Articles

The Other 99% of the Expressive Conduct Doctrine: The Occupy Wall Street Movement and the Importance of Recognizing the Contribution of Conduct to Speech

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> OCCUPY, v.: to gain access to and remain in (a building, etc.) or on (a piece of land), without authority, as a form of protest.[1]

I. INTRODUCTION

On December 17, 1773, dozens of colonists dumped tea from aboard three merchant vessels into the Boston Harbor.[2] Their intent in so doing was not to create a record-breaking batch of iced tea,[3] but to protest the monopoly held by the East India Company and the British Tea Tax imposed upon the colonies without the benefit of parliamentary representation.[4] This expression of defiance was understood throughout the colonies to symbolize discontent with British rule,[5] and was one of the key events credited with sparking the American Revolution. The American Revolution resulted in the creation of a new democratic form

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[1] OXFORD ENGLISH DICTIONARY ONLINE (Dec. 18, 2012), http://www.oed.com (defining "occupy"). Other definitions of "occupy" include the following: "[t]o take possession of (a place), esp. by force; to take possession and hold of (a building)"; "[t]o take up, use up, fill (space, time, etc.)"; "[t]o live in and use (a place) as its tenant or regular inhabitant; to inhabit; to stay or lodge in"; "[t]o hold possession or office; to dwell, reside; to stay, abide"; and "[t]o take possession of, take for one's own use, seize." *Id.*

[2] George Hewes, *Boston Tea Party: An Eyewitness Account by a Participant*, THE HISTORY PLACE (May 17, 2012), http://www.historyplace.com/unitedstates/revolution/teaparty.htm.

[3] *But see* HARLOW G. UNGER, AMERICAN TEMPEST: HOW THE BOSTON TEA PARTY SPARKED A REVOLUTION 5 (2011) (noting that, among the cries rallying the revolutionaries that night, someone yelled, "Boston Harbor a tea-pot tonight!"); *id.* at 6 (noting that a participant in the Tea Party recalled, "We were merry . . . at the idea of making so large a cup of tea for the fishes").

[4] *Id.* at 158, 176.

[5] *Id.* at 172.

of government dedicated to protecting individual rights. Yet today, nearly 250 years later, the United States Constitution, forged on the heels of the Boston Tea Party and other acts of defiance against perceived corporate oligarchy and political tyranny,[6] would not protect the very acts of protest that led to its genesis.[7]

The historic Boston Tea Party began when a three-day long meeting was held at Faneuil Hall in Boston, Massachusetts to seek redress from the British government's representatives in the colony.[8] Government-imposed taxes on tea were astronomically high, owing to a government-created monopoly on its import by the East India Company, which was struggling in business because its prices were undercut by smugglers.[9] To bolster the failing company, British Parliament permitted the company to export tea directly to the colonies, without having to first move the tea through England and pay an export tax to the British government.[10] Colonists resisted the Tea Act: in several ports, ships carrying the taxed tea were refused entry, or were disallowed to unload their cargo.[11] In Massachusetts, however, the loyalist governor refused to embargo the tea and instead ordered the ships blockaded into the harbor until the duty was paid.[12] The crowds meeting at Faneuil Hall defied orders to vacate the public space, held votes on how to proceed, and sought to persuade the governor that his constituents wanted the tea returned to England.[13] Participants railed against the monopolistic power of the East India Company and the government's imposition of taxes on the common man to protect corporate interests. As is, perhaps, obvious from history, discourse and speeches were unsuccessful in persuading the governor of the need for change, so protestors resorted to famously more unconventional means of protest.

If the motivations and grievances underpinning the Boston Tea Party sound familiar, it is not only because they are taught as rote in junior high school classes across the country, but also because references to similar sources of discontent can be found in the political movements

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[6] *See id.* at 159–60 ("In September 1773 the *Boston Gazette* reprinted a series of inflammatory articles against the Tea Act that had appeared in Philadelphia and New York newspapers. The articles argued that the government-backed East India Company monopoly on tea sales would drive small merchants out of business, encourage establishment of other government monopolies, and eventually destroy free enterprise.").

[7] *Cf.* Louis Henkin, *The Supreme Court, 1967 Term—Foreword: On Drawing Lines*, 82 HARV. L. REV. 63, 79 (1968) ("The Constitution protects freedom of 'speech,' which commonly connotes words orally communicated. But it would be surprising if those who poured tea into the sea and who refused to buy stamps did not recognize that ideas are communicated, disagreements expressed, protests made other than by words or mouth of pen."). This language was cited favorably by then-Judge Ginsburg in her concurrence in *Cmty. for Creative Non-Violence v. Watt*, 703 F.2d 586, 605 (1983) (Ginsburg, J., concurring), *rev'd sub nom.* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288 (1984).

[8] UNGER, *supra* note 3, at 161–62.

[9] *Id.* at 158.

[10] *Id.*; *see also* Tea Act, 1773, 13 Geo. 3, c. 44 (Eng.).

[11] UNGER, *supra* note 3, at 129–30 (discussing such "nonimportation agreements").

[12] *Id.* at 164.

[13] *Id.* at 162–65.

of today.[14] Since the collapse of the American economy, protests have arisen against federal taxation and spending[15] and against the government's continued pro-corporate policies.[16] One such movement, the Tea Party, became a political faction that has created division within the Republican Party. On the opposite side of the political spectrum, Occupy Wall Street (OWS) "is pretty easily characterized as a constitutional movement seeking to take back the Constitution from 'the malefactors of great wealth,' to borrow a phrase from a century ago."[17] OWS protests are laden with speech, signage, and chants, but also with expressive conduct. In lower Manhattan, New York City, for example, protestors established an encampment in Zuccotti Park—mere feet from Wall Street, the symbolic center of the perceived corporate oligarchy—

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[14] *See, e.g.*, Andrew Sullivan, *You Say You Want a Revolution*, DAILY BEAST (Oct. 22, 2011, 11:30 PM), http://www.thedailybeast.com/newsweek/2011/10/23/how-i-learned-to-love-the-goddamned-hippies.html ("The theme that connects [Occupy Wall Street and the Tea Party movements] is disenfranchisement . . . . [A] 'democratic deficit' gets to the nub of it."). Contemporary commentary on the Tea Act echoes eerily of the protests of modern times against government-backed big business. *See, e.g.*, UNGER, *supra* note 3, at 159–60 ("In September 1773 the *Boston Gazette* reprinted a series of inflammatory articles against the Tea Act that had appeared in Philadelphia and New York newspapers. The articles argued that the government-backed East-India Company monopoly on tea sales would drive small merchants out of business, encourage establishment of other government monopolies, and eventually destroy free enterprise.").

[15] *See, e.g.*, JILL LEPORE, THE WHITES OF THEIR EYES: THE TEA PARTY'S REVOLUTION AND THE BATTLE OVER AMERICAN HISTORY (2010) (discussing the modern Tea Party political movement and its historically inaccurate adoption of the Boston Tea Party narrative). The modern Tea Party found its genesis on February 19, 2009, when Rick Santelli appeared on CNBC and called upon viewers to dump derivative securities into Lake Michigan, mimicking the Boston Tea Party. Rick Santelli, *Squawk Box* (CNBC television broadcast Feb. 19, 2009). This "rant heard round the world" quickly spawned the Tea Party Movement, which railed against what it perceived to be taxation without representation. LEPORE, *supra*, at 4 (noting that Tea Party activists have faulted schools for failing to teach students the Boston Tea Party "as about a collection of interested citizens afraid of seeing their economic success determined by the whim of an interventionist governmental body" and characterized the Boston Tea Party participants as "fed up with taxation without representation"). Professor Lepore, however, notes that "the Tea Party's version of American history bore almost no resemblance to the Revolution [she] teach[es]." *Id.* at 7. Regardless of whence the Tea Party's mission arose, however, the Tea Party has come to be associated with anti-tax propaganda: the "Tea" in the modern "Tea Party" political movement purportedly stands for "Taxed Enough Already." Jill Lepore, *Tea and Sympathy*, THE NEW YORKER (May 3, 2010), http://www.newyorker.com /reporting/2010/05/03/100503fa_fact_lepore.

[16] *About Occupy Wall Street*, OCCUPY WALL STREET (Nov. 19, 2012), http://occupywallst.org/about [hereinafter *About OWS*] (defining the movement as "fight[ing] back against the richest 1% of people that are writing the rules of an unfair global economy that is foreclosing on our future"); *Declaration of the Occupation of New York City*, #OCCUPYWALLSTREET: NEW YORK GENERAL ASSEMBLY (Nov. 19, 2012), http://www.nycga.net/resources/declaration [hereinafter *Declaration of OWS*] (listing among the grievances driving the movement that "[corporations] have taken bailouts from taxpayers with impunity, and continue to give Executives exorbitant bonuses"; "influenced the courts to achieve the same rights as people, with none of the culpability or responsibility"; "determined economic policy, despite the catastrophic failures their policies have produced and continue to produce"; and "donated large sums of money to politicians, who are responsible for regulating them"). *See infra* Part III.

[17] Jack Balkin, *Occupy the Constitution*, BALKINIZATION (Oct. 19, 2011), http://balkin.blogspot.com/ 2011/10/occupy-constitution.html. Professor Balkin notes that "OWS advocates argue that the system of government in the United States is broken. The wealthy and powerful have used their wealth and power to buy access to government, and to use that access to twist regulations and programs to make themselves even more wealthy and powerful, thus turning American democracy into a self-perpetuating machine for taking from the have-nots and giving to the haves." *Id.* Balkin says this is, at base, an argument that the current form of government violates the Guarantee Clause of the United States Constitution. *Id.*

for nearly two months before they were evicted, signaling their occupation of Wall Street and the hope to ultimately recapture the government from corporate interests.[18]

From September 17 until November 15, 2011, protesters occupied the Wall Street area of Manhattan—the center of the corporate greed they perceived to be destroying the United States.[19] In the wee hours of November 15, however, the New York City Police Department evicted the protestors from the park.[20] Petitions for a restraining order were quickly filed and initially granted, but the court later lifted the Temporary Restraining Order ("TRO"), assuming, without deciding, that the First Amendment applied to OWS's activities,[21] but finding that the eviction did not abridge the occupiers' First Amendment rights.[22]

Beyond traditional speech—written and oral—the First Amendment protects expressive conduct. At least, as an academic matter, it does. The Supreme Court, in *United States v. O'Brien*, declared that "symbolic speech" in a public forum is protected from restriction or regulation unless (1) that restriction is within the government's constitutional power; (2) the restriction furthers an important or substantial government interest; (3) the restriction is not aimed at restricting speech; and (4) the incidental effect on speech is no greater than necessary.[23] However, the *O'Brien* Court did not define "symbolic speech" or set forth a test for identifying it,[24] thereby rendering what would become the expressive

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[18] *See* Colin Moynihan, *Wall Street Protest Begins, With Demonstrators Blocked*, CITY ROOM, N.Y. TIMES (Sept. 17, 2011), http://cityroom.blogs.nytimes.com/2011/09/17/wall-street-protest-begins-with-demonstrators-blocked (noting, on the first day of protests, that "[f]or months the protesters had planned to descend on Wall Street on a Saturday and occupy parts of it as an expression of anger over a financial system that they say favors the rich and powerful at the expense of ordinary citizens"); *see also* Rich Lamb, *Protestors Continue 'Occupy Wall Street' Demonstration In Zuccotti Park*, CBS NEW YORK (Sept. 29, 2011), http://newyork.cbslocal.com/2011/09/29/protestors-continue-occupy-wall-street-demonstration-in-zuccotti-park.

[19] *See* Esme E. Deprez & Alison Vekshin, *New York Police in Riot Gear Clear "Occupy" Protestors from Zuccotti Park*, BLOOMBERG (Nov. 15, 2011), http://www.bloomberg.com/news/2011-11-15/u-s-mayors-crack-down-on-occupy-wall-street.html (describing how "New York City police in riot gear swept into a Lower Manhattan park . . . to remove Occupy Wall Street demonstrators who had been camping there for more than eight weeks to protest income inequality").

[20] *Id.*

[21] *See* Waller v. City of New York, 933 N.Y.S.2d 541, 545 (Sup. Ct. 2011) (holding that the owner of the park had the right to adopt reasonable time, place, and manner restrictions in order to keep the space clean and safe); *see also id.* at 544 (assuming for purposes of the petition that the First Amendment applies to the owner of Zuccotti Park, thus obviating petitioners' request for a hearing as to whether Zuccotti Park is a traditional public forum, or a limited public forum).

[22] *See id.* at 545 ("The movants have not demonstrated that they have a First Amendment right to remain in Zuccotti Park along with their tents, structures, generators, and other installations to the exclusion of the owner's reasonable rights and duties to maintain Zuccotti Park, or to the rights to public access of others who might with to use the space safely. Neither have the applicants shown a right to a temporary restraining order that would restrict the City's enforcement of law so as to promote public health and safety.").

[23] *See* United States v. O'Brien (*O'Brien II*), 391 U.S. 367, 377 (1968) (outlining the circumstances under which government regulation may restrict "symbolic speech").

[24] *Id.* at 376. The Court assumed, without deciding, that the burning of a draft card in protest of the Vietnam War—the conduct for which O'Brien was convicted—was "speech" within the meaning of the First Amendment. *Id.*

conduct doctrine a vague mess.[25] Although the Court later set forth a tentative test for what constitutes expressive conduct to be subjected to the *O'Brien* test,[26] "it did so with such a generic approach that it has been of only limited help."[27] Perhaps because of this unhelpful guidance, many courts have followed the facilitative shortcut taken by the *O'Brien* Court and assumed, without deciding, that the conduct at issue was indeed speech.[28]

Judge Stallman of the New York County Supreme Court, in hearing the petition in *Waller v. City of New York*, dismissively addressed the First Amendment implications of the *place* of the protests.[29] However, he failed to acknowledge or address the First Amendment implications of his ruling on the *manner* of the protest; the brief decision is notably bereft of reference to the significance of the encampment to the message of "occupation."[30] He simply declared—without citation to precedent or discussion of any form—that, although the protestors had a right to be present in Zuccotti Park, they had no "First Amendment right to remain in Zuccotti Park, along with their tents, structures, generators, and other installations."[31]

Judge Stallman's finding underscores a flaw of the *O'Brien* test: to wit, the current doctrine is under-protective of conduct that embodies both expressive and non-expressive elements. Perhaps the most obvious indication of the doctrine's disregard for the value of speech is the fact that the *O'Brien* test has never been employed by the Supreme Court to

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[25] *See, e.g.*, James M. McGoldrick, United States v. O'Brien *Revisited: Of Burning Things, Weaving Things and G-Strings*, 36 U. MEM. L. REV. 903, 914–15 (2006) ("[T]he failure to limit the kind of expressive conduct that can be treated as speech invites more and more bizarre behavior to be claimed as speech. Conduct claimed to be within the ambit of speech goes beyond the reach of imagination and occupies an untold amount of judicial time and effort. Courts have decided a plethora of cases. Illustrative are the following lower court decisions. Owners of 'swingers club' did not have a free speech right to support public acts of sexual conduct. A three-dollar fee for non-residents to use a city beach did not breach their free-speech right to lie or sit on the beach. A ban on tattooing was only a limitation of self-expression and was not a limitation on free speech, nor was there a free-speech right to a body massage by a partially-nude masseuse. Weeds more than twelve inches high in a front lawn were not free speech. A law preventing the harassing of hunters did not raise free speech concerns. The free speech clause did not protect the right not to wear a motorcycle helmet, even when the helmet had been removed in a funeral procession as a sign of respect for the newly deceased former rider. Failure to get rid of cockfighting chickens was not protected speech. Thankfully, public cunnilingus and masturbation as part of an exotic dance performance was likewise not protected speech. However, the wearing of a ninja mask while attending an open meeting of a city commission was protected speech." (citations omitted)).

[26] Spence v. Washington (*Spence III*), 418 U.S. 405, 408–10 (1974).

[27] McGoldrick, *supra* note 25, at 912.

