CONDUCT AS SPEECH

For First Amendment purposes, there are three kinds of conduct: (1) conduct that has no communicative value, (2) conduct that is purely communicative, and (3) conduct that has a mix of communicative and non-communicative elements.

Sometimes it's easy to tell the difference. One spring, for example, a homeowner noticed that his U.S. flag had become frayed and moth-eaten. He decided to replace the flag and learned from the *United States Code* that the preferred way of disposing of a damaged flag is by burning. He took the flag into the back yard, dropped it into the grill, doused it with lighter fluid and set it ablaze. No one saw the action, and the flag burner later disposed of the cold ashes by spreading them in the flower bed. The act had no communicative value. Its purpose was solely to dispose of a damaged U.S. flag as suggested by the *Code*.

Come summer, the homeowner replaced the damaged flag and, on July 4, put it on a flag pole attached to the garage. The act is purely communicative: The homeowner displayed the flag to demonstrate patriotism on Independence Day.

But when fall arrived, the homeowner became dismayed. An incumbent president had taken actions with which the homeowner bitterly disagreed. He had a series of arguments with a neighbor, who happened to be the local chairman of the president's political party. The homeowner's irritation was inflamed even more because the president was using hundreds of flags in his re-election campaign, even using the flag as a background on campaign posters, bumper stickers and other paraphernalia. To demonstrate his distaste, the homeowner doused his recently purchased flag with lighter fluid, set it ablaze and tossed it on the neighbor's front porch. The burning flag destroyed a "Welcome" mat and left a large, sooty spot, requiring the porch to be repainted.

The homeowner's action contains both communicative and non-communicative elements. He communicated displeasure with presidential politics but also caused property damage.

Under Supreme Court rulings, the government may regulate purely communicative conduct only in extremely rare circumstances. Conduct that has both speech and non-speech elements, however, may be regulated more readily. Courts must balance the rights of an individual to express viewpoints through action against the rights of individuals who may be impacted by the action. The balancing is complex and often controversial.

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library is protected speech]; Clark v. Cmty. for Creative Non-Violence (Sleeping in some instances is expressive conduct]; Stromberg v. California (A regulation prohibiting the display of a red flag is not constitutional.]; Virginia v. Black (Cross burning, in many instances, is intimidating speech.]; West Virginia Bd. of Educ. v. Barnette (Students cannot be forced to salute the flag.]; Wooley v. Maynard (A person cannot be forced to display a license plate that contains an ideological message with which the person disagrees.]; United States v. O'Brien (Burning a draft card is not constitutionally protected.]. Citations for these cases appear in the bibliography at the end of this chaper.

Over the years, the Supreme Court has developed a series of tests it applies in adjudicating cases in which individuals or groups claim constitutional protection for symbolic speech. First, the Court asks, is the conduct expressive? If not, the First Amendment is not implicated, the inquiry ends, and the government may regulate the conduct. If the conduct is expressive, however, the Court then asks the more difficult question: Is the expressive conduct protected by the First Amendment?

Is the Conduct Expressive?

If conduct is expressive, it is "speech." The expressive nature of the conduct is the element that moves action from simply doing to communicating. The homeowner is no longer burning a damaged flag in his grill; he is burning it in public for the express purpose of communicating a message.

To determine whether conduct is purely utilitarian or has some communicative elements, the Court asks two questions: (1) Is there an intent to express a message? (2) Is there a likelihood the message will be understood by a witness? If there is no intent to express a message, or if it is not likely that a witness will understand the intended message, the conduct is not expressive and the First Amendment does not apply. Figure 1 demonstrates the flow of this inquiry.

The Court does not require that a viewer of expressive conduct understand the exact message the actor intends; only a general understanding is necessary. For example, when spectators watched in 1984 as Gregory Lee Johnson burned an American flag outside the meeting place of the Republican National Convention in Dallas, it was unnecessary that they knew Johnson was demonstrating his distaste for President Ronald Reagan, who was seeking re-nomination. It was sufficient that the spectators understood that Johnson was dissatisfied with some aspect of the United States or of the U.S. government or those entities symbolized by the flag.

Even though Johnson's action could be interpreted as a demonstration of disgust with President Reagan, the Republican Party, the U.S. government *or* the United States itself, Justice William Brennan, upholding Johnson's right to burn the flag, wrote in *Texas v. Johnson*, "The expressive, overtly political nature of this conduct was both intentional and overwhelmingly apparent."

The Court has recognized a wide array of conduct to be expressive: burning a cross, nude dancing, displaying a fighting words plate, burning a draft card, saluting a flag, displaying a flag,[2]

Not all these activities, however, are constitutionally protected. Once an action has been determined to be expressive, the Court must determine whether the First Amendment protects the expressive conduct. Cases involving expressive conduct date to the early twentieth century, but the Court's first substantive

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[2] See the cases listed in footnote 1.

treatment of it was in 1968. In *United States v. O'Brien*, the Court recognized that burning a draft card as a means of protesting the Selective Service System and U.S. involvement in Vietnam was expressive conduct, but ruled that other concerns outweighed David Paul O'Brien's right to burn the card. In *O'Brien*, the Court, for the first time, delineated the test for determining whether expressive conduct is protected by the First Amendment.

