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Abstract

A work of art has been defined as: "any human work made with the specific purpose of stirring human emotions; something displaying artistic merit:...all works belonging fairly to the so-called fine arts, painting, drawing, and sculpture."

Art and First Amendment Protection in Light of *Texas v. Johnson*[1]

I. Introduction

A work of art has been defined as: "any human work made with the specific purpose of stirring human emotions; something displaying artistic merit: . . . all works belonging fairly to the so-called fine arts, painting, drawing, and sculpture."[2]

Few people would disagree that the intentional burning of the American flag stirs human emotions. The flag is the symbol of our nation and has come to represent patriotism and freedom.[3] Certainly, burning the American flag does not constitute art as most Americans would define it. However, is an artist who incorporates the flag into one of his art pieces protected by the first amendment against government suppression, through flag desecration statutes, of his freedom of expression? The case of *Texas v. Johnson*[4] addresses the issue of the scope of first amendment protection that courts are willing to afford expressive speech in the form of flag desecration. Many Americans believe this U.S. Supreme Court decision has gone too far.[5]

During the 1984 Republican National Convention in Dallas, Gregory Lee Johnson participated in a flag-burning protest in front of City Hall.[6] Johnson, a member of the Revolutionary Communist Youth Brigade[7] was arrested and convicted under a Texas statute[8] classifying the

1. 109 S. Ct. 2533 (1989).
2. 6A C.J.S. *Arrest* § 291 (1975).
3. Halter v. Nebraska, 205 U.S. 34, 43 (1907).
4. 109 S. Ct. 2533 (1989).
5. Jacoby, McDaniel, McKillop, *A Fight for Old Glory*, NEWSWEEK, July 3, 1989, at 18.
6. *Johnson*, 109 S. Ct. at 2536.
7. Isaacson, *O'er the Land of The Free: A Decision Upholding the Right To Burn the Flag is the Best Reason Not To*, TIME, July 3, 1989, at 14.
8. TEX. PENAL CODE ANN. § 42.09. (Vernon 1989) provides in full:

§ 42.09, Desecration of Venerated Object

(a)A person commits an offense if he intentionally or knowingly desecrates

(1) a public monument;

(2) a place of worship or burial; or

(3) a national flag.

U.S. flag as a venerated object and permitting the criminal prosecution of those who desecrate it. Johnson was sentenced to a year in jail and fined $2,000.[9] The Texas Court of Criminal Appeals reversed the decision on constitutional grounds, holding that Johnson was engaged in symbolic speech protected by the first amendment and that the state's interests were insufficient to support Johnson's conviction.[10] John Vance, District Attorney for Dallas County, asked the U.S. Supreme Court to reinstate the conviction and to "squarely address" whether the state has the right to protect the flag as a "symbol of national unity and to jail those who dare to desecrate it by sending it up in smoke."[11] On a writ of certiorari, the U.S. Supreme Court held (a) Johnson's burning of the American flag was expressive speech and therefore protected by the first amendment, (b) Texas could not show that the interests it sought to protect ("preserving the flag as a symbol of national unity and preventing breaches of the peace") were important governmental interests justifying any limitations on first amendment freedoms; and (c) Government's prohibition on expression, resulting from society's offense or disagreement with the idea expressed, is inappropriate.[12]

Historically, first amendment theories have been centered around political expression.[13] In the views of courts and commentators, the effect of this centrality of political expression in first amendment theories has been the relegation of other types of non-political expression to second class status.[14] However, the impact of the decision in this case reaches beyond political expression, since every art piece incorporating the flag is not necessarily politically inspired.

An important concern of artists is whether their creations are protected forms of speech. When artwork is attacked under a statute prohibiting the physical use of the American flag, is the creation entitled to the same constitutional protection that the first amendment pro-

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(b) For purposes of this section, 'desecrate' means deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action.

(c) An offense under this section is a Class A misdemeanor.

9. N.Y. Times, June 22, 1989, at A1, col. 6.

10. *Johnson*, 109 S. Ct. at 2537.

