A Uniform Test Isn't Here Right Now, But Please Leave a Message: How Altering the Spence Symbolic Speech Test Can Better Meet the Needs of an Expressive Society

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A Uniform Test Isn’t Here Right Now, But Please Leave a Message: How Altering the *Spence* Symbolic Speech Test Can Better Meet the Needs of an Expressive Society

*Caitlin Housley*¹

INTRODUCTION

A peace sign. A flag. A war. Combined, these items were enough to incite nearly half a century of constitutional confusion and judicial debate that has yet to be resolved. In 1974, the Supreme Court of the United States embarked on what has now become the seemingly impossible task of declaring a sufficient test for symbolic speech protection under the First Amendment.² It all started when one college student decided to protest the Vietnam War by fixing a duct tape peace sign onto the American Flag.³ In the judicial proceedings following the incident, the Supreme Court articulated that in order for conduct to fall within the purview of the First Amendment, the Court must ask whether “[a]n intent to convey a particularized message was present, and . . . the likelihood was great that the message would be understood by those who viewed it.”⁴

Nearly twenty years later, the Court formulated a more diluted test, claiming that such a strict “particularized message” requirement would prohibit First Amendment protection for artistic works such as “the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll.”⁵ However, the Court has yet to articulate which test is better suited for approaching cases of symbolic speech, and this lack of uniformity has led to a spilt among the circuits.⁶ Yet even with a more diluted test, the Court could not have anticipated living in a society that relies on Facebook “like” buttons, YouTube videos, and emojis⁷ to express their ideas on a daily basis.

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³ *Spence*, 418 U.S. at 406.
⁴ Id. at 410–11.
⁶ As of 2008, there were over 1,600 citations to *Spence* in subsequent cases, many of which adopt differing versions of the *Spence* test. James M. McGoldrick, Jr., Symbolic Speech: A Message from Mind to Mind, 61 OKLA. L. REV. 1, 57 (2008).
⁷ Emojis are described as small images, typically used in text messages, to enhance communication. See Matt McFarland, Emojis: Silly Teenage Fad or Frontier of Modern Communication?, WASH. POST (Nov. 12, 2013), http://www.washingtonpost.com/blogs/innovations/wp/2013/11/12/emojis-silly-teenage-fad-or-frontier-of-modern-communication/.

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A uniform test for symbolic speech that protects abstract means of communication is crucial in a culture where people rely on technology, clothing, hairstyles, brands, and even tattoos to express their personalities and send messages about what they value in life. A uniform test would help ensure that people know whether or not their actions are protected when engaging in new forms of symbolic speech. As easy as it may have been for the Court to sidestep articulating a uniform test in the past, this problem will simply prove to be more complex and ever expanding as society continues to evolve. Thus, this Note proposes a dynamic test for symbolic speech that is strict enough to uphold the sanctity of the First Amendment while still being flexible enough to protect today's means of expression that are meant to be uniquely interpreted by each observer.

Part I of this Note will discuss how the test for symbolic speech has evolved since its origin in Spence v. Washington. Part II examines how four different circuits have adopted and altered the original test for symbolic speech. Lastly, Part III proposes a more dynamic test for symbolic speech by textually altering the existing tests and drawing on the importance of conduct and context in every symbolic speech case. Ultimately, this Note argues that by changing two words of the original Spence test and reincorporating a context element, the test can adequately adapt to protect those unique, artistic messages that intend a different meaning for each viewer who encounters them.

I. THE EVOLUTION OF THE SYMBOLIC SPEECH TEST

A. Spence's "Particularized" Message

On May 10, 1970, America was recovering from the tragic shootings at Kent State University while anticipating the Cambodian Campaign waged by President Richard Nixon during the Vietnam War. In order to express his disapproval, college student Harold Spence affixed duct tape in the shape of a peace sign to the front and back of the American flag and hung it upside down from his window for the community to see. However, instead of silently protesting the shootings and the war as Spence had planned, his actions led to a landmark case for the symbolic speech doctrine. Spence was arrested for violating a Washington statute regarding misuse of the flag. When questioned about his actions, Spence said, "I felt there had been so much killing and that this was not what America stood for. I felt that the flag stood for America and I wanted people to know that I thought America stood for peace."