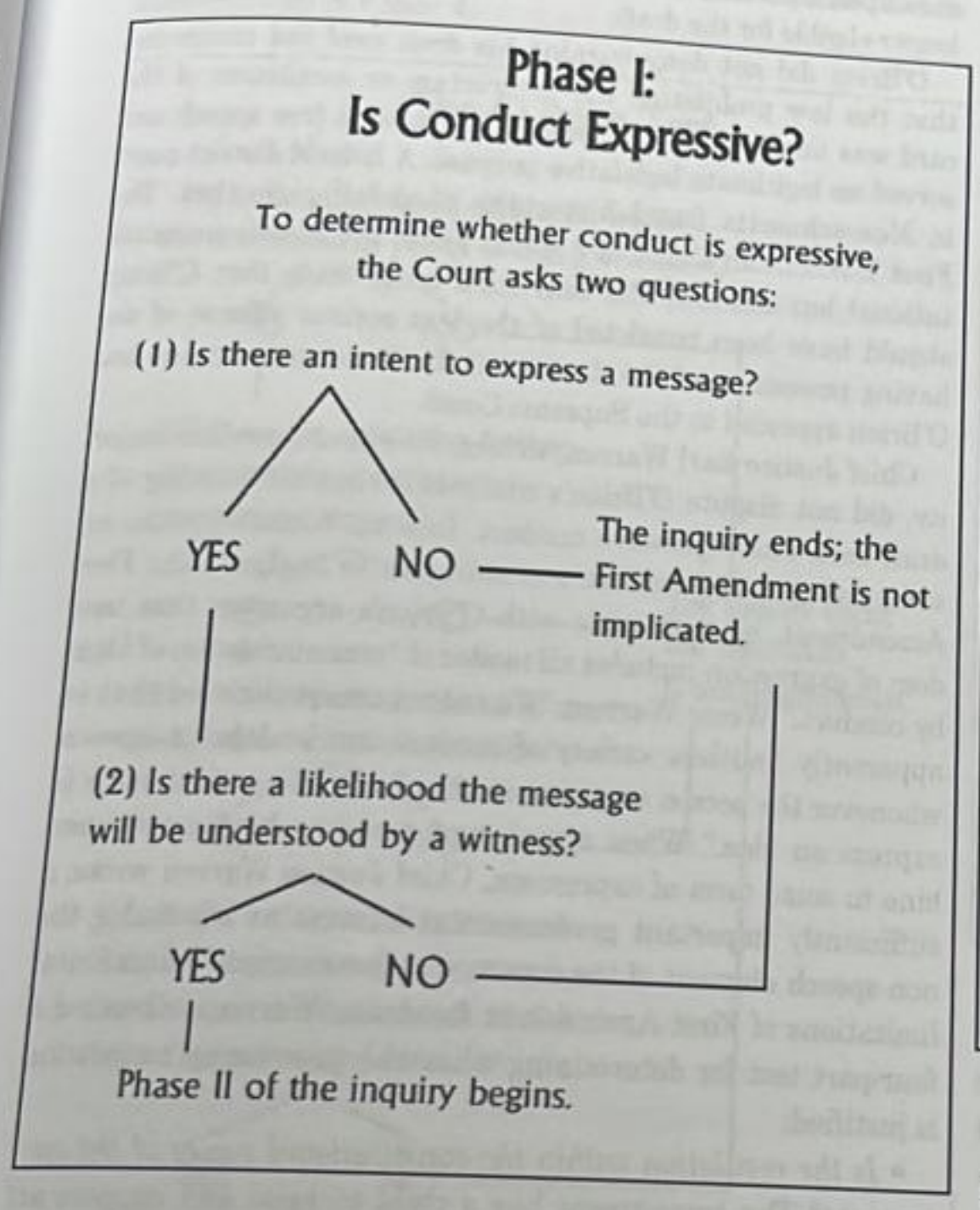

Figure 1

Is the Expressive Conduct Protected?

At first glance, O'Brien's burning of his draft card is remarkably similar to Johnson's burning of a U.S. flag: Both men had audiences, both were expressing distaste with political agendas, and both were using an age-old method of destruction to demonstrate that distaste. In both cases, there was an intent to express a message, and there was a likelihood that the message would be understood by witnesses.

But the Court found significant differences in the two acts. Ironically, the differences were based primarily upon the intent of the government rather than the intent of the speakers.

After the Court finds conduct to be expressive, it determines whether the conduct may be regulated by examining the rationale behind the government regulation being applied. The Court must determine whether the regulation is directed at the suppression of speech or at some other goal. If the purpose of the regulation is to restrict speech, the Court applies what it calls the "strict scrutiny test" to determine whether the regulation is constitutional; if the regulation is not directed at the suppression of speech, but at some other goal, the Court applies a test of intermediate scrutiny. Figure 2 demonstrates the flow of this inquiry.

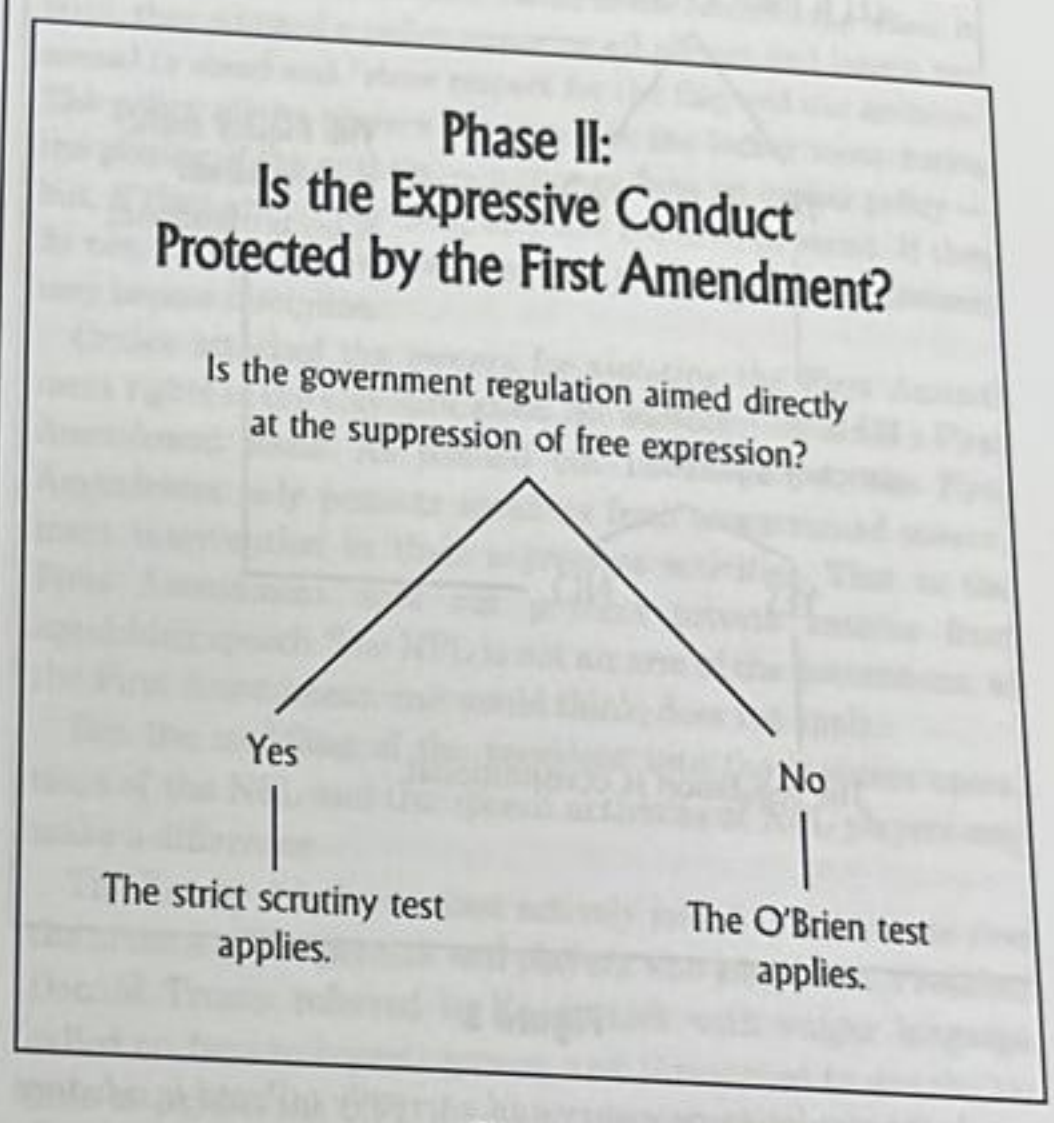

Figure 2

Strict Scrutiny. Attorneys for Texas argued to the Texas and U.S. supreme courts that the state's purpose in adopting its flag desecration act was to protect the U.S. flag as a symbol of patriotism and unity. And, the attorneys argued, the state had the right to do so. The Supreme Court agreed that protecting the flag is a noble cause. The method used to protect the flag, however, was directed at the suppression of free speech; the statute would allow expression supporting the state's goals, but would not allow expression contrary to those goals. Because the statute was directly related to the suppression of speech, therefore, strict scrutiny was required to determine whether the statute was constitutional. Figure 3 demonstrates the flow of the strict scrutiny test, which requires the resolution of two questions:

- *Is there a compelling government interest for the regulation?* The government interest advocated by the regulation must be more than a passing interest; it must be vitally important to

3

Conduct and Speech

By W. Wat Hopkins

Headnote Questions

- How does the Supreme Court determine whether conduct is expressive?
- How does the Supreme Court determine whether expressive conduct is constitutionally protected?
- What are the intermediate and strict scrutiny tests?
- What is the constitutional status of threatening speech, fighting words and intimidating speech?

