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Punishing Offensive Conduct on University Campuses: *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason University*

During the 1980s, many American colleges and universities launched efforts to increase their students' sensitivity to the concerns of women and of racial and ethnic minorities.¹ Some schools undertook long-term initiatives to promote greater understanding of the history of African Americans.² Others expanded their curricula to include courses designed to expose "European white male" biases embodied in Western institutions or latent in classic works of Western literature.³

Accompanying the growth of such programmatic and curricular initiatives was the development of campus codes of speech and conduct, created to discourage manners of speaking and acting that might be taken as offensive to particular segments of the university population.⁴ In a 1991 article,

1. Such efforts comprise a key component of what has derisively become known as the "political correctness" movement. For a sympathetic treatment of the "PC" cause, see JUNG MIN CHOI & JOHN W. MURPHY, *THE POLITICS AND PHILOSOPHY OF POLITICAL CORRECTNESS* (1992). For decidedly less sympathetic views, see ALLAN BLOOM, *THE CLOSING OF THE AMERICAN MIND* (1987); DINESH D'SOUZA, *ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS* (1991); and ROGER KIMBALL, *TENURED RADICALS: HOW POLITICS HAS CORRUPTED OUR HIGHER EDUCATION* (1990).

2. The University of North Carolina at Chapel Hill, for example, has been the site of a debate concerning the merits, funding, and campus location of a center devoted to the study and appreciation of African-American history and culture. For details of this highly controverted issue, see *Dispute Over Black Center Tears U. of North Carolina*, N.Y. TIMES, Apr. 21, 1993, at B11; Ashley Fogle, *A Place to Celebrate Black Culture Racially Divides a Campus*, L.A. TIMES, Oct. 11, 1992, at M5; Celeste E. Whittaker, *UNC Will Get Black Cultural Center, But Site May Mean Uproar Isn't Over*, ATLANTA J. & CONST., July 29, 1993, at A3.

3. This brand of scholarship is called "deconstructionism." Its origin in this country is usually attributed to the 1976 English translation of Jacques Derrida's *DE LA GRAMMATOLOGIE* (1967). See SHARON CROWLEY, *A TEACHER'S INTRODUCTION TO DECONSTRUCTION* at x (1989). Deconstructionists examine a given text not to discern the author's intended meaning, but rather to discover the writing's sub-texts—for example, its built-in racial, gender, and religious biases. See *CONTINENTAL PHILOSOPHY II: DERRIDA AND DECONSTRUCTION* 4 (Hugh J. Silverman ed., 1989).

4. The University of Michigan at Ann Arbor implemented one such code in 1988. Responding to racist incidents on campus, university officials announced a rule exposing students to discipline for "[a]ny behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status," and that interferes with an individual's employment or participation in university studies or activities. *Doe v. University of Mich.*, 721 F. Supp. 852, 856 (E.D. Mich. 1989). The university's president sought to justify the school's action by stating:

[J]ust as an individual cannot shout "Fire!" in a crowded theater and then claim immunity from prosecution for causing a riot on the basis of exercising his rights of free speech, so a great many American universities have taken the position that students at a university cannot by speaking or writing discriminatory remarks which seriously offend many individuals beyond the immediate victim, and which therefore detract from the

conservative writer Dinesh D'Souza recounted the promulgation of one such set of rules:

In 1987, the law school faculty of the State University of New York at Buffalo adopted a resolution that warned students not to make "remarks directed at another's race, sex, religion, national origin, age, or sexual preference," including "ethnically derogatory statements, as well as other remarks based on prejudice and group stereotype." Students who violated this rule should not expect protection under the First Amendment, the faculty resolution suggested, because "our intellectual community shares values that go beyond a mere standardized commitment to open and unrestrained debate."⁵

In *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason University*,⁶ the United States Court of Appeals for the Fourth Circuit considered whether the First Amendment poses any bar to a university's imposition of sanctions on students who engage in speech and conduct that university administrators find to conflict with the school's express mission⁷ of providing an educational environment free from overt manifestations of racism and sexism.⁸ Members of the Sigma Chi fraternity had initiated the lawsuit after George Mason University officials imposed sanctions on the fraternity for events that transpired at a fraternity-sponsored "ugly woman contest."⁹

necessary educational climate of a campus, claim immunity from a campus disciplinary proceeding. I believe that position to be valid.

Id. at 855. The *Doe* court struck down the rule for overbreadth and vagueness. *Id.* at 866-67; see also *infra* note 158.

5. Dinesh D'Souza, *Illiberal Education: Current Controversies in American Higher Education*, ATLANTIC MONTHLY, Mar. 1991, at 51. See generally ARATI R. KORWAR, WAR OF WORDS: SPEECH CODES AT PUBLIC COLLEGES AND UNIVERSITIES (1994) (discussing campus codes of speech and conduct, based on a study of 533 American colleges and universities).

6. 993 F.2d 386 (4th Cir. 1993).

7. George Mason University's mission statement provided, *inter alia*, that the university "is committed to promoting a culturally and racially diverse student body;" that "[e]ducation here is not limited to the classroom;" and that the university is "committed to teaching the values of equal opportunity and equal treatment, respect for diversity, and individual dignity." *Id.* at 388.

8. The case quickly assumed a place in the "political correctness" debate. *E.g.*, Clarence Page, *Insensitive Students Get Taste of Own Bitter Medicine*, ORLANDO SENTINEL TRIB., Sept. 6, 1991, at A15 (retelling the account of one George Mason student who opposed "campus 'political correctness'" and described a forum held by George Mason officials as a witch-hunt: "By the end of the forum," [the student] writes, 'the sorority representatives were in tears, confessing their guilt as they held hands for mutual support.'"); *First Amendment Rights: Testing Free Speech*, ARIZ. REPUBLIC, May 19, 1993, at A14 (describing the facts of the *Sigma Chi* case and concluding that "[t]his debate pitting politically correct policy over constitutional rights is tearing apart the nation's campuses"); *Lessons in Protest and Tolerance*, N.Y. TIMES, Sept. 3, 1991, at A22 (noting that the *Sigma Chi* case demonstrates how "[c]olleges and universities have been having a turbulent time deciding what speech and action are permissible on campus"); *The Bad News About Free Speech*, WASH. TIMES, May 17, 1993, at E2 (stating that "at GMU, Political Correctness took it on the chin").

9. *Sigma Chi*, 993 F.2d at 387; see also *infra* notes 16-21 and accompanying text.

The court held that inherently expressive activities merit full First Amendment protection.¹⁰ Because the contest was inherently expressive, the court ruled, the university could not impose sanctions on the fraternity. Rather, the university must find ways of furthering its interests that do not restrict students' rights to free speech.¹¹

This Note will examine the Supreme Court's First Amendment jurisprudence, focusing especially on the protection of conduct as speech¹² and on the Court's application of First Amendment principles to school settings.¹³ The Note reaches two primary conclusions. First, the Court of Appeals may have applied an improper test in determining whether the fraternity's contest merited full First Amendment protection.¹⁴ Second, the court misconstrued free speech principles when it suggested that universities may not restrict students' speech or expressive conduct to further compelling school interests.¹⁵

In April 1991, members of the Sigma Chi fraternity at George Mason University held their second annual "Derby Days" event, designed to entertain the university community and to raise funds for charity.¹⁶ As part of the "Derby Days" program, the fraternity sponsored an "ugly woman contest," in which six competing sorority teams dressed eighteen members of the fraternity as "ugly women."¹⁷ At the contest, one caucasian fraternity member was painted black, wore a stringy black wig and clothes stuffed with pillows to exaggerate breasts and buttocks, and parodied a stereotypical African-American accent.¹⁸

Soon after the event, nearly 250 students signed a petition condemning the event for its racist and sexist themes.¹⁹ The Dean for Student Services, members of the student government, and other student leaders later concluded that the event had created a "hostile learning environment for women and blacks, incompatible with the University's mission."²⁰ In light of this finding, the Dean imposed sanctions on the fraternity, restricting the members' social activities to pre-approved pledging and philanthropic

10. *Sigma Chi*, 993 F.2d at 391.