[28] *See, e.g.*, Barnes v. Glen Theatre, Inc., 501 U.S. 560, 560 (1991) (ruling that nonobscene nude dancing was a form of protected expression); Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293–94 (1984) (assuming that overnight sleeping in connection with the demonstration is expressive conduct protected to some extent but deciding that regulation of that conduct is not prohibited by the Constitution); First Vagabonds Church of God v. City of Orlando, Fla., 638 F.3d 756, 758 (11th Cir. 2011) (assuming, without deciding, that feeding the homeless was expressive conduct, but finding regulations forbidding it reasonable); Pinard v. Clatskanie Sch. Dist. 6J, 467 F.3d 755, 759 (9th Cir. 2006) (assuming, without deciding, that refusal to board a bus was expressive conduct, but refusing to protect it).

[29] Waller v. City of New York, 933 N.Y.S.2d 541, 544–45 (Sup. Ct. 2011).

[30] *See generally id.*

[31] *Id.* at 375.

strike down a content-neutral regulation that affected speech.[32] First, by failing to consider whether conduct embodies communicative elements within the ambit of the First Amendment, the *O'Brien* Court—and the decisions that followed from that case—too often determine that even a mildly important government interest sufficiently outweighs the important protections of the First Amendment.[33]

Furthermore, and of greater concern, the *O'Brien* test itself is flawed. The final element of the test—whether the incidental effect on speech is no greater than necessary[34]—approaches the problem of expressive conduct from the wrong direction. That is, it is overly deferential to the government's interest and dismissive of the value of speech. With respect to traditional methods of speech in a public forum, the Supreme Court has acknowledged that the location in which protected speech is made is sometimes essential to the message;[35] in such instances, if the speech were to be divorced from the relevant location, its value and impact would be diminished.[36] A close analogue exists with respect to conduct. In some instances, were speech to be divorced from the corresponding conduct, its value would be divorced from corresponding conduct, and therefore, its value or impact would be impaired. Yet, indicative of the flaws of the expressive conduct doctrine, the Court has not yet acknowledged that the *manner* of speaking—the conduct by which the message is conveyed—may sometimes be essential to the message.

Rather than asking if the effect is no greater than necessary, a constitutional test aimed at properly protecting the expressive elements of conduct should require a court to determine whether the prohibition of the proposed conduct forecloses an essential element of the message sought to be conveyed.[37] Where speech alone does not completely or effectively convey the message of the speaker, conduct that forms an essential element of the message should be protected for its own sake, not merely as a convenient shorthand for spoken word. Only then can the doctrine properly protect the expressive elements of conduct common in

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[32] *See Barnes*, 501 U.S. at 577 (Scalia, J. concurring) ("We have never invalidated the application of a general law simply because the conduct that it reached was being engaged in for expressive purposes and the government could not demonstrate a sufficiently important state interest.").

[33] *Cf.* R. George Wright, *What Counts as Speech in the First Place?: Determining the Scope of the Free Speech Clause*, 37 PEPP. L. REV. 1217, 1229 (2010) ("A mere assumption that the activity in question is speech may often leave the court with only an abstract, dry, bloodless, unexamined, superficial sense of how speech should be valued in the case at bar.").

[34] *O'Brien II*, 391 U.S. 367, 377 (1968).

[35] *See infra* Part IV.B.

[36] *See infra* Part IV.B.

[37] In contrast to the expressive conduct doctrine, which is more concerned with facilitating the government interest, the public forum doctrine addresses the manner of permissible restriction on speech in those fora traditionally held in trust for the public. In addressing restrictions on speech in the public forum, current doctrine asks whether there are "ample alternative means" of communicating the message. *See, e.g.*, Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (discussing the public forum doctrine). Thus, the public forum doctrine is vastly more speech-protective than the expressive conduct doctrine. *See infra* Part IV.

eras punctuated by intense political and economic frustration. *O'Brien* requires revision.

This Article begins in Part II by outlining the history and political message of OWS in New York City and the eventual eviction of protestors from Zuccotti Park. Part III then describes the current expressive conduct doctrine, tracing its origins from a prohibition on draft card burning in *O'Brien*. It goes on to discuss the test for what constitutes expressive speech—seldom used though that test may be—and the deleterious effects on free speech protection of assuming, without deciding, that given conduct constitutes speech. Part IV briefly describes Zuccotti Park's status as a traditional public forum, and then discusses the Supreme Court's treatment of location that is essential to the content of speech.

Because the New York state court decision evicting the protestors from Zuccotti Park failed to perform any constitutional analysis with respect to the protestors' First Amendment rights, Part V of this Article considers an as-of-yet hypothetical application of the current constitutional doctrine to the eviction of OWS from Zuccotti Park. Under the current doctrine, such a challenge would fail: because the OWS protestors expressed their message in part through conduct, rather than merely through words, the message conveyed by the symbolic occupation of Wall Street would be subordinated to merely nominal government interests. Although the encampment symbolizing occupation should properly be construed as speech, the risk is high that a court may employ the facilitative shortcut endorsed in *O'Brien*. However, even if such expressive conduct is properly construed as speech, it is likely that a court would nevertheless find that it is subordinated to a sufficiently important government interest because the *O'Brien* test is overly deferential to the government and therefore under-protective of speech.

Given this unsatisfying result, Part VI concludes that the expressive conduct doctrine is flawed both conceptually and in application, and calls for *O'Brien*'s revision to enhance protection for conduct that constitutes an important element of speech. Where conduct forms an essential element of the intended message—in that it constitutes not merely a convenient shorthand or substitute for speech, but rather stands for an element incapable of being conveyed by verbal or written speech alone—it must receive the same protection as pure speech. *O'Brien* should apply only where conduct does not form an essential element of speech. But where conduct is so speech-like that it is, essentially, speech, the somewhat more deferential "time, place, and manner" test should be applied to recognize the expressive contribution of the conduct.

II. THE OCCUPY WALL STREET MOVEMENT

A. The Message of Occupation

On September 17, 2011, a small group of protestors, poorly organized but nevertheless determined, set out to protest the capture of the government by corporate interests on Wall Street in New York City.[38] Carrying signs that read "End the Oligarchy," "Democracy Not Corporatization," and "Revoke Corporate Personhood," the group instead found their efforts rebuffed. After broadcasting their intentions on social media sites like Twitter, they arrived to find that the NYPD had barred access to the streets and sidewalks of Wall Street where they sought to protest.[39] Instead, they settled in Zuccotti Park, formerly called Liberty Park, half a block from Wall Street.[40] And there they remained.

By the second day of protests, 200 people had joined the cause.[41] As the group swelled to many hundreds of protestors, arrests began.[42] Protestors were arrested for writing with chalk on sidewalks, blocking traffic, allegedly attempting to jump over police barriers, and resisting arrest.[43] The government resistance—which originally may have been intended to quell the protests and disband the protestors—instead fortified the resolve of the group: a week and a half after the protest

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[38] *See generally About OWS*, *supra* note 16 (defining the movement "fight[ing] back against the richest 1% of people that are writing the rules of an unfair global economy that is foreclosing on our future"); Andrew Flemming, *Adbusters Sparks Wall Street Protest: Vancouver-Based Activists Behind Street Actions in the U.S.*, VANCOUVER COURIER (Sept. 27, 2011), http://www.vancourier.com/Adbusters+sparks+Wall+Street+protest/5466332/story.html.

[39] Moynihan, *supra* note 18. The police's actions in barring the protestors from actually reaching their target area and target audience are, themselves, of questionable constitutionality. Streets and sidewalks are fora which "have immemorially been held in trust for the use of the public and, time out of mind, have been used *for purposes of assembly, communicating thoughts between citizens, and discussing public questions.* Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens." Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939) (emphasis added). *See infra* Part IV.A for a discussion of the doctrine controlling speech in public fora.

[40] Colin Moynihan, *Wall Street Protests Continue, with at Least 6 Arrested*, CITY ROOM, N.Y. TIMES (Sept. 19, 2011), http://cityroom.blogs.nytimes.com/2011/09/19/wall-street-protests-continue-with-at-least-5-arrested.

[41] *Id.*

[42] There is room for debate as to which came first: the police response to OWS, or the popularization and increase in protest size and scope. *See, e.g.*, Clyde Haberman, *A New Generation of Dissenters*, CITY ROOM, N.Y. TIMES (Oct. 10, 2011), http://cityroom.blogs.nytimes.com/2011/10/10/a-new-generation-of-dissenters. Mr. Haberman notes, in his editorial, that OWS was relatively ignored until a high-ranking police officer, Inspector Anthony Bologna, penned in and pepper sprayed four non-violent, non-disorderly female protestors a week after the movement began. *Id.*; *see also* Sarah Maslin Nir, *Video Appears to Show Wall Street Protesters Being Pepper-Sprayed*, CITY ROOM, N.Y. TIMES (Sept. 25, 2011), http://cityroom.blogs.nytimes.com/2011/09/25/video-appears-to-show-protesters-being-pepper-sprayed. "If the Occupy Wall Street protesters ever choose to recognize a person who gave their cause its biggest boost," Mr. Haberman wrote, "they may want to pay tribute to Anthony Bologna. . . . That pepper shot in the face was a vital shot in the arm for the nascent anti-Wall Street movement. . . . Inspector Bologna's improvidence was a game changer." Haberman, *supra*.

[43] Moynihan, *supra* note 40.

began, the group ratified their statement of purpose, the "Declaration of Occupation of New York."[44]

Much as the Boston Tea Party in 1773 was provoked by the sentiment that the government favored corporate interests over those of its citizens, the Declaration of the Occupation of New York decried the capture of democracy by corporate interest:

> [W]e acknowledge the reality . . . that a democratic government derives its just power from the people, but corporations do not seek consent to extract wealth from the people and the Earth; and that no true democracy is attainable when the process is determined by economic power. We come to you at a time when corporations, which place profit over people, self-interest over justice, and oppression over equality, run our governments.[45]

Essentially, the OWS movement protested the perceived denial of a republican form of government[46] and protested what it saw to be the capture of democracy by corporate interests. The protestors, therefore, resolved to "recapture" democracy. The Declaration concluded with a plea "[t]o the people of the world" to peaceably "occupy public space" to create solutions to the flaws the movement saw in the corporate democracy.[47]

And occupy, they did. What began as a few sleeping bags laid out over cardboard on the ground in Zuccotti Park grew to an extensive tent city, with a pantry, kitchen, medical station, and library.[48] As the encampment grew, so too did official resistance to the movement. Initially, reports of a few arrests trickled in—some on questionable bases.[49] At other times, though, the police presence seemed to be tolerant of the movement.[50]

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[44] *Declaration of OWS*, *supra* note 16.

[45] *Id.* In support of the contention that corporate interests have superseded individual interests and liberty, the protesters promulgated a non-exhaustive list of grievances against corporations, including: "[t]hey have influenced the courts to achieve the same rights as people, with none of the culpability or responsibility"; "[t]hey determine economic policy, despite the catastrophic failures their policies have produced and continue to produce"; "[t]hey have donated large sums of money to politicians, who are responsible for regulating them"; "[t]hey have taken bailouts from taxpayers with impunity, and continue to give Executives exorbitant bonuses"; "[t]hey have perpetuated inequality and discrimination in the workplace based on age, the color of one's skin, sex, gender identity and sexual orientation"; "[t]hey have continuously sought to strip employees of the right to negotiate for better pay and safer working conditions"; and "[t]hey have used the military and police force to prevent freedom of the press." *Id.*

[46] *See* Balkin, *supra* note 17 (discussing the role of the Guarantee Clause—the constitutional guarantee of republican government—in OWS's philosophy).

[47] *Declaration of OWS*, *supra* note 16.

[48] Jonathan Massey & Brett Snyder, *Mapping Liberty Plaza*, PLACES, THE DESIGN OBSERVER GROUP (Sept. 17, 2012), http://places.designobserver.com/feature/mapping-liberty-plaza-zuccotti-park/35948/.

[49] *See, e.g.*, Moynihan, *supra* note 40 (noting that a woman was arrested for wearing a plastic mask on the *back* of her head).

[50] *See, e.g.*, Al Baker, *Wall Street Protest Visits Washington Sq.*, CITY ROOM, N.Y. TIMES (Oct. 8, 2011), http://cityroom.blogs.nytimes.com/2011/10/08/wall-street-protest-moves-to-washington-sq

The owners of Zuccotti Park similarly displayed a lukewarm tolerance toward the protestors. Zuccotti Park is not a public park; it is owned and maintained by Brookfield Properties. As such, it was not covered by the New York City ordinance imposing a curfew on parks[51] and forbidding camping.[52] Furthermore, because it is one of the older privately owned parks in New York City, it is not subject to the modern zoning laws imposing a curfew.[53] Per an agreement with the City upon the construction of Zuccotti Park, it was to remain open for public access twenty-four hours per day.[54] However, shortly after the occupation began, Brookfield promulgated new rules "which seem[ed] aimed at the very essence of the occupation: no camping, no tents, no tarps, no sleeping bags, no lying on the ground or on benches, and no storage of personal property on the ground or walkways 'which unreasonably interferes with the use of such areas by others.'"[55] Citing the need to be able to clean the park, Brookfield Properties, with the backing of the NYPD, threatened to evict the protestors.[56] The New York Civil Liberties Union[57] and even City Councilmen spoke up,[58] urging against this plan of action on First Amendment grounds. Even though eviction seemed imminent in mid-October, the police and property owners continued to tolerate OWS's protests for another month.

(noting that "as some police commanders tried to steer the procession along Sixth Avenue, the marchers disagreed and stayed on West Broadway, passing through the central corridor of SoHo and its bookstores, cafes and restaurants," and yet "[t]he police did not resist"); *but see* Natasha Lennard, *Covering the March, on Foot and in Handcuffs*, N.Y. TIMES (Oct. 2, 2011), http://cityroom.blogs.nytimes.com/2011/10/02/covering-the-march-on-foot-and-in-handcuffs (noting that, as protestors were ordered arrested by NYPD officers, the rank-and-file officers assigned to arrestees merely "made some small talk").

[51] *See* Lisa W. Foderaro, *Privately Owned Park, Open to Public, May Make Its Own Rules*, N.Y. TIMES (Oct. 13, 2011), http://www.nytimes.com/2011/10/14/nyregion/zuccotti-park-is-privately-owned-but-open-to-the-public.html. *See infra* Part IV.A for a discussion of Zuccotti Park's status as a public forum for purposes of First Amendment analysis.

[52] *See* NYC DEP'T OF PARKS & RECREATION, RULES & RECOMMENDATIONS § 1.04(p) ("No person shall engage in camping, or erect or maintain a tent, shelter, or camp in any park without a permit."); NYC DEP'T OF PARKS & RECREATION, RULES & RECOMMENDATIONS § 1.01(c) (decreeing that the rules be effective within and upon all areas under the jurisdiction of the Commissioner, as defined in Chapter 21 of the New York City Charter); NEW YORK CITY CHARTER § 533 ("Powers and Duties of the Commissioner") (stating that the commissioner has authority over all "parks, squares and public places").

[53] Anemona Hartocollis, *Facing Eviction, Protesters Begin Park Cleanup*, CITY ROOM, N.Y. TIMES (Oct. 13, 2011), http://cityroom.blogs.nytimes.com/2011/10/13/told-to-leave-protesters-talk-pre-emptive-strategy.

[54] *See* Foderaro, *supra* note 51 (reporting that the park is required to be open 24 hours a day).

[55] Hartocollis, *supra* note 53.

[56] *Id.*

[57] Press Release, N.Y. Civ. Liberties Union, NYCLU to City: Don't Use Wall St Clean Up as a Pretext for Mass Arrests (Oct. 13, 2011), http://www.aclu.org/free-speech/nyclu-city-dont-use-wall-st-clean-pretext-mass-arrests ("The city must not use the clean up as a pretext for mass arrests. To do so would be a violation of the spirit of the First Amendment and the spirit of dissent.").

[58] Hartocollis, *supra* note 53 (noting that 13 members of the Council wrote to Mayor Bloomberg: "The new rules you are enforcing, however — in particular the prohibition on sleeping bags and gear — is an eviction notice and potentially an unconstitutional closing of a forum to silence free speech.").