As readers of this book will no doubt learn — if they haven't already — much First Amendment jurisprudence depends upon interpretation and, beyond that, degrees of interpretation. One man's art is another's obscenity; one woman's opinion is another's libel; one author's fair use is another's copyright infringement.

One of the best examples of the divergence of attitudes toward free speech is the battle waged in the 1960s and '70s between Justice Hugo Black and some of his brethren on the U.S. Supreme Court. Justice Black took the position that the government cannot restrict the distribution of material because it is obscene, defamatory, indecent, or even because it might harm the national security. "I read 'no law ... abridging'" freedom of speech and press, Justice Black wrote in *Smith v. California*, "to mean *no law* abridging." Speech, he maintained, was absolutely protected.

The great free-speech advocate, however, had a very narrow definition of "speech." Just as "no law" meant "no law," in Justice Black's view, "speech" meant "speech" and nothing more. He disagreed, therefore, when the Court ruled that students could not be punished for wearing black armbands to school, or that a protester could not be punished for wearing a jacket with an offensive slogan on the back. These cases, Justice Black contended, involved conduct and did not implicate the First Amendment; no "speech" was involved.

Fortunately for picketers, flag-burners and dozens of others who have chosen over the years to express their views by doing rather than saying, a majority of the Supreme Court has never agreed with Justice Black's definition of "speech." Indeed, a majority of the Court has always recognized that "speech" is more than talking. Justice Abe Fortas, for example, wrote in *Tinker v. Des Moines Independent School District* that those students who wore armbands to school to protest the Vietnam War were participating in activity that was "closely akin to 'pure speech.'" Justice Fortas's characterization was momentous. If something that was so clearly an action could be considered "pure speech," many other types of conduct could be recognized as speech as well and, therefore, eligible for First Amendment protection. Under such a construction, expression, which is not mentioned in the First Amendment, is protected alongside "speech" and "press."

That has long been the case in First Amendment jurisprudence. Indeed, the Court has recognized a variety of activities as being speech: carrying or displaying a flag; marching or picketing; burning a flag, cross or draft card. The Court has also said that a sit-in is a form of expression, as is the "silent, reproachful presence" of a group of African Americans who refused to leave an all-white library. In fact, in some circumstances, even sleeping could be described as "speech."

This is not to say, however, that the First Amendment protects all expressive or symbolic conduct. Conduct, after all, may intrude on individual rights more than other forms of speech. It may literally do what a 1980s advertisement for a long-distance telephone company once suggested consumers figuratively do: Reach out and touch someone. The Court has said, therefore, that there must be some balance between the rights of the actor and the rights of others present when conduct is used as a means of expression. This tension between rights has been at the heart of expressive conduct cases since the 1960s, when the Court's first substantive analysis in this area of the law began.[1]

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[1] Some cases involving expressive conduct are Barnes v. Glen Theatre (Nude dancing, though expressive, may be regulated.); Brown v. Louisiana (A protest in a public

else.

• *Is the incidental restriction of free expression no greater than is essential to the furtherance of the stated governmental interest?* The Court noted that the restriction O'Brien violated was narrowly drawn.

O'Brien's conviction was upheld, therefore. More importantly, however, the Court established a test to be applied in cases involving expressive conduct. The flow of the O'Brien Test is demonstrated in Figure 4.

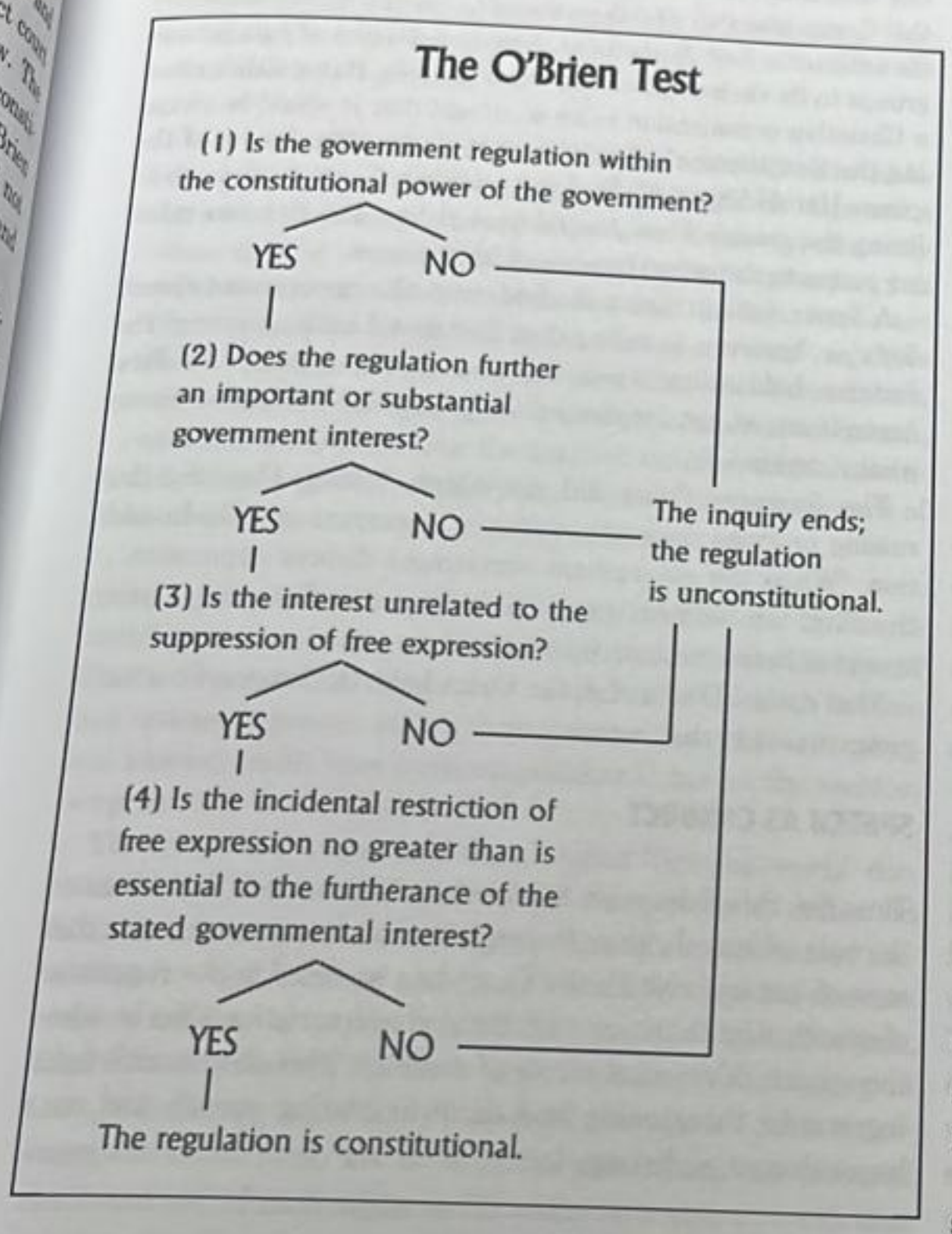

Figure 4

PROTECTED OR NOT: SPECIAL CASES

A variety of external issues may impact how or whether the First Amendment applies to conduct, as demonstrated here.

