THE FUTILE SEARCH FOR ALTERNATIVE MEDIA IN SYMBOLIC SPEECH CASES

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In 1966, David O'Brien stood on the steps of the South Boston Courthouse and burned his draft card to communicate his opposition to the draft and the Vietnam War. A central part of the government's argument against him in *United States v. O'Brien*[1] was that alternative means of communication were available for the expression of dissent.[2] Although the Supreme Court did not address the question of alternatives, the decision attached minimal significance to the medium. Justice Harlan's concurring opinion addressed the question, concluding that O'Brien "could have conveyed his message in many other ways than by burning his draft card."[3] In the 1980s the Supreme Court made the existence of alternative means of communication part of its analysis in content-neutral symbolic speech cases.[4]

In cases where the medium is the message, any inquiry into alternatives rests on the false perception that messages can be surgically separated from their media.[5] Alternative means of communi-

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1. 391 U.S. 367 (1968).

2. See notes 44-47 and accompanying text.

3. 391 U.S. at 389 (Harlan, J., concurring).

4. See, e.g., *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) (noting the similarity between the *O'Brien* test for content neutral regulations and the time, place and manner test, and applying a hybrid test). For criticism of the hybrid *O'Brien* time, place and manner test in settings other than symbolic speech cases, see David S. Day, *The Hybridization of the Content-Neutral Standards for the Free Speech Clause*, 19 Ariz. St. L.J. 195 (1987).

5. The premise that laws affecting media do not affect messages is a fundamental aspect of the Court's time, place and manner doctrine. See generally William E. Lee, *Lonely Pamphleteers, Little People and the Supreme Court: The Doctrine of Time, Place, and Manner Regulations of Expression*, 54 Geo. Wash. L. Rev. 757 (1986). Although a prohibition of a medium may be facially content-neutral, it could have a discriminatory impact on certain messages. See id. at 764-71.

Some commentators have recently suggested a heightened role for assessment of the suitability of alternative means of communication. See R. George Wright, *The Unnecessary Complexity of Free Speech Law and the Central Importance of Alternative Speech Channels*, 9 Pace L. Rev. 57 (1989); Note, *Motivation Analysis in Light of* Renton, 87 Colum. L. Rev. 344 (1987). While some aspects of alternative media, such as cost, are readily compared, this article argues that symbolic media involve factors, such as ability to convey emotion, that

cation, such as words, often lack the communicative power of symbolic actions such as flag burning. Additionally, the theoretical availability of alternative media is of little value to those who lack the skill or resources to use those media.

This article advocates that the Court disregard the existence of alternative channels of communication when assessing content-neutral prohibitions of symbolic media. This change would require the Court to treat the prohibition of a symbolic medium as a serious restriction on communicative opportunities rather than as a slight burden. The argument here is not that all methods of symbolic communication are protected. Rather, the argument is that the Court should recognize the importance individuals attach to the selection of a method of expression. First amendment doctrine should presume that individuals know best both what to communicate and how to communicate it.

To ask merely whether alternatives exist accomplishes nothing, because the answer will always be yes unless the government has banned all methods of communication. To ask whether the alternatives are "adequate" opens an inquiry into the capacity of various media to convey emotion and other highly nuanced and elusive aspects of symbolic speech. The Court has addressed similar issues in the context of words: some of the Court's answers provide a useful perspective for symbolic speech cases, and some answers reveal the difficulty of even posing the question of alternatives.

In *Cohen v. California*[6] the Court overturned a conviction for the use of a particular word to express opposition to the draft. Justice Harlan, writing for the Court, understood the communicative importance of certain words. He wrote, "[W]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process."[7] Even though other words could be used to convey what Justice Harlan called "cognitive content," a particular word may be unique

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make comparison of alternative media exceptionally difficult. In symbolic speech cases, inquiries into the suitability of alternative media will be highly arbitrary and most likely will depend largely on judgments about whether use of a particular form of expression should be protected.

6. 403 U.S. 15 (1971).