B. Eviction and Legal Action

The tentative tolerance of the NYPD and Brookfield Properties finally ran out in the wee hours of November 15, 2011. At one o' clock in the morning, hundreds of police officers in riot gear stormed into Zuccotti Park, backed by helicopters, trucks blasting bright lights, and loudspeakers.[59] Approximately 142 protestors were arrested, the campsites and personal property destroyed, and the camp's library ruined.[60] Coverage of the actual events is spotty, owing to the fact that the police removed all reporters from the park and blockaded them many blocks away, out of sight and earshot of the eviction.[61]

Immediately, OWS lawyers sought a TRO from the court, and by 6:30 a.m., an injunction was granted by the New York County Supreme Court.[62] The City responded quickly, filing papers opposing the TRO—a motion which was granted later that same day.[63] The City averred in its papers that the Occupy protest site created a fire hazard, necessitating the eviction;[64] it strongly urged the court

> not [to] extend the TRO and permit Brookfield and the City to go forward with their plan of reopening the park to all members of the general public, including protestors, while taking steps to prohibit the use of the Park in a manner that creates a public safety hazard, allows unhealthy and unsafe conditions to flourish and prevents all members of the general public from using and enjoying the park.[65]

Oral arguments were held the same day, and an order handed down later in the evening that denied the petitioners' request to extend the TRO, effectively abridging the protestors' First Amendment rights.[66]

In ruling on the opposition to the TRO, Judge Stallman apparently relied primarily on the government's papers. He noted that Zuccotti Park was a "privately-owned public-access plaza" required to be "open to the

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[59] Al Baker & Joseph Goldstein, *After an Earlier Misstep, a Minutely Planned Raid*, N.Y. TIMES (Nov. 15, 2011), http://www.nytimes.com/2011/11/16/nyregion/police-clear-zuccotti-park-with-show-of-force-bright-lights-and-loudspeakers.html (writing that pre-raid preparation by police was substantial and seemingly directed at suppressing protestors; police had studied OWS, underwent "major disaster drill" training, and practiced conventional counterterrorism responses before raiding the park).

[60] *Id.*

[61] Brian Stelter & Al Baker, *Reporters Say Police Denied Access to Protest Site*, MEDIA DECODER, N.Y. TIMES (Nov. 15, 2011), http://mediadecoder.blogs.nytimes.com/2011/11/15/reporters-say-police-denied-access-to-protest-site.

[62] Order to Show Cause and Temporary Restraining Order, Waller v. City of New York, 933 N.Y.S.2d 541 (Sup. Ct. 2011) (No. 112957/11).

[63] *Waller*, 933 N.Y.S.2d at 542.

[64] Affirmation of Deputy Mayor Cas Holloway in Opposition to TRO ¶ 5, *Waller*, 933 N.Y.S.2d 541 (No. 112957/2011) [hereinafter Holloway Aff.].

[65] *Id.* ¶ 2.

[66] *Waller*, 933 N.Y.S.2d at 544–45.

public and maintained for public use 365 days per year."[67] He apparently found the 24-hour-per-day occupation of the park to be inimical to "public use." Glossing over important First Amendment concerns,[68] Judge Stallman simply held that:

> [t]he movants have not demonstrated that they have a First Amendment Right to remain in Zuccotti Park, along with their tents, structures, generators, and other installations to the exclusion of the owner's reasonable rights and duties to maintain Zuccotti Park, or to the rights to public access of others who might wish to use the space safely.[69]

With that statement, OWS's eviction became permanent, and a very important aspect of its speech curtailed.[70] Although members of the movement reassembled in Foley Square, across the street from the courthouse, they could no longer speak *at* those to whom they wished to speak: the corporate interests on Wall Street, now some nine blocks away.[71] More fundamentally, however, the Occupy Wall Street movement could no longer occupy Wall Street.[72]

III. THE EXPRESSIVE CONDUCT DOCTRINE

Conduct that conveys a message, such as occupying a space in protest of the conduct of those who typically use the space, poses a peculiar constitutional quandary. Traditionally, it is within a

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[67] *Id.* at 543.

[68] *Id.* at 544 (assuming, without deciding, that the First Amendment applied to Zuccotti Park as a public forum).

[69] *Id.* at 545. As with most other statements in his opinion, Judge Stallman does violence to First Amendment jurisprudence with this proclamation. It is the *government* that bears the burden of showing that its restrictions on speech comport with all elements of the time, place, and manner doctrine; it is not the responsibility of the protestors to demonstrate that they have a First Amendment right to speech. *See* Snyder v. Phelps, 131 S. Ct. 1207, 1220 (2011) ("The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner." (quoting *Cohen v. California,* 403 U.S. 15, 21 (1971)); Edan Burkett, *Coordination or Mere Registration? Single-Speaker Permits in* Berger v. City of Seattle, 2010 B.Y.U. L. REV. 931, 945–46 (2010) ("The government bears the burden of showing that its regulations on expressive activity meet all three elements of the time, place, and manner test.").

[70] *See infra* Part V. Since the opinion was handed down, the New York City Police have cracked down severely on expressive conduct, taking the court's ruling to bizarre extremes. As one reporter notes: "I have seen one protestor at Union Square arrested, by four officers using considerable force, for sitting on the ground to pet a dog; another, for wrapping a blanket around herself (neither were given warnings; *but both behaviors were considered too close to 'camping'*) . . . ." David Graeber, *New Police Strategy in New York—Sexual Assault Against Peaceful Protestors*, TRUTHOUT (May 4, 2012) (emphasis added), http://truth-out.org/news/item/8912-new-police-strategy-in-new-york-sexual-assault-against-peaceful-protestors.

[71] *See infra* Part IV.B for a discussion of the importance of location to speech and its effect on free speech analysis.

[72] *See infra* Part V for a discussion of the crippling of OWS in the wake of the abridgement of its expressive conduct.

government's police power to regulate conduct; however, expressive conduct that resembles speech is also deserving of some First Amendment protection.[73] The Supreme Court has acknowledged that conduct may have both speech and non-speech elements, and that, "because of this intermingling of protected and unprotected elements, [expressive conduct] can be subjected to controls that would not be constitutionally permissible in the case of pure speech."[74]

Although it had, for some time before, been recognized that symbolic action may constitute speech,[75] the expressive conduct doctrine found its genesis in *United States v. O'Brien*.[76] The flaws attendant in the doctrine as a whole can be traced from the Supreme Court's analysis and decision in that case. Therefore, this discussion of the expressive conduct doctrine and the necessary revisions must begin with *O'Brien*.

A. A Burning Desire to Express Oneself: *United States v. O'Brien*

On March 31, 1966, David Paul O'Brien and his acquaintances burned their draft cards on the steps of the South Boston Courthouse in opposition to the draft.[77] He was indicted, tried, and convicted of the willful destruction of his draft card in violation of 50 U.S.C. § 462(b), which punished anyone who "forces, alters, knowingly destroys, knowingly mutilates, or in any manner changes" their draft card.[78] That particular section of the Code had been amended by act of Congress in 1965 to add the words "knowingly destroys" and "knowingly mutilates" to the list of proscribed activities.[79]

He was convicted at the trial level, and appealed. At trial and on appeal, O'Brien argued that the 1965 amendment was an unconstitutional abridgment of free speech that served no legitimate purpose.[80] On appeal,

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[73] *See* Amalgamated Food Emps. Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 323 (1968) ("[T]he mere fact that speech is accompanied by conduct does not mean that the speech can be suppressed under the guise of prohibiting the conduct."), *overruled by* Hudgens v. Nat'l Labor Relations Bd., 424 U.S. 507 (1976).

[74] *Id.* at 313. In the context of picketing, the Court noted that "no case decided by [the Supreme Court] can be found to support the proposition that the nonspeech aspects of peaceful picketing are so great as to render the provisions of the First Amendment inapplicable to it altogether." *Id.* at 314.

[75] *See, e.g.*, W. Va. State Bd. of Ed. v. Barnette, 319 U.S. 624, 633–34 (1943) (recognizing the salute of the flag as expressive conduct); Stromberg v. California 283 U.S. 359, 369 (1931) (recognizing the political message in displaying a red flag).

[76] *O'Brien II*, 391 U.S. 367, 376 (1968).

[77] *Id.* at 369. In his own defense, O'Brien informed the jury at trial that he publicly burned the certificate "so that other people would reevaluate their positions with Selective Service, with the armed forces, and reevaluate their place in the culture of today, to hopefully consider my position." *Id.* at 370.

[78] *Id.*

[79] *Id.*; *see also* Act of Aug. 30, 1965, Pub. L. No. 89-152, 79 Stat. 586 (1965) (amending statute to add quoted language).

[80] *O'Brien II*, 391 U.S. at 370; O'Brien v. United States (*O'Brien I*), 376 F.2d 538, 540 (1st

the First Circuit found that "no proper purpose [was] to be served by the additional provision prohibiting destruction or mutilation."[81] Rather, the First Circuit found, the law was aimed at abridgment of speech because it "singl[ed] out persons engaging in protest for special treatment," a motive that violated the "very core" of the First Amendment.[82] It upheld O'Brien's conviction, however, on the grounds that, by destroying his draft card, he was no longer in possession of the card, as required by the constitutionally valid portions of the law.[83]

Both the government and O'Brien appealed the judgment of the First Circuit. The Supreme Court noted, at the outset, that the statute did not abridge free speech on its face,[84] but continued to consider whether it constituted a violation of the First Amendment as applied.

The *O'Brien* Court refused to address O'Brien's contention that the act of burning his draft card was "symbolic speech," or expressive conduct. Rather, the Court held that, "*even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment*, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity."[85] Supreme Court precedent dictated that, when a course of conduct had both expressive and non-expressive elements, the expressive elements could be abridged, given a sufficiently important governmental interest.[86] Building upon that precedent, the *O'Brien* Court laid down a test for expressive conduct:

> a government regulation is sufficiently justified [(1)] if it is within the constitutional power of the Government; [(2)] if it furthers an important or substantial government interest; [(3)] if the governmental interest is unrelated to the suppression of free expression; and [(4)] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[87]

The Court held that the law at issue in *O'Brien* met all four of these requirements and that, therefore, O'Brien's conviction could be constitutionally upheld.[88] The *O'Brien* Court found that the regulation of the Selective Service System and maintenance of draft cards was within

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Cir. 1967).

[81] *O'Brien I*, 376 F.2d at 540.

[82] *Id.* at 541.

[83] *Id.* at 541–42.

[84] *O'Brien II*, 391 U.S. at 375 ("Amended § 12(b)(3) on its face deals with conduct having no connection with speech. It prohibits the knowing destruction of certificates issued by the Selective Service System, and there is nothing necessarily expressive about such conduct. The Amendment does not distinguish between public and private destruction, and it does not punish only destruction engaged in for the purpose of expressing views.").

[85] *Id.* at 376 (emphasis added).

[86] *Id.* at 377.

[87] *Id.*

[88] *Id.*

Congress's power to raise armies.[89] It further noted that "[t]he many functions performed by Selective Service certificates establish beyond a doubt that Congress has a legitimate and substantial interest in preventing their wanton and unrestrained destruction."[90] The Court similarly found the third prong of the test satisfied, noting that "[w]e perceive no alternative means [of protecting "this substantial governmental interest"] that would more precisely and narrowly assure the continuing availability of issued [draft cards] than a law which prohibits their willful mutilation or destruction."[91] With respect to the fourth prong of the *O'Brien* test, the Court merely noted that the focus of the statute was "limited to the noncommunicative aspect of O'Brien's conduct."[92] It wholly failed to address the impact of the statute on the communicative aspect of his conduct. Despite laying down a test requiring an analysis of the incidental effect of a statute on speech, the *O'Brien* Court failed to even identify what incidental effect the regulation had on the expressive elements of O'Brien's actions.

The *O'Brien* decision has been the subject of intense criticism, and for good reason. The test that emerged from the *O'Brien* decision is muddled and incomplete, and it unnecessarily creates a test distinct from the test for restrictions on time, place, and manner of speech. It is unclear from *O'Brien*, or any case that followed, why that pre-existing test—which dictates that restrictions on the time, place, or manner of speech must be justified without reference to the content of the regulated speech, narrowly tailored to serve a significant government interest, and leave open ample alternative means of communicating the desired message[93]—could not adequately balance governmental regulation against the First Amendment rights implicated by expressive conduct.

The most obvious flaw in the *O'Brien* Court's reasoning, however, as Professor McGoldrick notes, derives from the majority's assumption

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[89] *Id.*

[90] *Id.* at 380. It seems, however, that the Court needed to stretch to identify these "substantial interests." It noted that the cards proved that the individual was properly registered (*id.* at 378); however, that information is available in the Selective Service Systems files. It also noted that the information on the draft card "facilitates communication between registrants and local boards" (*id.*); yet, so too does publishing the board's number in the phone book. Finally, and most tenuously, the Court noted "[t]he regulatory scheme involving Selective Service certificates includes clearly valid prohibitions against the alteration, forgery, or similar deceptive misuse of certificates. The destruction or mutilation of certificates obviously increases the difficulty of detecting and tracing abuses such as these." *Id.* at 379-80. This argument completely ignores the common sense notion, suggested by the First Circuit, *see O'Brien I*, 376 F.2d 538, 541-42 (1st Cir. 1967), that anyone who destroys their draft card can be found guilty of nonpossession.

[91] *O'Brien II*, 391 U.S. at 381. In reaching this conclusion, however, the Court carefully and semantically parsed the importance of the 1965 amendment from the preexisting language in the statute, which mandated that the card remain in the registrant's possession at all times and that it not be forged or doctored. *Id.* at 381–82. The Court's analysis ignores the fact that someone who destroys their card was necessarily guilty of nonpossession of the card, which was a clearly valid aspect of the challenged law. *See O'Brien I*, 376 F.2d at 541–42 (noting that O'Brien's conviction could be upheld because, after destroying his card, he was no longer in possession of it).

[92] *O'Brien II*, 391 U.S. at 381–82.

[93] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

> that the burning of a draft card was protected symbolic speech . . . . The Court then seemed to treat the expressive action as anything but protected speech. Assuming, without affirmatively deciding, that expressive conduct is speech would seem to invite some disrespect for the free speech claim. . . . [A]ssuming that an act is free speech, without actually deciding so, . . . presents the real danger that the insincerity of the assumption will erode the level of protection given to the supposed free speech.[94]

He furthermore questions the necessity of the creation of a test separate from the time, place, and manner doctrine for First Amendment rights in a public forum.[95] Indeed, the creation of a distinct test for speech conveyed through conduct, rather than spoken or written word, inherently devalues that speech at the outset.

B. What Is Speech, Anyway?

Six years after creating a confused mess with respect to the expressive conduct doctrine in *O'Brien*, the Supreme Court was provided the opportunity to clarify the doctrine in *Spence v. Washington*.[96] Although the *Spence* Court set forth a definition of "expressive conduct," little was accomplished with respect to clarifying and strengthening the expressive conduct doctrine.

Harold Spence was charged with, and convicted of, violating a Washington state law forbidding the adulteration of an American flag. The statute provided, in relevant part, that "[n]o person shall, in any manner, for exhibition or display . . . [p]lace or cause to be placed any word, figure, mark, picture, design, drawing, or advertisement of any nature upon any flag . . . of the United States . . . or [e]xpose to public view any such flag."[97] On May 10, 1970, Spence hung an American flag, with a peace symbol affixed to it with removable tape, upside down from his apartment window.[98] His intended message, in so doing, was to "associate the flag with peace instead of war and violence, and to serve as a protest to the invasion of Cambodia and the killings at Kent State University, both of which events [sic] had occurred a few days before."[99]

On appeal from his conviction, the Washington Court of Appeals agreed with Spence's contention that the law punished protected

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[94] McGoldrick, *supra* note 25, at 910, 913.

[95] *See id.* at 944; *see also infra* Part IV.

[96] *Spence III*, 418 U.S. 405 (1974).

[97] State v. Spence (*Spence I*), 490 P.2d 1321, 1322 (Wash. Ct. App. 1971) (quoting WASH. REV. CODE § 9.86.020 (1970)).

[98] *Id.* at 1323.