11. *Id.* at 393. Although the fraternity member did utter words in a parody of African-American slang during the "ugly woman contest," *id.* at 388, the Fourth Circuit Court of Appeals narrowly framed the issue as whether the contest as conduct was sufficiently expressive to merit First Amendment protection, *id.* at 389.

12. *See infra* notes 41-68, 103-50 and accompanying text.

13. *See infra* notes 78-101, 151-67 and accompanying text.

14. *See infra* notes 142-43 and accompanying text.

15. *See infra* notes 151-52 and accompanying text.

16. *Sigma Chi*, 993 F.2d at 387.

17. *Id.* at 387-88.

18. *Id.* at 388.

19. *Id.*

20. *Id.*; see *supra* note 7 for relevant portions of the university's mission statement.

events and requiring the fraternity to create a program focused on diversity and the concerns of women.²¹

In June 1991, the fraternity sought declaratory and injunctive relief in the United States District Court for the Eastern District of Virginia under 42 U.S.C. § 1983,²² claiming the university's imposition of sanctions violated its First and Fourteenth Amendment rights.²³ Although discovery had not yet been completed,²⁴ the court granted the fraternity's motion for summary judgment.²⁵

The Court of Appeals for the Fourth Circuit affirmed.²⁶ The court found that the First Amendment protects nonobscene live entertainment because of its expressive character.²⁷ Although admittedly offensive and of very low quality, the contest was in the form of a skit and constituted inherently expressive²⁸ entertainment; as such, the court ruled, it was entitled to full First Amendment protection.²⁹ In so holding, the court exempted the contest from the two-part test, announced by the United States Supreme Court in *Texas v. Johnson*,³⁰ usually applied to determine if conduct is sufficiently expressive to implicate the First Amendment.³¹

The university had argued on appeal that the contest was not inherently expressive and that the two-part *Johnson* test should be applied.³² If the

21. *Sigma Chi*, 993 F.2d at 388.

22. Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1992).

23. *Sigma Chi*, 993 F.2d at 388. The First Amendment provides in pertinent part that "Congress shall make no law . . . abridging the freedom of speech . . ." U.S. CONST. amend. I. The Due Process Clause of the Fourteenth Amendment states: "[N]or shall any State deprive any person of life, liberty, or property, without the due process of law . . ." U.S. CONST. amend. XIV, § 1.

24. Brief of Appellants at 4, *Sigma Chi* (No. 91-2684).

25. *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 773 F. Supp. 792, 795 (E.D. Va. 1991), *aff'd*, 993 F.2d 386 (4th Cir. 1993).

26. *Sigma Chi*, 993 F.2d at 393.

27. *Id.* at 389-90.

28. For a discussion of the possible meaning and significance of the phrase "inherently expressive," see *infra* notes 107-41 and accompanying text.

29. *Sigma Chi*, 993 F.2d at 391.

30. 491 U.S. 397 (1989).

31. *Id.* at 404. To pass the *Johnson* test, the actor must have intended "to convey a particularized message" and there must have been a great likelihood "that the message would be understood by those who viewed" the conduct. *Id.* For a discussion of the *Johnson* test, see *infra* notes 56-64 and accompanying text.

32. Brief of Appellants at 9, *Sigma Chi* (No. 91-2684).

contest were subjected to this test, the university reasoned, it would properly be judged unprotected conduct.³³ The court of appeals disagreed, holding that because the contest was inherently expressive entertainment, the *Johnson* test was inapplicable.³⁴ The court further ruled that even if the *Johnson* test were applied, the contest would emerge from scrutiny as protected conduct: the fraternity's intended message was that the university's concerns about race and gender should be treated in a humorous manner and the subsequent signing of the petition demonstrates that the audience understood this message.³⁵

Because the contest was expressive conduct entitled to First Amendment protection, the court held, the university could not restrict it.³⁶ Rather, the university must find other means of achieving its goal of providing a learning environment that is not hostile to women and racial minorities.³⁷

Judge Murnaghan, concurring in the judgment, objected to the majority's finding that universities cannot restrict speech or expressive conduct that conflicts with important aspects of their educational mission, pointing to a line of Supreme Court cases in which he argued the Court had ruled to the contrary.³⁸ But, Judge Murnaghan wrote, First Amendment law need not have been invoked to dispose of the case. Rather, the dispute should have been resolved wholly on due process grounds because a university official had approved the event beforehand,³⁹ and the university had never

33. *Id.*

34. *Sigma Chi*, 993 F.2d at 392.

35. *Id.*; see *supra* note 31. As yet a third basis for its holding, the court stated that, under *R.A.V. v. City of St. Paul, Minn.*, 112 S. Ct. 2538 (1992), the university could not sanction conduct expressing ideas that "ran counter to the views the University sought to communicate to its students and the community," while "encouraging . . . conduct that would further the viewpoint expressed in the University's goals." *Sigma Chi*, 993 F.2d at 393.

36. *Sigma Chi*, 993 F.2d at 393.

37. *Id.*

38. *Id.* at 394 (Murnaghan, J., concurring in the judgment). Judge Murnaghan cited cases holding that a "content-based regulation of protected speech survives judicial scrutiny if it is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Id.* (Murnaghan, J., concurring in the judgment) (citing *Simon & Schuster, Inc. v. New York Crime Victims Bd.*, 112 S. Ct. 501, 509 (1991); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44-45 (1983); *Carey v. Brown*, 447 U.S. 455 (1980)). For a discussion of cases concerning universities' powers of restriction, see *infra* notes 78-101 and accompanying text.

39. The district court found that Kathryn Schilling, the university's Assistant Director of Student Organizations and Programs, had approved the Derby Days program beforehand, including the "ugly woman contest." *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 773 F. Supp. 792, 793 (E.D. Va. 1991), *aff'd*, 993 F.2d 386 (4th Cir. 1993). In its brief to the Fourth Circuit, however, George Mason University insisted that no university official had consented to the program and that in her affidavit Ms. Schilling expressly denied approving the event. Brief of Appellants at 8, *Sigma Chi* (No. 91-2684).

prescribed any rules that would communicate to its students that such behavior would not be allowed.⁴⁰

The guarantee of freedom of speech is found in the First Amendment.⁴¹ The First Amendment protects from abridgement both the spoken and written word, as well as expressive conduct.⁴² The Supreme Court extended First Amendment protection to expressive conduct as early as 1931, in *Stromberg v. California*.⁴³ In *Stromberg*, the Court held that a statute that prohibited displaying a red flag "as a sign, symbol or emblem of opposition to organized government" was unconstitutional, since it might be construed as barring "conduct which the State could not constitutionally prohibit," due to the provisions of the First and Fourteenth Amendments.⁴⁴

Not all conduct, however, implicates the First Amendment. In *United States v. O'Brien*,⁴⁵ the defendant had been convicted of burning his Selective Service registration certificate on the local courthouse steps.⁴⁶ He argued on appeal that the statute under which he had been convicted was unconstitutional as applied to him, because his conduct was protected by the First Amendment.⁴⁷ The Supreme Court rejected the notion that a "limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."⁴⁸ The *O'Brien* Court refrained, however, from articulating a test for determining when conduct is sufficiently expressive to merit the label of "speech."⁴⁹ Instead, the Court assumed *arguendo* that O'Brien's conduct was sufficiently com-

40. *Sigma Chi*, 993 F.2d at 394 (Murnaghan, J., concurring in the judgment); see also *infra* note 158. Consideration of such due process concerns is beyond the scope of this Note.

Because the university had not established rules prohibiting such conduct, the doctrine of prior restraint was not implicated in this case. It is nevertheless interesting to note that, despite the high level of scrutiny accorded to prior restraints on speech and expressive conduct, see, e.g., *Alexander v. United States*, 113 S. Ct. 2766, 2773 (1993); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975), Judge Murnaghan suggested that the university could have "refused to allow the Fraternity to perform its intended skit." *Sigma Chi*, 993 F.2d at 395 (Murnaghan, J., concurring in the judgment). For a brief introduction to the concept of prior restraint, see LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 12-34 (2d ed. 1988).

41. The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech . . ." U.S. CONST. amend. I.

42. *Texas v. Johnson*, 491 U.S. 397, 404 (1989).