7. Id. at 26. Professor White believes that certain words "do not operate in ordinary speech as restatable concepts but as words with a life and force of their own. They cannot be replaced with definitions . . . for they constitute unique resources, of mixed fact and value, and their translation into other terms would destroy their nature." James Boyd White, *When Words Lose Their Meaning* 11 (U. Chi. Press, 1984).

In other settings, Justice Harlan was quite comfortable with the examination of the availability of alternative media. See, e.g., *United States v. O'Brien*, 391 U.S. 367, 388-89 (1968) (Harlan, J., concurring); *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760*, 377 U.S. 58, 93 (1964) (Harlan, J., dissenting).

in conveying "otherwise inexpressible emotions . . . which, practically speaking, may often be the more important element of the overall message sought to be communicated."[8] The advantage of Justice Harlan's view is that it avoids the intractable assessment of the suitability of alternatives. Surely the judiciary is ill-equipped to inquire into both the cognitive and emotive nuances of words. By treating a communicator's selection of the form of expression and the message equally, Justice Harlan's approach places the issues in a speech protective framework.

In *FCC v. Pacifica Foundation*[9] the Court upheld restrictions on indecent broadcast speech. Justice Stevens's majority opinion claimed that the regulation would affect "the form, rather than the content, of serious communication. There are few, if any, thoughts that cannot be expressed by the use of less offensive language."[10] Justice Stevens' approach will never protect speech because it allows the Court to treat the burden on expression as slight. Also, it allows the Court to disregard the link between the medium and the message. Justice Brennan's dissent, though, reflected the perspective stated in *Cohen*. He believed that words cannot be readily separated from ideas and that "[a] given word may have a *unique* capacity to capsule an idea, evoke an emotion, or conjure up an image."[11]

The looseness of defining "adequate" alternatives is shown in

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8. 403 U.S. at 26. See also *Beauharnais v. Illinois*, 343 U.S. 250, 286 (1952) (Douglas, J., dissenting) ("Emotions sway speakers and audiences alike."). Linguists distinguish between the symbolic and emotive use of words. Professors Ogden and Richards wrote: "The symbolic use of words is *statement*; the recording, the support, the organization and communication of references. The emotive use of words is a more simple matter, it is the use of words to express or excite feelings and attitudes." Charles Kay Ogden & Ivor Armstrong Richards, *The Meaning of Meaning* 149 (Harcourt, Brace, & Co., 10th ed. 1949). They acknowledge that both functions are subtly interwoven. Id. at 150.

9. 438 U.S. 726 (1978).

10. *Id.* at 743 n.18. The broadcast in *Pacifica* was George Carlin's "Seven Dirty Words" in which the comedian used indecent language to satirize contemporary attitudes about certain words. It is difficult to conceive how Carlin could have made his point without using the offensive words. Professor Quadres notes that Carlin's monologue is "one of the best examples of . . . form and message, totally merged." Harold Quadres, *The Applicability of Content-Based Time, Place, and Manner Regulations to Offensive Language: The Burger Decade*, 21 Santa Clara L. Rev. 995, 1037 (1981).

11. 438 U.S. at 773 (Brennan, J., dissenting) (emphasis added). Similarly, Justice Brennan recently described boycotts as a special form of communication because of the ability to convey unique emotional messages. He wrote,

> The passive nonviolence of King and Gandhi are proof that the resolute acceptance of pain may communicate dedication and righteousness more eloquently than mere words ever could. A boycott, like a hunger strike, conveys an emotional message that is absent in a letter-to-the-editor, a conversation with the mayor, or even a protest march.

FTC v. Superior Ct. Trial Lawyers Ass'n, 110 S. Ct. 768, 789-90 (1990) (Brennan, J., concurring in part and dissenting in part).

