead statute was not limited to activities which could constitutionally be restricted under *LaRue*, but also included other activities without any governmental interest to counterbalance the constitutional infringement. It was, therefore, the fact that the prohibition of nude dancing was not limited to places that serve liquor which made it overbroad.[113]

Thus, although the courts seem to be moving toward finding a fundamental right of expression, they leave open the option of applying a rational basis test when a statute includes an element protected by another constitutional amendment. The significance of nude entertainment as a whole in relation to symbolic speech is that as in flag desecration and groming and dress code cases, the courts have again interpreted the word speech to include an item that is pure conduct without any verbal elements.

D. Buttons and Badges

Buttons and badges have also been deemed to be a form of expression, and thus courts have examined restrictions of such expression in light of the first amendment. However, as in other areas of symbolic speech, in cases involving buttons and badges a mere rational basis will be sufficient to validate a statute or rule.

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[109]401 U.S. 37 (1971). *See also* Steffel v. Thompson, 415 U.S. 452 (1974); Samuels v. Mackell, 401 U.S. 66 (1971).

[110]422 U.S. at 930.

[111]*Id.* at 932-34.

[112]*Id.* at 933.

[113]*Id.* at 933-34.

The best-known case in this area of nonverbal communications is *Tinker v. Des Moines Independent Community School District.*[114] Three petitioners, junior high and high school students, wore black armbands to school in opposition to the Vietnam War.[115] The policy of the school was that anyone wearing an armband would be asked to remove it and if he failed to do so he would be suspended until he returned without the armband.[116]

When the three students were suspended from school they brought an action in the United States District Court.[117] The court held for the school authorities on the basis that the regulation was reasonable in order to maintain discipline in the school,[118] and the Eighth Circuit affirmed.[119]

The United States Supreme Court reversed these lower courts in a decision employing the first amendment. The Court discussed at great length the link between passive expression and the guarantee of freedom of speech.[120] It concluded that the first amendment permitted "reasonable regulation of speech-connected activities in carefully restricted circumstances."[121] However, to meet the test it was necessary to show the existence of a reasonable state interest. In this case the record did not show a rationale which might have justified the claimed state interest of preventing disruption caused by armbands. In delivering the majority opinion, Justice Fortas stated that "clearly the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork and discipline, is not constitutionally permissible."[122]

At first glance the *Tinker* case appears to be quite broad in its interpretation of free speech. It emphasized the fact that the students were passive in their approach, and that they neither interrupted school activities nor sought to intrude in the school affairs or the lives of others. The only activism that resulted from these students' form of opposition to the Vietnam War was increased discussion outside of the classroom.[123] However, in empha-

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[114]393 U.S. 503 (1969).

[115]The three petitioners were 13, 15, and 16 years old. They were fully aware of the school regulation that opposed the wearing of armbands in school.

[116]393 U.S. at 504.

[117]The action was brought through the students' fathers under 42 U.S.C. § 1983 (1970). 258 F. Supp. 971 (1966).

[118]393 U.S. at 505.

[119]383 F.2d 988 (1967).

[120]393 U.S. at 508.

[121]*Id.* at 513.

[122]*Id.* at 511.

[123]*Id.* at 514.

sizing the students' passive conduct the Court did limit the scope of the concept of a guaranteed first amendment right to freedom of expression.[124] It held that symbolic speech in the schools is protected only when it is nondisruptive as in the form of a silent protest.[125]

These words of limitation were the basis for a subsequent decision, *Guzick v. Drebug*.[126] The regulations of Shaw High School in Ohio prohibited the wearing of any symbols not related to school activities.[127] Plaintiff, an 11th grader, wore an anti-Vietnam War button to school. When he failed to remove the button he was suspended from school. The district court stated, "We are at once aware that unless *Tinker* can be distinguished, reversal is required. We consider that the facts of this case clearly provide such distinction."[128] In this case, the state's interest in providing an atmosphere conducive to learning prevailed. Although the Sixth Circuit conceded that the buttons were a form of expression, it noted that "unless they have some relevance to what is being considered or taught, a school classroom is no place for the untrammeled exercise of such right."[129] One interesting point to note in the *Guzick* case is the fact that the court specifically stated that it is not necessary to have good order demolished to be permitted to establish rules.[130] It was sufficient that there was a likelihood of disorder.[131]

Another case subsequent to *Tinker* also managed to establish a sufficient state interest to prevail over the first amendment. In

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[124]*See, e.g.*, Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965); Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963); Haskell, *Student Expression in the Public Schools*: Tinker *Distinguished*, 59 GEO. L.J. 37 (1970); Note, *The Emerging Law of Students' Rights*, 23 ARK. L. REV. 619 (1970).