Although the Constitution's literal protection extends only to "freedom of speech," the Court acknowledged that Spence's nonverbal action would constitute

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8 Spence, 418 U.S. at 410–11.
9 Id. at 405–06.
10 Id.
11 Id. at 408.
12 U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . .").
speech that the framers had intended to protect. In fact, the concept of nonverbal conduct as speech dates back even to the 1940s, when the Supreme Court held that saluting the flag could be protected under the First Amendment, stating that “[s]ymbolism is a primitive but effective way of communicating ideas.”

Instead, the true issue arose when the Court acknowledged a need for drawing a line in symbolic speech cases. Noting that speech could be found in almost any mundane daily action, such as putting on clothes or walking down the street, the Supreme Court in United States v. O'Brien asserted, “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.” In an effort to weed out what they labeled “mindless nihilism,” the Court in Spence acknowledged that conduct must be “sufficiently imbued with elements of communication to fall within the scope of the First . . . Amendment[].” In determining this, the Court suggested that the context of the conduct was an important factor to consider because context could help give a symbol or conduct meaning.

However, the Court did more than suggest that conduct must be sufficiently imbued with elements of communication. Instead, they outlined a two-prong test, declaring that Spence’s conduct was symbolic 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.” This test remained largely unchanged for the next fifteen years and was cited as the leading authority for symbolic speech by famous cases like Wooley v. Maynard, the New Hampshire “Live Free or Die” license plate case. However, the test was slightly refined in 1989 in Texas v. Johnson.

In Johnson, the Court faced yet another flag case. This time, however, the respondent burned the flag as part of a march protesting the Reagan administration. When asked about his conduct, Johnson replied, “The American Flag was burned as Ronald Reagan was being renominated as President. And a more powerful statement of symbolic speech, whether you agree with it or not, couldn’t have been made at that time. It’s quite a just position [juxtaposition]. We

15 See City of Dallas v. Stanglin, 490 U.S. 19, 25 (1989) (“It is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one’s friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment.”). Although Stanglin was decided nearly twenty years after O’Brien, this “kernel of expression” idea is often quoted alongside the O’Brien Court’s assertion that the evaluation of conduct as speech can be quite limitless. McGoldrick, supra note 6, at 39–40.
17 Spence, 418 U.S. at 410.
18 Id. at 409.
19 Id. at 410.
20 Id. at 410–11.
23 Id. at 399–400.
had new patriotism and no patriotism."\textsuperscript{24} In determining whether the conduct should be protected as symbolic speech, the Court quoted \textit{Spence}, asking, "whether ['a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it."\textsuperscript{25}

However, the \textit{Johnson} Court deleted the "surrounding circumstances" portion of the \textit{Spence} test's second prong by inserting an omission bracket around "whether."\textsuperscript{26} As originally articulated in \textit{Spence}, the test read, "An intent to convey a particularized message was present, and \textit{in the surrounding circumstances} the likelihood was great that the message would be understood by those who viewed it."\textsuperscript{27} Later in its opinion, the \textit{Johnson} Court mentioned surrounding circumstances in passing.\textsuperscript{28} Yet later courts largely overlooked this discrepancy and instead focused only on what \textit{Johnson} articulated to be the two more important elements of the test—a particularized message and a great likelihood that others would understand that message.\textsuperscript{29}