San Francisco Arts & Athletics, Inc. v. United States Olympic Committee,[12] where the Court upheld a permanent injunction prohibiting the petitioner from describing an athletic competition and related events as the "Gay Olympics." To the Court, the restrictions on "Olympic" merely affected a manner of communication and not a message.[13] The Ninth Circuit found that the SFAA had "satisfactory" alternative means of communication, although it did not present any analysis of the substitutes.[14] The Court merely noted that the SFAA held its athletic event under the name "Gay Games," evidently assuming that the substitute was adequate.[15] But Judge Kozinski and Justice Brennan regarded the availability of alternatives as irrelevant. Judge Kozinski wrote in dissent: "To say that the SFAA could have named its event 'The Best and Most Accomplished Amateur Gay Athletes Competition' no more answers the first amendment concerns here than to suggest that Paul Robert Cohen could have worn a jacket saying 'I Strongly Resent the Draft.' "[16] Justice Brennan's dissent stated that translations never fully capture the sense of the original and that the first amendment protects more than the right to a mere translation.[17]

SFAA and *Pacifica* should be viewed in context: the former is a commercial speech case and the latter involved broadcasting. The Court regards first amendment interests in both settings to be reduced. Both cases can easily be set aside as precedents for cases where the symbolic speech addresses political issues, a subject matter the Court regards as at the core of first amendment protection.[18] *Cohen*, therefore, sets the appropriate framework for symbolic speech cases involving political speech. *Cohen* raises a provocative question for symbolic speech: if prohibition of a particular word

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12. 483 U.S. 522 (1987).

13. Id. at 536.

14. *Int. Olympic Com. v. San Francisco Arts & Athletics*, 781 F.2d 733, 737, reh. den. 789 F.2d 1319 (9th Cir. 1986). The Ninth Circuit stated, "Because SFAA had satisfactory alternative means for expressing its opposition to the Olympics, it has no First Amendment right to use 'Olympics' or the Olympic symbols to promote its games or products." Id. The mere assertion of the availability of alternatives is common in symbolic speech cases. See, e.g., *United States v. Ferguson*, 302 F. Supp. 1111, 1114 (N.D. Cal. 1969) (message could have been conveyed in many ways other than burning the flag).

15. 483 U.S. at 536.

16. 789 F.2d at 1321 (Kozinski, J., dissenting from denial of rehearing *en banc*).

17. 483 U.S. at 569-70 (Brennan, J., dissenting).

18. See, e.g., *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966) (there is practically universal agreement that a major purpose of the first amendment was to protect the free discussion of governmental affairs). Of course, the first amendment's protection is not limited to political speech. See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 231 (1977) (cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters is not entitled to full first amendment protection). The point is that cases such as *O'Brien* raise considerations wholly apart from those in cases such as *SFAA* and *Pacifica*.

creates the risk of suppressing an idea, does not a prohibition of a particular symbolic behavior also create the risk of suppressing an idea?

In symbolic speech cases where the Court finds that the government is regulating content, the availability of alternatives is either not discussed—and by implication considered to be insufficient to justify the restriction[19]—or it is explicitly rejected as a justification of the law.[20] Under either approach, the result is the same; the Court does not allow the possibility of alternative media to alter the presumed invalidity of content-based regulations.

Texas v. Johnson[21] illustrates the Court's approach to the question of alternative media in the context of content-based restrictions. The state claimed that the flag was a unique symbol and that the statute was necessary to prevent dilution of the flag's symbolic value,[22] but also asserted that alternative means of communication remained open for political dissent.[23] The respondent claimed that the statute selectively relegated to other media only those who express viewpoints in opposition to the state's view of the flag.[24] Justice Brennan noted that the Court's hostility to content regulation "is not dependent upon the particular mode in which one chooses to express an idea."[25] Further, the availability of alternative means of communication was insufficient to justify the law.[26]

In his dissent, Chief Justice Rehnquist characterized the flag as a unique symbol[27] but nonetheless claimed that flag burning "conveyed nothing that could not have been conveyed and was not conveyed just as forcefully in a dozen different ways."[28] The Chief Justice's claim, like that of the state, contradicts itself because if the flag is unique, then by definition other forms of communication cannot be as "forceful" as flag burning. Granted, Johnson was free to

19. See, e.g., *Tinker v. Des Moines Ind. Community School Dist.*, 393 U.S. 503 (1969) (prohibition on armbands was designed to suppress views opposing American involvement in Vietnam).