11. Garbus, *The 'Crime' of Flag Burning*, THE NATION, MAR. 20, 1989, AT 369.

12. *Johnson*, 109 S. Ct. at 2538-48.

13. *See* Nahmod, *Artistic Expression and Aesthetic Theory: The Beautiful, The Sublime and the First Amendment*, 1987 WIS. L. REV. 222.

14. *Id.*

vides to the spoken and written speech of literature, journalism and political discourse? The question is not simply one of immunity from potential harassment; in a sense, it goes to the very dignity of what artists do. Are they mere decorators of surfaces and environments, or are they engaged in a form of communication that ought to be treated by the law in ways comparable to other forms of communications?

It may be helpful to first look at the evolution of first amendment protection of symbolic speech. Then by seeing the interrelationship between symbolic speech and art one can get a better understanding of why the Court's holding in *Johnson* will affect artistic expression.

II. Historical Development of First Amendment Protection of Symbolic Speech

Freedom of speech has been recognized as one of the preeminent rights of Western democratic theory, the core of individual liberty.[15] Justice Cardozo characterized it as "the matrix, the indispensible condition of nearly every other form of freedom."[16] The application of this theory, however, has often resulted in public controversy. As Justice Holmes observed, "it is . . . not free thought for those who agree with us, but freedom for the thought that we hate"[17] which gives the theory its most enduring value.

One can readily appreciate the wisdom of Professor Thomas Emerson's emphasis on the importance as well as the difficulty of arriving at an understanding of the system of freedom of expression as envisioned by the language of the first amendment. "[T]he theory of freedom of expression is a sophisticated and even complex one . . . . It does not come naturally to the ordinary citizen but needs to be learned . . . . It must be reiterated not only for each generation, but for each new situation."[18]

The first amendment to the United States Constitution provides: "Congress shall make no law . . . abridging the freedom of speech, or

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15. Dunagin v. City of Oxford, 489 F. Supp. 763, 769 (N.D. Miss 1980), *rev'd on other grounds*, 701 F.2d 335 (5th Cir. 1983) (per curiam).

16. Palko v. Connecticut, 302 U.S. 319 (1937).

17. United States v. Schwimmer, 279 U.S. 644, 654-54 (1929) (Holmes, J., dissenting).

18. Emerson, *Toward A General Theory of the First Amendment*, 72 YALE L.J. 877, 894 (1963). *See* Van Alstyne, *A Graphic Review of the Free Speech Clause*, 70 CALIF. L. REV. 107 (1982) for an excellent introduction to, and analysis of, the free speech clause.

of the press, or the right of the people peaceably to assemble and to petition the Government for a redress of grievances."[19] These first amendment freedoms rest upon four main premises:

> First, freedom of expression is essential as a means of ensuring individual self-fulfillment . . . . Second, freedom of expression is an essential process for advancing knowledge and discovering truth . . . . Third, freedom of expression is essential to provide for participation in decision making by all members of society . . . . Finally, freedom of expression is a method of achieving a more adaptable and hence a more stable community, of maintaining the precarious balance between healthy cleavage and necessary consensus.[20]

The first amendment, however, does not confer an absolute right to speak.[21] The State in the exercise of its police power may promulgate regulations restricting this freedom if it is necessary to advance a state interest.[22]

Few areas of first amendment law are as confused, or as perplexing, as the case law involving the protection of "symbolic speech."[23] While accepting the necessity of balancing competing interests of the government's need to regulate certain forms of expression against the speaker's first amendment freedoms,[24] the United States Supreme

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19. U.S. CONST. amend. I.