43. 283 U.S. 359 (1931).

44. *Id.* at 369. Specifically, the Court held that the statute could be read as prohibiting "free political discussion." *Id.*

45. 391 U.S. 367 (1968).

46. *Id.* at 369.

47. *Id.* at 371.

48. *Id.* at 376.

49. The Court did, however, formulate a four-part test for determining the validity of government restrictions on conduct, once the conduct has been determined to have both "speech" and "non-speech" elements. See *infra* note 72.

municative to "bring into play the First Amendment" and disposed of the case on other grounds.⁵⁰

Six years later, in *Spence v. Washington*,⁵¹ the Supreme Court more directly addressed the question of what constitutes protected expressive conduct under the First Amendment. Spence had been convicted under a state statute prohibiting "improper use" of the American flag, after he had placed black tape on a flag in the form of a peace symbol, and hung the flag upside down, from his apartment window, to protest United States military action in Vietnam.⁵² The Court first held that to constitute expressive conduct worthy of First Amendment protection, the actions must be "sufficiently imbued with elements of communication."⁵³ After noting that both "the nature of [the person's] activity" and "the factual context and environment in which it was undertaken" are pertinent factors in the determination, the Court found in the case before it that "[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."⁵⁴ Consequently, the Court held, Spence's conduct was "a form of protected expression."⁵⁵

50. *O'Brien*, 391 U.S. at 376. O'Brien's actions exemplify a fact that no student of the First Amendment could miss: The tumultuous period of the 1960s and early 1970s provided numerous opportunities for the Court to distinguish between expressive conduct and conduct that is outside the protection of the First Amendment. In addition to *O'Brien*, see *Spence v. Washington*, 418 U.S. 405, 405-08 (1974) (concerning a man who in 1970 placed black tape on his American flag in the form of a peace symbol, then hung the flag upside down, from his apartment window, to protest American military action in Vietnam); *Healy v. James*, 408 U.S. 169, 172-75 (1972) (dealing with university students who wished to establish a local chapter of an organization that had helped to organize numerous campus protests); *Grayned v. City of Rockford*, 408 U.S. 104, 105 (1972) (involving student participants in a demonstration designed to draw attention to inequities faced by African American students); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 93 (1972) (regarding a man who picketed a local high school, claiming that the school discriminated against African Americans); *Cohen v. California*, 403 U.S. 15, 16 (1971) (concerning a man who walked through the local courthouse wearing a jacket with the words "Fuck the draft" displayed across it); *Schacht v. United States*, 398 U.S. 58, 59-60 (1970) (involving a man charged with unlawfully wearing an American military uniform, during a street-corner skit designed to protest the American presence in Vietnam); *Street v. New York*, 394 U.S. 576, 578-79 (1969) (regarding a man who, upon hearing that civil rights leader James Meredith had been shot, took his American flag to a nearby street corner and burned it, telling the crowd "We don't need no damn flag!"); *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 504 (1969) (concerning students who wore black armbands "to publicize their objections to the hostilities in Vietnam"); and *Brown v. Louisiana*, 383 U.S. 131, 136 (1966) (involving African-American students who had staged a "sit-in" in a "whites only" area).

51. 418 U.S. 405 (1974).

52. *Id.* at 406-07.

53. *Id.* at 409.

54. *Id.* at 409-11.

55. *Id.* at 410.

In *Texas v. Johnson*,⁵⁶ a 1989 case involving flag burning, the Supreme Court returned to *Spence* to determine when conduct merits First Amendment protection. To receive such protection, the *Johnson* Court held, conduct must pass a two-part test: (1) the actor must have intended to "convey a particularized message," and (2) there must have been a great likelihood "that the message would be understood by those who viewed [the conduct]." ⁵⁷

Although the Court did not formally frame this test until *Johnson*, it declared that the *Johnson* principles had been guiding its First Amendment jurisprudence for at least half a century. Justice Brennan, writing for the majority, clarified this by pointing to a series of the Court's decisions involving flags, extending back to 1931, as examples of the ways in which the Court had applied the test in the past.⁵⁸ As additional instances of the Court's application of the two-part test, Justice Brennan cited the Court's decisions in *Tinker v. Des Moines Independent Community School District*,⁵⁹ in which the Court held that the First Amendment protects students wearing black armbands to protest United States involvement in Vietnam; *Brown v. Louisiana*,⁶⁰ in which the Court extended First Amendment privileges to African Americans staging a "sit-in" in a "whites only" area; and *Schacht v. United States*,⁶¹ in which the Court found that the First Amendment protects an actor in a dramatic presentation.⁶²

The Court did not qualify the application of the *Johnson* two-part test; it simply stated that the test is appropriate for determining "whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play."⁶³ Whether the Court intended the test to govern all types of conduct in nevertheless unclear.⁶⁴

56. 491 U.S. 397 (1989).

57. *Id.* at 404 (quoting *Spence*, 418 U.S. at 410-11).

58. *Id.* at 404-05. These decisions include *Spence*, 418 U.S. at 410-11, *see supra* notes 51-55 and accompanying text; *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632-42 (1943) (holding that because the flag salute is a form of symbolic utterance, school authorities may not compel students to perform it); and *Stromberg v. California*, 283 U.S. 359, 369-70 (1931) (holding that displaying a red flag is expressive conduct).

59. 393 U.S. 503, 511-14 (1969).

60. 383 U.S. 131, 141-43 (1966).

61. 398 U.S. 58, 61-62 (1970); *see also infra* note 103.

62. *Johnson*, 491 U.S. at 404.

63. *Id.*

64. The requirement that there be a great likelihood "that the message would be understood by those who viewed [the conduct]," *id.* at 404 (quoting *Spence v. Washington*, 418 U.S. 405, 410-11 (1974)), raises potential problems. For example, one can pose what might be called the problem of "difficult art." A dancer, for example, might choreograph a series of brilliantly innovative movements, fully intending to convey a particularized message. Yet the complexity of the dance might render its intended meaning quite unlikely to be understood by those viewing it. Merely as an intuitive matter, it seems unlikely that the Court would rule that the series of dance

Two years after the Court's decision in *Johnson*, in *Barnes v. Glen Theatre, Inc.*,⁶⁵ the Supreme Court was asked to decide whether the First Amendment protects nude dancing. The Court did not employ the *Johnson* analysis, even though dance is indisputably a form of conduct; rather, the Court simply looked to its previous statements on the subject.⁶⁶ Having reviewed the Court's prior decisions,⁶⁷ the Justices concluded that "nude dancing . . . is expressive conduct within the outer perimeters of the First Amendment."⁶⁸

Despite the First Amendment's broad protection of speech and expressive conduct, that protection "is not absolute at all times and under all circumstances."⁶⁹ The Supreme Court, for example, has identified particular kinds of expression that may be completely restricted. "[T]he lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace"—have been held not to require First Amendment protection because "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."⁷⁰ In addition, when expressive conduct has non-speech elements, the government might be permitted to apply "incidental" restrictions on that expression. In *United States v. O'Brien*,⁷¹ a case concerning the burning of draft-registration certificates, the Court held that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."⁷² The government may also impose reasonable "time, place,

steps—by virtue of its artistic brilliance—is unprotected by the First Amendment. See *infra* notes 134-35 and accompanying text.

65. 111 S. Ct. 2456 (1991).

66. *Id.* at 2460.

67. See *id.* (citing *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 66 (1981); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975); and *California v. LaRue*, 409 U.S. 109, 118 (1972)).

68. *Id.* at 2460. Largely due to the absence of a *Johnson*-type analysis in such cases, at least two student authors have suggested or implied that the *Johnson* test is intended to be applied only to "non-inherently expressive" activities. See Zachary T. Fardon, Recent Development, *Barnes v. Glen Theatre, Inc.: Nude Dancing and the First Amendment Question*, 45 VAND. L. REV. 237, 270 (1992); Timothy M. Tesluk, Comment, *Barnes v. Glen Theatre: Censorship? So what?*, 42 CASE W. RES. L. REV. 1103, 1106 (1992). As will be discussed *infra* notes 103-41, however, the matter is not quite as clear as that.

69. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942).

