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Symbolic Speech and the First Amendment – A Proposal of Adjudicative Model

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Słowa kluczowe: Pierwsza Poprawka, wolność słowa, wypowiedzi symboliczne, zachowanie ekspresyjne, „standard O’Briena”

Abstract

The First Amendment to the United States’ Constitution prohibits any abridgment of the freedom of speech. According to the consistent line of the Supreme Court’s precedents, dating from 1931, the term “speech” encompasses non-verbal expressive conduct. Granting such symbolic speech constitutional protection can be justified with phenomenological, axiological, and historical arguments. Nevertheless, the constitutional jurisprudence regarding symbolic speech has so far been a little inconsistent and haphazard. The article proposes an adjudicative model that could be applied to all symbolic speech cases, bringing greater coherence and predictability to judicial decisions in this area. The suggested procedure comprises five basic steps: preliminary analysis (assessing basic features of the law in question independent of any First Amendment-specific enquiries), application of the “Spence test”, application of the doctrine of a categorical exclusion, intermediate scrutiny, and strict scrutiny.

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Streszczenie**Wypowiedzi symboliczne i Pierwsza Poprawka –
propozycja modelu sądowego stosowania prawa**

Pierwsza Poprawka do Konstytucji Stanów Zjednoczonych zakazuje jakiegokolwiek ograniczania wolności słowa. Zgodnie z konsekwentną linią orzecniczą Sądu Najwyższego od 1931 r., pojęcie „słowo” obejmuje także niewerbalne zachowania ekspresyjne. Udzielanie takim symbolicznym wypowiedziom ochrony konstytucyjnej jest uzasadnione względami fenomenologicznymi, aksjologicznymi i historycznymi. Orzecznictwo konstytucyjne w tej materii było jednak dotąd nieco chaotyczne. Artykuł zawiera propozycję sądowego modelu stosowania prawa, który mógłby zostać wykorzystany do wszystkich spraw tego rodzaju, zwiększając spójność i przewidywalność sędziowskich rozstrzygnięć. Sugerowana procedura obejmowałaby pięć podstawowych kroków: analiza wstępna (ocena podstawowych znamion badanego prawa niezależnie od kwestii związanych z Pierwszą Poprawką), zastosowanie „testu Spence’a”, zastosowanie doktryny wykluczenia kategorialnego, zastosowanie pośredniego nadzoru sędziowskiego, zastosowanie ścisłego nadzoru sędziowskiego.

I.

The First Amendment to the Constitution of the United States, in conjunction with the Fourteenth Amendment, forbids any governmental body (legislative, executive, or judicial) to abridge freedom of “speech”. In contradistinction to comparable clauses included, for example, in the European Convention on Human Rights² or the Polish Constitution of 1997³, the Clause expressly covers only speech, which term, by the ordinary use of the word, appears to denote only verbal modes of expression (written or spoken word). Taken literally, the First Amendment would not extend its protective mantle to silent movies, instrumental music, most sculptures or paintings, or any other

² Art. 10 sec. 1: “Everyone has the right to freedom of expression”.

³ Art. 54 sec. 1: “The freedom to express opinions, to acquire and to disseminate information shall be ensured to everyone”.

kind of non-verbal expression of one's beliefs, opinions, judgments, or emotions. Such a conclusion would hardly be tenable due to moral and legal arguments and is not seriously espoused in the American constitutional doctrine or adjudication. Both legal scholars and the courts have long recognized the "symbolic speech" category, which enjoys a significant level of constitutional protection. In contrast to the so-called "pure speech"⁴ and "speech plus"⁵, this particular type of expression is wholly non-verbal and may be briefly but accurately defined as expressive or communicative conduct. The article proposes an adjudicative model that could be applied to all symbolic speech cases, bringing greater coherence and predictability to judicial decisions in this area.