[125]393 U.S. at 514. *See also* Note, *Teachers' Freedom of Expression Outside the Classroom: An Analysis of the Application of* Pickering *and* Tinker, 8 GA. L. REV. 900 (1974); Note, *Symbolic Speech, High School Protest and the First Amendment*, 9 J. FAMILY L. 119 (1969); Note, *Free Speech and the Hostile Audience*, 26 N.Y.U.L. REV. 489 (1951). The note analyzing the application of *Pickering* and *Tinker* summarized the effect of these cases when a teacher's expression is involved: "The effect of these decisions is to protect teacher expression unless it has interfered, or could reasonably have been expected to interfere, with normal school functioning." 8 GA. L. REV. at 917.

[126]431 F.2d 594 (6th Cir. 1970), *cert. denied*, 401 U.S. 948 (1971).

[127]*Id.* at 595.

[128]*Id.* The district court denied plaintiff's application for a preliminary injunction and dismissed the complaint. 305 F. Supp. 472 (N.D. Ohio 1969).

[129]431 F.2d at 600-01.

[130]*Id.* at 600.

[131]The court noted the prior rebelliousness of the students as support for its decision. *Id.*

Slocum v. Fire & Police Commission[132] the Appellate Court of Illinois held that a police officer could be required to wear an American flag emblem on the sleeve of his uniform.[133] Further, a failure to comply with this police commission regulation was sufficient grounds for a suspension.[134] The court rationalized the infringement on the first amendment on the basis of the state's interest in developing a sense of loyalty to the nation.[135]

Both *Slocum* and *Guzick* provide limitations of *Tinker* through factual distinctions. Whether a button or badge will receive the first amendment's guarantee is based upon whether the governmental interest is reasonably linked to the regulation.[136] If so, the court will likely validate the statute.

E. Musical Expression

On March 5, 1971, the Federal Communications Commission (FCC) issued a public notice entitled "Licensee Responsibility to Review Records Before Their Broadcast."[137] This first notice was a result of complaints received by the FCC that the lyrics of songs being broadcast related to drugs.[138] The action taken aimed to alleviate the alleged problem through a policing of broadcasting by licensees.[139] When confusion arose as to exactly what responsibilities were placed upon the licensees by this first notice, a second notice of explanation was issued by the Commission.[140] The essence

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[132] 8 Ill. App. 3d 465, 290 N.E.2d 28 (1972).

[133] *Id.* at 467, 290 N.E.2d at 30.

[134] *See* 6 Creighton L. Rev. 264 (1972).

[135]

> The flag does, however, tend to develop a sense of loyalty to nation. We regard this as an important governmental interest. Since a municipality has the power to prescribe a uniform for its police force, and since display of the flag tends to promote an important governmental interest, a flag emblem may be made a part of the uniform.

8 Ill. App. 3d at 469, 290 N.E.2d at 33.

[136] *See* 45 N.Y.U.L. Rev. 1278 (1970).

[137] 36 Fed. Reg. 4901 (1971).

[138] *See* Fifer, *Musical Expression and First Amendment Considerations*, 24 DePaul L. Rev. 143 (1974).

[139]

> In short, we expect broadcast licensees to ascertain, before broadcast, the words or lyrics of recorded musical or spoken selections played on their stations. Just as in the case of the foreign-language broadcasts, this may also entail reasonable efforts to ascertain the meaning of words or phrases used in the lyrics. While this duty may be delegated by licensees to responsible employees, the licensee remains fully responsible for its fulfillment.