[99] *Id.*

speech.[100] Characterizing *O'Brien* as a balancing test,[101] the court determined that the law's overbreadth served no legitimate government interest and overturned Spence's conviction. However, the Washington Supreme Court reversed, noting that the statute at issue "[did] not purport to inhibit speech of any kind whether actual or symbolic, printed or auditory; it merely says that one cannot use the flag of the United States as the material upon which to print his utterance; he cannot lawfully employ the flag as a billboard, poster, or placard upon which to print his message."[102] By divorcing the medium (the flag) from the message (American peace), the Washington Supreme Court convinced itself that Spence's message could easily be conveyed by other means. Therefore, it concluded that "whatever impairment might be said to arise from this state trenching upon the defendant's rights to speak his mind freely and communicate his personal views by sign and symbol is minimal—so miniscule and trifling as to come within the *de minimus non curat lex* rule."[103]

Fortunately, the Supreme Court of the United States corrected the Washington Supreme Court's many errors and overturned Spence's conviction. In *Spence v. United States*, the Court, in a per curiam decision, reversed the Washington Court's holding "on the ground that[,] as applied to appellant's activity[,] the Washington statute impermissibly infringed protected expression."[104] Eschewing the approach used in *O'Brien* of assuming, without deciding, that Spence's actions constituted speech, the Supreme Court began its analysis by determining that the expressive conduct at issue was, indeed, speech because "[a]n intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it."[105] The Court assumed for purposes of argument that the government interest advanced by the state—preserving the national flag as a symbol of the country and nothing more—was substantial.[106] It nonetheless found that the statute was unconstitutional as applied to Spence's conduct; the government's purported interest was in no way impaired by Spence's message.[107]

The *Spence* test has since been clarified, somewhat, in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*.[108] There, the

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[100] *Id.* at 1322.

[101] *Id.* at 1325 ("The problem of reconciling protection of legitimate governmental interests with the demands of free speech calls for an evaluation of competing interests and the striking of a balance that will mark the boundaries between what is constitutionally permissible and what is constitutionally impermissible. The doctrine of balancing was articulated in *United States v. O'Brien* . . . .").

[102] State v. Spence (*Spence II*), 506 P.2d 293, 299 (Wash. 1973).

[103] *Id.* at 300.

[104] *Spence III*, 418 U.S. 405, 406 (1974).

[105] *Id.* at 410–11.

[106] *Id.* at 413–14.

[107] *Id.* at 414–15.

[108] Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, 515 U.S. 557 (1995).

Court held that a Massachusetts ordinance forbidding parade organizers from prohibiting a particular group from marching in the parade violated the organizers' rights of free speech.[109] The Court, largely addressing the issue of freedom of assembly, nevertheless held that First Amendment speech rights also inhered in the case, and noted that parades constitute expressive conduct in a public forum.[110] As the organizer of such a parade, the Court held, Hurley was entitled to exclude a gay, lesbian, and bisexual group from the parade because "a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message."[111] Therefore, just as Spence was entitled to protest both the shootings at Kent State and U.S. involvement in Cambodia,[112] speakers may express many viewpoints through a single act.[113] Expressive conduct need not convey a singular, concrete, isolated message to be protected; a combination of many grievances may be aired through a single action.[114]

C. When You Assume . . . : *Community for Creative Non-Violence* and the Protection of Speech

Perhaps surprisingly—given its seeming obscurity from traditional speech—camping in public parks has been the focus of constitutional scrutiny before. In *Clark v. Community for Creative Non-Violence*, the Supreme Court upheld the National Park Service's prohibition on camping on the National Mall in Washington, D.C., and in Lafayette Park, a sprawling lawn across the street from the White House.[115] The difference in the analysis employed, and conclusions reached, by the majority and the dissenters illustrates perfectly the dangers of the habit, instigated by the Supreme Court in *O'Brien*, of assuming, without deciding, that a given course of conduct constitutes speech.

Activists with the Community for Creative Non-Violence ("CCNV"), wanting to draw attention to the plight of the homeless, sought—and were awarded—a permit to erect a tent city on the Mall, but were denied permission to sleep in the tents.[116] CCNV then filed suit alleging, *inter alia*, that the denial of a permit to sleep in the symbolic tent city was an abridgement of speech.[117] On the heels of a contentious split in the D.C. Court of Appeals, sitting *en banc*, the Supreme Court

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[109] *Id.* at 580–81.

[110] *Id.* at 569.

[111] *Id.* at 569–70.

[112] *Spence I*, 490 P.2d 1321, 1323 (1971).

[113] *Hurley*, 515 U.S. at 569–70.

[114] *Cf. Declaration of OWS*, *supra* note 16 (setting forth a non-exhaustive, varied list of grievances, protesting the "corporate forces of the world").

[115] Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 289–90, 299 (1984).

[116] *Id.* at 291–92.

[117] *Id.* at 292.

granted certiorari,[118] and reversed the appellate court's finding that the limitation was an abridgement of speech.[119]

Although the Court acknowledged the *Spence* test for expressive conduct,[120] it assumed, without deciding, that the act of sleeping in the symbolic tent city was communicative conduct; the Court also noted, without support, that it had "serious doubts" that the First Amendment required the Park Service to permit the protests at all.[121] The *Clark* Court nevertheless found that the conduct could be prohibited.[122] It applied the *O'Brien* four-factor test to determine that the regulation prohibiting sleeping in the National Parks was a permissible limitation on CCNV's speech rights.[123]

However, by assuming, without deciding, that the act of sleeping in the tent city was expressive conduct, the Court did not adequately consider the value of the expression, "erod[ing] the level of protection given to the supposed free speech interest."[124] The mere assumption that

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[118] The D.C. Circuit, sitting *en banc*, fractured sharply on the issue: four opinions for six judges concurred with the per curiam opinion of the court, while five judges dissented. *See* Cmty. for Creative Non-Violence v. Watt, 703 F.2d 586, 586 (D.C. Cir. 1983) (per curiam), *rev'd sub nom.* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288 (1984); *see also id.* at 587 (Mikva, J., concurring); *id.* at 600 (Robinson, C.J., concurring for himself and Wright, J.); *id.* at 600 (Edwards, J. concurring); *id.* at 604 (Ginsburg, J., concurring); *id.* at 608 (Wilkey, J., dissenting for himself and four others); *id.* at 622 (Scalia, J., dissenting for himself and two others).

[119] *Clark*, 468 U.S. at 292.

[120] *Id.* at 294 ("[A] message may be delivered by conduct that is intended to be communicative and that, in context, would reasonably be understood by the viewer to be communicative."); *see also Spence III*, 418 U.S. 405, 410–11 (1974) (holding that expressive conduct exists where "[a]n intent to convey a particularized message [is] present, and in the surrounding circumstances the likelihood [is] great that the message [will] be understood by those who view[] it").

[121] *Clark*, 468 U.S. at 293 ("We need not differ with the view of the Court of Appeals that overnight sleeping in connection with the demonstration is expressive conduct protected to some extent by the First Amendment. We assume for present purposes, but do not decide, that such is the case, but this assumption only begins the inquiry." (citing *O'Brien II*, 391 U.S. 367, 376 (1968)); *id.* at 296.

[122] *Id.* at 299.

[123] *Id.* at 294–96. Its application, however, was limited by the Court, which held that "[e]xpression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions." *Id.* at 293. Restrictions on the time, place, or manner of speech must be (1) justified without reference to the content of the regulated speech; (2) narrowly tailored to serve a significant government interest; and (3) leave open ample alternative means of communicating the desired message. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983); *see* City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 808 (1984) (holding that a restriction on the time, place, or manner of expression was justified where it was narrowly tailored to serve the city's interest in eliminating visual clutter); *see also infra* Part IV.A. The Court declared, without much ceremony, that the government had a substantial interest in "maintaining the parks in the heart of our Capital in an attractive and intact condition, readily available to the millions of people who wish to see and enjoy them by their presence." *Clark*, 468 U.S. at 296. The Court similarly declared that the restriction was narrowly tailored to achieve that interest. *Id.* ("To permit camping—using these areas as living accommodations—would be totally inimical to these purposes."). In so doing, however, the Court failed to address how sleeping in the tent city (prohibited by the government) differed in any significant way from maintaining a 24-hour-a-day vigil (which was permitted). *Id.* at 295 ("The regulation otherwise left the demonstration intact, with its symbolic city, signs, and the presence of those who were willing to take their turns in a day-and-night vigil.").

[124] McGoldrick, *supra* note 25, at 913–14 (discussing the failure of the Court in *O'Brien* to adequately consider the speech-like qualities of burning a draft card and noting "[t]he easy assumption in *Clark v. Community for Creative Nonviolence*—that sleeping in a tent city in Lafayette Park across Pennsylvania Avenue from the White House was speech—likely contributed to the Court's failure to weigh the free speech issues at stake carefully"); *see id.* at 910–15.

something is speech impairs a speaker's ability to demonstrate to the Court the value or importance of the speech at issue, and leaves the Court without a sense of how essential the particular conduct is to the desired message.[125] Additionally, this mechanism makes it all too easy to identify a governmental interest that outweighs the speaker's interest in the conduct attempted.[126] This is, perhaps, made most clear by comparison of the majority opinion of Justice White and the dissenting opinion, written by Justice Marshall and joined by Justice Brennan.

Unlike the majority, the dissent wrestled with the question of whether sleeping in the park, in the context presented by the case, constituted speech. Justice Marshall noted that "[t]he proper starting point for analysis of this case is a recognition that the activity in which the respondents seek to engage—sleeping in a highly public place, outside, in the winter for the purpose of protesting homelessness—is symbolic speech protected by the First Amendment."[127] In strong terms, Justice Marshall wrote that, by assuming, without deciding, that sleeping in the symbolic tent city was speech,

> the Court thereby avoid[ed] examining closely the reality of the respondents' planned expression. The majority's approach denatures respondents' asserted right and thus makes all too easy identification of a Government interest sufficient to warrant its abridgement. A realistic appraisal of the competing interests at stake in this case requires a closer look at the nature of the expressive conduct at issue and the context in which that conduct would be displayed.[128]

Justice Marshall called attention to the fact that the majority characterized the act of sleeping in the tent cities as facilitative (*i.e.*, that it offered an inducement to the homeless to join the protest), rather than expressive, and that this characterization "provide[d] a hint of the weight the Court attached to respondents' First Amendment claims."[129] Indeed, by this characterization, the majority at best undervalues the speech at issue, and at worst assumes that there is no speech value to sleeping in the park at all.

Delving into CCNV's purposes behind its proposed sleep-speech, Justice Marshall acknowledged that sleeping in the park was "integral" to

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[125] *See* Wright, *supra* note 33, at 1228–29 (pondering "is there not some risk that we may wind up unintentionally undervaluing, and perhaps in some cases trivializing, freedom of speech through our frequent recourse to the bypass tactic?" and noting that "[a] mere assumption that the activity in question is speech may often leave the court with only an abstract, dry, bloodless, unexamined, superficial sense of how speech should be valued in the case at bar"); *see also* McGoldrick, *supra* note 25, at 913 (noting that "assuming that an act is free speech, without actually deciding so, . . . presents the real danger that the insincerity of the assumption will erode the level of protection given to the supposed free speech interest").

[126] *Clark*, 468 U.S. at 302 (Marshall, J., dissenting).

[127] *Id.* at 301.

[128] *Id.* at 302.

[129] *Id.* at 310.

conveying the realities of homelessness,[130] such as the lack of privacy and the discomfort of sleeping outside in the bitter cold of winter. Applying the *Spence* test, and viewing the proposed speech in the context of the surrounding circumstances, Justice Marshall determined that the act of sleeping in the tent cities was intended to convey the deplorable conditions faced by the homeless, and that those viewing the demonstration would understand its political significance.[131] Maintaining a sleepless vigil, in shifts, as the majority suggested CCNV was free to do,[132] did not carry the same significance as sleeping in the park would: shift changes would diminish the impact of CCNV's message.

Beyond his consideration of whether the act of sleeping in the park constituted expressive conduct worthy of First Amendment protection, Justice Marshall's analysis of the case differed little from that of the majority. He used the same standard in evaluating the restrictions.[133] Justice Marshall, however, reached a different conclusion from the majority.[134] The "significant" government interest identified by the majority and the government, he noted, was the interest in "maintaining the parks in the heart of our Capital in an attractive and intact condition, readily available to the millions of people who wish to see and enjoy them by their presence."[135] Yet, he concluded, the government had failed to demonstrate that its ban on sleeping advanced that interest: Justice Marshall lamented that "the tailoring requirement is virtually forsaken inasmuch as the Government offers no justification for applying its absolute ban on sleeping yet is willing to allow respondents to engage in activities—such as feigned sleeping—that is no less burdensome."[136]

Given the different conclusions reached by the majority and dissent in *Clark*, when the same standard and doctrine were applied, it appears that the consideration of whether sleeping in the park constitutes speech—an issue assumed away by the majority, but addressed by the dissent—can influence the outcome of a First Amendment analysis. This

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[130] *Id.* at 303–04 (quoting *Brief for Respondents* at 2).

[131] *Id.* at 305; *cf. Spence III*, 418 U.S. 405, 413–14 (1974) (explaining that the national flag is "capable of conveying simultaneously a spectrum of meanings" and that observers would understand the political significance of its being disfigured; also holding that there was "no risk that appellant's acts would mislead viewers into assuming that the government endorsed his viewpoint"); *see also* Cmty. for Creative Non-Violence v. Watt, 703 F.2d 586, 601 (D.C. Cir. 1983) (Edwards, J. concurring) (noting that the protestors "can express with their bodies the poignancy of their plight[; t]hey can physically demonstrate the neglect from which they suffer with an articulateness even Dickens could not match"), *rev'd sub nom.* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288 (1984).

[132] *Clark*, 468 U.S. at 295 ("The regulation otherwise left the demonstration intact, with its symbolic city, signs, and the presence of those who were willing to take their turns in a day-and-night vigil.").

[133] *Id.* at 308 (Marshall, J., dissenting). He agreed with the majority's statement that symbolic speech "is nonetheless subject to reasonable time, place, and manner restrictions." *Id.* And he agreed with the majority that "no substantial difference distinguishes the test applicable to time, place, and manner restrictions and the test articulated in *United States v. O'Brien*." *Id.* at 308 n.6.

[134] *Id.* ("I conclude, however, that the regulations at issue in this case, as applied to respondents, fail to satisfy this standard.").

[135] *Id.* at 308; *see also id.* at 296 (majority op.).

[136] *Id.* at 312 (Marshall, J., dissenting).

same distinction explains the split among the D.C. Circuit: those judges that concurred in the per curiam decision and struck down the prohibition on sleeping reached the question of whether sleeping was, in the context presented, expressive;[137] those judges who dissented, and would abridge the rights of CCNV, assumed the issue away.[138] *Clark* does more than address the constitutionality of camping. It underscores a serious flaw in expressive conduct jurisprudence, first perpetrated in *O'Brien*: the jurisprudential mechanism of assuming, without deciding, that a particular act constitutes speech.[139]

IV. LOCATION, LOCATION, LOCATION: THE IMPORTANCE OF THE FORUM AND THE FIRST AMENDMENT

Judge Stallman's opinion in *Waller v. City of New York* only addressed the protestors' First Amendment arguments in a conclusory fashion.[140] Judge Stallman declined to address the question of whether

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[137] *See* Cmty. for Creative Non-Violence v. Watt, 703 F.2d 586, 592 (D.C. Cir. 1983) (Mikva, J., concurring) ("In the present case, our evaluation of the government's ban on sleeping in symbolic structures is underscored by first amendment scrutiny because, as applied to CCNV's proposed demonstration, the government's ban will clearly affect expression: there can be no doubt that the sleeping proposed by CCNV is carefully designed to, and in fact will, express the demonstrators' message that homeless persons have nowhere else to go."), *rev'd sub nom.* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288 (1984); *id.* at 600 (Spottswood, J., concurring) ("[S]leeping in tents at the demonstration sites is a vivid and forceful component of the public message the demonstrators seek to convey; it summons First Amendment scrutiny because, *qua* sleeping, it is expressive."); *id.* at 601 (Edwards, J., concurring) ("[I]t is necessary to determine whether sleeping under the circumstances of this case constitutes 'speech' protected by the First Amendment. I believe that it does, and that the Park Service's total ban against sleeping cannot withstand scrutiny under the test set forth by the Supreme Court in *United States v. O'Brien*."); *id.* at 600 ("[I]n this case there is both a 'particularized message' appellants wish to convey by sleeping in the part and a reasonable expectation that the message will be understood by those who view it. Thus *sleeping in this case is symbolic speech within the pale of the First Amendment*." (emphasis added)); *id.* at 608 (Ginsburg, J., concurring) (noting that there is both communicative and noncommunicative value in sleeping in the symbolic tent city).