There exist a virtual plethora of justifications for protecting symbolic speech based on the First Amendment. Let us briefly recapitulate the most cardinal ones. First, this type of expression is – in principle – phenomenologically indistinguishable from pure speech. Melville B. Nimmer famously noted that "in one sense all speech is symbolic. At this moment, the reader is observing black markings on paper that curl and point in various directions. We call such markings letters, and in groups, they are referred to as words. What is being said in this sentence is meaningful (...) because the reader recognizes these markings as symbols for particular ideas. The same is true of oral speech, which is simply the use of symbolic sounds. Outside of the science-fiction realm (...) all communications necessarily involve the use of symbols"⁶. Second, freedom of symbolic speech can be substantiated, justified, and defended as valuable on the same grounds as its verbal-related counterpart. It too is intrinsically connected to individual self-fulfillment, autonomy, and dignity; it too plays a role in the marketplace of ideas and the attendant search for truth, public good, or beauty; it too plays a significant role – as we shall demonstrate further – in democratic systems and seems to be a cru-

⁴ I.e., "the communication of ideas through spoken or written words or through conduct limited in form to that necessary to convey the idea", *Pure speech*, [in] *Merriam-Webster dictionary of law*, Springfield 1996, p. 398.

⁵ A type of behavior that combines verbal and non-verbal components withing one coherent whole, like picketing, distributing leaflets, demonstrating, etc. See, e.g., *Lovell v. City of Griffin*, 303 U.S. 444 (1938); *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Chicago Police Dept. v. Mosley*, 408 U.S. 92 (1972).

⁶ M. Nimmer, *The Meaning of Symbolic Speech under the First Amendment*, "UCLA Law Review" 1973, vol. 21, p. 33.

cial prerequisite and condition for genuine self-government; it too contributes to achieving political change via peaceful means; it too instills greater tolerance and understanding in citizens⁷. Third, from a historical standpoint (considerations of this nature play a far greater role in the American constitutional discourse than in other Western democracies), the symbolic speech was commonly regarded as a fitting equivalent of verbal expression by participants in political debates in the 18th or 19th century; by prominent British legal scholars (like William Blackstone or Sir Edward Coke) whose determinations exerted significant influence on the legal system of the United States; by various laws and regulations in the very early years of America's independent existence⁸. Those assertions – which can only be sketched in this article – appear to constitute a coherent line of argumentation that justifies the principle of going beyond the strictly literal interpretation of the First Amendment and adopting the functional and purposive construction of the Free Speech Clause with respect to symbolic expression.

Almost from the outset of its freedom of speech jurisprudence (which can be dated to the end of World War I), the United States' Supreme Court has consistently accepted the doctrinal assumptions and has been dependably extending the First Amendment's coverage – though not necessarily the full scope of its protection – to various, sometimes quite controversial, instances of symbolic expression. The strictly non-verbal activities recognized by the Court to be communicative in a First Amendment-relevant sense included: displaying a red flag which was supposed to signal support for Communism⁹; a refusal to salute the flag of the United States during school ceremonies¹⁰; a refusal to follow segregationist regulations by leaving racially exclusive establishments¹¹; purposeful destruction of a draft card, intended as an anti-war statement¹²; "desecration" of the American

⁷ W. Sadurski, *Freedom of Speech and Its Limits*, Dordrecht 1999, pp. 8–35; T.I. Emerson, *The System of Freedom of Expression*, New York 1970, pp. 6–7.

⁸ E. Volokh, *Symbolic Expression and the Original Meaning of the First Amendment*, "Georgetown Law Journal" 2009, vol. 97, iss. 4, pp. 1059–1084.

⁹ *Stromberg v. California*, 283 U.S. 359 (1931).

¹⁰ *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

¹¹ *Garner v. Louisiana*, 68 U.S. Reports 157 (1961); *Brown v. Louisiana*, 83 U.S. Reports 131 (1966).

¹² *United States v. O'Brien*, 391 U.S. 367 (1968).

flag for communicative purpose¹³; wearing black armbands by high school students as expressive symbols of political protest¹⁴; financially contributing to political campaigns¹⁵; sleeping in a national park as a communicative vehicle to dramatize the plight of the homeless¹⁶; nude dancing¹⁷; burning a cross to convey affirmation of the Ku-Klux-Klan's ideological beliefs¹⁸. As we can see, the categories of conduct defined by the Court as expressive have been quite diverse; the willingness to do so has been a stable phenomenon in SCOTUS decisions. Still, this particular area of adjudication remains doctrinally unclear, as the Court's rulings, both in terms of reasoning and results, frequently seemed to be inconsistent, unpredictable, and haphazard¹⁹. This article aims to propose a general model for adjudicating symbolic speech cases that would be applicable to all potential circumstances. Our objective here is both descriptive and normative. On the one hand, we are not going to propose any new standards of assessing the constitutionality of regulations dealing with free speech, relying instead on tests or mechanisms employed for that purpose by the Supreme Court (in a few instances tinkering at their edges interpretation-wise). On the other hand, we will place often disparate, contradictory, and arbitrarily applied strands of the Court's jurisprudence in such cases within a comprehensive intellectual and legal framework.