36 Fed. Reg. 4901 (1971).

[140] 36 Fed. Reg. 8090 (1971).

of this notice was that the licensees had an affirmative responsibility to be aware of the contents of records played and to judge the records' suitability.[141] From these two notices have arisen cases presenting the constitutional question of whether the FCC action is an abridgement of freedom of speech.[142]

The issue presented in these cases is whether one can equate music with speech. It has been stated that "a work of pure music can express and—more importantly—*convey* feeling and emotion."[143] In conveying meaning, music is essentially the same as concepts that are expressed in words. Finding music within the scope of the first amendment can be further justified by the fact that so many other items such as films and parades have been granted protection.[144] Those who feel that music is not comparable

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> (1) That the First Notice should not have been construed to be a direct prohibition of any particular type of record, but rather that the Commission's only direct imposition of will would occur in the renewal context;
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> (2) that there would be no active reprisals;
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> (3) that there nevertheless did exist an affirmative responsibiilty on the part of licensees to
>
> (a) know a record's contents
>
> (b) judge the record's suitability for broadcast, and
>
> (c) be prepared to sink or swim by these decisions at renewal time.

Id. at 8090-91.

[142]*See* Comment, *Drug Songs and the Federal Communications Commission*, 5 U. MICH. J.L. REFORM 334 (1972).

[143]Fifer, *supra* note 138, at 161.

[144]*See, e.g.*, Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968) (labor activities); Cox v. Louisiana, 379 U.S. 536 (1965) (parades and demonstrations); Times Film Corp. v. City of Chicago, 365 U.S. 43 (1961) (films); Teamsters Local 695 v. Vogt, Inc., 354 U.S. 284 (1957) (picketing); Terminiello v. Chicago, 337 U.S. 1 (1949) (public speeches); Saia v. New York, 334 U.S. 558 (1948) (use of sound tracks); Martin v. City of Struthers, 319 U.S. 141 (1943) (solicitation); National Broadcasting Co. v. U.S., 319 U.S. 190 (1943) (broadcasting); United States v. One Book Entitled "Ulysses", 5 F. Supp. 182 (S.D.N.Y. 1933), *aff'd*, 72 F.2d 705 (2d Cir. 1934) (book). An historical argument can be noted to show the diversity intended for the first amendment. Leading constitutionalist Zachariah Chafee, Jr. states:

> If 'speech' is limited . . . so is 'press'. Yet that is impossible in view of the address of the Continental Congress in 1774 to the people of Quebec, in which freedom of the press, in addition to its political values, is said to be important for 'the advancement of truth, science, morality and arts in general'. . . .
>
> Moreover, the framers would hardly have relegated science, art, drama, and poetry to the obscure shelter of the Fifth Amendment, . . . inasmuch as 'due process' meant mainly proper procedure until the middle of the nineteenth century.

Chafee, Book Review, 62 HARV. L. REV. 891, 897 (1947).

to speech state that although the lyric portion of a musical composition is clearly speech, the combination of lyric and music together is not susceptible of first amendment protection.[145] This argument is further strengthened by noting the impact that broadcasting has on the public, therefore justifying more careful regulation.[146]

The argument reached its height in *Yale Broadcasting Company v. Federal Communications Commission.*[147] Appellant, a radio station licensee, argued that the two notices were an unconstitutional burden on the first amendment right to free speech.[148] He compared this case to *Smith v. California,*[149] in which the Supreme Court reversed a bookseller's conviction of possession and sale of obscene literature on the basis that although the state might have a legitimate interest in restricting obscenity, it could not accomplish its goal by placing on the bookseller the procedural burden of examining every book contained within his store. The D.C. Circuit, however, distinguished the *Yale* case from the *Smith* case. The reasoning was that while a bookstore might contain thousands of hours' worth of reading material, a broadcaster would have a maximum of 24 hours' worth of material to check each day.