[138] *See id.* at 613 (Wilkey, J., dissenting) ("Unlike Judge Mikva, we find it unnecessary to solve this dilemma in the present case. Like the Supreme Court in *O'Brien*, we find that *even assuming the applicability of the more demanding First Amendment standard of review*, the regulations here pass muster." (emphasis added)). Interestingly, Judge Wilkey spills much ink castigating Judge Mikva for failing to adequately address whether the conduct at issue was speech, while he, himself, failed to address the issue at all. *Id.* at 611–13; *see also id.* at 622 (Scalia, J., dissenting) ("I concur with the principal dissent in this case because I agree that if traditional First Amendment analysis is applied to this sleeping, *on the assumption that it is a fully protected form of expression*, the appellants would nonetheless lose." (emphasis added)).

[139] *See, e.g.*, McGoldrick, *supra* note 25, at 912–13 (identifying the failure to articulate a standard for speech versus conduct as a failing of the *O'Brien* court).

[140] He dismissed entirely the protestors' argument that, because the Park's rules prohibiting camping were enacted only after the demonstration began, they were aimed at the conduct and message of the protestors, not content-neutral, and therefore, not a reasonable time, place, or manner restriction. Waller v. City of New York, 933 N.Y.S.2d 541, 544–45 (Sup. Ct. 2011); *see* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) ("[I]n a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are *justified without reference to the content of the regulated speech*, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'" (quoting *Clark*, 468 U.S. at 293) (emphasis added)).

Zuccotti Park was a traditional public forum or a limited public forum for purposes of assessing time, place, or manner restrictions on free speech rights.[141] Instead, he simply assumed, without deciding, that the First Amendment applied to the protestors' conduct.[142] He merely admonished that "[e]ven protected speech is not equally permissible in all places and at all times."[143] Nevertheless, he wrote, "the owner has the right to adopt reasonable rules to permit it to maintain a clean, safe, publicly accessible space consonant with the responsibility it assumed to provide public access according to law."[144] This assertion, however, is not supported in the opinion by case law, and for good reason: Judge Stallman grossly misstates the "time, place, and manner" doctrine. Furthermore, his opinion is devoid of any consideration of the importance of the location to the message conveyed by the Occupy protestors.

A. The Public Forum and Free Speech

It appears from Judge Stallman's sparse opinion that the question of whether Zuccotti Park was public or private property for purposes of the First Amendment arose during oral arguments on the TRO.[145] It seems clear that Zuccotti Park is as traditional a forum for assembly and free speech as was Faneuil Hall in Boston, where participants in the Boston Tea Party assembled to air their grievances against the British Parliament and the East India Company.

A public forum is a space, such as a park, which has, since time

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[141] *Waller*, 933 N.Y.S.2d at 544.

[142] *Id.*

[143] *Id.* (quoting Snyder v. Phelps, 131 S. Ct. 1207, 1218 (2011)) (alteration in original). It appears that Judge Stallman's analysis may have been skewed by a bias against OWS's message. Whereas the majority of his legal analysis is completely unsupported by precedent, *Snyder v. Phelps* is the only case cited in his original opinion. *See generally id.* Furthermore, the quotation he chose from that case—"[e]ven protected speech is not equally permissible in all placed and at all times"—is in fact a direct quote, in its entirety, from another Supreme Court case, *Cornelius v. NAACP Legal Def. and Educ. Fund, Inc.*, 473 U.S. 788, 799 (1985). That he cited only one case—*Snyder v. Phelps*—and that he pulls from that case a quotation more properly attributable to another case, whether conscious or unconscious, can be no mistake. *Snyder v. Phelps* involved particularly distasteful speech: members of the Westboro Baptist Church, a homophobic, cult-like, organization successfully protected their rights to parade around in front of funerals of war heroes toting signs reading "God Hates Fags" and "Thank God for Dead Soldiers." 131 S. Ct. at 1213. By contrast, the *Cornelius* case, to which the quote should have properly been attributed, involved much milder, praise-worthy speech: literature describing a charity's fundraising campaign. *Cornelius*, 473 U.S. at 790–91. Ironically, in his commitment to equating OWS with unfavorable speech, Judge Stallman chose to cite a case upholding speech rights while in the same breath he improperly curtailed protected speech, instead of citing a case where the restrictions on speech were upheld. *Compare generally Snyder*, 131 S. Ct. 1207, *with Cornelius*, 473 U.S. 788. Adding to the curiosity of his choice of cases, Judge Stallman apparently changed the citation to yet another case before publishing it in one of New York's unofficial reporters. *See Waller*, 34 Misc. 3d at 375 (citing Frisby v. Schultz, 487 U.S. 474, 479 (1988) rather than *Snyder*, 131 S. Ct. at 1207).

[144] *Waller*, 933 N.Y.S.2d at 545.

[145] *See id.* at 544 (commenting that petitioners' request for a hearing on whether the park is a limited or traditional public forum is unnecessary).

immemorial, been held in trust for speech.[146] At least academically, in public fora, the government's ability to curtail speech is limited: "in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'"[147] In some cases, a privately owned space may nevertheless constitute a "public forum" or "limited public forum" for purposes of protecting a member of the public's right to speak on the property.[148] The question of whether a public park is a traditional public forum "depends upon whether the property has by law or tradition been given the status of a public forum, or rather has been reserved for specific official uses."[149] While Zuccotti Park was unquestionably privately *owned*, the city itself admits that it was created pursuant to a special zoning permit that required the owners to maintain the park as open for public use year-round.[150]

The government's concession that it "closely resembles a public park in that it must be open to the public and maintained for public use 365 days per year,"[151] should be sufficient to doom any argument that the park is not a traditional public forum. Parks "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between

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[146] Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939) ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for *purposes of assembly, communicating thoughts between citizens, and discussing public questions*. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens."). A "limited public forum" is one which, although not among the categories of traditional public fora—streets, sidewalks, parks—was nevertheless opened up to speech. *See, e.g.*, Hefron v. Int'l Soc. for Krishna Consciousness, Inc., 452 U.S. 640, 655 (1981) ("The Minnesota State Fair is a limited public forum in that it exists to provide a means for a great number of exhibitors temporarily to present their products or views, be they commercial, religious, or political, to a large number of people in an efficient fashion."); Widmar v. Vincent, 454 U.S. 263, 273, 276 (1981) (striking down a ban on religious speech because the university "opened its facilities for use by student groups," and therefore, it could not exclude groups because of the content of their speech).

[147] Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (citing Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)). Once a non-public forum is open for speech purposes, creating a limited public forum, the speech receives some First Amendment protection, though less so than in a traditional public forum. In a limited public forum, the government may impose restrictions that are reasonable and viewpoint neutral. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 49 (1983) ("The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves.")

[148] *See, e.g.*, PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 77, 88 (1980) (holding that a state may permit First Amendment activities at a privately-owned shopping center); Amalgamated Food Emps. Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 325 (1968) (holding that protected First Amendment activities could not be abridged in a privately owned shopping center), *overruled by* Hudgens v. Nat'l Labor Relations Bd., 424 U.S. 507 (1976); Marsh v. Alabama, 326 U.S. 501, 502, 509 (1946) (holding that the sidewalks in a company town, though privately owned, were open for First Amendment purposes).

[149] Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 761 (1995) (citing Cornelius v. NAACP Legal Def. and Educ. Fund, Inc., 473 U.S. 788, 802–03 (1985)).

[150] Holloway Aff., *supra* note 64, ¶ 9.

[151] *Id.*

citizens, and discussing public questions."[152] Furthermore, because the city required, pursuant to zoning laws, that the developer of the adjacent building create a public space in exchange for concessions on zoning restrictions,[153] Zuccotti Park therefore ought to hold the status of a public forum.[154] Thus, OWS's message, in written words, should have bent only to a content-neutral, narrowly-tailored regulation necessary to serve an important government interest;[155] the government's right to regulate their symbolic speech should likewise have been "sharply circumscribed."[156]

The only interests identified by Judge Stallman in his opinion were the right of Zuccotti Park's owner to maintain the park for public use and the right of the public to that use. Were Judge Stallman's reasoning sound on this matter, the First Amendment protection afforded speech in important public locations would be all but eviscerated. It strains interpretation to hold that the interest of the public in access to the park could qualify as a government interest; were it so, it would be the interest that all but destroyed the time, place, and manner doctrine with respect to public fora.[157] Fortunately, the Supreme Court has rightfully eschewed this rationale; the government may not completely prohibit speech in a public forum, nor may it distinguish speech based on content without the restriction being narrowly tailored and necessary to serve a compelling government interest.[158] It has not, however, yet passed on the issue particular to the eviction of OWS from Zuccotti Park and the closing of the park: when, if ever, the government may close entirely a public

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[152] Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939).

[153] Foderaro, *supra* note 51.

[154] *See Pinette*, 515 U.S. at 761 (stating that property may "*by law* [be] given the status of a public forum")

[155] *See id.* (expressive content may be regulated on a public forum "only if such a restriction is necessary, and narrowly drawn, to serve a compelling state interest"); Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) ("[T]he government may impose [reasonable time, place, or manner restrictions], provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'"); Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984) (holding that "restrictions of this kind are valid provided that . . . they are narrowly tailored to serve a significant government interest . . . .").

[156] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

[157] Maintaining a park as open for the unimpeded access of the general public would entitle the government to all but exclude speech from public fora. *But see Clark*, 468 U.S. at 298 (noting that the government had an interest in prohibiting camping in national parks because the effects of camping—the digging of holes, the creation of fire pits, etc.—could impede the enjoyment of the park by the general public). Were it an "important government interest" to permit the general public to use the space filled by a protest, any protest could be forbidden; the only way, and thus the narrowly tailored way, to protect this interest is to deny the speech rights of the would-be protestors. So long as a prohibition on protestors was not based on the content of their message, speech could be forever forbidden in places that "have immemorially been held in trust for the use of the public . . . used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague*, 307 U.S. at 515.

[158] *See Perry*, 460 U.S. at 45; *Pinette*, 515 U.S. at 761 (holding that the government may impose "reasonable, content-neutral time, place, and manner restrictions" on speech in a traditional public forum, but that "[the government] may regulate expressive content only if such a restriction is necessary, and narrowly drawn, to serve a compelling state interest").

forum in order to silence a certain viewpoint or form of speech.[159]

Regardless of whether the Supreme Court may one day hold that a public forum may be permanently closed to speech in order to facilitate the public enjoyment of the space, it has not done so yet. Therefore, if there is a government interest to justify ousting the protestors from Zuccotti Park, it lies in "the owner's reasonable rights and duties to maintain Zuccotti Park."[160] Judge Stallman noted that "[t]o the extent that city law prohibits the erection of structures, the use of gas or other combustible materials, and the accumulation of garbage and human waste in public places," it was proper to evict the protestors from the park.[161] Yet, this all but ignores an essential prong of the time, place, and manner doctrine: the requirement that the restriction on speech be "narrowly tailored."[162] It is important to note, however, that a "narrowly tailored" solution to a government interest need not be the *most* narrow of the options. In *Ward v. Rock Against Racism*, the Supreme Court noted that "[t]he requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation, and *the means chosen are not substantially broader than necessary to achieve that interest.*"[163] Therefore, to pass muster under *Rock Against Racism*, a complete eviction of the protest from the park should be considered "substantially broader than necessary."[164] By evicting the protestors, the City essentially foreclosed Zuccotti Park as a forum for speech.

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[159] *See* Kelly L. Monroe, Note, *Purpose and Effects: Viewpoint-Discriminatory Closure of a Designated Public Forum*, 44 U. MICH. J.L. REFORM 985, 991 (2011) ("The Supreme Court has never decided the issue of when the government may close a designated public forum altogether[, and i]n particular, it has never addressed whether a state actor may close a forum to everyone in order to silence a certain viewpoint.").

[160] Waller v. City of New York, 933 N.Y.S.2d 541, 545 (Sup. Ct. 2011).

[161] *Id.*

[162] *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (the government may impose reasonable time, place, or manner restrictions on protected speech, "even in a public forum . . . provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information" (internal quotation marks omitted) (citations omitted)). If the concerns were about the construction of structures, those could have been validly placed off-limits, while permitting the protestors to remain; if the concerns were the use of combustibles, flammables could have been validly prohibited while allowing the protest itself to continue; if the concern was about the cleanliness of the park, it could have been cleared out, section by section, on a weekly basis for cleaning while permitting the protestors to stay in the park. Such solutions would be narrowly tailored, so as to survive constitutional scrutiny—total eviction by police force was not. *See infra* Part VI.B.

[163] *Rock Against Racism*, 491 U.S. at 782–83 (emphasis added).

[164] *See, e.g.*, Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 818 (1985) (Blackmun, J., dissenting) ("In a traditional public forum, the government rarely could offer as a compelling interest the need to reserve the property for its normal uses, because expressive activity of all types traditionally has been a normal use of the property."); *but see Clark*, 468 U.S. at 298–99 (suggesting, in dicta, that protests that impede the use of the park by the general public should be banned).

B. The Importance of Location to Speech: Or, How to Occupy Wall Street from a Distance?

In the wake of eviction, some protestors regrouped several blocks away at Foley Square; however, the new location was not as well-suited for the speech: the occupation of Wall Street could not, as a practical matter, be carried out from nine blocks away. The Supreme Court has occasionally, though subtly, suggested that the relationship between the location of speech and the content of the speech may be important to determining what constitutional protections are due.[165] Although it may initially appear that ample alternative means of communication remain available to the OWS protestors—such as marching or planning events at other locations, or milling about Zuccotti Park during the day but not camping there—it is questionable that these alternatives permit the protestors to convey the message intended by the encampment mere steps from Wall Street.[166] In short, the protestors cannot occupy Wall Street from nine blocks away.

The "ample alternative means" prong of the time, place, and manner doctrine serves to restrict speech in favor of the government's agenda, rather than to protect the rights of the speaker. As Professor David Allen argues, "[r]ather than serving as a way to increase expressive opportunities within society, the ample alternatives test became an important tool in the government management of dissent. . . . It allowed government to make decisions about where to locate dissent based on [the] government's interest rather than the interests of the speakers."[167] The ample alternative means prong of the time, place, and manner test has received relatively little clarification from the Supreme Court,[168] which has, as a result, "devalue[d] public interaction with

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[165] *See, e.g.*, Snyder v. Phelps, 131 S. Ct. 1207, 1217 (2011) (considering the fact that "[t]here is no doubt that Westboro chose to stage its picketing at the Naval Academy, the Maryland State House, and Matthew Snyder's funeral . . . *because of the relation between those sites and its views*" in upholding the protestors rights to speak in those locations (emphasis added)); Members of City Council v. Taxpayer for Vincent, 466 U.S. 789, 812 (1984) (noting that "[w]hile the First Amendment does not guarantee the right to employ every conceivable method of communication at all times and in all places, a restriction on expressive activity may be invalid if the remaining modes of communication are inadequate" (citations omitted)); Grayned v. City of Rockford, 408 U.S. 104, 123–24 (1972) (Douglass, J. dissenting) (noting that Grayned's protests were located in close proximity to a school because "[t]he school where the present picketing occurred was the center of racial conflict"); Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 322–23 (1968) (noting that a Union protest aimed at a particular store could not be relocated to a position so remote as to defy the message), *overruled by* Hudgens v. Nat'l Labor Relations Bd., 424 U.S. 507 (1976).