Private Businesses & Regulating Expressive Conduct

Kneeling is often seen as a form of expressive conduct. Many people kneel — publicly and privately — to show deference to a higher being when they pray. Christians often kneel when they receive the elements of Holy Communion. Some people kneel to show deference to persons in positions of authority or to pay respect during funeral services.

Rarely in the United States, however, has kneeling drawn the attention it did between 2016 and 2018 when Colin Kaepernick, then a quarterback for the San Francisco 49ers, knelt during the pre-game playing of the National Anthem.[3]

The result was a firestorm of controversy that included condemnations and threats by the President of the United States. The owners of the NFL teams added to the controversy when, in 2018, they adopted a policy requiring all players and league personnel to stand and "show respect for the flag and the anthem." The policy allows players to remain in the locker room during the playing of the anthem — a change from an earlier policy — but, if they are on the field, they are required to stand. If they do not, their teams will be fined and the league's commissioner may impose discipline.

Critics attacked the owners for violating the First Amendment rights of the players, but, on the surface, this is not a First Amendment issue. As pointed out in Chapter 1, the First Amendment only protects speakers from unwarranted government intervention in their expressive activities. That is, the First Amendment does not prevent private entities from squelching speech. The NFL is not an arm of the government, so the First Amendment, one would think, does not apply.

But the meddling of the president into the business operations of the NFL and the speech activities of NFL players may make a difference.

The Trump Administration actively joined in the debate over the actions of Kaepernick and players who joined him. President Donald Trump referred to Kaepernick with vulgar language, called on fans to boycott games, and threatened to use the tax code to punish the NFL if action was not taken to halt the protests or punish the players. In an effort to emphasize the administration's position, Vice President Mike Pence attended an NFL game apparently for the sole purpose of walking out when some players kneeled.

Legal scholars have called the ban illegal for a variety of reasons, most significantly because it may violate labor laws that require such issues to be discussed with unions before implementation. They have also argued that the ban violated the First Amendment because of the intersection of the government and private entities. That is, the NFL owners may be acting to restrict players' speech rights because they are afraid of action by the Trump Administration that may harm their business.

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[3] For the first four pre-season games of 2016, Kaepernick sat during the playing the anthem. Then, after consulting with a former Green Beret and professional football player, he began kneeling. *See Ex-Green Beret Nate Boyer Writes Open Letter Trump, Kaepernick, NFL and America,* ESPN, Oct. 13, 2017, http://www.espn.com/story/_/id/21003968-2017-ex-green-beret-nate-boyer=writes-open-letter-president-donald-trump-colin-kaepernick-nfl-united-states-america.

governmental operations. In Texas v. Johnson, Justice Brennan recognized that there may be a compelling government interest in protecting the flag as a symbol of national unity. National unity is important, Justice Brennan wrote, and the flag may be the single best symbol of the United States and that unity.

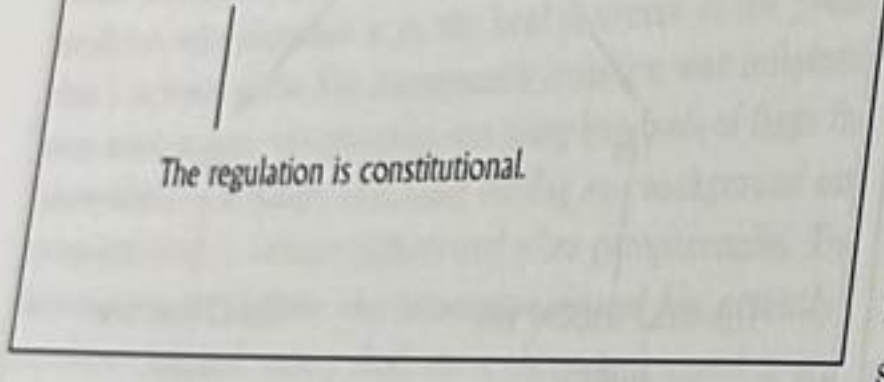

Figure 3

• *Is the regulation necessary and narrowly tailored to advance the government interest?* A necessary regulation is one that is essential, rather than optional, for the advancement of the government's interest. To survive strict scrutiny, a regulation must be necessary; but it also must be narrowly tailored. Being narrowly tailored means that the regulation goes as far as necessary to advance the government interest but does not overstep its bounds. In the area of speech, a narrowly tailored regulation is one that does not encompass protected speech in its prohibitions. Justice Brennan said the Texas act was not narrowly tailored. Even though protecting the flag is a compelling government interest, an individual's right to criticize the government is powerful. The government may promote the flag, Brennan wrote, but may not control messages critical of the government simply because the flag is the medium of that criticism. "If there is a bedrock principle underlying the First Amendment," he wrote, "it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."

Intermediate Scrutiny: The O'Brien Test. The Court came to a different conclusion in *United States v. O'Brien.*

When David Paul O'Brien burned his draft card, he was protesting Johnson, expressing his discontent with government policy, specifically, with Selective Service. At the time, federal law required all men in the United States who were 18 or older to carry draft cards until they surrendered them to government officials upon induction into the armed forces or until they were no longer eligible for the draft.

O'Brien did not deny burning his draft card but contended that the law prohibiting the destruction or mutilation of a draft card was unconstitutional because it inhibited free speech and served no legitimate legislative purpose. A federal district court in Massachusetts found him guilty of violating the law. The First U.S. Circuit Court of Appeals found the statute unconstitutional but affirmed the conviction on grounds that O'Brien should have been convicted of the less serious offense of having possession of the draft card. Both the government and O'Brien appealed to the Supreme Court.

Chief Justice Earl Warren, writing for a seven-member majority, did not dispute O'Brien's contention that the burning of a draft card was expressive conduct. Instead, based upon the assumption that the conduct was sufficient to implicate the First Amendment, he took issue with O'Brien's argument that freedom of expression includes all modes of "communication of ideas by conduct." Wrote Warren: "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." When speech and non-speech elements combine in some form of expression, Chief Justice Warren wrote, a sufficiently important governmental interest in regulating the non-speech element of the communication can justify incidental limitations of First Amendment freedoms. Warren delineated a four-part test for determining when the government regulation is justified:

• *Is the regulation within the constitutional power of the government?* The government has a right to raise and support armies, the Court noted, and to make all necessary and proper laws to that end; therefore, the Selective Service Act was within the power of the government.