A second contention on the part of the *Yale* appellant in opposition to the notices requiring a licensee to police the broadcasts, was that so many of the lyrics in songs are obscure and ambiguous.[150] He noted how many modern songs were virtually unintelligible and filled completely with meaningless gibberish. The court conceded the validity of this argument, but claimed that this should not prevent a broadcaster from having some knowledge of the contents of the music. The court stated that the licensees should be required to make at least a reasonable effort to know what was

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[145]Fifer, *supra* note 138, at 159.

[146]*Id.* at 157. Two other arguments presented justifying the regulation of broadcasting by licensees were that a broadcast license is a matter of privilege, not right; and that only a limited number of licenses can be issued, thus the existence of a fairness doctrine. *See also* Barrow & Manelli, *Communications Technology—A Forecast of Change, Part I,* 34 LAW & CONTEMP. PROB. 205 (1969); Levin, *The Radio Spectrum Resource,* 11 J. LAW & ECON. 433 (1968); Comment, *The First Amendment and Regulation of Television News,* 72 COLUM. L. REV. 746, 763 (1972).

[147]478 F.2d 594 (D.C. Cir. 1973). (Appeal to review a notice and order issued by the FCC.)

[148]*Id.* at 595. The appellant also argued in the alternative that the notices imposed new duties on licensees and were therefore to be the subject of rule-making procedures. A final allegation by the appellant was that the requirements specified in the notices were impermissibly vague and that the FCC had abused its discretion in refusing to clarify its position. *Id.*

[149]361 U.S. 147 (1959).

[150]478 F.2d at 598.

in the "canned music": "No producer of pork and beans is allowed to put out on a grocery shelf a can without knowing what is in it and standing back of both its contents and quality."[151]

The licensees appealed the circuit court's decision to the Supreme Court.[152] Certiorari was denied but with an eloquent dissent by Justice Douglas. Justice Douglas equated music with speech on the basis of a message emanating from the song.[153] He stated that "songs play no less a role in public debate, whether they eulogize the John Brown of the abolitionist movement, or the Joe Hill of the union movement, provide a rallying cry such as 'We Shall Overcome', or express in music the values of the youthful 'counterculture.' "[154] He felt it would be inconsistent with the first amendment to require a broadcaster to censor its music.[155]

A later case, *Citizens Committee to Save WEFM v. Federal Communications Commission,*[156] involved an appeal by a citizen's group from orders of the FCC approving assignment of a license for a radio station as well as the new licensee's proposal to change the entertainment format of the station from classical to contemporary music.[157] In the case, the application of music to the first amendment was discussed in detail. The court noted that in addition to its artistic value, music can be an important mode of political and moral expression.[158] If there is regulation of what can and cannot be put on the air, it is possible that lyrics of popular songs which communicate controversial ideas will be repressed.[159] On the other hand, there is the possibility that through government regulation of broadcasting an enhanced variety of political and cultural viewpoints may be heard.[160] In this case the court concluded that it was impossible to resolve the conflict between diversity of viewpoints provided through controls, and freedom from regulation. Thus, it balanced the two views and elected to

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[151] *Id.* at 599. The court recapitulated its views on the first amendment issue by stating that it was not expressing a value judgment on the style of music produced. It merely felt that the licensee had the responsibility to evaluate the music being broadcast. *Id.*

[152] 414 U.S. 914 (1973).

[153] *Id.* at 917.

[154] *Id.* at 918.

[155] *Id. See, e.g.,* Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 148 (1973); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969); Lamont v. Postmaster General, 381 U.S. 301, 309 (1965).

[156] 506 F.2d 246 (D.C. Cir. 1974).

[157] *Id.* at 249.

[158] *Id.* at 251.

[159] *Id.*

[160] *Id. See* Associated Press v. United States, 326 U.S. 1 (1945); Brandywine-Main Line Radio, Inc., 473 F.2d 16 (D.C. Cir. 1972).

minimize regulation except when diversity was most seriously threatened.[161]