[166] *See* David S. Allen, *Spatial Frameworks and the Management of Dissent: From Parks to Free Speech Zones*, 16 COMM. L. & POL'Y 383, 412–14 (2011) (discussing urban planning and zoning rules as means of controlling dissenting speech in order to ensure that the speech was not made in the "wrong place").

[167] *Id.* at 414.

[168] Am. Civ. Liberties Union of Colo. v. City & Cnty. of Denver, 569 F. Supp. 2d 1142, 1163 (2008) (noting the lack of Supreme Court guidance on what constitutes ample alternative means of communication within the context of restriction on the place of protest).

dissent and disempower[ed] individual speakers."[169]

The tension between the values underlying the First Amendment and the ample alternative means arm of the public forum doctrine has come to a head in the context of ironically-termed "free speech zones" at political events and on college campuses. Free speech zones, although routinely found to be constitutional by courts, "contain[], capture[], and zone[] [free speech] away from its intended recipients."[170] College campuses across the country have designated areas in which protests may occur. Likewise, "free speech zones" or "demonstration zones" have been established at the Republican and Democratic National Conventions since 2004. Oftentimes these locations are hidden away from the public,[171] behind buildings,[172] or under a bridge overpass more than a block from the event.[173] Courts have routinely upheld such restrictions on speech as permissible, given the status of a "free speech zone" as a limited public forum;[174] however, to do so devalues the importance of location to speech.

Sometimes speech is without value—or of diminished value—if it is not made in a particular location. Speech that is permitted only in a location so removed from the target audience that the audience cannot

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[169] Allen, *supra* note 166, at 419–20 (discussing the ample alternative means criteria in the context of free speech zones at political conventions).

[170] Joseph D. Herrold, *Capturing the Dialogue: Free Speech Zones and the "Caging" of First Amendment Rights*, 54 DRAKE L. REV. 949, 951 (2006).

[171] *E.g.*, *Your Right to Say It . . . But Over There*, CHI. TRIBUNE (Sept. 28, 2003), http://articles.chicagotribune.com/2003-09-28/news/0309280121_1_protesters-civic-center-secret-service (examples of relegating protestors to hidden areas at presidential or vice-presidential speaking events).

[172] *Id.*

[173] Allen, *supra* note 166, at 383–84. Professor Allen describes the free-speech zone at the 2004 Democratic National Convention as anything but free:

> The site, referred to as a Demonstration Zone (DZ), featured overhead netting, chain-link fence, razor wire and armed guards. For many, the space more resembled a prison than an area to celebrate First Amendment freedoms, something that was not lost on federal Judge Douglas P. Woodlock, who toured the site before the convention began:
>
> "I at first thought, before taking a view (of the protest zone), that the characterization of the space being like a concentration camp was litigation hyperbole. Now I believe it's an understatement. One cannot conceive of other elements put in place to create a space that is more of an affront to the idea of expression than the designated demonstration zone."

Id. (quoting Theo Emery, *Judge Upholds "Free Speech Zone" But Permits March on FleetCenter*, ASSOCIATED PRESS (July 22, 2004), *available at* http://www.axisoflogic.com/artman/publish/ Article_10416.shtml).

[174] *See, e.g.*, *Am. Civil Liberties Union of Colorado v. City & County of Denver*, 569 F. Supp. 2d 1142 (D. Colo. 2008). This logic, it seems, is circular and decidedly wrongheaded. A free speech zone is frequently created within a traditional public forum—a park, parking lot, or sidewalk abutting the event. To demote an area of a traditional public forum to the status of a limited public forum, simply because the government wishes to exclude the speech from the rest of the park, parking lot, or sidewalk, threatens to swallow the public forum doctrine whole. Taken to its logical extreme, such a device for caging speech would permit the government to all but exclude speech from the majority of traditional public fora by pushing speech to the furthest corner of, say, Central Park.

hear it should not withstand constitutional scrutiny.[175] Placement of a free speech zone in such a remote location has not yet been subjected to constitutional scrutiny by the Supreme Court. However, previous Supreme Court decisions have acknowledged the importance of location to speech: "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."[176]

The juxtaposition of two cases in particular highlights the Court's recognition that regulating the location of speech may impermissibly diminish the value of the speech itself. In *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*[177] and *Lloyd Corporation v. Tanner*,[178] the Court addressed factually analogous situations, yet came to—at first blush—inconsistent results.

In *Logan Valley*, a labor union appealed a state court decision enjoining the union from picketing on the sidewalks of a privately-owned shopping center.[179] The sidewalks, parking lots, and driveways of the shopping center were privately owned. The Union sought to peacefully picket one of the tenants of the shopping center, Weis Markets, Inc., because the grocery store employed only non-union employees who were "not receiving union wages or other union benefits."[180] Initially, the picketing proceeded almost exclusively in the parcel pick-up area of the parking lot—the portion of the lot where customers could drive their cars to the storefront in order to load parcels.[181] Weis and Logan Valley Plaza sought and obtained an injunction banishing the picketers from the property and relegating them to a thin strip of land, referred to by the court as "berms," between the privately-owned parking lot and a busy, high-speed highway.[182]

The Supreme Court reversed the injunction, noting that the union's speech, including the conduct of picketing,[183] was protectable under the First Amendment, and moreover, it was protectable in front of the

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[175] Serv. Emp. Int'l Union, Local 660 v. City of L.A., 114 F. Supp. 2d 966, 972 (C.D. Cal. 2000); *see also* Amalgamated Food Emps. Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 321–24 (1968) (describing ways in which requiring protestors to picket outside the commercial development containing their target would render their speech ineffective), *overruled by* Hudgens v. Nat'l Labor Relations Bd., 424 U.S. 507 (1976).

[176] Schneider v. New Jersey, 308 U.S. 147, 163 (1939).

[177] *Logan Valley*, 391 U.S. 308 (1968).

[178] Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).

[179] *Logan Valley*, 391 U.S. at 313. The sidewalks, parking lots, and driveways of the shopping center were privately owned. *Id.* at 311.

[180] *Id.* at 310, 311 (internal quotation marks omitted).

[181] *Id.*

[182] *Id.* at 312.

[183] *Id.* at 313–14 ("[P]icketing involves elements of both speech and conduct, i.e., patrolling, and . . . because of this intermingling of protected and unprotected elements, picketing can be subjected to controls that would not be constitutionally permissible in the case of pure speech. Nevertheless, no case decided by this Court can be found to support the proposition that the nonspeech aspects of peaceful picketing are so great as to render the provisions of the First Amendment inapplicable to it altogether." (citations omitted)).

store.[184] Employing language reminiscent of the public forum doctrine,[185] the Court noted that private ownership of the property, in and of itself, was an insufficient basis to exclude the union's speech because "[t]he shopping center here is clearly the functional equivalent of the business district . . . in [*Marsh v. Alabama*]" and "is freely accessible and open to the people in the area and those passing through."[186] The Court then noted that the union's "picketing was directed solely at one establishment within the shopping center," yet under the injunction, they were banished to public ground 300 to 350 feet away from the subject store.[187] The Court noted

> Thus the placards bearing the message which petitioners seek to communicate to patrons of Weis must be read by those to whom they are directed either at a distance so great as to render them virtually indecipherable—where the Weis customers are already within the mall—or while the prospective reader is moving by car from the roads onto the mall parking areas via the entrance ways cut through the berms.[188]

The Court concluded that the restriction on the picketing location "substantially hinder[ed] the communication of the ideas which petitioners [sought] to express to the patrons of Weis."[189]

The *Logan Valley* opinion played a central role in *Lloyd Corporation* just four years later. *Lloyd Corporation* involved a challenge by pamphleteers to their exclusion from sidewalks within a private shopping center.[190] On its face, the two cases seem very similar: both involved privately owned property that resembled the "functional equivalent of [a] business district";[191] both addressed the question of

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[184] *See id.* at 323–24 ("[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.").

[185] *See id.* at 315 ("It is clear that if the shopping center premises were not privately owned but instead constituted the business area of a municipality, which they to a large extent resemble, petitioners could not be barred from exercising their First Amendment rights there on the sole ground that title to the property was in the municipality. . . . [S]treets, sidewalks, parks, and other similar public places are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely.").

[186] *Id.* at 318–19 (internal quotation marks omitted). *Marsh v. Alabama* involved a challenge by a Jehovah's Witness to the prohibition of handbilling in a "company-town." 326 U.S. 501, 503–04 (1946). The court held that, because the sidewalks and roads of the company town were functionally indistinguishable from public sidewalks and roads in municipalities, the private nature of the sidewalks and roads was an insufficient basis upon which to infringe First Amendment rights. *Id.* at 507–08.

[187] *Marsh*, 326 U.S. at 503–04. The court held that, because the sidewalks and roads of the company town were functionally indistinguishable from public sidewalks and roads in municipalities, the private nature of the sidewalks and roads was an insufficient basis upon which to infringe First Amendment rights. *Id.* at 507–08.

[188] *Id.* at 322.

[189] *Id.* at 323.

[190] Lloyd Corp. v. Tanner, 407 U.S. 551, 552 (1972).

[191] *Compare id.* at 553–54 (describing the layout of the shopping center), *with Logan Valley*,

what exclusions of speech were permitted when the shopping center—traditionally a public forum—was privately owned;[192] and both involved traditionally protected modes of speech.[193] Yet, unlike in *Logan Valley*, the *Lloyd Corporation* Court determined that the First Amendment rights bent to private property rights.[194]

Several individuals sought to distribute handbills to customers of the shopping center, advertising meetings of the "Resistance Community," which opposed the draft and the Vietnam War.[195] When they entered the private sidewalks within the shopping center, however, they were made to leave, based on the shopping center's policy against handbilling.[196] They sued, seeking declaratory and injunctive relief.[197]

The Court, in denying the injunctive relief sought, carefully distinguished *Logan Valley*.[198] It noted that First Amendment protection was afforded to the *Logan Valley* protestors' choice of location "only in a context where the First Amendment activity was related to the shopping center's operations."[199] Although the *Logan Valley* decision emphasized the analogy to *Marsh v. Alabama*, and addressed the fact that the private sidewalks of the shopping center were virtually indistinguishable from traditional public fora,[200] the *Lloyd Corporation* Court considered this "language . . . unnecessary to the decision."[201] It noted that, instead, the holding of *Logan Valley* "was carefully phrased to limit its holding to the picketing involved, where the picketing was directly related in its purpose to the use to which the shopping center property was being put, and where the store was located in the center of a large private enclave with the consequence that no other reasonable opportunities for the picket[er]s to convey their message to their intended audience were available."[202] Noting that "[n]either of these elements is present" in *Lloyd Corporation*,[203] the Court declined to extend the rationale of

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391 U.S. at 315 ("It is clear that if the shopping center premises were not privately owned but instead constituted the business area of a municipality, which they to a large extent resemble, petitioners could not be barred from exercising their First Amendment rights . . . .").

[192] *Compare Lloyd Corp.*, 407 U.S. at 552 ("This case presents the question . . . as to the right of a privately owned shopping center to prohibit the distribution of handbills on its property . . . ."), *with Logan Valley*, 391 U.S. at 309 ("This case presents the question whether peaceful picketing of a business enterprise located within a shopping center can be enjoined on the ground that it constitutes an unconsented invasion of the property rights of the owners of the land on which the center is situated.").

[193] *Compare Lloyd Corp.*, 407 U.S. at 552 (handbilling), *with Logan Valley*, 391 U.S. at 309 (picketing).

[194] *Lloyd Corp.*, 407 U.S. at 564–65.

[195] *Id.* at 556.

[196] *Id.* at 555–56.

[197] *Id.* at 556.

[198] *See generally id.*

[199] *Id.* at 562.

[200] Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 315–18 (1968), *overruled by* Hudgens v. Nat'l Labor Relations Bd., 424 U.S. 507 (1976).

[201] *Lloyd Corp.*, 407 U.S. at 562.

[202] *Id.* at 563 (internal quotation marks omitted) (citations omitted).

[203] *Id.* at 564.

Logan Valley to *Lloyd Corporation*.[204] Consideration of these two cases together suggests that the Supreme Court is sensitive to the incremental importance of location to the desired message.

Other cases have hinted at the same consideration. For example, in *Snyder v. Phelps*, the Supreme Court considered whether tort claims for intentional infliction of emotional distress may properly be sustained against the Westboro Baptist Church (WBC) for exercising its First Amendment rights.[205] The Court held that such claims could not lie, because the WBC had the right to protest where they did, and to express their extreme views as they did.[206] In so holding, the Supreme Court noted that

> [t]here is no doubt that [WBC] chose to stage its picketing at the Naval Academy, the Maryland State House, and Matthew Snyder's funeral to increase publicity for its views *and because of the relation between those sites and its views*—in the case of the military funeral, because [WBC] believes that God is killing American soldiers as punishment for the Nation's sinful policies.[207]

Despite acknowledging that the choice of location caused distress to the loved ones of L.C. Snyder, the Court nevertheless held that WBC had a right to picket "on matters of public concern at a public place adjacent to a public street" because "[s]uch space occupies a special position in terms of First Amendment protection."[208] In so holding, the Court, at least implicitly, accepted the idea that the *location* of the protest with relationship to its message contributed something of value to the speech. In balancing the interests of Mr. Snyder's right not to hear WBC's message against WBC's right to speak, the Court seemed to acknowledge that, were the speech to be made elsewhere, its impact would have been diminished.

OWS, like the WBC, chose Zuccotti Park as the location of their protest "because of the relation between [the] site[] and its views," a link which strengthens the impact of its message.[209] In a somewhat bizarre

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[204] *Id.* at 570.

[205] Snyder v. Phelps, 131 S. Ct. 1207 (2011). WBC is a fundamentalist church, comprised primarily of a single family led by its patriarch-preacher Fred Phelps, with a cult-like mentality and extreme political and social views. WBC espouses the "political" belief that their god is punishing the United States for its tolerance of homosexuality by killing soldiers. *Id.* at 1213. Its primary method of conveying that belief to an often outraged public is through protests at the funerals of fallen soldiers. *Id.* After one such protest at the funeral of Marine Lance Corporal Matthew Snyder, the WBC faced several tort claims from L.C. Snyder's father, including intentional infliction of emotional distress and intrusion upon seclusion. *Id.* at 1214.

[206] *Id.* at 1220.

[207] *Id.* at 1217 (emphasis added).

[208] *Id.* at 1218 (quoting United States v. Grace, 461 U.S. 171, 180 (1983)) (internal quotation marks omitted).

[209] *Id.* at 1217. Judge Stallman, in his opinion abridging the speech rights of the protestors, openly concedes this point: "Occupy Wall Street brought attention to the increasing disparity of wealth and power in the United States, *largely because* of the unorthodox tactic of *occupying the subject public space* on a 24-hour basis, and constructing an encampment *there*." Waller v. City of

inverse of the free speech zones cropping up at political conventions, the City of New York appears to have created in Zuccotti Park a speech-free zone,[210] assuming that the protestors could simply relocate their speech with no incident effect on their message. To preclude them from staging their protest in proximity to Wall Street—and instead forcing them to relocate far from the path to work travelled by the corporate executives whose greed they decry—devalues and inhibits their speech.

V. FROM THE BOSTON COURT HOUSE TO LIBERTY PARK: APPLICATION OF *O'BRIEN* TO OCCUPY WALL STREET

More troubling still than the distance from which the OWS protestors must speak[211] is the fact that an essential element[212] of their speech was effectively forbidden when the court sanctioned their eviction from Zuccotti Park. Despite the fact that Stallman's decision was devoid of any constitutional analysis, let alone an analysis of the effects of the eviction on the expressive conduct of the protestors, the eviction would nevertheless remain likely if a court hearing the challenge followed the established *O'Brien* framework, particularly if the court merely assumed, without deciding, that the challenged conduct was speech.[213] The following section considers an as-of-yet hypothetical application of constitutional analysis to OWS's eviction from Zuccotti Park, which highlights the doctrine's flaws in theory and as applied.