20. T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6-7 (1970).

21. Stromberg v. California, 283 U.S. 359 (1931).

22. *Id.* The importance of the state interest is determined by the scrutiny level that the Court applies. The second prong of the *O'Brien* test is "if [the regulation] furthers an important or substantial governmental interest . . . . " 391 U.S. 367, 377 (1968). On judicial review, the Supreme Court usually applies one of the three primary scrutiny levels depending on the interests involved in the case. At strict or high scrutiny, a regulation will be upheld if it is necessarily related to a compelling state interest and has the least drastic effect on the alleged constitutional right. At middle or intermediate level scrutiny, a regulation will be upheld if it is substantially related to an important state interest and has a lesser drastic effect. At low or rational basis scrutiny, a regulation will be upheld if it is rationally related to a legitimate state interest. Under *O'Brien*, therefore, expressive conduct is placed in the intermediate level of scrutiny. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW, 530-37 (3d ed. 1986).

23. *See generally* M. NIMMER, FREEDOM OF SPEECH § 3.06 (1984); J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW §§ 16.48, 16.49 (3d ed. 1986).

24. For a discussion of the competing "absolutist" approach, *see* Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865 (1960).

Court's discussions tend to concentrate primarily on the government's side of the balance rather than on the nature and extent of the speaker's interest.[25]

The development of first amendment protection for nonverbal speech has spanned a mere fifty-eight years, but significant processes have taken place during that period. The Supreme Court recognized that speech may be nonverbal and throughout the years has set limits on the amount of first amendment protection for symbolic expression by enunciating several tests.[26]

The Supreme Court first recognized that first amendment rights were not confined to verbal expression in 1931.[27] In *Stromberg v. California*,[28] the appellant displayed a red flag in a public place in violation of a state statute that prohibited displaying a red flag "as a sign, symbol, or emblem of opposition to organized government . . . ."[29] A California Superior Court convicted Stromberg for violating that statute.[30] The United States Supreme Court found the statute unconstitutional on vagueness grounds and reversed.[31] Although it appeared that the action was merely conduct, the Court overturned the conviction and gave Stromberg's activity the constitutional protection of free speech, reasoning that the action was a means of free political discussion.[32]

Twelve years later, in *West Virginia State Board of Education v. Barnette*,[33] the Supreme Court gave first amendment protection to another form of nonverbal speech. In *Barnette*, school officials expelled students who refused to salute the American flag.[34] The Court recognized that the "act" of refusing to salute the flag was "a form of utter-

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25. For a discussion of balancing in first amendment cases, *see* M. NIMMER, *supra* note 23, at §§ 2.02-2.06; Carrafiello, *Weighing the First Amendment on the Scales of the Balancing Test: The Choice of Safety Before Liberty*, 8 S.U.L. REV. 255 (1982); Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975); Gunther, *In Search of Judicial Quality on a Changing Court: The Case of Justice Powell*, 24 STAN. L. REV. 1001 (1972).

26. *See infra* notes 51 & 76 and accompanying text.

27. Stromberg v. California, 283 U.S. 359 (1931).

28. *Id.*

29. *Id.* at 361.

30. *Id.* at 360.

31. *Id.* at 369-70.

32. *Id.* at 369.

33. 319 U.S. 624 (1943).

34. *Id.* at 629-30. The children, Jehovah Witnesses, refused to salute the flag on religious grounds.

ance,"[35] and therefore held that it was entitled to first amendment protection.[36]

In *Brown v. Louisiana*,[37] decided in 1966, Justice Fortas reemphasized that first amendment rights "are not confined to verbal expression [but] embrace appropriate types of action which certainly include the right in a peaceable and orderly manner to protest . . . ."[38] The Appellants in *Brown*, five Negroes, were convicted of breaching the peace because they participated in a peaceful sit-in to protest the denial of equal treatment in a segregated public library.[39] The Supreme Court overturned their convictions and once again extended first amendment protection to nonverbal speech.[40] The Court first recognized that "sitting" in a library usually has nothing to do with making a statement and is not the type of conduct that an observer normally would construe as expressive.[41] But, after balancing the appellant's first amendment rights and the state's interest in keeping the peace, the Court found that in that particular context, the "sitting" was "powerfully expressive,"[42] and therefore, constitutionally protected.[43]