For example, in \textit{Cressman v. Thompson}, a case concerning an Oklahoma license plate, the Tenth Circuit Court of Appeals cited the \textit{Spence} test, italicizing what they understood to be the two elements of the test for symbolic speech.\textsuperscript{30} The court said, "An 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."\textsuperscript{31} It used \textit{Johnson}'s interpretation of \textit{Spence} by paying no attention to the "surrounding circumstances"\textsuperscript{32} element in its articulation of the symbolic speech elements. Like the \textit{Cressman} court, other courts interpret the symbolic speech test to have two elements, both lacking any articulation of the importance of surrounding circumstances. Context has largely become an afterthought in the search for a uniform symbolic speech test, and courts have now moved to criticizing the "particularized message"\textsuperscript{33} element as where the \textit{Spence} test lacks merit. One specific case challenged the "particularized message"\textsuperscript{34} requirement to such an extent that it changed the way many courts would view both the \textit{Spence} and the \textit{Johnson} tests still today—\textit{Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston}.\textsuperscript{35}

\textsuperscript{24} Id. at 406 (alteration in original).
\textsuperscript{25} Id. at 404 (alteration in original) (quoting \textit{Spence} v. Washington, 418 U.S. 405, 410–11 (1974)).
\textsuperscript{27} \textit{Spence}, 418 U.S. 410–11 (emphasis added).
\textsuperscript{28} \textit{Johnson}, 491 U.S. at 406. ("In these circumstances, \textit{Johnson}'s burning of the flag was conduct . . .
\textsuperscript{29} Id. at 404.
\textsuperscript{30} \textit{Cressman} v. Thompson, 719 F.3d 1139, 1149 (10th Cir. 2013).
\textsuperscript{31} Id. (alteration in original) (quoting \textit{Spence} v. Washington, 418 U.S. 405, 410–11 (1974)).
\textsuperscript{32} \textit{Spence}, 418 U.S. at 411.
\textsuperscript{33} Id.
\textsuperscript{34} Id.
B. Hurley's Liberalization of the Spence Test

Breaking free of the landmark flag decisions, Hurley involved a parade. The City of Boston authorized the South Boston Allied War Veterans Council ("the Council") to host a St. Patrick's Day-Evacuation Day Parade. In deciding which organizations were allowed a place in the parade, the Council denied a place for GLIB—an organization formed by gay, lesbian, and bisexual individuals. GLIB's solely wanted to march in the parade to show pride in their Irish heritage as well as their sexual orientation, and to show others that such a community existed. Members of GLIB filed suit alleging that the Council had violated a Massachusetts public accommodation law making it illegal to deny an organization participation in a parade solely because the organization's views did not parallel the parade organizer's view. In defense, the Council asserted that the statute violated their First Amendment guarantee of free speech. Ultimately holding that parades do constitute symbolic speech worthy of First Amendment protection, the Hurley Court seemingly altered nearly twenty years of symbolic speech precedent.

Although the main issues in Hurley were forced association and discrimination (concepts not related to symbolic speech), modern courts have interpreted Hurley as either modifying symbolic speech precedent or completely rejecting it. Particularly, courts cite Hurley because it seemed to liberalize what many now label to be the strict Spence test. The Hurley Court engaged in a fairly short discussion of whether or not a parade would be conduct protected by free speech, focusing more on the facts of the case than on explaining the legal justifications of their decision. The majority of the Court's legal analysis occurred in just one sentence that eliminated the "particularized message" element of the Spence test. In what some consider to be a "sudden unprovoked attack" on Spence, the Hurley Court asserted that "a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message,' . . . would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll."
While this one sentence is quoted by most cases and scholarly articles as completely changing the symbolic speech doctrine, the Hurley Court’s best attempt at explaining why they abolished twenty years of symbolic speech precedent was by saying that “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.”

Essentially, the Court believed a parade would not be considered symbolic speech under the Spence test because a particular message (what the Court defined as “a narrow, succinctly articulable message”) could not be deciphered from a parade and even though the petitioners could not articulate a message, they should not be penalized.