So, let us imagine that a petitioner argues before the Supreme Court that their freedom of symbolic speech has been unconstitutionally abridged by a certain governmental regulation violative of the First Amendment. What kind of analytical steps should the Justices undertake (and in what order) to correctly, reliably, and consistently evaluate the validity of such a claim?

¹³ *Street v. New York*, 394 U.S. Reports 576 (1969); *Smith v. Goguen*, 415 U.S. Reports 566 (1974); *Spence v. Washington*, 418 U.S. Reports 405 (1974); *Texas v. Johnson*, 491 U.S. 397 (1989); *United States v. Eichman*, 496 U.S. 310 (1990).

¹⁴ *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

¹⁵ *Buckley v. Valeo*, 424 U.S. 1 (1976).

¹⁶ *Clark v. Community for Creative Non-Violence*, 468 U.S. Reports 268 (1984).

¹⁷ *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000).

¹⁸ *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *Virginia v. Black*, 538 U.S. 343 (2003).

¹⁹ M.V. Tushnet, A.K. Chen, J. Blocher, *Free Speech Beyond Words: The Surprising Reach of the First Amendment*, New York 2017, p. 1 and further.

II.

The first substantive step involves formulating certain introductory and basic determinations regarding the general traits of the questioned law. At the outset, the Court should ascertain if the government can constitutionally enact the relevant regulation. While it may seem redundant to include such a threshold question here, it is worth mentioning that the Court itself has made it the first part of the four-pronged “O’Brien standard”, devised specifically to be applied in symbolic speech cases²⁰. So, for instance, if a governmental body belonging to the executive branch of government passes a statute, or if Congress violates the Enumerated Powers Clause of the Constitution, or if some legislative body passes a bill of attainder – such laws are dead on arrival, and the Court does not need to resort to any analysis particular to the First Amendment. The next threshold verification involves checking if the law is not unconstitutionally vague. The successful claim of vagueness is also instantaneously fatal. A regulation that “fails to define clearly the conduct it proscribes” reduces the certainty of law, entraps the innocent into legal violations, cedes too much arbitrary power to law enforcement and petty officials²¹. In short, if the law fails to clear these obstacles, there is no need for the Court to engage in any in-depth symbolic speech-oriented analysis.

III.

The next determination that the Court has to revolve around the question of whether the criminalized or otherwise burdened action is sufficiently communicative or sufficiently imbued with expressive elements to fall under the rubric of constitutionally protected symbolic speech. The so-called Spence test provides a valid standard in that regard²². In its light, the analyzed conduct has to fulfill two conditions. From a speaker’s standpoint, it must be intended “to convey a particularized message”. From the audience’s perspective, there

²⁰ United States v. O’Brien...

²¹ G.R. Stone, L.M. Seidman, C.R. Sunstein, M.V. Tushnet, *The First Amendment*, Gaithersburg-New York 1999, p. 114.

²² Spence...

must be a great likelihood “that the message would be understood”. The urgent need for **some** test of this kind is, in my opinion, undeniable. The simple fact is that every voluntary human behavior – even actions undertaken because of threat, blackmail, superior’s order, or physical coercion – is to a certain extent communicative²³. A smile may denote compassion, euphoria, contempt, joy; having an eccentric haircut may symbolize generational rebellion; launching a terrorist attack may be a pretty clear manifestation of political ideology; kissing a partner may express commitment and love. At the very least, every action communicates the actor’s conviction that his or her current preference is to engage in said conduct. Lack of criteria that would allow us to distinguish between expressive acts covered (and sometimes protected) by the Free Speech Clause and other communicative activities would ultimately stretch the First Amendment beyond a breaking point. Does the “Spence standard” fulfill this role adequately? I agree with Susan Williams²⁴ that, generally speaking, the test performs this function reasonably well but may require a few subtle modifications on its interpretive margins. One, the conduct should be “primarily” intended to convey a message. The 9/11 terrorists surely intended to communicate certain political convictions with their act, but it was only a secondary objective. It would serve no rational purpose to bring such activities within reach of the First Amendment (even if just to say that it is not applicable). Practical concerns of evidentiary nature also seem to support this change, making it harder for a party to claim communicative intent *post factum*. Two, while a message must be particularized to at least a certain degree, this requirement should not exclude general, unequivocal, or ambiguous meanings. Three, the relevant messages should not be confined just to those that could be verbalized in a propositional form; the criterion should be interpreted to encompass emotive content as well. Four, while the audience has to be able – with a “great likelihood” – to recognize the behavior as primarily expressive, they do not need to divine the exact meaning of the activity as intended by the symbolic speaker. For example, the public destruction of the American flag as a sign of protest would pass the test, even if the speaker simply intended to express their general emotional condemna-

²³ F.S. Haiman, *Speech and Law in a Free Society*, Chicago 1981, p. 31.