Although the Court had previously recognized that certain expressive conduct warranted first amendment protection, it was not until the landmark case of *United States v. O'Brien*[44] in 1968 that the Court developed a test setting forth the boundaries for first amendment protection of symbolic expression. The United States District Court for the District of Massachusetts convicted O'Brien for burning his selective service certificate on the steps of the South Boston Courthouse.[45] His action violated the Universal Military Training and Service Act of 1945,[46] which provided that a person would be guilty of an offense if he "forge[d], alter[ed], knowingly destroy[ed], knowingly mutilate[d], or

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35. *Id.* at 632.
36. *Id.* at 642.
37. 383 U.S. 131 (1966).
38. *Id.* at 142.
39. *Id.* at 136-37.
40. *Id.* at 143.
41. *Id.* at 139.
42. Clark v. C.C.N.V., 468 U.S. 288, 306 (1954) (Marshall, J., dissenting) (citing *Brown*, 383 U.S. at 139).
43. 383 U.S. at 143.
44. 391 U.S. 367 (1968).
45. *Id.* at 369.
46. *Id.* at 370.

in any manner change[d] any such certificate . . . ."[47]

O'Brien argued free speech abridgement, but the Supreme Court refused to accept that argument. The Court stated: "We cannot accept the view that an apparently limitless variety of conduct can be labelled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."[48] The Court stated that even had it assumed O'Brien's conduct contained a communicative element to implicate the first amendment, the conduct would not have received automatic first amendment protection.[49] "[W]hen '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."[50]

The Court in *O'Brien* then laid out the framework for the regulation of nonverbal speech in a four-prong test:

> [A] government regulation is sufficiently justified [1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged first amendment freedoms is no greater than is essential to the furtherance of that interest.[51]

Applying this test, the Court in O'Brien first noted that the "power of Congress to classify and conscript manpower for military service [was] 'beyond question.' "[52] Thus, the regulation met the first prong of the test. In considering the second prong of the test, the Court held that the government had a vital interest in raising armies, and the continued availability to each registrant of his selective service certificate furthered the proper functioning of that system.[53] Further, the Court found the requirement that the governmental interest be unrelated to the suppression of free expression satisfied because the regulation was

47. *Id.*; *see also* Universal Military Training and Service Act of 1948, 50 U.S.C. § 462(b)(3) (1982).
48. 391 U.S. at 376.
49. *Id.*
50. *Id.*
51. *Id.* at 377.
52. *Id.*
53. *Id.* at 381.

in no way based on content.[54] The Court also found no alternative means that would have narrowly assured the continued availability of the selective service certificates more than was essential to the furtherance of the governmental interest.[55]

Since the second prong of the *O'Brien* test requires an important or substantial governmental interest, the Court implied that cases concerning expressive conduct would be reviewed at the intermediate level of scrutiny similar to that applied in equal protection cases.[56] Under this rationale, the Court should weigh the expressive conduct against the governmental interest, and in order to justify first amendment impingement, the governmental interest should be a substantial one.

One year later, the Court faced another symbolic expression case—*Tinker v. Des Moines School District*.[57] In *Tinker*, three students were suspended from a public school for wearing black armbands in protest of the Vietnam War.[58] A school policy adopted two days earlier prohibited the wearing of black armbands to exhibit opposition to the Vietnam War.[59] On certiorari to the United States Supreme Court, the Court characterized the wearing of armbands as an action that involved "direct primary first amendment rights . . . ."[60] Even though the Court did not specifically apply the *O'Brien* test in *Tinker*, it appears that the school regulation would have failed the third prong of the test; the regulation was not unrelated to the suppression of free expression.[61] In *Tinker*, the Court balanced the student's exercise of first amendment rights against the school's interest in maintaining discipline and order.[62] According to the Court, wearing armbands was not disruptive action, but was only "silent, passive expression of opinion . . . ."[63] Therefore, the regulation was constitutionally

54. *Id.* at 381-82.

55. *Id.* at 381.

56. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 530-37 (3d ed. 1986).

57. 393 U.S. 503 (1969).

58. *Id.* at 504.

59. *Id.*

60. *Id.* at 508.