After Hurley, the Court saw an influx of cases that branched off from such meritorious holdings regarding flag desecration, cross burning, war protesting, and sit-ins to cases involving weddings on beaches, license plates, school dress codes, and sagging pants. But with each new case, courts have been reluctant to adopt any one, concrete test and instead have adopted a number of ways to tiptoe around the issue and decide cases without ever declaring which test is most deserving of recognition.

II. HOW THE CIRCUITS SPLIT

The confusion stemming from a lack of uniformity on this issue is most apparent in the lower courts, as many circuits have adopted differing views on the symbolic speech issue. The Second, Eleventh, Sixth, and Ninth Circuits each have articulated their different approaches to symbolic speech. One has kept the Spence test intact, even in the wake of Hurley. Another applies Hurley, but adds a

48 Paul E. Salamanca, Video Games as a Protected Form of Expression, 40 GA. L. REV. 153, 167–68 (2005) (“This finding has enormous and unmistakable value for the development of non-cognitive forms of expression, both as a means of affecting audiences and as a means of promoting self-development.”).
49 Hurley, 515 U.S. at 569–70.
50 Id. at 569.
54 See Clark v. Cmty. for Creative Non-Violence, 468 U.S. 298, 293–94 (1984) (invoking organization that sought permit to erect tents in public park to symbolize the plight of the homeless during the winter months).
55 See Kashumanu v. Hawaii, 682 F.3d 789, 798–99 (9th Cir. 2012).
59 See, e.g., Cressman, 719 F.3d at 1150 (describing the four different tests adopted in five circuits).
60 See McGoldrick, supra note 6, at 56–76.
"reasonable person" element. The remaining two believe that Spence and Hurley can coexist.

A. The Second Circuit's Originalist Approach

The Second Circuit expressed its intent to leave the Spence test intact even after the Hurley decision in Church of the American Knights of the Ku Klux Klan v. Kerik. In Kerik, the American Knights, an "unincorporated political membership association that advocates on behalf of the white race and the Christian faith," applied to the New York Police Department for an event permit. The Police Department denied the permits, informing the organization that their plans to dress in traditional garb including robes, hoods, and masks resembling the Ku Klux Klan of the Reconstructionist era would violate New York's anti-mask law. After much judicial debate, the organization obtained a preliminary injunction and hosted the event as planned.

Later, the court addressed the problem further when both sides filed for summary judgment in proceedings before the court. The district court initially granted summary judgment for the American Knights on five different grounds, all relating to the First Amendment. Regarding symbolic speech, the district court stated that masks would be protected, despite the defendant's argument that they do not advance a "particularized message." Using the Hurley Court's liberalized version of the Spence test, the District Court for the Southern District of New York found that masks could be symbolic speech regardless of whether a "particularized message" was present. Yet, on appeal, the defendants still asserted that the masks lacked the communicative elements necessary for First Amendment protection.

Although the United States Court of Appeals for the Second Circuit agreed with the lower court that the masks were protected symbolic speech, the court minimally cited Hurley. The only time it directly addressed Hurley was in a footnote saying that it believed the Spence test remained intact, even in the wake of Hurley. The court said, "While we are mindful of Hurley's caution against demanding a narrow and specific message before applying the First Amendment, we have interpreted Hurley to leave intact the Supreme Court's test for expressive conduct in Texas v. Johnson [that utilizes the Spence test]." Even with adoption of the stricter test, the court still found that the masks constituted protected speech. The court found that there was intent to send a message by quoting the American

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61 356 F.3d 197, 205 (2d Cir. 2004).
62 Id. at 199–200.
63 Id. at 200–01.
64 Id. at 201.
66 Id. at 216.
67 See id.
68 Kerik, 356 F.3d at 203.
69 Id. at 205 n.6.
70 Id.
Knights' articulation of their goal "to convey to the public that [they] follow the ideological tradition of the Klan and share many of the views about racial separation and white pride with which the Klan has been identified."\textsuperscript{71} Further, the court asserted that it could not deny that the clothing of the Knights was expressive and that it sent a message to others that could easily be interpreted.\textsuperscript{72} Thus, despite holding that the \textit{Spence} test was still intact and applying the stricter principles, the Second Circuit still reached the same conclusion that the District Court did while applying \textit{Hurry}.