20. See, e.g., *Spence v. Washington*, 418 U.S. 405, 411 n.4 (1974) (rejecting state court's claim that the inhibition on expression was minuscule because many alternative media could be used).

21. 491 U.S. 397 (1989).

22. Texas v. Johnson, 491 U.S. 397 (1989) (Brief for Petitioner at 20, 27).

23. Id. at 40.

24. Johnson, 491 U.S. 397 (Brief for Respondent at 13 n.14).

25. 491 U.S. at 416. To the majority, the case was similar to *Schact v. United States*, 398 U.S. 58 (1970) where the Court invalidated a federal statute that permitted actors to wear military uniforms only if the portrayal did not discredit the armed forces.

26. 491 U.S. at 416 n.11.

27. Id. at 422 (Rehnquist, C.J., dissenting). President Bush, who favored a constitutional amendment to protect the flag, continually emphasized the flag's uniqueness. See, e.g., 26 Weekly Comp. Pres. Doc. 938 (June 12, 1990).

28. 491 U.S. at 431.

use verbal slogans, but Chief Justice Rehnquist offered no standards or guidelines to explain how he concluded that such slogans conveyed Johnson's message—both the cognitive and the emotional[29]—as forcefully as flag burning. Chief Justice Rehnquist's perception of flag burning as an "inarticulate grunt" that was "no essential part of any exposition of ideas"[30] is more accurately seen as reflecting his belief that the flag should have special protection than as an assessment of the communicative forcefulness of flag burning.

Both the United States and the appellees in *United States v. Eichman*[31] agreed that the flag was unique. The United States argued that the importance of preserving the flag's symbolism warranted placing flag burning outside the protection of the first amendment. This would not harm freedom of expression because alternative means of expression, such as words, remained available.[32] To the appellees, however, the flag's symbolic significance made the impropriety of restricting its use even more apparent.[33] Flag burning was regarded as an "indispensable" means of rejecting forced patriotism,[34] and as a way of leaping across language barriers to indict the government internationally for its oppression.[35]

The Court rejected the government's invitation to reconsider flag burning as fully protected expression and consequently did not address the relevance of the availability of alternative means of expression. In dissent, however, Justice Stevens suggested that prohibitions on certain methods of communication were justified if (1) supported by a interest unrelated to suppression of specific ideas; (2) the speaker could use other means to express those ideas; and (3) the speaker's interest in using a particular means of communication was less important than the interest supporting the prohibition.[36] The first point concerns facial viewpoint neutrality, a factor Justice Stevens finds highly significant.[37] While the Flag Protection Act of

29. In *Smith v. Goguen*, 415 U.S. 566 (1974), he acknowledged the "deep emotional feelings" the flag arouses. Id. at 602 (Rehnquist, J., dissenting).

30. 491 U.S. at 431-32.

31. 110 S. Ct. 2404 (1990).

32. *United States v. Eichman*, 110 S. Ct. 2404 (1990) (Brief for the United States at 45). At oral argument the government claimed that robust, uninhibited debate was unimpeded. *Eichman*, 110 S. Ct. 2404 (1990) (Transcript of Oral Argument at 48).

33. Eichman, 110 S. Ct. 2404 (Brief for Appellee Strong at 31-32).

34. Eichman, 110 S. Ct. 2404 (Joint Appendix at 53) (declaration of David Blalock).

35. Id. at 47-48 (declaration of Shawn Eichman).

36. 110 S. Ct. at 2410 (Stevens, J., dissenting).

37. See e.g., *Texas v. Johnson*, 491 U.S. 397, 438 (Stevens, J., dissenting) (claiming that flag statute does not facially single out particular viewpoints); *Young v. American Mini Theatres*, 427 U.S. 50, 86 (1976) (Stevens, J., dissenting) (zoning ordinance is viewpoint neutral).