• *Does the regulation further an important or substantial government interest?* Because the draft card and other Selective Service documents further the smooth and proper functioning of the system, Congress has a legitimate and substantial interest in preventing their wanton and unrestrained destruction and assuring their continuing availability by punishing people who knowingly and willfully destroy them.

• *Is the governmental interest unrelated to the suppression of free expression?* The non-destruction requirements of the law were aimed at the continued smooth operation of the Selective Service System, the Court held. That is, they were aimed at the non-communicative aspects of O'Brien's conduct and nothing

Other observers have suggested that the First Amendment is implicated because of another intersection of government and private business — the fact that many stadiums in which professional football games are played are subsidized by the political jurisdictions in which they are located. That is, cities give tax breaks and other benefits in order to lure NFL franchises and the added income they draw. Such intersections could be tantamount to the NFL taking on the role of government when it restricts speech on matters of public concern by the players.

The Strange Case of Nude Dancing

Dancing, most people will agree, is a form of expression, at least in those contexts in which professionals perform for audiences. And it would seem just as obvious that whether a professional dances with or without clothing is irrelevant to whether the dancer is attempting to express a message, and the message is apparent to an observer. The Supreme Court, however, has reached such conclusions begrudgingly and remains unwilling to grant constitutional protection to nude dancing.

The Court most recently faced the issue in 2000 in Erie v. Pap's A.M. The case began when the operator of a nightclub featuring nude dancing challenged an Erie, Pennsylvania, ordinance that prohibited public nudity. The nightclub owner claimed that the ordinance infringed his First Amendment free expression rights by prohibiting expressive conduct in the form of nude dancing. The Pennsylvania Supreme Court agreed, but the U.S. Supreme Court overturned that opinion, ruling that the ordinance was constitutional. The Court was splintered in its rationale, however.

Writing for four justices, Sandra Day O'Connor found that, since the ordinance prohibited all nudity, not just nude dancing, it was not a content-based restriction and was constitutional under the four-part O'Brien Test. Justice O'Connor admitted that nude dancing is expressive conduct — though "it falls only within the outer ambit of the First Amendment's protection." Two justices concurred in the judgment, thereby allowing the ordinance to stand, but were not willing to go as far as Justice O'Connor. Antonin Scalia, joined by Clarence Thomas, wrote that nude dancing could be regulated as conduct, unless there was evidence that an ordinance aimed at the dancing was aimed specifically at the "communicative character" of the dancing rather than the nudity itself.

Only Justices John Paul Stevens and Ruth Bader Ginsburg recognized that nude dancing is, indeed, expressive conduct, and regulations such as those enacted in Erie must face strict scrutiny. Discounting the Court's argument that the ban was aimed at the secondary effects of nude dancing — increased sex crimes, for example — Justice Stevens wrote that the Court held, for the first time, that such effects "may justify the total suppression of protected speech."

What seems clear from the Court's opinion in Erie — as well as earlier nude dancing cases — is that the justices are willing to allow certain types of expressive conduct to be regulated because the conduct is not expressive, but because they like the message the conduct is communicating.

Government Speech v. Public Forums

Three flagpoles stand in Boston's City Hall Plaza. On one flies the United States flag; on a second, it flies the flag of the Commonwealth of Massachusetts; on the third, it flies Boston's flag. Sometimes, however, Boston allows private groups to fly their flags on the third flagpole. But it didn't allow a Christian organization to do so, afraid that it would be violating the Constitution's Establishment Clause. The leader of the group, Harold Shurtleff, filed suit, alleging that the city was violating the group's First Amendment rights. The city was denying access to the group because of its message.

A lower federal court latched onto the government-speech doctrine, however, in ruling that Boston did nothing wrong. The doctrine holds that when the government speaks, the First Amendment is not implicated — a government is free to say what it wants.

The Supreme Court did not agree, finding that the flagpole raising program does not express government speech. In addition, "When the government encourages diverse expression, the First Amendment prevents it from discriminating against speakers based on their viewpoint,"

That's what Boston did, the Court held, by denying Shurtleff's group access to the flagpole.

SPEECH AS CONDUCT

Thus far, this discussion has centered on conduct that takes on the role of speech, that is, conduct that is expressive. Another area of law with which the Court has wrestled is the regulation of speech that takes on additional characteristics, that is, when the speech takes on the role of conduct. This occurs with fighting words, threatening speech, intimidating speech and, to a lesser degree, picketing.

Threatening Speech

Fighting words are words that are so vile or obnoxious that they are likely to prompt a physical reaction. For example, what might happen if, during a hotly contested football game between two bitter rivals — say the University of Virginia and Virginia Tech — a Tech fan wandered into the U.Va. student section wearing a sweatshirt that read "F*** the Cavaliers"?

The result might seem obvious, and the example is not as far-fetched as it might first appear. In 1968, Paul Robert Cohen walked into the Los Angeles County Courthouse wearing a jacket bearing the slogan "F*** the draft." He was arrested and con-

unless they were aimed at a member of one of the specified clas-ses. It would be acceptable under the ordinance, the Court ruled, to use fighting words against someone based on political affiliation, union or non-union membership or sexual prefer-ence: "The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on dis-favored subjects." The Court recognized that the conduct was reprehensible but ruled that the subject was being unconstitu-tionally punished under an ordinance that advanced what amounted to viewpoint discrimination.

Revisiting the issue of cross burning during its 2002-03 term, the Supreme Court carved out a new category of speech that is not protected by the First Amendment — intimidation. In *Vir-ginia v. Black*, it held that when cross burning achieves the sta-tus of intimidating speech, it can be proscribed and punished, but the Court also held that not all instances of cross burning are intimidating. It found a Virginia state law to be unconstitu-tional because, in addition to banning cross burning that is de-signed to intimidate "any person or group," the law stated that the act of burning a cross was *prima facie* evidence of an intent to intimidate. The clause making cross burning automatically intimidating, the Court held, also made the law unconstitution-al. While cross burning can be "a particularly virulent form of intimidation," Justice Sandra Day O'Connor wrote for the ma-jority, and it always can be considered "a symbol of hate," it has also been used to communicate "messages of shared ideology." Therefore, to be proscribed, cross burning must cross the line from being a symbol representing some ideology, celebration or ritual and must become intimidating.