A. Assuming, Without Deciding, that the Occupation of Zuccotti Park Constitutes Speech . . .

As set forth in *Spence*, expressive conduct is speech if it carries with it "[a]n intent to convey a particularized message," and if "in the surrounding circumstances the likelihood [is] great that the message would be understood by those who viewed it."[214] Within this framework, the occupation of Wall Street in Zuccotti Park should properly be classified as speech. An "occupation" is defined by the Oxford English Dictionary, *inter alia*, as "[t]he action of occupying a work place, public building, etc., as a form of protest" and "[t]he action or condition of

New York, 933 N.Y.S.2d 541, 543 (Sup. Ct. 2011) (emphasis added). *See infra* Part V for a discussion of the crippling effect that the relocation has on not only the ability to reach the target audience, but indeed the very content of the speech itself.

[210] *See* Herrold, *supra* note 170, at 960–71 (discussing the speech-free zones—often referred to as "secured zones"—created in tandem with free speech zones at various political conventions).

[211] *See supra* Part IV.B.

[212] *See infra* Part VI.A.

[213] *See infra* Part V.A.

[214] *Spence III*, 418 U.S. 405, 410–11 (1974).

residing in or holding a place or position."[215] The act of "occupying," with people, placards, and tents, is unquestionably the heart of the movement: by occupying the park, the protestors intended to protest the corporate influence on democracy and take back democracy for the people.[216] This is what the protestors *intended* to do and what those observing the protest *understood* them to be doing.[217] Unquestionably, the targets of the message—the financial institutions—understood the point of view of the occupiers. It matters not that OWS did not espouse a single message;[218] all that matters is that the conduct is intended to convey a message and that viewers understand it to convey a message.[219] The occupation of Zuccotti Park is, therefore, properly construed to have a speech element to it, protectable by the First Amendment subject to the *O'Brien* balancing test.

Whether a court would have considered the extent to which the occupation of Zuccotti Park was expressive is another matter entirely. Given the relative ease with which the *O'Brien* Court assumed the issue away,[220] and given the fact that subsequent cases have seen the use of this facilitative shortcut,[221] it is possible that a court properly considering the issue of whether the occupation constitutes speech may have followed suit. Were the court to do so, however, OWS's speech rights almost certainly would have been curtailed because the approach "denatures [a party's] asserted right and thus makes all too easy identification of a Government interest sufficient to warrant its abridgement."[222]

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[215] OXFORD ENGLISH DICTIONARY ONLINE (Dec. 18, 2012), http://www.oed.com (defining "occupation").

[216] Flemming, *supra* note 38.

[217] *Cf. Spence III*, 418 U.S. at 410–11 ("An intent to convey a particularized message was present and . . . the likelihood was great that the message would be understood by those who viewed it.").

[218] *Compare Spence I*, 490 P.2d 1321, 1323 (Wash. App. Ct. 1971) (noting that Spence's conduct was intended to symbolize protest of *both* the invasion of Cambodia *and* the Kent State University killings), *with Declaration of OWS*, *supra* note 16 (listing several messages sought to be conveyed by OWS).

[219] *See* Hurley v. Irish-American Gay, Lesbian, & Bisexual Grp. of Boston, 515 U.S. 557, 569–70 (1995) ("[A] private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech.").

[220] *See O'Brien II*, 391 U.S. 367, 376 (1968) ("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. However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment.")

[221] *See, e.g.*, Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984) ("We need not differ with the view of the Court of Appeals that overnight sleeping in connection with the demonstration is expressive conduct protected to some extent by the First Amendment. We assume for present purposes, but do not decide, that such is the case.").

[222] *Id.* at 302 (Marshall, J., dissenting); *see also* Wright, *supra* note 33, at 1228–29 ("A mere assumption that the activity in question is speech may often leave the court with only an abstract, dry, bloodless, unexamined, superficial sense of how speech should be valued in the case at bar.").

B. . . . There is Nevertheless a Countervailing Government Interest Sufficiently Substantial to Justify Abridgement of OWS's Speech

Even if a court were to take the time and consideration necessary to determine that the act of occupation constituted speech, it is nevertheless likely that the court would uphold the protestors' eviction under the current expressive conduct doctrine. First, although Zuccotti Park should be properly considered a traditional public forum,[223] there may be some question, given the park's status as a "privately owned public park," whether the City could step in, of its own accord, and evict protestors. This does not matter, though, to a consideration of whether the eviction is within the government's constitutional powers. If the park is a public space, it is within the government's police powers to regulate conduct within its borders. If it is private property, it cannot be seriously disputed that the police could clear the park upon request for assistance from the park's owners, Brookfield Properties.[224]

Second, it is also likely that the court hearing a challenge to the eviction would find that the government had an important or substantial interest in freeing the park from the occupation. Some may argue that the Supreme Court's holding in *Clark*, barring protestors from sleeping in a tent city, controls the outcome of the Occupy protest; however, the case is distinguishable from *Clark* in important ways. The National Park Service in *Clark* issued a permit for a "symbolic tent city" to be erected on the National Mall and in the park across from the White House; it was *sleeping* in the tents that was prohibited.[225] In lower Manhattan, by contrast, it is the *tents* that are disallowed; sleeping is conspicuously absent from Brookfield's list of prohibited activities.[226] Thus, the Supreme Court in *Clark*, faced a much more speech-permissive regulation than the one at issue in this case: symbolic structures were permitted for the sake of CCNV's message; they are not for the sake of

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[223] *See supra* Part IV.A.

[224] *See* Foderaro, *supra* note 51 ("Enforcement [of park regulations] would fall to the building's management company, . . . but if park users refuse to comply, the management may call on the Police Department for help, as it has in an effort to clean out the park."); *cf. O'Brien II*, 391 U.S. at 377 (requiring a regulation abridging expressive conduct to be "within the constitutional power of the Government"). It should be noted that, in a previous challenge to the city's ban on sleeping on city sidewalks, a federal court found the plaintiff—a tenants' rights organization—likely to succeed on the merits of a First Amendment challenge, under the time, place, and manner doctrine. Metropol. Council, Inc. v. Safir, 99 F. Supp. 2d. 438, 439, 450 (S.D.N.Y. 2000). The merits were never reached, however, as the proceeding was merely one for a preliminary injunction, and thus is not controlling. *Id.* at 450.

[225] *Clark*, 468 U.S. at 292.

[226] *See* Waller v. City of New York, 933 N.Y.S.2d 541, 543 (Sup. Ct. 2011) (noting that the relevant prohibitions were "[c]amping and/or the erection of tents or other structures[;] [l]ying down on the ground, or lying down on benches . . . [;] [t]he placement of tarps or sleeping bags or other covering on the property[;] [and] [s]torage [or] placement of personal property on the ground, benches, sitting areas or walkways which unreasonably interferes with the use of such areas by others").

OWS's message. Therefore, a court considering a challenge to the eviction should not simply cite to *Clark* to resolve the issue of whether an important government interest exists, but rather should look to the arguments advanced by the City of New York in opposition to the TRO.[227] The City purportedly sought to

> reopen[] the park to all members of the general public, including protestors, while taking steps to prohibit the use of the [p]ark in a manner that creates a public safety hazard, allows unhealthy and unsafe conditions to flourish and prevents all members of the general public from using and enjoying the park.[228]

The Supreme Court has previously held that an abridgement of speech in public fora may be permitted in order to enable others to enjoy the public space;[229] therefore, the City's purported concern for the rights to public access for other members of the public and the safe, hygienic maintenance of the park would likely constitute an important government interest.[230] Third, and relatedly, the eviction of the protests from Zuccotti Park in order to facilitate the access of the general public is likely to be found "unrelated to the suppression of free expression."[231] Once the eviction is found to be related to public enjoyment of the park, it is all too easy to say that the regulation, therefore, is unrelated to speech,[232] and that it is, instead, related to public rights of access.

Finally, because the Supreme Court's application of the final prong of *O'Brien* has been misapplied since its inception, the eviction of the campers in Zuccotti Park would likely be found to be no more speech restrictive than necessary. In *O'Brien* itself, the Court simply considered whether the statute's prohibition of conduct was, nominally, "limited to the noncommunicative aspect of O'Brien's conduct":[233] it never considered what incidental effect the regulation had on speech. Prohibition of sleeping bags, tents, and other camping equipment in Zuccotti Park is aimed at the noncommunicative element of OWS's conduct, at least, inasmuch as the prohibition on draft card burning was aimed only at the noncommunicative elements of O'Brien's conduct. Because the precedential case implied that the incidental restrictions on

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[227] Holloway Aff., *supra* note 64, ¶ 2.

[228] *Id.*

[229] *See* Ward v. Rock Against Racism, 491 U.S. 781, 800 (1989) (describing New York City's "substantial interest" in limiting sound volume during a concert in Central Park); *Clark*, 468 U.S. at 298 (stating that the government was not required to tolerate protests that damaged parks or made them inaccessible to members of the public).

[230] *Cf. O'Brien II*, 391 U.S. 367, 377 (1968) ("[W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.").

[231] *Id.*

[232] *Cf. id.* (requiring that any restriction on expressive conduct be unrelated to speech).

[233] *Id.* at 381–82.

speech need not be considered, so long as the regulation facially strikes at the noncommunicative elements of the act, this prong is essentially toothless to protect OWS's speech rights, regardless of whether the incidental effect of the regulation—prohibiting the "occupation" of Wall Street—is significantly greater than necessary.

Of course, none of this analysis was undertaken by Judge Stallman in deciding *Waller v. City of New York.* He ignored completely his obligation to ensure that the First Amendment rights of the petitioners before him were not abridged by the City's regulations.[234] Yet the OWS protestors were not, ultimately, prejudiced by this outcome. Ultimately, the eviction of OWS from Zuccotti Park and the silencing of its message of occupation are not peculiar to Stallman's failure to apply constitutional law; the same result would likely attend under the current *O'Brien* expressive conduct framework.

This result—the silencing of the speech of the 99%—should not rest easily with constitutional scholars, courts, politicians, or activists. The same application to the conduct of the participants in the Boston Tea Party would similarly leave their expressive conduct unprotected from government intervention.[235] Contemporaneously discussing the *O'Brien* case, Professor Louis Henkin noted

> [t]he Constitution protects freedom of "speech," which commonly connotes words orally communicated. *But it would be surprising if those who poured tea into the sea* and who refused to buy stamps *did not recognize that ideas are communicated, disagreements expressed, protests made other than by word of mouth or pen.*[236]

The milquetoast *O'Brien* test fails to protect what most would presume to be protected First Amendment activity. Yet the activity—conduct essential to the central message of the protest movement—ought to be protected as a legitimate form of government protest. *O'Brien* requires revision.

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[234] *See generally* Waller v. City of New York, 933 N.Y.S.2d 541 (Sup. Ct. 2011) (mentioning the First Amendment in only a conclusory fashion, citing only one First Amendment case directly).

[235] Briefly, the Boston Tea Party was both intended and understood to be a protest against the monopoly of the East India Company and the British Parliament's support thereof. *See* Unger, *supra* note 3, at 158, 176. The government interest at stake—protection of an industry essential to its economy—could certainly be said to be an important one, and one unrelated to speech. *cf. id.* at 158; *O'Brien II*, 391 U.S. 367, 377 (1968) ("[W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."). Because any punishment meted out against the participants in the Boston Tea Party would be directed at protecting the tea from destruction, not at punishing the conduct *qua* speech, a modern court applying the *O'Brien* framework would find the final element satisfied. *Cf. O'Brien II*, 391 U.S. at 377. The protestors at the Boston Tea Party would find no protection in the foundational document that flowed from their acts of protest.

[236] Henkin, *supra* note 7, at 79 (emphasis added).

VI. WHEN ACTIONS SPEAK LOUDER THAN WORDS: CREATING A SPEECH-PROTECTIVE TEST FOR EXPRESSIVE CONDUCT

But what revision? Professor McGoldrick, in his article, United States v. O'Brien *Revisited: Of Burning Things, Waving Things, and G-Strings*, identifies no less than eight errors made by the Court in *O'Brien*.[237] Each of the errors he assigned to *O'Brien*, however, strikes at the same fundamental, underlying flaw: the test articulated is under-protective of speech. The unsatisfying outcome discussed in Part V results from a flaw in the expressive conduct doctrine present from its inception: the *O'Brien* test does not adequately consider whether the restriction on conduct eliminates an essential element of the speaker's message.[238] Where the *O'Brien* test does make this consideration, it forecloses not just expressive conduct, but conduct which *is* essentially speech irreplaceable by words. Where conduct forms an essential element of the message sought to be conveyed by the speaker, it should receive the same protection as the spoken word; in public fora, a restriction on an essential element should be subjected to the narrow tailoring requirement and the ample alternative means prong of the time, place, and manner test.

A. "Go Ahead and Occupy, Just Make Sure You Vacate By Nine P.M.": The Silencing of Essential Elements

In some instances, conduct functions as convenient shorthand for written or spoken word. For example, the burning of a draft card may symbolize resolute opposition to the draft.[239] In other instances, however, conduct fulfills a role—and contributes something to speech—that

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[237] McGoldrick, *supra* note 25, at 909–10 ("First, the Court fundamentally failed to distinguish between expressive conduct that would be accorded a high level of protection under the Free Speech Clause of the First Amendment and that conduct which, like the regulation of walking on the grass, would only have to be justified by at most a conceivably-valid governmental interest. . . . Assuming, without affirmatively deciding, that expressive conduct is speech would seem to invite some disrespect for the free-speech claim. . . . Second, instead of focusing on when expressive conduct might qualify as speech, the *O'Brien* court adopted a four-part test which confusingly combined a government enumerated powers issues with a free speech test. Third, the Court badly stated its own version of the intermediate test. Fourth, the Court implied, but failed to define, a strict scrutiny test. Fifth, the Court then mistakenly applied the intermediate test when it should have applied strict scrutiny. Sixth, the Court further complicated matters by misapplying the intermediate test. It overstated the weight of questionable governmental purposes and undervalued the effectiveness of the symbolic aspects of O'Brien's expressive conduct. Seventh, the Court failed to articulate correctly the role of legislative motive, a failure that continues to this day. Finally, the time, place, and manner test, though at the time of the *O'Brien* case not as fully developed as it is now, would have provided a better approach for the Court than its four-part test.").

[238] *See infra* Part V.B.

[239] *Cf. O'Brien II*, 391 U.S. at 370 (noting that O'Brien burned his draft card "so that other people would reevaluate their positions with Selective Service, with the armed forces, and reevaluate their place in the culture of today, to hopefully consider [his] position.").

cannot sufficiently be accounted for with words alone.[240] Under current doctrine, and especially in practice, *O'Brien* fails to accord sufficient protection to the latter category of conduct.

Sometimes, words alone are insufficient to convey the message intended by the speaker. Were this not true, colonists would not have resorted to dumping tea into the Boston Harbor; O'Brien would have merely shouted through a bullhorn rather than burning his draft card to demonstrate his opposition to the draft; and members of OWS could have launched a letter-writing campaign. Chief Justice William Rehnquist, dissenting in *Texas v. Johnson*, a case which sanctioned flag burning as protected speech, pejoratively referred to expressive conduct as "the equivalent of an inarticulate grunt or roar."[241] Rehnquist was correct, though not for the reasons he believed: when pure speech alone is insufficient to convey the emotion, conviction, or urgency of the speakers' message, an inarticulate roar must be protected by the First Amendment.[242]

The occupation of Wall Street was the protestors' "inarticulate grunt or roar." Protests, political discourse, and the political system had failed in the eyes of the protestors; just as meetings at Faneuil Hall and petitions to the governor to hear their grievances had failed the participants in the Boston Tea Party, and the occupiers, like the colonists, resorted to famously more unconventional means of protest.

The importance of the encampment and symbolic occupation of Wall Street to the message of OWS suggests a revision to the *O'Brien* test which would promote a more speech-protective doctrine. The fourth prong of the test currently asks whether "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of [the government's] interest."[243] This prong essentially permits conduct—and the speech it conveys—to be prohibited entirely, even if the value to speech lost is substantial, so long as the prohibition is a response "no greater than necessary" to serve the government's needs. Furthermore, since its inception, it has been applied in such a manner as to essentially write it out of the test altogether. In *O'Brien*, the Court determined that this prong was satisfied merely because the restriction was "limited to the noncommunicative aspect of O'Brien's conduct."[244] This element of the *O'Brien* test, so construed, all but folds into the third

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[240] *See, e.g.*, Brown v. Louisiana, 383 U.S. 131, 141–42 (1966) (attaching First Amendment protection to a sit-in in a racially segregated library as a means of civil rights protest).