1989[38] did not single out viewpoints such as opposition to racial discrimination, it punished acts associated with disrespect for the flag and one's view of the flag is a viewpoint.[39] The second and third inquiries are more relevant to the purpose of this article. The second inquiry accomplishes nothing: as noted above, unless all other forms of expression have been banned, there will always be alternatives. To ask whether the alternatives are adequate is not a satisfactory question either. Both the definition and identification of adequacy are value laden and question begging. Adequacy can be defined according to hidden or underlying principles. For example, if one believes that the first amendment protects messages to a greater extent than it protects the choice of a medium,[40] another medium will be adequate even though the communicator must sacrifice some intensity or communicative impact. Even if one believes that the alternatives must not result in diminished communicative impact,[41] the comparison of the communicative impact of various forms of speech is a highly elusive task.[42] Justice Stevens proposed no definition of adequacy, nor did he elaborate the factors to be studied when determining adequacy.[43]

Justice Stevens admitted that critical inquiry was really the third point: a balance of the individual's interest in using the flag against the importance of the symbol. This inquiry, however, is

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

39. *Johnson*, 491 U.S. at 413 n.9. One of the reasons the *Eichman* appellees burned flags was to protest "forced patriotism." Joint Appendix at 53 (declaration of David Blalock).

40. Cf. *Adderley v. Florida*, 385 U.S. 39, 47-48 (1966) (people do not have a constitutional right to speak whenever and however and wherever they please); *Cox v. Louisiana*, 379 U.S. 536, 554 (1965) (the rights of free speech and assembly do not mean that everyone with opinions to express may address a group at any public place and at any time).

41. But see Irving R. Kaufmann, *The Medium, the Message and the First Amendment*, 45 N.Y.U. L. Rev. 761, 773 (1970) ("[a]ll media cannot convey all messages with equal force").

42. See C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. Rev. 964 (1978). Professor Baker is also critical of the absence of criteria for measuring the adequacy of different forms of expression. He adds,

> Judges (as arms of the state), particularly given that judges are drawn almost exclusively from the dominant classes in society, will normally find that the dissidents have had adequate opportunity and that they have lost in the debate because their position is unpersuasive. In other words, state determination of adequacy will usually favor the status quo.

Id. at 987.

43. Justice Stevens acknowledged that some media may be less effective in drawing attention, 110 S. Ct. at 2411 (Stevens, J., dissenting), but this does not address all of the reasons why communicators select a particular medium. For a discussion of factors motivating selection of a form of symbolic speech, see Howard M. Friedman, *Why Do You Speak That Way? Symbolic Speech Reconsidered*, 15 Hastings Const. L.Q. 587 (1988).

heavily dependent upon one's view of the usefulness of alternatives. Consider the following statements:

> A) There are many alternatives to flag burning; thus when the individual interest succumbs to the government's interest, free speech is insignificantly burdened.
> B) Flag burning is a unique form of expression; thus when the individual interest succumbs to the government's interest, free speech is significantly burdened.

By presuming there were many alternatives, Justice Stevens framed the issues in a manner that easily allowed vindication of the government's interest. As noted earlier, his presumption about alternatives is flawed: if the flag is unique, then by definition there is no alternative means of expressing the message of flag burning. Recognizing the communicative importance of flag burning does not necessarily require a result in favor of the individual. The Court could still find the governmental interest to be sufficiently important to justify the admittedly serious impact on free expression. But to do so, the fit between the law's means and end must withstand exacting scrutiny.

In its *O'Brien* brief, the United States claimed that draft card burning was not an "essential" means for disseminating a viewpoint because an array of alternative modes of expressing opposition to the Vietnam war existed.[44] At oral argument, the Solicitor General again claimed that adequate alternatives existed: "O'Brien was free, at all times, to express dissent by speech from the courthouse steps, or on the street corners, by letters to the editor, by pamphlet, by radio and television."[45] The Court did not expressly address the question of the availability of alternatives, but Justice Harlan wrote in a concurring opinion that the case would be altogether different if there were no other way for O'Brien to convey his message.[46] Jus-

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44. *United States v. O'Brien*, 391 U.S. 367 (1968) (Brief for the United States at 8). See also *United States v. Miller*, 367 F.2d 72, 81 (2d Cir. 1966) (law prohibiting destruction of draft cards does not prevent political dissent through other means of communication).