61. *Id.* at 510-11.

62. *Id.* at 513. The Court said that a regulation that did not show the students' activities would materially or substantially disrupt the work and discipline of the school would violate the constitutional rights of the students.

63. *Id.* at 508.

impermissible.[64]

Litigation surrounding flag desecration statutes is another area in which the Supreme Court has been called upon to elaborate the test it established in *O'Brien*. The first case was *Street v. New York*.[65] In response to the slaying of a civil rights leader, Street burned his personally-owned flag on a street corner in New York while "talking out loud" to a group of approximately thirty people.[66] The Court overturned Street's conviction in a narrow holding which avoided the issue of constitutionality of a statute prohibiting flag desecration by action. The case was decided in terms of the first amendment protection afforded verbal expression. On the basis of the record, it was possible that Street's words alone or his words and actions together were the basis of his conviction. According to the Court, a conviction based on Street's words, totally or in part, would be unconstitutional.

It is interesting that the *Street* Court focused not on the first amendment protection for expressive action discussed in *Barnette*, but rather on general first amendment protection for speech. While citing *Barnette*, one of the early cases in symbolic speech, the *Street* Court would not consider two of Street's contentions that the statute "is vague and imprecise because it does not clearly define the conduct which it forbids," and that publicly destroying or damaging an American flag as a means of protest is constitutionally protected expression.[67]

In 1974 the Supreme Court in *Spence v. Washington*[68] departed from several assumptions it had made in *O'Brien*, in which the Court refused to consider the individual's motive in communicating and the communicative nature of the activity.[69] In addition, *Spence* seemed to answer questions left opened by *O'Brien* regarding the kind of "conduct" that may be labeled "speech."[70] Three Seattle police officers ar-

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64. *Id.* at 511.

65. 394 U.S. 576 (1969).

66. *Id.* at 578.

67. *Id.* at 580-81.

68. 418 U.S. 405 (1974) (per curiam).

69. In *O'Brien*, the Court considered only whether the regulation furthered a substantial governmental interest that was unrelated to the suppression of free expression and was no greater than was essential to the furtherance of that interest. The Court in *O'Brien* did not consider O'Brien's motive for burning his selective service certificate. The Court simply assumed there was a communicative nature in his activity. 391 U.S. at 377.

70. CCNV v. Watt, 703 F.2d 586, 602 (D.C. Cir. 1983) (Edwards, J., concurring) (quoting *O'Brien*, 391 U.S. at 376).

rested Spence for displaying an American flag with a peace symbol attached to it.[71] The flag was Spence's way of demonstrating against the Kent State killings and the invasion of Cambodia.[72] The trial court found Spence guilty under Washington's "improper use" statute forbidding exhibition of a United States flag to which is attached extraneous material.[73] The Washington Supreme Court sustained the conviction.[74] On appeal, the United States Supreme Court openly considered both the nature of Spence's activity and the factual context in which it was conducted.[75] The Court then overturned Spence's conviction because "[a]n intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it."[76] The Court in *Spence*, therefore, appeared to have made a subtle shift from the rigid four-prong test of *O'Brien* to a more general balancing of first amendment rights against alleged governmental interests.

This shift became more apparent when the *Spence* Court went on to apply an analysis similar to the one employed in *Street v. New York*.[77] Only now the *Street* framework of governmental interests was balanced against expressive activity rather than against words. The Court concluded that none of the four possible governmental interests was compelling enough to uphold Spence's challenged conviction, according to the facts of the case. However, the Court did leave open the possibility that there could be a legitimate state interest in preserving the flag as an "unalloyed symbol of our country."[78]

The Court concluded that even if there were a legitimate governmental interest, it would be unconstitutional as applied to Spence's activity. The Court did not conclude, on the other hand, that no governmental interest in preserving the flag as a national symbol is strong enough to outweigh first amendment considerations. This state interest, yet to be found, may fulfill the requirements of the first two parts of the four-part *O'Brien* test.