70. *Id.* at 572.

71. 391 U.S. 367 (1968).

72. *Id.* at 376. When the government's interest in regulating the conduct is indeed unrelated to the conduct's "speech" element, the four-part test for constitutionality announced by the *O'Brien* Court applies. *Texas v. Johnson*, 491 U.S. 397, 403 (1989). Under the *O'Brien* test, a governmental regulation is

and manner" restrictions on expressive conduct, under certain circumstances.⁷³

Of particular relevance to the *Sigma Chi* decision, government-imposed restrictions may, in some instances, consist of content-based restraints on speech or expressive conduct.⁷⁴ The Court repeatedly has insisted that the government may not restrict communication merely because some may find it offensive.⁷⁵ Rather, content-based restrictions are subjected to "the most exacting scrutiny,"⁷⁶ in the form of a stringent two-part test: the restriction must (1) further a substantial or compelling government interest, and (2) be narrowly drawn to achieve that interest.⁷⁷

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.

O'Brien, 391 U.S. at 377.

73. *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972). "The crucial question," the Court wrote in *Grayned*, "is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Id.* at 116. The analysis applied to these restrictions is essentially identical to the four-part test announced by the *O'Brien* Court. *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2460 (1991); *Texas v. Johnson*, 491 U.S. 397, 407 (1989); see also *supra* note 72.

74. *R.A.V. v. City of St. Paul, Minn.*, 112 S. Ct. 2538, 2545 (1992). For a good introduction to both "incidental" and "content-based" restrictions, see LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 12-2, 12-3 (2d ed. 1988). See also *supra* note 38.

75. *R.A.V.*, 112 S. Ct. at 2559 (White, J., concurring in the judgment) ("The mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected."); *United States v. Eichman*, 496 U.S. 310, 318 (1990) ("[A]ny suggestion that the Government's interest in suppressing speech becomes more weighty as popular opposition to that speech grows is foreign to the First Amendment."); *Johnson*, 491 U.S. at 414 ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); *FCC v. Pacifica Found.*, 438 U.S. 726, 745 (1978) ("[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it."); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) ("[G]overnment may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views."); *Street v. New York*, 394 U.S. 576, 592 (1969) ("It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.").

76. *Boos v. Barry*, 485 U.S. 312, 321 (1988); *Widmar v. Vincent*, 454 U.S. 263, 276 (1981); see also *Carey v. Brown*, 447 U.S. 455, 461-62 (1980) ("[J]ustifications for selective exclusions from a public forum must be carefully scrutinized."); *Mosley*, 408 U.S. at 98-99 ("When government regulation discriminates among speech-related activities in a public forum, . . . the justifications offered for any distinctions it draws must be carefully scrutinized.").

77. *Simon & Schuster v. New York State Victims Bd.*, 112 S. Ct. 501, 509 (1991); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981). Interestingly, Justice Kennedy has argued that this two-part test was derived wholly from the Court's equal protection jurisprudence and "has no real or legitimate place when the Court considers the straightforward question whether the State may enact a burdensome restriction of speech based on content only." *Simon & Schuster*, 112 S. Ct. at 512 (Kennedy, J., concurring in the judgment). Having voiced his objections, Justice

The Supreme Court's First Amendment analysis of a particular instance of speech or conduct may acquire a special dimension when the speech or conduct occurred in an educational context. There was a time when a narrow judicial rendering of students' constitutional rights may have discouraged First Amendment litigation against universities.⁷⁸ Consider, for example, a decision by the Illinois Supreme Court in 1891:

By voluntarily entering the university, or being placed there by those having the right to control him, [the student] necessarily surrenders very many of his individual rights. How his time shall be occupied; what his habits shall be; his general deportment; . . . his hours of study and recreation, —in all these matters, and many others, he must yield obedience to those who, for the time being, are his masters⁷⁹

This view of students' constitutional rights, to the extent it still had adherents, was largely eviscerated by the Supreme Court's 1969 decision in *Tinker v. Des Moines Independent Community School District*.⁸⁰ Justice Fortas, writing for the majority in *Tinker*, stated that neither students nor teachers "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."⁸¹ The Justice further wrote that students

may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.⁸²

Three years later, Justice Powell, writing for a majority of the Court, similarly observed that the Court's past decisions

leave no room for the view that, because of the acknowledged need for order [at schools], First Amendment protections should apply with less force on college campuses [*sic*] than in the com-

Kennedy nevertheless acknowledged that the two-part test had indeed "found its way into [the Court's] First Amendment jurisprudence." *Id.* at 513 (Kennedy, J., concurring in the judgment).

78. One student author noted that, earlier this century,

[E]ven at the university level, . . . constitutional litigation was long discouraged by a judicial attitude similar to that which once inhibited constitutional challenges to state regulations by public employees—the notion that attendance at a public institution is a privilege which can be conditioned on the waiver of constitutional liberties. This view of the constitutional rights of the public university student appears moribund.

Developments in the Law—Academic Freedom, 81 HARV. L. REV. 1045, 1129 (1968).

79. *North v. Board of Trustees*, 27 N.E. 54, 56 (Ill. 1891).

80. 393 U.S. 503 (1969).

81. *Id.* at 506. The majority argued that the cited proposition had been "the unmistakable holding of th[e] Court for almost 50 years." *Id.* In dissent, Justice Black expressly denied this claim. *Id.* at 521 (Black, J., dissenting).

82. *Id.* at 511.

munity at large. Quite to the contrary, "the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."⁸³

The Court is not eager, however, to intervene in school affairs, preferring to leave matters of school rules and disciplinary procedures to school officials.⁸⁴ Indeed, the Court has gone so far as to hold that students' First Amendment freedoms may be restricted by school officials in ways that the State might not ordinarily be able to restrict the expression of its citizens.⁸⁵ The Court has justified this restrictive approach because of the "special characteristics of the school environment."⁸⁶

In *Tinker*, the Court announced the primary test to which school restrictions on expression must be subjected.⁸⁷ There, the Court held that students' expression may be restricted when it "materially and substantially disrupt[s] the work and discipline of the school."⁸⁸ Although *Tinker* in-

83. *Healy v. James*, 408 U.S. 169, 180 (1972) (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)).

84. See, e.g., *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 278-79 (1988) (Brennan, Marshall, and Blackmun, J.J., dissenting) ("The public educator's task is weighty and delicate indeed. . . . Accordingly, we have traditionally reserved" the operation of the schools "to the States and their local school boards."); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) ("The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board."); *Widmar v. Vincent*, 454 U.S. 263, 279 (1981) (Stevens, J., concurring in the judgment) ("In my opinion, a university should be allowed to decide for itself" which programs should be given use of limited school facilities.); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) ("Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. . . . Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.").

85. See, e.g., *Hazelwood Sch. Dist.*, 484 U.S. at 266 ("A school need not tolerate student speech that is inconsistent with its 'basic educational mission,' . . . even though the government could not censor similar speech outside the school." (quoting *Bethel Sch. Dist.*, 478 U.S. at 685)); *Healy*, 408 U.S. at 203 (Rehnquist, J., concurring in the result) ("The government as employer or school administrator may impose upon employees and students reasonable regulations that would be impermissible if imposed by the government upon all citizens.").

86. *Tinker*, 393 U.S. at 506. Subsequent Court decisions have imbued those words of Justice Fortas with important meaning. See, e.g., *Hazelwood Sch. Dist.*, 484 U.S. at 266 ("We have nonetheless recognized that the First Amendment rights of students in the public schools 'are not automatically coextensive with the rights of adults in other settings.'" (quoting *Bethel Sch. Dist.*, 478 U.S. at 682), "and must be 'applied in light of the special characteristics of the school environment.'" (quoting *Tinker*, 393 U.S. at 506)); *Healy*, 408 U.S. at 189 ("In the context of the 'special characteristics of the school environment,' the power of the government to prohibit 'lawless action' is not limited to acts of a criminal nature." (quoting *Tinker*, 393 U.S. at 506)).

87. 393 U.S. 503 (1969).