\textbf{B. The Eleventh Circuit's "Reasonable Person"}

In \textit{Holloman ex rel. Holloman}, the Eleventh Circuit adopted a new interpretation of the \textit{Hurry} test.\textsuperscript{73} In \textit{Holloman}, a high school student had been publicly ridiculed and punished by his principal and teacher for remaining silent during the Pledge of Allegiance.\textsuperscript{74} To communicate disapproval with the administration's treatment of his classmate, Michael Holloman protested such behavior the next day by silently raising his fist in the air instead of reciting the pledge.\textsuperscript{75} He, too, was punished and ridiculed by his principal and teacher.\textsuperscript{76} Holloman brought suit against various members of the school district for a number of reasons—one being that he was punished for engaging in constitutionally protected conduct.\textsuperscript{77}

The United States Court of Appeals for the Eleventh Circuit agreed that Holloman's conduct constituted speech worthy of First Amendment protection.\textsuperscript{78} The court referenced the stricter \textit{Spence} test but noted it was liberalized in \textit{Hurry}.\textsuperscript{79} However, the Eleventh Circuit differs from most other courts because it incorporates a reasonable person element into the \textit{Hurry} test. The court said, "Thus, in determining whether conduct is expressive, we ask whether the reasonable person would interpret it as \textit{some} sort of message, not whether an observer would necessarily infer a \textit{specific} message."\textsuperscript{80}

It is uncertain whether the reasonable person standard made \textit{Hurry} any stricter, as the court still applied the \textit{Hurry} test in typical fashion. The court held that Holloman's actions were protected under the First Amendment because it was reasonable to infer that some other students would interpret Holloman's actions to be in protest of the treatment of his classmate.\textsuperscript{81} The court emphasized its \textit{Hurry}

\textsuperscript{71} \textit{Id.} at 206 (alteration in original).
\textsuperscript{72} See \textit{id.}.
\textsuperscript{73} See Holloman \textit{ex rel.} Holloman \textit{v.} Harland, 370 F.3d 1252, 1270 (11th Cir. 2004) (adding a reasonableness element to the test).
\textsuperscript{74} \textit{Id.} at 1260.
\textsuperscript{75} \textit{Id.} at 1261.
\textsuperscript{76} \textit{Id.}
\textsuperscript{77} \textit{Id.} at 1260–62.
\textsuperscript{78} \textit{Id.} at 1270.
\textsuperscript{79} \textit{Id.}
\textsuperscript{80} \textit{Id.} (emphasis in original).
\textsuperscript{81} \textit{Id.} at 1260–61, 1270.
rationale by stating that "e[ven] if students were not aware of the specific message Holloman was attempting to convey, his fist clearly expressed a generalized message of disagreement or protest directed toward [his teacher], the school, or the country in general." Thus, the court did not analyze the Spence element that required the likelihood to be great that others would understand the exact “particularized message” Holloman was trying to send. However, the reasonable person standard did seem to add another layer of analysis to the court’s decision than would otherwise be typical in administering the Hurley test. While the court expressed a liberal view of symbolic speech, it still paused long enough to consider whether the inference they constructed was actually reasonable.