The Court had previously indicated that, in addition to fighting words, speech that constituted what it called a "true threat" could be proscribed. Some scholars and advocates had rgued that cross burning constituted threatening speech. The ourt in *Virginia v. Black* agreed and held that intimidating eech as a type of threat could be proscribed and punished. ote Justice O'Connor: "Intimidation in the constitutionally cribable sense of the word is a type of true threat, where a er directs a threat to a person or group of persons with the of placing the victim in fear of bodily harm or death." Court did not elaborate on what kinds of speech might be ting, what the distinctions are between intimidating nd true threats or how lower courts can make such de-ons. But that is the way of the Court. Because it only uestions put to it, the process of establishing tests can l arduous. The Court, for example, held in 1957 that mendment does not protect obscenity, but it was a majority of the Court agreed upon a test for ob-Court has taken similar paths in the area of ex-uct[4] and commercial speech.

ears, however, before the Court develops a test for determining when speech in general and cross b ticular become intimidating, if it ever does. Indeed has already turned down one request to expand the called intimidating speech. The Seventh U.S. Circ Appeals cited *Virginia v. Black* in denying First A protection to a prison inmate's statements that he bomb a federal office building in Milwaukee. The er, rather than recognizing that Justice O'Connor intimidating speech as unprotected, reported that tablished a new definition of "true threats." It rejected ernment's argument that the inmate's discussion of bombing of a federal building was either a true threat dating speech under *Virginia v. Black*, and the Supre refused to hear the case.

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d in footnote 1.

Picketing

The Court has recognized that picketing is a time method of expressing a message, particularly among peo cannot afford to publish their complaints or are focused row problems. Therefore, the Court has granted picketers protection, still balancing their rights against those of ot dividuals and against public peace and safety. It has h peaceful picketing cannot be licensed, that restrictions eting must be content-neutral and that picketing can banned from public property.

One of the Court's most important rulings on picketing near the middle of the twentieth century in *Thornhill v. Ala-bama*. In striking down Alabama's statute prohibiting pi a place of business, the Court noted that freedom of speech press "are among the fundamental personal rights and lib which are secured to all persons" by the Constitution and picketing is one of the activities that "may enlighten the p on the nature and causes" of public debate.

The rights of individuals to picket or distribute inform often depend upon where the picketing occurs and the ra behind government regulations restricting the picketing. Pi ing in an area designated a public forum — like a park or walk — is almost always protected, if the picketing is pea and if it does not interfere with other valid uses of the pub rum. Even in the absence of a public forum, the Court has that absolute bans on First Amendment activity — incl picketing — may be unconstitutional because the govern cannot justify such bans.

The Court reaffirmed the constitutional protections for p eting on public property in 2011. *Snyder v. Phelps* involved tentional infliction of emotional distress, but the Court did decide the case on that issue. Instead, it held that member the Westboro Baptist Church of Topeka, Kansas, had a cons tutional right to protest at the funeral of a serviceman killed the line of duty because their speech involved matters of pu concern and because the protest took place on public prope

victed of violating that portion of the California Penal Code that prohibited maliciously and willfully disturbing the peace or quiet of any neighborhood or person by offensive conduct.

The Supreme Court, however, found that the conduct was speech and was protected. Three justices disagreed. Harry Blackmun, Warren Burger and Hugo Black argued, in a dissent drafted by Blackmun, that "Cohen's absurd and immature antic ... was mainly conduct and little speech." They said Cohen should have found another way of expressing his opinion.

In the majority opinion, however, Justice John Marshall Harlan pointed out the importance of the emotive as well as the cognitive force of speech:

> We cannot overlook the fact, because it is well illustrated by the episode involved here, that much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for the emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.

Even though the Court found Cohen's "absurd and immature antic" to be protected speech, the antic demonstrates the type of speech that can take on the role of conduct: The words become like actions. A person willing to respond to the words with physical violence could have confronted either Cohen or the reckless Virginia Tech football fan.

The Court first recognized the so-called "fighting words" doctrine in 1942 in *Chaplinsky v. New Hampshire*. A Jehovah's Witness was arrested for calling a police officer a "damned fascist" and a "God damned racketeer." The Court upheld the conviction, calling the verbal assault an attack of fighting words, that is, words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." Such utterances, the Court said, "are no essential part of any expression of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interests in order and morality."

Not only must the words be particularly violent or obnoxious, they must be aimed directly at an individual for the fighting-words doctrine to apply, as the Court demonstrated seven years later in *Terminiello v. Chicago*. A well-publicized speech by a right-wing anti-Semite was met by a crowd of protesters, some of whom were able to break into the meeting hall where the speech was held. The speaker, Arthur Terminiello, repeatedly referred to the protesters as "scum" or "slimy scum." The speech so stirred members of the crowd that police feared unrest. Like Walter Chaplinsky, Terminiello was convicted of breaching the peace by using language that would stir the public to anger. In Terminiello's case, however, the Court reversed. Justice William O. Douglas, in one of his few free-speech majority opinions, wrote that free speech is designed to invoke dispute:

> It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute ... is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. There is no room under our Constitution for a more restrictive view.

What's the difference in the two cases? Among other things, *Terminiello* did not involve a face-to-face confrontation. In an important lower court case, the Illinois Supreme Court upheld the rights of neo-Nazis to march in Skokie, Illinois, displaying the swastika, which an appellate court ordered removed because of the fighting-words doctrine. The state supreme court recognized, however, that the march removed the speech from that one-on-one dialogue to a more abstract insult. Ironically, after winning the right to march in Skokie, the neo-Nazis never did.

The confrontational nature of language has been important to the Supreme Court as well. The Court has consistently struck down as vague and overbroad state laws prohibiting the use of abusive, menacing, insulting or profane language, if those statutes had not been narrowed by state courts to focus on fighting words. Though the Court has upheld convictions for the use of abusive language when there was a threat of a riot, the threat must be relatively direct. A speaker's shout that "We'll take the f***ing streets," for example, was found not to be fighting words, nor did it tend to incite a riot, because the speaker was obviously not referring to an imminent action, but, rather, to some possible future action.

The Court has faced few fighting words cases, but did so in 1992. In *R.A.V. v. St. Paul*, it held that a conviction for burning a cross in the yard of an African-American couple who had moved into a predominantly white neighborhood could not stand under the fighting-words doctrine. The cross that the juvenile burned didn't cause much of a fire — it was made from broken chair legs — but the Minnesota Supreme Court said the act amounted to fighting words. It upheld the conviction for violating a city ordinance prohibiting the burning of a cross, the placing of a Nazi swastika, or other similar action for the purpose of arousing anger, alarm or resentment "on the basis of race, color, creed, religion or gender."

The Supreme Court reversed. It said St. Paul could prohibit fighting words but that the ordinance allowed fighting words

To determine whether those speeches incited violent action, the Court applied a test it established in 1969 in *Brandenburg v. Ohio*. The test has three parts: (1) whether a speaker intended to incite violence, (2) whether such violence was imminent, and (3) whether resulting violence was likely.

Very few speeches have met the Brandenburg Test.

On January 6, 2021, however, Donald Trump delivered a speech to a crowd of protestors who minutes later stormed the U.S. Capitol. The riot caused property damage, injury and death. Application of the Brandenburg Test to Trump's speech demonstrates that it might be a textbook example of speech that did, in fact, incite a riot.