²⁴ S.H. Williams, *Truth, Autonomy, and Speech: Feminist Theory and the First Amendment*, New York 2004, pp. 201–202.

tion of the United States (in contrast to objecting to a specific policy) and the audience realized that the act had been committed for communicative purposes (and not for convenience or without any specific goal in mind). While such a construction of the standard would indubitably create a heavy (but defeasible) presumption in favor of a speaker, it is preferable to ignore the test altogether as the Court sometimes did²⁵.

IV.

Assuming the positive result of the “Spence test”, the next step to take is verifying whether the expression does not fall within one of the categories of speech that are deprived of the First Amendment’s protection. The doctrine of a categorical exclusion, as defined by the Court, claims that “there are certain well-defined and narrowly limited classes of speech, the prevention, and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the (...) “fighting” words – those which by their very utterance (...) tend to incite an immediate breach of the peace”²⁶. While those words are a reflection of times when the “absoluteness of the command of the First Amendment” was not perceived as a significant encumbrance on the government’s authority to enact laws proscribing bad speech²⁷. While the Supreme Court’s jurisprudence substantially narrowed the definitions of particular categories, the doctrine remains valid. Therefore, the interpreter ought to consult the relevant decisions of the Supreme Court to check whether the conduct in question falls within some unprotected category²⁸. While it is extremely difficult, though not inconceivable, to have an instance of symbolic expression fit the definitions of some of those categories (for example, the concept of “obscenity” as stipulated in *Miller v. California*), other such conceptualizations – like

²⁵ Clark...

²⁶ *Chaplinsky v. State of New Hampshire*, 315 U.S. 568 (1942).

²⁷ A. Mehra, *Free Flow of Information: A New Paradigm*, New York 1986, p. 131.

²⁸ *Watts v. United States*, 394 U.S. 705 (1969); *Virginia...; R.A.V....; Miller v. California*, 413 U.S. 15 (1973); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

those of incitement or “true threats” or “fighting words” – can apply to non-verbal activities (e.g., burning a cross before a black person’s residence). After determining that the behavior in question is in that sense proscribable, the Justice should nevertheless evaluate whether the law prohibiting the conduct does not suffer from two formal defects (which simply constitute two sides of the same coin). The first inquiry should determine whether the law is not unconstitutionally overbroad, which happens if a regulation, while criminalizing some unprotected activities, also reaches conduct that enjoys constitutional protection. Such an attempt to “burn[ing] down the barn to get rid of the mice”²⁹ is subject to facial invalidation. The next step is to apply the doctrine of underinclusiveness which states that – absent a persuasive reason – the government is not allowed to penalize only select subcategories of speech belonging to a generally proscribable category while leaving others unregulated. While this assumption raises a lot of controversies among commentators³⁰, I do think that it would be at the very least constitutionally problematic to, for example, only prohibit “fighting words” of racial nature or only criminalize threats leveled against members of preferred social groups or only criminalize libel of politicians (if nothing else, it is an equal protection issue).

V.

If the analyzed limitation of freedom of speech cannot be justified based on the doctrine of a categorical exclusion, the interpreter must continue their inquiry by looking into the character of the burdens imposed upon the expression. Here the constitutional investigation bifurcates³¹.

²⁹ T.L. Tedford, D.A. Herbeck, *Freedom of Speech in the United States*, State College 2001, p. 445.

³⁰ M.L. Hurdle, *R.A. V. v. City of St. Paul: The Continuing Confusion of the Fighting Words Doctrine*, “Vanderbilt Law Review” 1994, vol. 47, pp. 1143–1174; J.M. Laurence, *Minnesota Burning: R.A. V. v. City of St. Paul and First Amendment Precedent*, “Hastings Constitutional Law Quarterly” 1994, vol. 21, pp. 1117–1147.