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71. 418 U.S. at 406.
72. *Id.* at 408.
73. *Id.* at 407.
74. *Id.* at 408.
75. *Id.* at 410.
76. *Id.* at 410-11. The *Spence* test, therefore, involves two considerations: (1) whether an intent to convey a particularized message is present; and (2) whether the likelihood was great that the message would be understood by those who viewed it.
77. 394 U.S. 576 (1969).
78. 418 U.S. at 412-14.

III. Art as Protected Symbolic Expression

The first amendment prohibits the enactment or enforcement of any law "abridging the freedom of speech, or of the press."[79] Despite the use of the words "speech" and "press" instead of the general term "expression," it is generally true that other kinds of expression are also protected. The Supreme Court held that the first amendment protects forms of political expression, such as conducting a political demonstration,[80] carrying a red flag as a political protest,[81] wearing a black armband in protest against the Vietnam war,[82] and now the burning of the American flag.[83] In addition, nonpolitical forms of expression with aesthetic value, such as books[84] and motion pictures,[85] are protected. On the other hand, "conduct" has been treated differently than "speech," even when the conduct is intended to be a form of communication. The extent to which art objects are akin to pure speech or to conduct with speech elements is uncertain.

Even if a work of art is akin to pure speech, as some courts have held,[86] the first amendment would not grant an artist license to explore every subject matter that may appeal to him. Traditional exceptions include obscenity, libel and so-called "fighting" words, or words which in themselves tend to cause a breach of the peace.[87]

The protection of self-fulfillment is one of the purposes underlying the first amendment.[88] In many symbolic speech cases, the individual's expressive conduct similarly is more cathartic than communicative.[89]

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79. U.S. CONST. amend. I. The first amendment applies directly to prohibit only federal restrictions of free speech. The fourteenth amendment, however, has been held by the Supreme Court to restrict state action to the same extent. *See* Cantwell v. Connecticut, 310 U.S. 296 (1940).

80. Cox v. Louisiana, 379 U.S. 536 (1965).

81. Stromberg v. California, 283 U.S. 359 (1931).

82. Tinker v. Des Moines School District, 393 U.S. 503 (1969).

83. Texas v. Johnson, 109 S. Ct. 2533 (1989).

84. Memoirs v. Massachusetts, 383 U.S. 413 (1966) (plurality opinion).

85. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).

86. Korn v. Elkins, 317 F. Supp. 138 (D. Md. 1970); Close v. Lederle, 303 F. Supp. 1109 (D. Mass. 1969), *rev'd*, 424 F.2d 988 (1st Cir.), *cert denied* 400 U.S. 903 (1970).

87. Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).

88. T. EMERSON, *supra* note 20, at 6. Self-fulfillment also has other aspects. Emerson refers to it as "the realization of [man's] character and potentialities as a human being." *Id.*

89. M. NIMMER, FREEDOM OF SPEECH § 1.03 (1984). *See also* Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978).

These cases pose some of the most analytically difficult problems in the law governing symbolic expression. In the words of Professor Gunther of Stanford University Law School, a first amendment claim based on self-fulfillment conduct is virtually "indistinguishable from the autonomy aspects of substantive due process," that is, from the claim that " 'liberty' is broad enough to protect all individual behavior that does not harm others."[90]

This insight is at the core of Professor Schauer's definition of freedom of speech as freedom to communicate.[91] It suggests that the Court should permit greater governmental control of symbolic expression when it is not communicative—when it is motivated primarily by a desire to achieve self-satisfaction rather than to communicate to others.[92] Otherwise we must resort to drawing an artificial line between speech and conduct to prevent the first amendment from undermining the legitimate exercise of governmental police powers.