88. *Id.* at 513. The Court extracted this test from the holding of the Fifth Circuit Court of Appeals in *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966). *Id.*

The *Tinker* test has been invoked on numerous occasions by the Supreme Court. See, e.g., *Hazelwood Sch. Dist.*, 484 U.S. at 272 (acknowledging that *Tinker* provides the standard "for determining when a school may punish student expression"); *Widmar*, 454 U.S. at 276-77 (affirming the right of a university "to exclude even First Amendment activities that violate reason-

volved the expressive conduct of junior high and high school students, the Court has expressed its willingness to apply the *Tinker* test to the speech and conduct of college students as well.⁸⁹ Whether applied in the context of elementary, secondary, or post-secondary educational institutions, the basis for the *Tinker* test would appear simply to be the Court's recognition of "the mutual interest of students, faculty members, and administrators in an environment free from disruptive interference with the educational process."⁹⁰ Mere fear of disturbance, however, is not enough to justify a school's restriction of student expression.⁹¹

Although the Court has demonstrated a willingness to invoke the *Tinker* test in any educational context, the Court has applied the test differently to junior high schools, high schools, and universities.⁹² In *Bethel School District No. 403 v. Fraser*,⁹³ the Court held that

it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse. Indeed, the "fundamental values necessary to the maintenance of a democratic political system" disfavor the use of terms of debate highly offensive or highly threatening to others. Nothing in the Constitution prohibits the states from insisting that certain modes

able campus rules or substantially interfere with the opportunity of other students to obtain an education"); *Healy*, 408 U.S. at 189 ("[A]ctivities need not be tolerated where they infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education."). For other cases generally dealing with permissible restrictions on student expression, see Mitchell J. Waldman, Annotation, *What Oral Statement of Student Is Sufficiently Disruptive So As to Fall Beyond Protection of First Amendment*, 76 A.L.R. FED. 599 (1986).

It is not the case, however, that *only* when expression "materially and substantially disrupt[s] the work and discipline of the school" may a school restrict it. The Court rejected that reading of *Tinker* in *Hazelwood Sch. Dist.*, 484 U.S. at 270 n.2 ("[T]he proposition that '[o]nly speech that 'materially and substantially interferes with the requirements of appropriate discipline' can be found unacceptable and therefore be prohibited' . . . does not . . . even accurately reflect our holding in *Tinker*." (emphasis added)).

89. In *Healy v. James*, 408 U.S. 169 (1972), a case involving First Amendment rights of students at Central Connecticut State College, the Court held that actions may be prohibited that "materially and substantially disrupt the work and discipline of the school". . . . [A]ctivities need not be tolerated where they infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education." *Id.* at 189 (citation omitted) (quoting *Tinker*, 393 U.S. at 513). The Court reaffirmed its adherence to this view in *Widmar*, 454 U.S. at 276-77 (affirming "the continuing validity of cases" such as *Healy* "that recognize a university's right to exclude even First Amendment activities" in particular circumstances).

90. *Healy*, 408 U.S. at 171.

91. *Tinker*, 393 U.S. at 508.

92. The Court applies the First Amendment in accordance with the "special characteristics of the school environment." *Id.* at 506.

93. 478 U.S. 675 (1986).

of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the "work of the schools."⁹⁴

Both *Bethel* and *Tinker* involved the speech and conduct of students enrolled at junior high and high schools. The *Bethel* Court, moreover, made it clear that the students' young ages heavily influenced its decision: "It does not follow . . . that simply because the use of an offensive form of expression may not be prohibited to adults . . . the same latitude must be permitted to children."⁹⁵

Yet in *Healy v. James*,⁹⁶ a case in which the Court considered a university's refusal to grant recognition to an organization that school officials feared would promote campus disruption and violence,⁹⁷ the Court struck a strikingly different chord:

[T]he wide latitude accorded by the Constitution to the freedoms of expression and association is not without its cost in terms of the risk to the maintenance of civility and an ordered society. Indeed, this latitude often has resulted, on the campus and elsewhere, in the infringement of the rights of others. Though we deplore the tendency of some to abuse the very constitutional privileges they invoke, and although the infringement of rights of others certainly should not be tolerated, we reaffirm the principles of the Bill of Rights upon which our vigorous and free society is founded.⁹⁸

Perhaps in an elaboration of the *Tinker* test, the Court in *Hazelwood School District v. Kuhlmeier*⁹⁹ held that "[a] school need not tolerate student speech that is inconsistent with its 'basic educational mission.'"¹⁰⁰ In an earlier case, however, the Court stated that the contents of a university's mission statement do not automatically "exempt [the school's] actions from constitutional scrutiny."¹⁰¹

It was in light of these First Amendment principles that the Fourth Circuit Court of Appeals was called upon to decide *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason University*.¹⁰² At the heart of the Court of Appeals's ruling is the conclusion that the fraternity's "ugly wo-

94. *Id.* at 683 (quoting *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979) and *Tinker*, 393 U.S. at 508, respectively).

95. *Bethel Sch. Dist.*, 478 U.S. at 682. The Court further noted that the speech the student plaintiff had given at a school assembly, which was the subject of the dispute, "was acutely insulting to teenage girl students," and "could well be seriously damaging to its less mature audience, many of whom were only 14 years old." *Id.* at 683.

96. 408 U.S. 169 (1972).

97. *Id.* at 171-76.

98. *Id.* at 194.

99. 484 U.S. 260 (1988).

100. *Id.* at 266 (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986)).

101. *Widmar v. Vincent*, 454 U.S. 263, 268 (1981).

102. 993 F.2d 386 (4th Cir. 1993).

man contest" was *inherently expressive* conduct because of its skit format.¹⁰³ Without attempting to define the phrase "inherently expressive conduct"—other than to suggest that skits and various other forms of entertainment are within its scope¹⁰⁴—the court held that all such conduct is automatically entitled to First Amendment protection¹⁰⁵ and therefore need not be subjected to the two-part test announced by the Supreme Court in *Texas v. Johnson*.¹⁰⁶ The court's failure to lay a foundation for that conclusion suggests the court believed it was adhering to established precedent. In reality, however, the court may have established a new mode of First Amendment analysis.

The notion of "inherently expressive" conduct has enjoyed very limited currency in court opinions; to the extent that the phrase has been used, there has been little agreement regarding the kinds of conduct that exemplify it. Of all reported state and federal cases, the phrase "inherently expressive" had been used in only six decisions prior to *Sigma Chi*.¹⁰⁷ The Court of Appeals for the District of Columbia Circuit, in 1983, appears to have been the first to use the phrase. The court noted that in most cases involving restrictions on symbolic speech, the given activity was "inherently expressive," since the vast majority of people engaging in those activ-

103. *Id.* at 391 (emphasis added). In focusing on the contest's skit format, the court relied in part on *Schacht v. United States*, 398 U.S. 58 (1970), in which the Supreme Court construed a statute permitting actors to wear military uniforms in theatrical productions to shield from punishment even actors in "crude and amateurish" performances. *Schacht*, 398 U.S. at 61-62. The court in *Sigma Chi* acknowledged that *Schacht* involved the interpretation of a statute, *Sigma Chi*, 993 F.2d at 390, but justified its reliance on the case by observing that, in *Schacht*, "Justice Black . . . declare[d] that an actor participating in even a crude performance enjoys the constitutional right to freedom of speech." *Id.* Justice Black had written: "An actor, like everyone else in our country, enjoys a constitutional right to freedom of speech, including the right openly to criticize the Government during a dramatic performance." *Schacht*, 398 U.S. at 63.

Justice Black's opinion in *Schacht* may simply be read as pointing out that, merely because a person has assumed a dramatic role, the words leaving that person's mouth do not lose their constitutional protection. This reading of Justice Black is subtly, yet significantly, different than the Fourth Circuit's reading of those words. The Fourth Circuit apparently interpreted Justice Black's statement to stand for the proposition that *because* one is participating in a dramatic performance, one is *automatically* entitled to First Amendment protection.

104. *Sigma Chi*, 993 F.2d at 390-92.

105. *Id.* at 391-92.

106. 491 U.S. 397, 404 (1989); *see also supra* notes 56-63 and accompanying text.