³¹ There has been a tendency in both judicial decisions and constitutional doctrine to hybridize the two following tests, see D.S. Day, *The Hybridization of the Content-Neutral Standards for the Free Speech Clause*, “Arizona State Law Journal” 1987, vol. 19, iss. 2, pp. 195–227. I believe they are conceptually different and should be kept that way.

While the First Amendment dramatically reduces the government's competence to penalize or otherwise regulate speech based on its content or a viewpoint expressed by the speaker, its protective power is far less potent for the authorities' prerogative to "alter [speech's] location, change the way it is presented, or shift its timing. The government is permitted to restrict where, when, and how people speak" provided it does not run afoul of certain standards which the Supreme Court construed the First Amendment to impose³². It appears like a reasonable enough compromise. While the government should not be given free rein in this field, not even the most ardent supporter of the freedom of expression would be likely to tolerate a transmission of messages via loudspeakers at 2 A.M. in a suburban neighborhood, a presentation of an erotic (not obscene) spectacle right in front of a kindergarten or an erection of immense billboard in a residential area advertising acne medicine. The relevant test of constitutionality states that, for a time, place, or manner regulation to pass the First Amendment scrutiny, it has to be content-neutral (i.e., "justified without reference to the content of the regulated speech), it has to serve a significant governmental interest while being narrowly tailored to do so, and it has to leave a speaker with ample alternative channels of communication³³. While, in my opinion, the judicial interpretation of the test has often been conducted in too lax a manner, particularly with respect to the "narrow tailoring" requirement³⁴, on its face, the standard seems like a reasonable enough compromise between the need to protect free speech and other important social and individual values. One example directly pertaining to symbolic speech might refer to zoning regulations that result in spatial confining of clubs presenting nude dancing (which, of course, is an expressive activity) but are not content-based and do not impose a total prohibition of this type of erotic entertainment. If a regulation does not comply with the said standard, the Justice must move to step five.

If the analyzed regulation introduces an absolute ban on a certain kind of symbolic speech, the relevant standard for the First Amendment inquiry is

³² R. Trager, D.L. Dickerson, *Freedom of Expression in the 21st Century*, Thousand Oaks 1999, p. 138.

³³ *Ward v. Rock Against Racism*, 491 U.S. 781 (1989); Clark...

³⁴ R.G. Wright, *Time, Place, and Manner Restrictions on Speech*, "Northern Illinois University Law Review" 2020, vol. 40, p. 270 et seq.

the already mentioned “O’Brien test”. Having already considered the first condition of the standard at the outset of analysis, the Justice should start here with evaluating the regulation from the standpoint of prong number three that states that the interest furthered by the law must be unrelated to the suppression of expression. The key inquiry is to determine if the conduct is burdened due to its communicative or non-communicative properties³⁵. I believe that the thought experiment suggested by Larry Alexander³⁶ aptly explains the distinction. We should imagine statute A that criminalizes the creation of fire hazard in any public place by any means and statute B that penalizes burning an American flag as a symbolic protest against the US government’s policies. Let us also assume that the penalties included in both statutes are identical. Now let us consider a person who engages in this type of symbolic communication in a public place and does, in fact (involuntarily) cause a fiery conflagration. Statute A would certainly pass the threshold imposed by the 3rd prong of the “O’Brien standard” as the law would serve the interest of fire safety – an objective unrelated to any expressive aspect of the act in question – and would be triggered by creating the hazard via any action regardless of its communicative attributes. On the other hand, Statute B would violate the standard as its explicit objective would be to punish a specific mode of political protest – an expressive interest *par excellence*. It should be noted that while these two statutes are pretty easy to evaluate from the relevant standpoint, the factual inquiry into an interest served by a statute might be a challenging endeavor (especially when multiple interests can be reasonably identified), especially if an interpreter ignores – like I think they should – legislative history³⁷. Nevertheless, the difficulty of establishing which side of the demarcating line drawn by the 3rd prong of the test a regulation falls is not a justification for erasing the line altogether. It should make us engage in a deep, careful, and contextual analysis of the issue instead of treating the question superficially or cur-

³⁵ D. Alfange, Jr., *Free Speech and Symbolic Conduct: The Draft-Card Burning Case*, “The Supreme Court Review” 1968, vol. 1968, pp. 1–52.

³⁶ L. Alexander, *Is There a Right of Freedom of Expression?*, New York 2005, pp. 41–42.