(1) To demand that a group take violent action is clear evidence of intent to incite, but courts have recognized other ways intent can be demonstrated. Trump claimed some fifteen times that the presidential election was rigged and some six times wondered whether Vice President Mike Pence would act to save the election; he said that "we're going to fight like hell" to ensure that the rigged election would be overturned; he encouraged the crowd to walk down Pennsylvania to the Capitol. All this, and more, was directed at an already riled crowd. For weeks, the language of insurrection had been used on social media to encourage participation in the rally. Many persons who attended the rally said they were there because Trump wanted them to show up to take action. In such a volatile environment, even neutral-sounding words could prompt violence, demonstrating intent. The Court has held that context in such situations "is all important," and that intent can be determined by a "rational inference from the import of the language."

(2) Trump's exhortation that the crowd walk to the Capitol, and his promise that he would join them, though he didn't, satisfies the imminence requirement of the Brandenburg Test. In addition, violent mayhem erupted shortly after Trump's speech.

(3) The likelihood element of *Brandenburg* is satisfied because there was, indeed, a violent response to the speech. The Court held that without lawless action, appeals for violence "must be regarded as protected speech." There are dozens of examples of rioters saying they were acting at then-President Trump's direction. Playing into that atmosphere is clear evidence of likelihood.

Application of the Brandenburg Test to Trump's speech, therefore, indicates that Trump intended a violent insurrection and that was, indeed, the result of the speech. Whether he will ever be held accountable is another question.

RECENT CASES

Some recent Supreme Court cases demonstrate the complexities of expressive conduct.

Campaign Paraphernalia & Polling Places

The Supreme Court recently expanded the expressive voters have in and around polling places. In 1962, upheld a Tennessee law prohibiting the display of terials within 100 feet of polling places.

In 2018, however, the Court struck down a Minnesota that prohibited anyone, including voters, from wearing buttons or other campaign paraphernalia inside polling A state, the Court held in *Minnesota Voters Alliance et al. sky et al.*, may prohibit certain apparel in polling places "must draw a reasonable line," and the Minnesota law do so. It fails to define the word "political" in the statute has provided only "haphazard interpretations" of what may not be acceptable. The statue, therefore, is not "capable reasoned application."

License Plates and Symbolic Speech

The Supreme Court determined Paul Robert Cohen's display words to be a form of conduct. Similarly, other courts have termined the obscuring of words also to be a form of conduct.

In 1974, George Maynard, a Jehovah's Witness living in Hampshire, was charged under state law with obscuring words "Live Free or Die" on his license plate. Maynard said found the slogan violated his faith, and, therefore, he objected being forced to advocate that message. A federal three-judge district court found Maynard's action to be symbolic speech. The Supreme Court did not resolve the symbolic speech question but found that Maynard could not be required by the government to advocate a message with which he disagreed.

Speech by means of license plate returned to the Supreme Court — in a different context — in its 2015 term.

When the Texas Division of the Sons of Confederate Veterans was refused its request for a specialty license plate displaying the Confederate Battle Flag, it filed suit claiming its First Amendment free speech rights had been violated. Members of the group argued that the license plate would constitute private speech — the speech of those who purchased and displayed it — and the refusal by the state amounted to constitutionally forbidden viewpoint discrimination. The Court, however, ruled that the issuance of specialty license plates constituted government speech and ruled for the state. "When government speaks it is not barred by the Free Speech Clause from determining the content of what it says," the Court held in a 5-4 opinion.

The cases are very different. One involves speech a private individual is required — or not required — to display. The other involves the murky area of government speech. They demonstrate, however, the continuing complexity of the issue of speech as conduct.

"Simply put," Chief Justice John Roberts wrote for the Court, "the church members had the right to be where they were." Under the Court's ruling, the right to picket on public property trumped the right of a private person to be free from verbal attacks that cause severe emotional distress.

The Court, however, let stand a ruling that limited picketing activities near Saint John's Church in the Wilderness, in Denver. The church was successful in seeking an injunction that prohibited anti-abortion picketing that inhibited worship services. In addition to their shouting, picketers displayed placards that contained pictures of aborted fetuses. The Colorado Court of Appeals distinguished the case from *Snyder* because, the court found, the disturbance caused by the picketers interfered with the church's worship services. The court upheld most of the restrictions, and the Supreme Court denied certiorari.

Politics have often intruded upon the Supreme Court's adjudications related to picketing. Some examples are:

• *Picketing the Supreme Court building.* While the Court has ruled that picketing on the public sidewalks around the Court building is constitutionally protected, that protection does not apply to the adjacent plaza and grounds. The Court held in *United States v. Grace*, a 1983 case, that restrictions on picketing on the public sidewalks are unconstitutional. In 2013, however, the Marshal of the Court, with the approval of Chief Justice Roberts, banned picketing on the grounds. A federal circuit court upheld the restriction in order to maintain a tranquil environment around the Supreme Court building and to preserve the appearance of a judiciary immune to public pressure.

• *Picketing abortion clinics.* The Court has balanced the free-speech rights of persons who picket abortion clinics with the rights of women who want abortions to have free access to the clinics. The Court upheld the use of zones in which picketing could be banned but held that 300-foot buffer zones were unreasonable and burdened more speech than necessary to serve the government's interest in guaranteeing the free flow of traffic. It also held that a so-called "floating buffer zone" requiring pickers to stay at least fifteen feet from people or vehicles entering leaving the clinics violated the First Amendment because it urburdened speech. In 2014, the Court continued that balanc- approach. In *McCullen v. Coakley*, it struck down as over- d a thirty-five-foot buffer zone around abortion clinics from h individuals were categorically excluded unless they were ling through those zones to reach an abortion clinic or other establishment. The Court ruled that the law estab- g the zone failed the intermediate scrutiny test and un- tutionally restricted the speech rights of persons who d to communicate with potential patients.

keting military bases. The Court has allowed the military rict picketing and the distribution of literature on mili- ses — even those portions of the bases open to the pub-

• *Picketing the homes of Supreme Court Justices.* In May 2022, an opinion apparently written by Justice Samuel Alito condemning abortion and the Court's holding in *Roe v. Wade* was leaked to the media. While the holding in the draft was unsurprising, the almost virulent language of Justice Alito's opinion was. The protest against the Court that followed included picketers showing up outside the homes of Justice Alito and two of the four justices who joined the draft opinion, John Roberts and Brett Kavanaugh. (Neil Gorsuch and Amy Coney Barrett were the other two joiners.) The pickets caused a mini-debate over whether such activity is proper. The federal government and Virginia, where Justice Alito lives, have statutes prohibiting such picketing, though their constitutionality is questionable. Indeed, the Court, in *Snyder v. Phelps*, upheld protests at a funeral because, it held, the protesters were focused on matters of public concern and were not involved in activity that violated the law — they were where they had a right to be. The streets and sidewalks have long been held to be public forums. If the picketers crossed onto private property, that is more problematic. Often, however, even the private property rights of individuals and corporations must give way when individuals choose to express themselves by picketing. While the Court has recognized that owners have certain rights over their property, when the property is used for a public purpose and when it's obvious that the picketers are expressing their own viewpoints and are not speaking for the property owners, the Court has allowed picketing on private property.