If the exhibiting of art objects is a form of conduct with speech elements,[93] then in addition to the exclusions noted, other incidental limitations may be imposed where there is a sufficiently important governmental interest in regulating the "nonspeech element" in such conduct.[94]

No facts could more sharply focus the question of whether artworks are entitled to consideration as "symbolic speech" than those surrounding the case of Stephen Radich, a New York City art dealer. In 1966, Radich was arrested and convicted of exhibiting art pieces which "desecrated" the flag.[95] Radich displayed the sculptural constructions of Marc Morrel which prominently incorporated the United States flag in several settings, including the flag in the shape of a phallic symbol and in the shape of a human body hanging from a yellow noose. Despite no verbal speech being involved, both Morrel and Radich asserted that the purpose of the exhibit was to protest the Vietnam war. Radich was found guilty of violating New York's flag desecration law. Affirming his conviction, the New York Court of Appeals

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90. G. GUNTHER, CONSTITUTIONAL LAW 1089 n.12 (11th ed. 1985). *See also* F. SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 50-59 (1982).

91. *See* F. SCHAUER, *supra* note 90, at 53.

92. *Id.* at 92-106.

93. *See* People v. Radich, 26 N.Y.2d 114, 257 N.E.2d 30, 308 N.Y.S.2d 846 (1970), *aff'd* 401 U.S. 531 (1971). Radich's conviction was affirmed by an equally divided court, so the decision has no precedential value for subsequent cases.

94. United States v. O'Brien, 391 U.S. 367 (1968).

95. *Radich*, 26 N.Y.2d at 114, 257 N.E.2d at 30, 308 N.Y.S.2d at 846.

rejected Radich's argument that his conduct was protected under the first amendment and found that the purpose of the flag statute was to preserve the public order, not to suppress ideas.[96] Most noteworthy was Chief Judge Fuld's dissent—an opinion prophetic of the federal court decision that would clear Radich some four years later.[97]

In his dissenting opinion, Chief Judge Fuld rejected the majority's contention that any danger to the public order resulted from Radich's display of antiwar art. He emphasized that in the quiet atmosphere of Radich's upstairs Madison Avenue art gallery, there was no danger to the public order. Judge Fuld further stated, "it 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 those sculptures were intended to convey."[98]

The Court had the opportunity to solve some of the uncertainty surrounding rights of artistic expression under the first amendment, but the Court's decision in effect delayed any conclusive determination of first amendment rights for artistic works.

A recent Illinois case involving the flag and an art exhibit occurred in Chicago. A student at the School of the Art Institute of Chicago displayed an exhibit entitled "What is the Proper Way to Display a U.S. Flag?"[99] The exhibit contained a photocollage depicting shots of coffins draped with flags and South Koreans burning the American flag. A guest book was placed on a shelf for visitors to answer the question posed by the exhibit's title, and an American flag on the floor extended from the wall so visitors would walk upon the flag to view the exhibit and sign the guest book.[100] In response to the exhibit, the United States Senate, the Chicago City Council and both houses of the Illinois Legislature passed measures to bar such an exhibit by making it a crime to "knowingly display the flag on the ground;"[101] however, the Supreme Court's decision in *Johnson* nullifies these legislative

96. *Id.*

97. *See* United States *ex rel*, Radich v. Criminal Court of New York, 385 F. Supp. 165 (S.D.N.Y. 1974). In this subsequent habeas corpus proceeding, in a rambling yet thoughtful opinion, the court granted the writ, holding the New York flag statute unconstitutional as applied to Radich.

98. *Radich*, 26 N.Y.2d at 128, 257 N.E.2d at 39, 308 N.Y.S.2d at 857.

99. Hochfield, *Flag Furor*, ART NEWS, Summer 1989, at 43.

100. *Id.*

101. N.Y. Times, June 22, 1989, at B8, col. 1

acts.[102] The student's case will not go to the Supreme Court since a lower court granted him the right to display the exhibit.[103] Judge Kenneth Gillis of the Cook County Circuit Court said, "Certainly the artist (student) succeeded in this particular case of communicating ideas and feelings, and it is good to know that the flag has not lost its ability to communicate and motivate as well."[104]

IV. Conclusion

For those artists and others engaged in political protest, the use of the American flag has been a focal point for assertion of first amendment rights. The Supreme Court has decided several flag desecration cases over the past twenty years, always overturning the convictions in narrow holdings and never definitively deciding if flag burning could be banned.[105] Similarly, there has not been a satisfactory judicial determination of the constitutional rights of artists to create and exhibit flag art, and until *Johnson*, the scope of the flag desecration statutes had not been satisfactorily defined.