Music as an aspect of the first amendment's guarantee of free speech is therefore a new concept. An outgrowth of the FCC's 1971 regulations, it has expanded to many areas of broadcasting. In the cases that have discussed the issue of whether music can be equated with speech, the courts have held it to be within the scope of the first amendment. However, in the *Yale* and *WEFM* cases the courts balanced the FCC interest with the licensee's or citizen's interest and found the FCC to prevail. In light of the courts' decisions one can question whether the first amendment was being truly enforced as it should be. If the courts were in fact abiding by the first amendment, it would follow that they would not accept merely the rational basis for the regulation given by the FCC. The first amendment's guarantee of free speech is a fundamental right[162] and would therefore require the court to find a compelling rationale for usurping it.[163] Yet both the *Yale* and *WEFM* cases fail to mention the need for a compelling interest for upholding the FCC regulations. In both of these cases, the courts accepted the governmental interest despite the fact that it resulted in an infringement of the first amendment right to freedom of speech.

Conclusion

Freedom of speech became a written reality in 1791.[164] Since then it has been limited in many ways through cases in areas which the courts have held to be permissible subjects of regulation.[165] Only one area, however, has benefited through time. Symbolic speech or nonverbal conduct was virtually an unknown doctrine until 1967.[166] With the counterculture,[167] revolutions[168] and student dissent, came a penumbra to freedom of speech—freedom of expression.

At first, nonverbal expression was afforded the same protection as in other free speech cases.[169] This protection, however, proved to be too broad for future courts. With the end of the

[161]506 F.2d at 252.

[162]*See* note 25 *supra*. *See also* Police Department v. Mosley, 408 U.S. 92 (1972) (expression of an opinion as a fundamental right).

[163]*See* Stroud, *Sex Discrimination in High School Athletics*, 6 Ind L. Rev. 661, 665 (1973).

[164]See note 1 *supra*.

[165]*E.g.* obscenity, loudspeakers, hostile audiences, subversiveness, captive audiences, and slander. See notes 13-18 *supra*.

[166]See text accompanying notes 19-26 *supra*.

[167]T. Roszak, the Making of a Counterculture (1969).

[168]H. Marcuse, One-Dimensional Man 1-123 (1964); C. Reich, the Grening of America 3-21, 299-349 (1970).

[169]See text accompanying notes 19-26 *supra*.

Warren Court came the limitations to *O'Brien's* holding that symbolic speech is a fundamental right subject only to compelling state interests.[170] The limitations came in the areas of flag desecration,[171] dress and grooming codes,[172] nude entertainment,[173] buttons and badges,[174] and musical expression.[175] They came as factual distinctions to *O'Brien* and as decisions which completely ignored the need for a substantial state interest. With these cases came the court's general rule of merely finding a rational basis for sustaining the legislation or regulation.

Where do we stand today? In constitutional law, questions such as these can never be answered. For as easily as *O'Brien* was created it could be destroyed. At one extreme we have *O'Brien* and at the other is the failure to recognize any conduct as speech. Emerson noted the need to find the median when he stated:

> To some extent expression and action are always mingled: most conduct includes elements of both. Even the clearest manifestations of expression involve some action, as in the case of holding a meeting, publishing a newspaper, or merely talking. At the other extreme, a political assassination includes a substantial measure of expression.[176]

Courts should return to the compelling state interest test in cases involving symbolic speech. The expansion of the doctrine to include such expressions of feeling as assassinations need not be feared since they would hardly prevail over the obvious compelling state interests of peace, order, and life. Nonverbal conduct which falls within the areas of obsenity, hostile audiences, and subversiveness also need not be feared since they too would be surpassed by the established state interests.

Body language has always been present, yet only now has it come to be recognized as speech.[177] With the growth of new methods of expression the first amendment needs to be adapted. But these adaptations are being rated second class. Perhaps in time they too will receive full class status. Perhaps in time freedom of expression will be explained as merely a *casus omissus* of our Founding Fathers.

ELLEN S. PODGOR

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[170]Chief Justice Warren wrote the opinion for the majority in the *O'Brien* decision.

[171]See text accompanying notes 36-69 *supra.*

[172]See text accompanying notes 70-87 *supra.*

[173]See text accompanying notes 88-113 *supra.*

[174]See text accompanying notes 114-36 *supra.*

[175]See text accompanying notes 137-63 *supra.*

[176]T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 80 (1970).

[177]J. FAST, BODY LANGUAGE (1970).