The Court has also held that towns may not restrict access to private homes to disseminate information. The Village of Stratton prohibited persons from distributing information door-to-door without first receiving a "Solicitation Permit." Apparently the issuance of the permit was *pro forma*, but the Jehovah's Witnesses of New York complained that the application process infringed their First Amendment rights. The Court agreed, ruling in 2002 that persons engaging in door-to-door advocacy could not be required to identify themselves through an application and permit procedure.

Inciting Violent Action

If speech can be punished for taking on the role of action, it follows that speech that incites violent action can also be punished. And it can. The Court has established a high hurdle, however, that has rarely been cleared. For example, the Court held that a passionate speech in which a civil rights leader promised Blacks who patronized white-owned businesses that "we're gonna break your damn necks" was insufficient for liability in a legal action. Similarly, a promise by the leader of a group of civil rights protesters being dispersed from downtown streets that they would return and "take the f***ing streets later" did not amount to inciting imminent lawless action.

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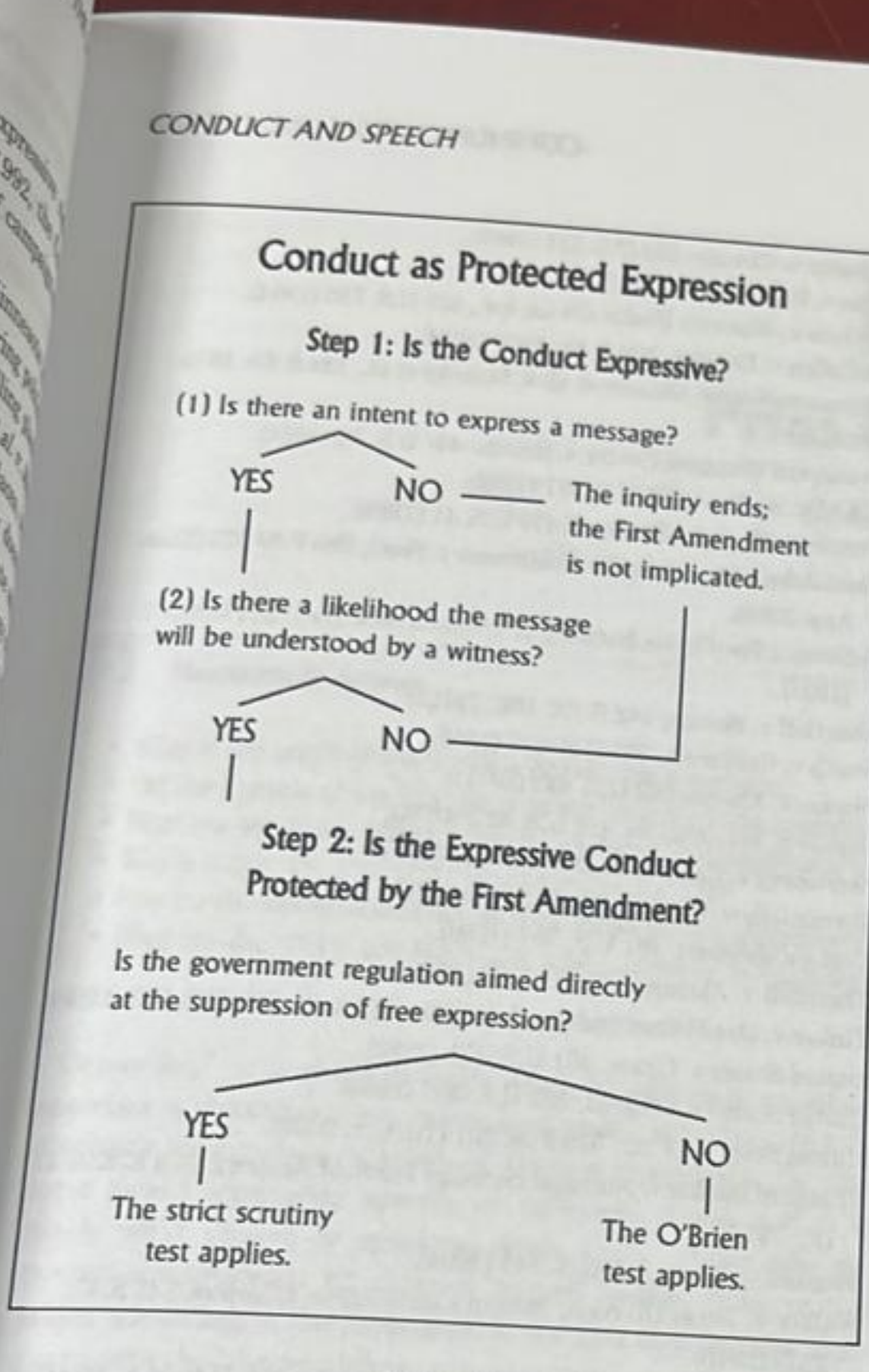

Figure 5

SUMMARY

The speech/conduct conundrum consists of parallel issues: conduct that takes on the role of speech and speech that takes on the role of conduct.

Based on *United States v. O'Brien, Texas v. Johnson* and other Supreme Court cases, the Court has established a carefully delineated course in dealing with expressive conduct. That course is described in Figure 5.

In traveling that course, the Court must answer some specific questions.

Is the conduct expressive? The conduct is expressive if there is an intent to express a message and if there is a likelihood the message will be understood. If there is either no intent or no likelihood of understanding, the conduct is not expressive, the First Amendment is not implicated, and the inquiry is over. If the conduct is expressive, however, the inquiry continues.

Is the expressive conduct protected? The path to determining whether conduct is protected begins with the rationale behind the government regulation. The Court first determines whether the regulation is aimed directly at speech. If it is, the Court applies a strict scrutiny test by asking two questions: (1) Does the regulation advance a compelling government interest? and (2) Is the regulation necessary and narrowly tailored? If the answer to either question is no, the regulation is unconstitutional. If the answer to both questions is yes, the regulation is constitutional.

If the Court finds that the regulation is not aimed specifically at speech, it applies a test of intermediate scrutiny, called the "O'Brien Test," to determine whether the regulation is constitutional. Under the test, a regulation is required to meet four points: (1) The activity regulated must be within the constitutional power of the government; (2) the regulation must advance an important government interest; (3) the government interest must be unrelated to the suppression of free expression; and (4) the incidental restriction on speech must be no greater than necessary to advance the government interest.

Just as conduct can take on the role of speech, speech can sometimes become like conduct. Words can be so vile or obnoxious that they prompt a physical response. Courts allow such words to be regulated but take care to ensure that governments don't trammel free expression in their efforts to protect other individual rights. Statutes prohibiting offensive or abusive language, for example, have routinely been held to be unconstitutional unless they have been narrowed so they only prohibit fighting words. In addition, the Supreme Court has ruled that intimidation is a category of what it calls "true threats" and may be banned.

Finally, courts have recognized the value of picketing and have allowed individuals to picket on both private and public property. Picketing in areas traditionally held to be a public forum is almost always allowed. Picketing on private property is more problematic, but the Supreme Court has often allowed such picketing.

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