The *Johnson* case does not stand for the proposition that flag desecration statutes are unconstitutional or that any action taken with respect to the flag is expressive and thus constitutionally protected. The Court found that to characterize such action for first amendment purposes, the context in which it occurred must be considered.[106] Another finding by the Court was that the State may have a sufficiently important governmental interest justifying incidental limitations on freedom of expression, but preserving the flag as a symbol of national unity is not such an interest.[107] The Court provided that the "function of free speech under our system of government is to invite dispute . . . [i]t may indeed best serve its high purpose when it induces a condition of unrest, dissatisfaction with conditions as they are, or even stirs people to anger."[108] Furthermore, the Court set forth that the first amendment does not prevent a State from preventing "imminent lawless action."[109] When Defense counsel argued that if the flag over time was ignored

102. *Id.*
103. L.A. Daily J., Mar. 22, 1989, at 1, col. 4.
104. *See* Hochfield, *supra* note 99, at 44.
105. *Waiving The Flag*, THE NEW REPUBLIC, Jan. 23, 1989, at 7.
106. *See* Hochfield, *supra* note 99, at 44.
107. *Texas v. Johnson*, 109 S. Ct. 2533, 2542 (1989).
108. *Id.* (citing Terminiello v. Chicago, 337 U.S. 1, 4 (1949)).
109. *Id.* (citing Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)).

and abused, it would lose its symbolic value, Justice Scalia shot back saying that the emotions stirred by actions like Johnson's increase the flag's symbolic value rather than decrease it.[110]

In response to the *Johnson* decision, Congress passed the Flag Protection Act of 1989,[111] amending 18 U.S.C. § 700 to protect the physical integrity of the flag.[112] Almost immediately after the statute took effect, a protest occurred in front of a post office in Seattle, Washington and a flag was burned.[113] The participants were arrested and charged with violating the Flag Protection Act.[114]

In its first court test, U.S. District Judge Barbara Rothstein relied on *Johnson* to hold the Flag Protection Act unconstitutional and dismissed the charges against the defendants.[115] Judge Rothstein held "pursuant to the decision in *Johnson*, the asserted governmental interest in protecting the symbolic value of the flag cannot survive the exacting scrutiny which this court must apply."[116]

Judge Rothstein's ruling may automatically be appealed directly to the United States Supreme Court because of a provision inserted in the statute by Congress.[117] As of this printing, the Supreme Court has not yet heard the appeal. While Judge Rothstein's holding technically is only binding in the Western district of Washington, federal judges elsewhere may be reluctant to rule otherwise pending the Supreme Court's review, especially in light of the Supreme Court's recent holding in *Johnson*.

For now, artists who incorporate the flag into their works are safe from prosecution under 18 U.S.C. § 700. However, a caveat is necessary since the government can assert a compelling interest to infringe upon first amendment rights in order to prevent breaches of the peace. The Supreme Court will likely affirm Judge Rothstein's decision and finally elimiante any uncertainty concerning first amendment protection

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110. *The High Court Stands 5-4 On a Burning Issue*, U.S. News & World Report, July 3, 1989, at 8.

111. Flag Protection Act of 1989, Pub. L. No. 101-131, 103 Stat. 777 (codified as amended at 18 U.S.C. § 700 (1989)).

112. *Id.*

113. United States v. Haggerty, No. CR89-315R (W.D. Wash. Feb. 21, 1990) (LEXIS, Genfed library, Dist. File).

114. *Id.*

115. *Id.*

116. *Id.*

117. Flag Protection Act of 1989, Pub. L. No. 101-131, 103 Stat. 777 (codified as amended at 18 U.S.C. § 700 (1989)).

of symbolic expression in the form of flag desecration, thus insuring the protection of flag art.

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