45. Transcript of Oral Argument 10, in Phillip B. Kurland and Gerhard Casper, 65 *Landmark Briefs and Arguments of the United States Supreme Court* 908, 917 (University Pub., 1975).

46. 391 U.S. at 388-89 (Harlan, J., concurring). Professor Tribe regards the initial burden of proof of the inadequacy of alternatives as resting upon the speaker. Laurence H. Tribe, *American Constitutional Law* 983 (Foundation, 2d ed. 1988). Professor Redish disagrees with this, stating that an inquiry into adequate media should occur only after the state has established a compelling interest for its regulation. Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 Stan. L. Rev. 113, 149 n.209 (1981). After a compelling interest is established, Redish would require that the speaker prove that alternative media are inadequate. Id. at 149. Redish does note, however, that the inquiry into alternative media poses first amendment difficulties: "why is it an appropriate task for . . . the Supreme Court to decide for Mr. O'Brien what increases or decreases the intensity of his

tice Harlan's opinion lacked an explanation of how he concluded that the alternatives conveyed the same message as draft card burning.

What if the *O'Brien* Court had evaluated the adequacy of alternative forms of expression? O'Brien told the jury that he burned his draft card because he considered the draft system "intrinsically immoral, wrong, a system that sustains death rather than life."[47] If O'Brien had stood on the steps of the South Boston Courthouse and uttered those words, would they convey the intensity of his feelings about the draft in a manner that could be identified as "adequate" in comparison to the burning of his draft card? It is one thing to measure readily identifiable factors such as the expense of various media; it is quite another for a court to compare the cognitive and emotional impact of different media. Comparing a form of symbolic speech with other communicative modes involves elusive questions of nuance and communicative impact that ultimately depend on question-begging assessments of the activity's first amendment status.

Clark v. Community for Creative Non-Violence[48] also illustrates the difficulty of defining and identifying adequate alternatives. CCNV was permitted to erect a symbolic tent city to protest the plight of the homeless, but participants were not allowed to sleep in the tents. In its application for a Park Service permit, CCNV explained that the demonstration would allow the homeless to "communicate their humanity, their need, and their plight to the government and to the public, in the *only* real way open to them."[49] At the Supreme Court, CCNV explained that many homeless lack the resources and skills necessary to communicate their ideas through verbal expression.[50] The United States claimed that by itself, sleep would communicate only that the people were sleepy. Because the public would not understand the protester's message without an explanation through other media, sleep barely added to that message.[51] Justice White found that the regulation prohibiting

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message? Is not this very inquiry an invasion of first amendment freedom?" Id. at 148-49 (notes omitted).

47. *United States v. O'Brien*, 391 U.S. 367 (1968) (Joint Appendix at 29).

48. 468 U.S. 288 (1984).

49. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) (Joint Appendix at 14).

50. Brief for Respondents at 22. At oral argument counsel for respondents stated, "The First Amendment, were it confined solely to verbal activity, were it confined solely to the classic means of expression, would be a means of communication that was open to the comfortable and the highly educated." Transcript of Oral Argument at 39, *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984).

51. Brief for Petitioners at 13-14. A similar claim was made during oral argument of *Eichman* when the government claimed that flag burning left a major "message gap" that had

camping in certain parks left the symbolic city intact with signs and the presence of those willing to take part in a day-and-night vigil. Thus, the regulation could not be faulted on the ground that the plight of the homeless could not be communicated in ways other than sleep.[52] By merely pointing to alternatives, Justice White implicitly found them to be adequate.