107. In three of those decisions, the phrase appears unintended to import any particular significance to the court's First Amendment analysis. *See Lehnert v. Ferris Faculty Ass'n*, 111 S. Ct. 1950, 1958 (1991) (finding that employees in a prior case, *Ellis v. Brotherhood of Ry., Airway & S.S. Clerks*, 466 U.S. 435 (1984), who objected to the use of union funds, were not complaining because of any inherently expressive quality of the funded activities); *Clarke v. United States*, 886 F.2d 404, 411 (D.C. Cir. 1989) (noting that "[a] legislator's vote is inherently expressive"); *Russ v. Jordan*, No. C-92-1084MHP, 1992 U.S. Dist. LEXIS 19484, at *8 (N.D. Cal. Dec. 8, 1992) (stating that "there is nothing inherently expressive about watching a demonstration").

ities "will do so in order to express something thereby."¹⁰⁸ Significantly, the court cited three examples of "inherently expressive conduct," examples the Supreme Court later used in *Texas v. Johnson*¹⁰⁹ to exemplify its past implementation of the two-part test for expressive conduct.¹¹⁰ Consequently, a reading of those two decisions alone suggests that inherently expressive activities are in no way exempt from the *Johnson* analysis.

The Court of Appeals for the Seventh Circuit used the phrase in a 1990 decision, *Miller v. Civil City of South Bend*,¹¹¹ finding that dance is a form of inherently expressive conduct.¹¹² Having made this observation, the court nevertheless proceeded to conclude that the two-part *Johnson* test must be applied to decide whether nude dancing is an activity entitled to First Amendment protection.¹¹³ For the Seventh Circuit, it is therefore clear that inherently expressive conduct is subject to the *Johnson* analysis.

The Supreme Court granted certiorari in the *Miller* case and handed down *Barnes v. Glen Theatre, Inc.*¹¹⁴ The respondents urged the Court to reject the Seventh Circuit's reasoning and to hold that the *Johnson* test should be applied only "to handle those 'arguable' situations where the activity is inherently conduct, yet asserted to be undertaken to convey a particularized message."¹¹⁵ Significantly, the Court remained silent on the issue, letting stand the Seventh Circuit's conclusion that inherently expressive conduct is governed by the *Johnson* analysis.¹¹⁶

In his concurrence in *Barnes*, Justice Scalia wrote that he would define "inherently expressive" conduct as "conduct that is normally engaged in for

108. *Community for Creative Non-Violence v. Watt*, 703 F.2d 586, 617 (D.C. Cir. 1983), *rev'd sub nom. Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984).

109. 491 U.S. 397, 404 (1989); *see also supra* notes 58-62 and accompanying text.

110. As examples, the appellate court cited the burning of draft cards, the wearing of arm bands, and the superimposition of a peace symbol on an American flag. *Community for Creative Non-Violence*, 703 F.2d at 617. The court then contrasted those activities with the practice of camping in public parks as a means of demonstrating the plight of the homeless, and concluded that camping, as an activity with "a great deal of independent significance . . . has expressive First Amendment value only in a very limited set of circumstances." *Id.* at 617-18.

111. 904 F.2d 1081, 1085 (7th Cir. 1990), *rev'd sub nom. Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991).

112. *Id.* "Attempts to distinguish between expressive and nonexpressive dance," the *Miller* court wrote, "are misconceived . . ." *Id.* at 1086.

113. *Id.* at 1086. The court concluded that nude dancing was indeed protected expressive conduct. *Id.* at 1086-87.

114. 111 S. Ct. 2456 (1991), *rev'g Miller v. Civil City of South Bend*, 904 F.2d 1081 (7th Cir. 1990).

115. Brief for Respondents Glen Theatre, Inc., et al. at 25, *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991) (No. 90-26).

116. The Court reversed the Seventh Circuit on other grounds. The Supreme Court did not itself employ the *Johnson* analysis, however; it simply declared that, in light of established precedent, "nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment." *Barnes*, 111 S. Ct. at 2460.

the purposes of communicating an idea, or perhaps an emotion, to someone else"¹¹⁷—a definition substantively identical to the one pronounced by the Court of Appeals for the District of Columbia Circuit.¹¹⁸ He doubted that dancing, the particular activity before the Court, was an example of such conduct.¹¹⁹ He then gave as an example of inherently expressive conduct the flying of a red flag¹²⁰—a clear reference to the Court's 1931 decision in *Stromberg v. California*.¹²¹ Of particular importance is the fact that the *Johnson* Court had cited *Stromberg* two years earlier as an example of a Supreme Court decision that conformed to, and which presumably required the application of, the *Johnson* two-part test for expressive conduct.¹²²

Justice Souter also took up the issue of inherent expressiveness in his concurrence in *Barnes*.¹²³ He reasoned that "[n]ot all dancing is entitled to First Amendment protection as expressive activity"—aerobic exercise, for example, "would . . . be outside the First Amendment's concern."¹²⁴ Justice Souter continued with words that may be of great significance:

[D]ancing as a performance directed to an actual or hypothetical audience gives expression at least to generalized emotion or feeling, and where the dancer is nude or nearly so the feeling expressed, in the absence of some contrary clue, is eroticism, carrying an endorsement of erotic experience. . . . [S]uch performance dancing is inherently expressive¹²⁵

Those words may hold the key to resolving the "inherent expressiveness-*Johnson*" issue. As noted previously,¹²⁶ the Court's *Spence v. Washington* decision¹²⁷—from which the *Johnson* Court drew its two-part test¹²⁸—emphasized the relevance of "the factual context and environment" in which an activity is performed.¹²⁹ As Justice Souter's method of reasoning implied, it is from *context* that one can infer the presence of both an

117. *Id.* at 2466 n.4 (Scalia, J., concurring in the judgment).

118. *Community for Creative Non-Violence v. Watt*, 703 F.2d 586, 617 (D.C. Cir. 1983), *rev'd sub nom. Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984); *see also supra* note 108 and accompanying text.

119. *Barnes*, 111 S. Ct. at 2466 n.4 (Scalia, J., concurring in the judgment). *Contra* *Miller v. Civil City of South Bend*, 904 F.2d 1081, 1085 (7th Cir. 1990), *rev'd sub nom. Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991).

120. *Barnes*, 111 S. Ct. at 2466 n.4 (Scalia, J., concurring in the judgment).

121. 283 U.S. 359, 366 (1931); *see also supra* note 44 and accompanying text.

122. *Texas v. Johnson*, 491 U.S. 397, 405 (1989); *see also supra* note 58 and accompanying text.

123. *Barnes*, 111 S. Ct. at 2468 (Souter, J., concurring in the judgment).

124. *Id.* (Souter, J., concurring in the judgment).

125. *Id.* (Souter, J., concurring in the judgment).

126. *See supra* note 54 and accompanying text.

127. 418 U.S. 405, 410 (1974).

128. *Texas v. Johnson*, 491 U.S. 397, 404 (1989).

129. *Spence*, 418 U.S. at 410. The *Johnson* Court reiterated the enormous importance of context. *Johnson*, 491 U.S. at 405.

intent to convey a message, and an audience likely to understand it. Indeed, the *context* of the dancing in *Barnes* led Justice Souter to conclude that the activity was inherently expressive.

The crucial insight that Justice Souter may have therefore provided is this: A finding that an activity is inherently expressive, far from exempting it from the *Johnson* test, may instead provide an invaluable tool with which to conduct the necessary *Johnson* analysis. "[I]n the absence of some contrary clue,"¹³⁰ a finding that a person engaged in what may be regarded as an inherently expressive activity—such as dancing before an audience, performing a skit, or any other conduct "normally engaged in for the purpose of communicating an idea, or . . . emotion, to someone else"¹³¹—may be all but conclusive in finding that an intent to convey a particularized message, *Johnson's* first prong, was in fact present.

This reading of the cases is in accord with the Seventh Circuit's reasoning in *Miller*,¹³² with the Supreme Court's refusal to correct that reasoning in *Barnes*,¹³³ and, perhaps most significantly, with the Court's holdings in First Amendment cases involving the arts.¹³⁴ Activities such as performing music and acting in a dramatic performance, absent "some contrary clue," always take place for the purpose of conveying an idea or feeling, before an audience likely (or at least eager) to understand or experience it. Consequently, because of the Court's well-established reluctance to trammel individuals' First Amendment rights,¹³⁵ those who engage in such activities will, in all but extraordinary cases, be regarded as engaging in protected conduct.