[241] Texas v. Johnson, 491 U.S. 397, 432 (1989) (Rehnquist, J., dissenting) ("Far from being a case of 'one picture being worth a thousand words,' flag burning is the equivalent of an inarticulate grunt or roar that, it seems fair to say, is most likely to be indulged in not to express any particular idea, but to antagonize others.").

[242] Members of the City Council of the City of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 812 (1984) (noting that "[w]hile the First Amendment does not guarantee the right to employ every conceivable method of communication at all times and in all places, *a restriction on expressive activity may be invalid if the remaining modes of communication are inadequate*" (emphasis added) (citations omitted)).

[243] *O'Brien II*, 391 U.S. at 377.

[244] *Id.* at 381–82.

prong of the test: whether the government interest is unrelated to the suppression of expression.[245] The test as a whole—but particularly this final factor—is anything but speech-protective.[246]

A more appropriate, speech-protective inquiry is whether the prohibition on conduct effectively forecloses an essential element of the message sought to be conveyed by the speaker. Just as the Supreme Court implicitly recognized, in *Logan Valley* and *Snyder v. Phelps*, that the *location* of speech may be essential to the desired message,[247] *O'Brien* should similarly be revised to reflect the recognition that, sometimes, the *manner* in which a message is conveyed—the element of conduct itself—may be essential to the message.

Conduct forms an essential element of a speaker's message where it communicates something not conveyed by the speech alone, be it dumping tea into the Boston Harbor,[248] burning a flag,[249] occupying the symbolic center of the corporate oligarchy,[250] or an inarticulate roar.[251] The identification of conduct forming an essential element of speech is necessarily a fact-specific one. Where a message—or a particular aspect of a message—is conveyed only by the conduct, and is not conveyed effectively through speech alone, it essentially *is* speech, and ought to be protected as such. Therefore, the weary *O'Brien* test should be revised, as follows: a government regulation may restrict expressive conduct if (1) "if it is within the constitutional power of the Government";[252] (2) "if it furthers an important or substantial governmental interest";[253] (3) "if the governmental interest is unrelated to the suppression of free expression";[254] *and* (4) *if it does not foreclose an essential element of the speech.*

The occupation of Zuccotti Park played an important role in conveying the protestors' exasperation with the corporate oligarchy and their message of the reclaiming of democracy. Indeed, as Judge Stallman himself acknowledged in *Waller*, "Occupy Wall Street brought attention

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[245] *Cf. id.* at 377.

[246] *Cf.* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 577 (1991) (Scalia, J., concurring) ("We have never invalidated the application of a general law simply because the conduct that it reached was being engaged in for expressive purposes and the government could not demonstrate a sufficiently important state interest."); *see also* McGoldrick, *supra* note 25, at 910 (noting that the *O'Brien* court "seemed to treat the expressive action as anything but protected speech").

[247] Snyder v. Phelps, 131 S. Ct. 1207, 1217 (2011) (noting that the location of the expressive activity affects its publicity and thus its effectiveness); Amalgamated Food Emps. Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 321–22 (1968) (describing the importance of picketing location), *overruled by* Hudgens v. Nat'l Labor Relations Bd., 424 U.S. 507 (1976); *see also* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 302–03 (1984) (Marshall, J., dissenting) (noting the importance of the locations chosen by protestors—the National Mall and Lafayette Park—to their message and intended audience).

[248] Hewes, *supra* note 2.

[249] Texas v. Johnson, 491 U.S. 397, 399 (1989).

[250] *Declaration of OWS*, *supra* note 16.

[251] *Johnson*, 491 U.S. at 432 (Rehnquist, J., dissenting).

[252] *O'Brien II*, 391 U.S. 367, 377 (1968).

[253] *Id.*

[254] *Id.*

to the increasing disparity of wealth and power in the United States, *largely because of the unorthodox tactic of occupying the subject public space on a 24-hour basis, and constructing an encampment there.*"[255] The ability to camp out in the "subject public space"—to "occupy" Wall Street—formed an essential element of the protestors' speech, even in the eyes of a judge who would not protect that speech. Imagine the OWS message without the conduct: one could picture OWS protestors standing in Central Park, Times Square, or along the side of a road carrying signs reading, "We are occupying Wall Street." Such a protest is so ineffectual as to be nearly comical. Yet that is the plight of the OWS movement in the wake of *Waller v. City of New York*, because without the ability to occupy, the movement's message is diminished in scope and impact. That essential element of speech—the physical occupation of the symbolic center of the perceived corporate oligarchy—deserves protection because it does not merely stand in the place of speech, or augment an otherwise effective exercise of First Amendment rights: it *is* speech itself.

B. What to Do: Treating Conduct that Forms an Essential Element as Speech Per Se

Because expressive conduct that forms an essential element of a speaker's message, it deserves the same protection afforded pure speech, and thus, should properly be considered speech per se. In a public forum, the level of protection afforded speech is governed by the public forum doctrine,[256] which requires that a content-neutral regulation be narrowly tailored to achieve an important government interest, and that it leave open ample alternative means for communication.[257]

Professor McGoldrick has suggested that the *O'Brien* test should be replaced entirely by the time, place, and manner test.[258] He argued that this test "would have provided a better approach for the Court than [the *O'Brien*] four-part test," which he described as "badly stated" and "misapplied."[259] Indeed, there are many overlaps between the two doctrines. The Supreme Court in *Clark* suggested that when the conduct takes place in a public forum, the test for expressive conduct is essentially indistinguishable from the time, place, and manner test.[260]

In fact, the *O'Brien* test is less speech-protective than the companion test that applies to the spoken word at each turn. Although both tests are structurally a form of intermediate scrutiny, the *O'Brien*

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[255] Waller v. City of New York, 933 N.Y.S.2d 541, 543 (Sup. Ct. 2011) (emphasis added).

[256] *See supra* Part IV.A.

[257] Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

[258] McGoldrick, *supra* note 25, at 944–45.

[259] *Id.* at 910.

[260] Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 298–99 (1984).

test looks much more like rational basis than the time, place, and manner test. While there are clear parallels between several elements of both tests,[261] at each point of similarity, the *O'Brien* test departs from the time, place, and manner test in the direction of less speech protection.

First, the time, place, and manner test requires the restriction on speech be content-neutral;[262] the *O'Brien* test requires that it be "unrelated to . . . expression."[263] Thus, where *spoken* word in a public forum may not be restricted on the basis of the content or viewpoint espoused, conduct may be abridged in a manner that affects certain content more than others, so long as the restriction itself is not based on the expression. Second, the time, place, and manner test requires that the restriction leave open ample alternative means of communication;[264] *O'Brien* requires only that the incidental effect on speech be no greater than necessary to achieve the government's interest.[265] Although the "ample alternative means" element of the test has proved to favor government interests by permitting the government to "make decisions about where to locate dissent based on [the] government's interest rather than the interests of the speakers,"[266] a restriction may not entirely foreclose speech.[267] By contrast, under the *O'Brien* framework, speech in the form of conduct may nevertheless be foreclosed entirely if that is the only means of achieving the government's interest. Where conduct forms an essential element of speech—that is, where it is the only means of conveying an aspect of the speaker's message—the *O'Brien* test permits the speech to be foreclosed entirely.

Third, and most significantly, the time, place, and manner test requires that the restriction be narrowly tailored, whereas, there is no analogous prong in the *O'Brien* test.[268] Absent this requirement in *O'Brien*, a regulation may prohibit conduct in furtherance of a government objective, even if it sweeps far too broadly and forecloses much more speech than necessary.

This last flaw is precisely the fate that befell the symbolic speech of the OWS protestors. When the facts of the protestors' eviction from Zuccotti Park are hypothetically subjected to the *O'Brien* test,[269] their First Amendment Rights cave to the government's purported interests because there is no requirement that the restriction fit the interest. Under the time, place, and manner test, however, the constitutional infirmity of

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[261] *See* McGoldrick, *supra* note 25, at 928–34 (noting that the *O'Brien* test, like the time, place, and manner test, is meant to be intermediate scrutiny, but is confusingly worded); *see also id.* at 935–36 (noting that the test was misapplied).

[262] *Rock Against Racism*, 491 U.S. at 791.

[263] *O'Brien II*, 391 U.S. 367, 377 (1968).

[264] *Rock Against Racism*, 491 U.S. at 791.

[265] *O'Brien II*, 391 U.S. at 377.

[266] Allen, *supra* note 166, at 414.

[267] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

[268] *Compare Rock Against Racism*, 491 U.S. at 791, (noting a narrowly tailored requirement), *with O'Brien II*, 391 U.S. at 377 (omitting any mention of a narrowly tailored requirement).

[269] *See supra* Part V.B.

the regulation is clear.[270] In opposition to the TRO, New York City identified two specific reasons[271] why the eviction of the protestors from Zuccotti Park was necessary: first, the fire hazard posed by the presence of generators and wooden pallets elevating tents;[272] and second, occupation was contributing to the unsanitary conditions of the park.[273] Both of these concerns are unquestionably within the state's police powers to address. But while complete eviction of the protestors from the park certainly achieved the government's purported interest in redressing a fire hazard and ensuring sanitary conditions, it did so in an overly broad way that foreclosed more speech than was necessary.[274] Prohibition of generators, gasoline, and combustibles could have mitigated the City's legitimate concern of fire: indeed, the City acknowledged that the fire marshal issued such a prohibition.[275] Likewise, where unsanitary conditions pose a public health concern, they could be redressed by requiring the occupation to temporarily vacate quadrants of the park—or indeed the entire park—periodically for cleaning. Violations of the prohibition on fire hazards or instructions to yield to cleaning crews could and should be addressed via the penal system, not through an absolute and permanent abridgement of speech.[276] While the time, place, and manner test recognizes the importance of the fit between the regulation and the government's interest,[277] the *O'Brien* test does not. And as a result, more speech than necessary may be curtailed when the speech comes in the form of conduct, rather than words.

Comparison of the *O'Brien* test to the time, place, and manner test demonstrates that, at every turn, modern First Amendment jurisprudence subordinates conduct to spoken or written word. Both tests favor words even where the message conveyed is the same and even where the conduct forms an essential element of the message irreplaceable by words alone. Conduct forming an essential element of the message is not just a shorthand or placeholder for speech: it is speech, per se. It conveys

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[270] *See infra* Part IV.A.

[271] The purposes listed do not include New York City's conclusory assertion that the park should be open to all members of the public. Holloway Aff., *supra* note 64, ¶ 5.

[272] *Id.* ¶¶ 20–21.

[273] *Id.* ¶ 19.

[274] *Cf.* Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989) (stating that time, place, or manner regulations must be narrowly tailored).

[275] Holloway Aff., *supra* note 64, ¶ 8.

[276] *See* N.Y. Civ. Liberties Union, Press Release, "NYCLU to City: Don't Use Wall St. Clean Up as a Pretext for Mass Arrests" (Oct. 13, 2011) *available at* http://www.nyclu.org/news/nyclu-city-don't-use-wall-st-clean-pretext-mass-arrests ("The city must not use the clean up as a pretext for mass arrests. To do so would be a violation of the spirit of the First Amendment and the spirit of dissent."); Hartocollis, *supra* note 53 (mentioning protestors' decision to clean the park in response to a directive from City Hall).

[277] *But see Rock Against Racism*, 491 U.S. at 798 (noting that "a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so"). The flaws of the time, place, and manner restriction, while not as severe or detrimental to speech rights as the flaws of *O'Brien*, are beyond the scope of this Article.

a sentiment or message that cannot be conveyed by words alone. It should, therefore, be protected as speech. In a public forum, conduct that constitutes an essential element of speech should be subjected to the time, place, and manner test. Content-neutral restrictions on essential elements of speech should be "narrowly tailored to serve a significant government interest" and should leave open ample alternative means for making the speech.[278]

Although the time, place, and manner test is more speech-protective than the *O'Brien* test, it is still far from perfect in its application to conduct in public fora.[279] A common sense answer to a call for the replacement of the *O'Brien* test with the time, place, and manner test is that, when expressive conduct is involved, there are always "ample alternative means" of making the speech—just *say* it, just *write* it. It may seem that the "ample alternative means" prong of the time, place, and manner test is rendered meaningless when applied to conduct rather than words. In many instances, this may be true: the sentiment conveyed by burning a draft card[280] could effectively be conveyed by wearing a jacket—or carrying a sign—bearing the written words "Fuck the Draft."[281] But where an essential element of the message *cannot* be conveyed by speech alone—as with the Boston Tea Party or the symbolic occupation of Wall Street by the OWS movement—the common sense of "just say it, just write it" loses its persuasive force. Such conduct should be treated as speech precisely because it is not capable of being replaced by words alone: the ability to "just say" or "just write" does not constitute an alternative means of conveying the message embodied within the conduct. Foreclosing conduct constituting an essential element of the message, therefore, would entirely foreclose the speech itself—an unconstitutional result.[282]

VII. CONCLUSION: THE PRO-SPEECH EFFECT OF THE ESSENTIAL ELEMENTS TEST ON THE BROADER EXPRESSIVE CONDUCT DOCTRINE

Revising the *O'Brien* test to include a consideration of whether the conduct forms an essential element of the speech ensures that, if an essential aspect of the message is communicated through conduct rather than written or spoken words, it is afforded the same protection as pure speech. Indeed, this revision strengthens and refines the expressive

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[278] *Id.* at 791 (quoting Clark v. Cmty. For Creative Non-Violence, 468 U.S. 288, 293 (1984)).

[279] *See supra* Part IV.B.

[280] As the plaintiff did in *O'Brien II*, 391 U.S. 367 (1968).

[281] As the plaintiff did in Cohen v. California, 403 U.S. 15 (1971).

[282] *See* Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789 (1984); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (stating that the government cannot ban all communicative activity in public forums).

conduct doctrine with respect to all conduct.

First, it forces a court to consider whether the conduct in question constitutes speech.[283] The requirement would retire the facilitative shortcut employed since *O'Brien* was handed down, of assuming, without deciding, that the conduct at issue constitutes speech.[284] Elimination of the assumption would provide more accurate protection for the communicative elements of conduct, even if the conduct is not ultimately found to be an essential element of the message: no longer could a court inadvertently devalue the communicative element of conduct.[285] By requiring a court to balance a state's police power against a speaker's actual speech rights, rather than balance a state's police power against a hypothetical speech right, the addition of the essential element factor to the *O'Brien* test would enhance the accuracy with which this balancing test is applied.

Second, where conduct is found to constitute an essential element of speech, it will be treated on par with pure speech.[286] Thus, a spectrum is created which tracks the original purpose of the balancing test. On one end, where conduct bears no communicative element, a state's police power may properly regulate it. Where there are both communicative and noncommunicative elements to the speech, or where the conduct forms a convenient shorthand for speech, an intermediate level of scrutiny is applied to ensure that only a sufficiently important exercise of a state's police power curtails the expressive elements of the conduct.[287] And on the other end of the spectrum, where the conduct is so essential to the message conveyed that the message cannot be effectively conveyed absent the conduct, a more stringent level of scrutiny is applied, treating the speech-like conduct as a coequal of spoken or written words.[288] Thus, the more speech that is inherent in conduct, the more protection is afforded by the First Amendment.

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[283] *See supra* Part VI.B.

[284] *See, e.g.*, *Clark*, 468 US. at 293 (assuming, without deciding, that sleeping constitutes speech).

[285] *Cf.* McGoldrick, *supra* note 25, at 914 ("The easy assumption in *Clark v. Community for Creative Nonviolence* [sic]—that sleeping in a tent city in Lafayette Park across Pennsylvania Avenue from the White House was speech—likely contributed to the Court's failure to weigh the free speech issues at stake carefully").

[286] *See supra* Part VI.B.

[287] *See O'Brien*, 391 U.S. at 376–77.

[288] *See supra* Part VI.B.