Justice White perceived the primary purpose of sleep as "facilitative."[53] Justice Marshall in dissent characterized the primary purpose of sleep in symbolic terms. Sleeping portrayed the neglect from which the homeless suffer "with an articulateness even Dickens could not match."[54] Although Justice Marshall agreed with the majority that the appropriate test was one in which the adequacy of alternatives was measured, he did not reach this prong of the inquiry because he felt the government had failed to justify the restriction.[55] But his perception of the symbolic importance of sleep affected the intensity of his scrutiny of the government's interests. In contrast, the majority discounted sleep's symbolic importance and was thus able to treat the ban like a mere restriction on the demonstration's physical attributes, such as its size. But a prohibition of a medium raises different problems from regulations affecting where, when, and how speakers may use that medium. Banning sleeping as a manner of expression is distinct from limiting the number of participants in a sleep-in because the latter preserves the communicator's autonomy in selecting the medium of expression.[56]

Symbolic speech is of critical importance to those "puny anonymities"[57] who attract attention to their ideas through the most

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to be filled in with words. *United States v. Eichman*, 110 S. Ct. 2404 (1990) (Transcript of Oral Argument at 5-7). Some Justices disagreed with this assessment of flag burning. Id. at 8. See also text accompanying note 35.

52. 468 U.S. at 295.

53. Id. at 296. The organizers of the demonstration had experience with previous demonstrations involving the homeless and claimed that unless the homeless had a "survival-related reason" for being in the park, they would not participate. Joint Appendix at 14. To the extent that the ban would limit the nature, extent, and duration of the demonstration, the Court believed that it would lessen the impact on the parks. 468 U.S. at 296. Justice Marshall argued that the facilitative purpose of sleeping took nothing away from its status as symbolic expression. Id. at 310 n.7 (Marshall, J., dissenting).

54. 468 U.S. at 306 (Marshall, J., dissenting) (quoting *CCNV v. Watt*, 703 F.2d 586, 601 (D.C. Cir. 1983) (Edwards, J., concurring)).

55. Id. at 308-12.

56. Lee, 54 Geo. Wash. L. Rev. at 805 n.301 (cited in note 5). I have previously commented on the ambiguity of the term "manner." Id. at 757 n.2. In the symbolic speech context, it is critical for the Court to distinguish between regulations affecting the physical attributes of a manner of expression and total prohibitions of that manner of expression.

57. The phrase originates with Justice Holmes in *Abrams v. United States*, 250 U.S. 616, 629 (1919) (Holmes, J., dissenting).

powerful communicative resource available to them, their symbolic behavior. The Court should recognize that for some communicators and messages, there is no other medium. Additionally, the Court should recognize that a prohibition of a symbolic medium may have a disproportionate impact on certain messages.

When the Court understates the importance of a particular medium, as occurred in *O'Brien* and *Clark*, cursory scrutiny of the law occurs.[58] Consider the consequences of disregarding alternatives in symbolic speech cases. This would avoid the intractable problems posed by judicial definition of the "adequacy" of alternatives. More importantly, disregarding alternatives casts the burden on expression in a different light. To facilitate important first amendment values such as self-fulfillment and the participation of poorly-financed citizens, the Court should acknowledge the importance of an individual's choice of how to communicate. The Court's symbolic speech methodology should disregard the fact that alternatives—which are always available in theory—exist.

58. The *Clark* Court barely scrutinized whether the prohibition advanced the governmental interest and rejected the view that less restrictive measures were available. 468 U.S. at 299. Justice White concluded that camping would be contrary to the government's interest in maintaining the parks, yet this overlooks that the government allowed the demonstrators to erect tents and feign sleep and that there was no proof that actual sleep caused additional damage. On the issue of the narrowness of the prohibition, the Court was satisfied that the prohibition did not exceed its purpose (id. at 297), and stated that the judiciary is not endowed with "competence to judge how much protection of park lands is wise and how that level of conservation is to be attained." Id. at 299. The *O'Brien* Court gave very generous treatment to the government's interests; commentators describe the governmental interests in *O'Brien* as insubstantial. See, e.g., Dean Alfange, *Free Speech and Symbolic Conduct: The Draft Card Burning Case*, 1968 Sup. Ct. Rev. 1, 23. The draft card destruction law was seriously defective because a law prohibiting nonpossession, which could occur for noncommunicative purposes, was not enforced while the law against destruction was enforced only against those who publicly burned their cards.