³⁷ I subscribe to the old English rule according to which “for the purpose of ascertaining the intention of the legislature, no extrinsic fact, prior to the passage of the bill, which is not itself a rule of law or an act of legislation, can be inquired into or in any way taken into view” (quoted in W. Eskridge Jr., *Legislative History Values*, “*Chicago-Kent Law Review*” 1990, vol. 66, p. 365).

sorily. If the regulation is proven to be aimed at the communicative aspect of conduct, the Justice should move directly to step number 5. If the law clears the relevant threshold, it needs checking against the standard's second and fourth prong. Taken together, they demand that the regulation prohibit no more speech than is essential for furthering a substantial government interest. They appear to demand, in other words, that even a content-neutral law, when applied to symbolic speech, must possess a special justification to pass constitutional muster due to the guarantee of the First Amendment as it must protect some interest of "unusual force"³⁸; there also has to be "a high degree of relevance, necessity, and the realistic probability that the suppression would accomplish the non-expressive purpose"³⁹. Whereas in judicial practice, these requirements were not given much strength, they suggest that in some cases, a symbolic speaker might enjoy a legal immunity not afforded to someone who commits an outwardly identical act deprived of any significant expressive component. While it may appear controversial from the standpoint of the 14th Amendment (enacting the principle of equal protection of laws), the Free Speech Clause does grant expression a preferred constitutional position among various human activities, and I believe that the interpretation of the "O'Brien standard" should reflect that truth. If the regulation fails to clear those obstacles, the Justice must proceed to step number five.

VI.

At this point, the Justice knows two things. Firstly, the analyzed regulation is correct from a formal standpoint – it has been issued by a constitutionally empowered governmental body. It is not unacceptably vague, and it does not suffer from overbreadth. Secondly, the law in question burdens free speech and cannot be squared with the First Amendment based on the doctrine of a categorical exclusion, of the time, place, and manner test, or the "O'Brien standard". There is one final juridical method of reconciling such a law with the Free Speech Clause, i.e., applying the so-called "strict scrutiny" examination. The

³⁸ L.S. Underkuffler, *The Idea of Property: Its Meaning and Power*, Oxford 2003, p. 69.

³⁹ R.A. Seid, *A Requiem for O'Brien: On the Nature of Symbolic Speech*, "Cumberland Law Review" 1992, vol. 23, p. 577.

standard requires that regulation is a narrowly tailored and least speech-restrictive instrument to serve some compelling government interest⁴⁰. In the context of the Free Speech Clause, having to subject a broad law (as opposed to the one operating in specific areas, like campaign finance, access to information concerning judicial proceedings, solicitations, etc.) to strict scrutiny almost invariably – and rightfully so – sounds a death knell for the regulation⁴¹. It is particularly difficult to imagine a regulation surviving strict scrutiny in the context of expressive action (unless one considers an act of spending money on political campaigns to be an instance of symbolic speech – but the Supreme Court has consistently rejected such a classification). Phenomenology of this type of expression makes it hard to envisage a situation when non-verbal and not categorically excluded conduct simply must be prohibited in the name of some fundamental public interest. Nevertheless, such a possibility must be taken into account at the theoretical level.

VII.

The adjudicative model I propose above is an ideal type in a sense that while it remains applicable to every symbolic speech case, sometimes it will also be supplemented – depending on particularities and complexities of a given legal controversy – by certain additional doctrines (public forum standard, commercial speech standard, prior restraint standard, etc.). However, in a general sense, the scheme comprises all the deliberative steps needed to assess compliance of regulation of symbolic speech with the First Amendment, providing a clear, logical, consistent, and useful roadmap for judges and constitutional scholars. Taking into account the prominent role played by expressive conduct in political discourse (especially as a mode of demonstrative, persuasive, and efficient protest as evidenced by the popularity of displaying symbols, burning flags, or destroying draft cards as a means of conveying political messag-

⁴⁰ R.J. Steamer, *Contemporary Supreme Court Directions in Civil Liberties*, “Political Science Quarterly” 1977, vol. 92, No. 3, p. 433; R.G. Spece Jr., D. Yokum, *Scrutinizing Strict Scrutiny*, “Vermont Law Review” 2015, vol. 40, iss. 2, p. 295 et seq.

⁴¹ A. Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, “Vanderbilt Law Review” 2006, vol. 59, iss. 3, pp. 844–857.

es), a substantial reduction of capriciousness and a significant increase in predictability of judicial decisions in this area would be a welcome development.

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