Finally, the examples of past decisions cited by the *Johnson* Court¹³⁶ to show the consistency of the Court's application of the two-part test—and presumably also the kinds of activities that require the application of that test—include instances of conduct that are surely inherently expressive. Justice Scalia, for example, regards the flying of a red flag as inherently

130. *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2468 (1991) (Souter, J., concurring in the judgment).

131. *Id.* at 2466 n.4 (Scalia, J., concurring in the judgment).

132. 904 F.2d 1081, 1085-86 (7th Cir. 1990), *rev'd sub nom. Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991); *see also supra* notes 111-13 and accompanying text.

133. *See supra* notes 114-16 and accompanying text.

134. The Court has held, for example, that "motion pictures . . . and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee." *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981).

135. *See, e.g., Winters v. New York*, 333 U.S. 507, 510 (1948) (acknowledging the difficulty in discerning an exposition of ideas from pure entertainment and electing to err on the side of protection).

136. *Texas v. Johnson*, 491 U.S. 397, 404-05 (1989); *see also supra* notes 58-62 and accompanying text.

expressive.¹³⁷ Saluting the flag—another of the *Johnson* Court's examples¹³⁸—is certainly inherently expressive. Just as dancing before an audience is inherently expressive conduct according to Justice Souter,¹³⁹ the act of placing one's hand over one's heart or at one's brow while at the same time orienting oneself toward an American flag is an activity nearly always engaged in for the purpose of communicating an idea or emotion to someone else—the idea of allegiance to the United States or the feeling of patriotism.¹⁴⁰ The *Johnson* Court suggested that such activities are indeed subject to the two-part test.¹⁴¹

Under this reading of the law, the Fourth Circuit's holding in *Sigma Chi* that the *Johnson* test is inapplicable to inherently expressive conduct¹⁴² stands in disregard of Supreme Court precedent.¹⁴³ The error would be of no practical consequence to the parties involved in *Sigma Chi*, though, if the court were correct in stating that even if the *Johnson* test were applied, the "ugly woman contest" would "qualif[y] as expressive conduct."¹⁴⁴ Yet the court's reasoning on this point is subject to criticism as well. The court held that, based on the university's objection to the racist and sexist themes of the contest, "[i]t is manifest . . . that the University officials thought the Fraternity intended to convey a message."¹⁴⁵ The court further concluded that the fraternity's later apology suggested they, too, had intended to convey a message.¹⁴⁶ Finally, the court itself purported to identify the message, stating that it was "evident . . . the Fraternity's purposefully non-sensical treatment of sexual and racial themes was intended to impart a

137. *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2466 n.4 (1991) (Scalia, J., concurring in the judgment); see also *supra* note 120 and accompanying text.

138. *Johnson*, 491 U.S. at 405.

139. *Barnes*, 111 S. Ct. at 2468 (Souter, J., concurring in the judgment); see also *supra* note 125 and accompanying text.

140. It should be noted, however, that the *Johnson* Court stated: "We have not automatically concluded . . . that any action taken with respect to our flag is expressive. Instead, in characterizing such action for First Amendment purposes, we have considered the context in which it occurred." *Johnson*, 491 U.S. at 405.

141. *Id.* at 404-05. Similarly, the District of Columbia Circuit's examples of inherently expressive activities, see *supra* note 110—examples later used by the *Johnson* Court to demonstrate the application of its two-part test, see *supra* notes 58-62 and accompanying text—are also activities normally engaged in for the purpose of communicating an idea or emotion. Surely those who superimpose a peace symbol on an American flag and then fly the flag upside down, for example, always do so in order to convey a message. The only remaining question is whether viewers are likely to understand that message.

142. *Sigma Chi*, 993 F.2d at 391.

143. See *supra* notes 114-41 and accompanying text.

144. *Sigma Chi*, 993 F.2d at 392.

145. *Id.* The university's own brief to the court contradicted this assertion by stating that "the University has no idea what expressive message, if any, was intended by the participants." Reply Brief of Appellants at 2, *Sigma Chi* (No. 91-2684) (emphasis added).

146. *Sigma Chi*, 993 F.2d at 392.

message that the University's concerns . . . should be treated humorously."¹⁴⁷

The problem with such a reading of the events is that it leaves no room for common ignorance. One might infer from the fraternity's apology, for example, that the participants had never given any thought to the racist and sexist overtones of the display and later felt remorse at the offense they had unintentionally caused.¹⁴⁸ The court's inference that the contest was intended to convey a message that particular university policies lacked merit and should be treated humorously may therefore have accorded the participants far more credit for their pre-event intellectual machinations than they deserved. If this is true, then an intent to convey a particularized message was lacking and, under *Johnson*, the conduct was not sufficiently expressive to merit First Amendment protection.¹⁴⁹ George Mason University, therefore, may very well have been correct in arguing that "discovery w[ould] demonstrate that the contest does not merit characterization as a skit but only as mindless fraternity fun, devoid of any artistic expression."¹⁵⁰

Assuming that the "ugly woman contest" did constitute expressive conduct entitled to First Amendment protection, however, the judges in the majority may have strayed from Supreme Court precedent in holding that, although the university "has a substantial interest in maintaining an educational environment free of discrimination and racism," the university could not achieve those goals by selectively limiting speech.¹⁵¹ Judge Murnaghan, in his concurring opinion, took the majority to task for that holding, arguing that George Mason "does have greater authority to regulate expressive conduct within its confines as a result of the unique nature of the educational forum."¹⁵²

While the judges may have ignored several pertinent Supreme Court holdings,¹⁵³ it appears unlikely that recognition of those cases would have

147. *Id.*

148. One journalist appears to have given the events precisely that reading, commenting that Organizers [of the contest] later apologized, saying they did not mean for anyone to take offense. How could the organizers have been so blithely ignorant? Easy. As my non-college-educated father once observed wisely, they may have a whole lot of book sense, but that doesn't mean they have any common sense.

Clarence Page, *Insensitive Students Get Taste of Own Bitter Medicine*, ORLANDO SENTINEL TRIB., Sept. 6, 1991, at A15.

149. Put another way, although the fraternity's contest was in the form of a skit, it would not properly be regarded as protected expressive conduct if the "contrary clue" were established that the participating fraternity members did not intend to convey a message. See *supra* notes 123-31 and accompanying text.

150. *Sigma Chi*, 993 F.2d at 391.

151. *Id.* at 393.

152. *Id.* at 394 (Murnaghan, J., concurring in the judgment).

153. See *supra* notes 80-101 and accompanying text.

led to a different result. Although universities do have the kind of authority that Judge Murnaghan described,¹⁵⁴ it is not clear to what lengths George Mason officials could lawfully have gone to achieve the university's goals. Under the Court's holdings in *Tinker*,¹⁵⁵ *Healy*,¹⁵⁶ and *Widmar*,¹⁵⁷ George Mason officials could have punished the fraternity¹⁵⁸ if the contest had "materially and substantially disrupt[ed] the work and discipline of the school."¹⁵⁹ No facts in *Sigma Chi* suggest the conduct had such an effect, however. As in *Tinker*, there was apparently no "material[] disrupt[ion of] classwork."¹⁶⁰ Nor did the fraternity's contest "infringe reasonable campus rules"¹⁶¹ or "substantially interfere with the opportunity of other students to obtain an education."¹⁶² Nor did the courts find that the contest

154. See *supra* notes 80-101 and accompanying text.

155. 393 U.S. 503, 513 (1969); see also *supra* note 88 and accompanying text.

156. 408 U.S. 169, 189 (1972); see also *supra* note 89.

157. 454 U.S. 263, 276-77 (1981); see also *supra* note 89.

