First Amendment freedom is no greater than is essential to the furtherance of that government interest." [1561] The Court has suggested that this standard is virtually identical to that applied to time, place, or manner restrictions on expression.[1562]

Although almost unanimous in formulating and applying the test in *O'Brien*, the Court splintered when it had to deal with one of the more popular forms of "symbolic" conduct of the late 1960s and early 1970s—flag burning and other forms of flag desecration. No unifying theory capable of application to a wide range of possible flag abuse actions emerged from the early cases. Thus, in *Street v. New York*,[1563] the defendant had been convicted under a statute punishing desecration "by words or act" upon evidence that when he burned the flag he had uttered contemptuous words. The conviction was set aside because it might have been premised on his words alone or on his words and the act together, and no valid governmental interest supported penalizing verbal contempt for the flag.[1564]

A few years later the Court reversed two other flag desecration convictions, one on due process/vagueness grounds, the other under the First Amendment. These cases were decided by the Court in a manner that indicated an effort to begin to resolve the standards of First Amendment protection of "symbolic conduct." In *Smith v. Goguen*,[1565] a statute punishing anyone who "publicly . . . treats contemptuously the flag of the United States" was held unconstitutionally vague, and a conviction for wearing trousers with a small United States flag sewn to the seat was overturned. The language subjected the defendant to criminal liability under a standard "so indefinite that police, court, and jury were free to react to nothing more than their own preferences for treatment of the flag." [1566]

The First Amendment was the basis for reversal in *Spence v. Washington*,[1567] which set aside a conviction under a statute punishing the display of a United States flag to which something is

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[1561] United States v. O'Brien, 391 U.S. 367, 377 (1968).

[1562] Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298 & n.8 (1984).

[1563] 394 U.S. 576 (1969).

[1564] 394 U.S. at 591–93. Four dissenters concluded that the First Amendment did not preclude a flat proscription of flag burning or flag desecration for expressive purposes. Id. at 594 (Chief Justice Warren), 609 (Justice Black), 610 (Justice White), and 615 (Justice Fortas). In Radich v. New York, 401 U.S. 531 (1971), *aff'g*, 26 N.Y.2d 114, 257 N.E.2d 30 (1970), an equally divided Court, Justice Douglas not participating, sustained a flag desecration conviction of one who displayed sculptures in a gallery, using the flag in apparently sexually bizarre ways to register a social protest. Defendant subsequently obtained his release on habeas corpus, United States ex rel. Radich v. Criminal Court, 459 F.2d 745 (2d Cir. 1972), *cert. denied*, 409 U.S. 115 (1973).

[1565] 415 U.S. 566 (1974).

[1566] 415 U.S. at 578.

[1567] 418 U.S. 405 (1974).