158. This statement presupposes that there is no due process violation in imposing sanctions. See *supra* notes 39-40 and accompanying text. An analysis of due process concerns is beyond the scope of this Note. The reader who wishes to explore such issues, though, would do well to begin with *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) (regarding the notice of prohibited speech and conduct that students must receive before a school may punish such speech and conduct). Also pertinent is the decision of a Michigan district court to strike down as unconstitutional codes of speech and conduct promulgated by the University of Michigan at Ann Arbor. *Doe v. University of Mich.*, 721 F. Supp. 852, 867 (E.D. Mich. 1989); see also *supra* note 4. One of the court's bases for so holding was that the university had "never articulated any principled way to distinguish sanctionable from protected speech." *Doe*, 721 F. Supp. at 867. As a result, in violation of students' due process rights under the Fourteenth Amendment, "[s]tudents . . . were necessarily forced to guess at whether a comment about a controversial issue would later be found to be sanctionable under the Policy." *Id.*

159. *Tinker*, 393 U.S. at 513. In *Tinker*, the conduct in question was the wearing of armbands to protest American involvement in Vietnam. *Id.* at 504. Because the school could not show a real threat of material and substantial disruption of the school's affairs—despite the fact that hostile remarks were directed at the armband-wearing students, *id.* at 508—the school's restriction of the conduct was held unconstitutional, *id.* at 514.

The relationship between the *Tinker* test and that set out by the Court for content-based restrictions on speech imposed by the state, see *supra* notes 74-77, 88 and accompanying text, is not entirely clear. But in finding that George Mason officials could not impose sanctions on the fraternity, in part because the university "has available numerous alternatives to imposing punishment on students based on the viewpoints they express," *Sigma Chi*, 993 F.2d at 393, the court appears to be employing something akin to the "narrowly drawn" principle that is used to scrutinize content-based restrictions on expression. See *supra* note 77 and accompanying text.

160. *Tinker*, 393 U.S. at 513.

161. *Healy v. James*, 408 U.S. 169, 189 (1972). The university's briefs, as well as the decisions of the district and appellate courts, make no reference to any such applicable campus rules.

162. *Id.* The university argued that the contest "interfere[d] with student learning," Brief of Appellant at 3, *Sigma Chi* (No. 91-2684), and created "distractions to learning," *id.* at 6. Moreover, the university had secured affidavits from "[f]our educators" stating that the contest "interfered with the educational pursuits of other students." Reply Brief of Appellant at 6, *Sigma Chi* (No. 91-2684). The district court nevertheless found that "there has been no substantial or material disruption of GMU's educational mission." *Iota Xi Chapter of Sigma Chi Fraternity v.*

prompted "substantial disorder."¹⁶³ Indeed, even if the university had feared a disturbance as a result of the display, that fear would not have been a constitutionally sufficient basis for sanctioning the fraternity, because "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."¹⁶⁴

Moreover, because the Supreme Court has applied the *Tinker* analysis differently to schools with students of different ages, with the result that college and university students are accorded greater freedoms of expression than younger students,¹⁶⁵ George Mason officials faced an especially high constitutional hurdle in their attempt to punish the fraternity. Assuming the problems the "ugly woman contest" caused on the George Mason campus are no more repugnant to the life of a university than the threat of physical violence to students, then the Supreme Court's ruling in *Healy v. James*¹⁶⁶ all but forbade George Mason officials from sanctioning Sigma Chi. The *Healy* Court's words, in fact, seem tailored to precisely the situation that George Mason officials faced: "[T]he wide latitude accorded by the Constitution to the freedoms of expression and association is not without its cost in terms of the risk to the maintenance of civility and an ordered society. . . . [Yet] we reaffirm . . . the principles of the Bill of Rights"¹⁶⁷

It may well be that the Fourth Circuit Court of Appeals reached the proper conclusion in *Sigma Chi*, when it held that George Mason officials could not impose sanctions on the fraternity for their sponsorship of an "ugly woman contest."¹⁶⁸ The particular premises on which the court founded that conclusion, however, are susceptible to criticism.

First, in its finding that "inherently expressive" conduct is automatically entitled to First Amendment protection and need not be subjected to the *Johnson* test,¹⁶⁹ the court employed a mode of analysis that is in conflict with Supreme Court precedent.¹⁷⁰ Moreover, when the *Sigma Chi* court *did* apply the *Johnson* test to make the point that the same result would have

George Mason Univ., 773 F. Supp. 792, 794 (E.D. Va. 1991) (emphasis added), *aff'd*, 993 F.2d 386 (4th Cir. 1993). The appellate court did not address the issue.

163. *Tinker*, 393 U.S. at 513.

164. *Id.* at 508. The Court added that "[a]ny word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk." *Id.*

165. See *supra* notes 92-98 and accompanying text.

166. 408 U.S. 169 (1972). At issue in *Healy* was the establishment at a state college of a local chapter of an organization that had been linked to violent demonstrations on other campuses. *Id.* at 169; see also *supra* notes 89, 96-98 and accompanying text.

167. *Healy*, 408 U.S. at 194.

168. See *Sigma Chi*, 993 F.2d at 393. For example, the due process argument that persuaded Judge Murnaghan, see *supra* notes 39-40 and accompanying text, does seem compelling. See *supra* note 158.

169. *Id.* at 392; see also *supra* notes 31-34, 57 and accompanying text.

170. See *supra* notes 114-31 and accompanying text.

been reached,¹⁷¹ its reasoning appears flawed. It seems likely, even probable, that the participating fraternity members intended *not* to convey a particularized message concerning university policy, but only to make the audience laugh.¹⁷² Although that distinction does little to diminish the feelings of disgust the contest aroused in the minds of many,¹⁷³ it is crucial to the determination of First Amendment protection.

Second, even if the "ugly woman contest" were found sufficiently expressive to implicate the First Amendment, the court's suggestion that universities may not selectively limit the speech of their students¹⁷⁴ disregards Supreme Court holdings to the contrary.¹⁷⁵ It is settled that universities may restrict the expression of their students in ways in which the State may not restrict the speech of its citizens.¹⁷⁶ It is nevertheless doubtful that the "ugly woman contest" created the kind of "material and substantial disruption of the work and discipline of the school" that would authorize university officials to sanction it.¹⁷⁷

In certain respects, it is discouraging that this Note should conclude with the suggestion that conduct so base might be shielded from a university's sanctions. Many would be troubled indeed if, in the final analysis, conduct that achieves no constructive purpose and serves only to alienate and belittle members of the university community were found to be a necessary evil of campus life. America's institutions of higher education have long held themselves out as places dedicated to this nation's noblest principles, not the least of which is an unyielding commitment to the notion of individual dignity.¹⁷⁸ Speech and conduct threatening that dignity would seem to merit only the disapprobation that punishment may bring. Yet it is, of course, that same commitment to high principles that gives rise to the dilemma school officials and judges face when students speak or behave offensively. Competing with the urge to punish is the desire to echo the words of Justice Powell: "Though we deplore the tendency of some to abuse the very constitutional privileges they invoke, . . . we reaffirm . . . the principles of the Bill of Rights upon which our vigorous and free society is founded."¹⁷⁹

171. *Sigma Chi*, 993 F.2d at 393; see also *supra* note 35 and accompanying text.

172. See *supra* notes 145-49 and accompanying text.

173. See *supra* notes 19, 148 and accompanying text.

174. *Sigma Chi*, 993 F.2d at 393.

175. See *supra* notes 80-101 and accompanying text.

176. See *supra* notes 80-101 and accompanying text.

177. See *supra* notes 87-89, 159-64 and accompanying text.

178. See *supra* note 7.

179. *Healy v. James*, 408 U.S. 169, 194 (1972).

Not surprisingly, the tension between such principles has sparked fierce debate.¹⁸⁰ Established rules of analysis, such as those set out by the Supreme Court in *Tinker*,¹⁸¹ *Healy*,¹⁸² and *Johnson*,¹⁸³ supply the initial terms of discussion. The precise contours of the legal precepts that will be forged in the heat of that debate, as it continues to be carried out in university board rooms and in our country's courthouses, remain to be seen.

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180. See *supra* notes 1-5 and accompanying text.

181. 393 U.S. 503, 513 (1969); see also *supra* notes 87-101 and accompanying text.

182. 408 U.S. 169, 189 (1972); see also *supra* note 89.

183. 491 U.S. 397, 404 (1989); see also *supra* notes 56-58 and accompanying text.