C. The Sixth and Ninth Circuit’s Harmony View

The Sixth and Ninth Circuits both have adopted a view that the Spence and Hurley tests can live in harmony. These circuits apply the Spence factors as outlined in Johnson, noting that in order to obtain constitutional protection, the speech must contain a particularized message and the likelihood must be great that others would interpret such message. However, they use Hurley to qualify this test, saying that the message does not have to be narrow or succinct in order to be protected. In Blau v. Fort Thomas Public School District, the Sixth Circuit held that a middle school girl’s clothing choices were not protected by symbolic speech. Robert Blau, the father of Amanda Blau, filed suit on behalf of his daughter against the school district for the district’s approval of a dress code. When the court asked about a message that Amanda might be trying to send with her clothing choices, the Blaus claimed there was not one. Instead, Amanda just wanted to be able to wear clothes that fit well and looked nice.

Despite this somewhat lackluster claim, the court still engaged in a symbolic speech analysis. They recognized the particularized message test of Spence, but combined it with Hurley, stating, “The threshold is not a difficult one, as ‘a narrow, succinctly articulable message is not a condition of constitutional protection.’” Even though they adopted the liberal ideology of Hurley, the Sixth Circuit still acknowledged a need to draw a line between what is conduct imbued with elements of communication, and what is not. The Sixth Circuit said, “[T]he First Amendment does not protect such vague and attenuated notions of expression—namely, self-expression through any and all clothing that a 12-year old

81 See id. at 1270.
85 401 F.3d 381, 390 (6th Cir. 2005).
86 Id. at 386.
87 Id.
88 Id.
89 Id.
90 Id. at 388.
may wish to wear on a given day."\textsuperscript{91} Since the court found that the Blaus did not meet their burden of proving that their conduct had communicative elements, the Sixth Circuit ruled that the First Amendment did not protect such actions.\textsuperscript{92} In fact, the court argued that any other decision would reflect poorly on laudable precedent cases, stating that, "[t]o say that Amanda Blau’s desire to wear clothes she ‘feel[s] good in,’ as opposed to her desire to express ‘any particular message’ . . . fits within [the] line of [precedent symbolic speech] cases gives the invocation of precedent a bad name."\textsuperscript{93}

The Ninth Circuit took the same approach in \textit{Kaahumanu v. Hawaii}.\textsuperscript{94} In \textit{Kaahumanu}, a Hawaiian pastor and a wedding events organization sued the Hawaiian Department of Land and Natural Resources (DNLR) for requiring permits for commercial weddings on beaches.\textsuperscript{95} With the permits came a variety of fees and requirements, including the requirement that the applicant take out comprehensive public liability insurance in order to obtain the permit.\textsuperscript{96} The plaintiffs alleged that the DNLR imposed unduly burdensome requirements on their right to host commercial weddings on Hawaiian beaches.\textsuperscript{97}

One of the plaintiff’s arguments was that such requirements restrict free speech because weddings are expressive conduct.\textsuperscript{98} In analyzing this argument, the Ninth Circuit combined the \textit{Spence} and the \textit{Hurley} tests by saying that a particularized message must be present and it must be likely that others would understand the message in the surrounding circumstances.\textsuperscript{99} However, a "narrow, succinctly articulable message" is not a requirement.\textsuperscript{100} The court held that the particularized message of weddings was easy to discern even though each wedding is unique and the message varies from couple to couple. The court stated, "The core of the message in a wedding is a celebration of marriage and the uniting of two people in a committed long-term relationship."\textsuperscript{101} Thus, the court found that weddings easily fit within the protection of the First Amendment.\textsuperscript{102}

It is interesting to note that both of these circuits do not cite the full \textit{Hurley} phrase that is often quoted. Rather than saying that "a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a ‘particularized message’ . . . would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold

\textsuperscript{91} Id. at 390.
\textsuperscript{92} Id. at 389.
\textsuperscript{93} Id. (citation omitted).
\textsuperscript{94} See generally 682 F.3d 789 (9th Cir. 2012).
\textsuperscript{95} Id. at 793.
\textsuperscript{96} Id. at 794.
\textsuperscript{97} Id. at 795–96.
\textsuperscript{98} Id.
\textsuperscript{99} Id. at 798.
\textsuperscript{100} Id. (citing Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 569 (1995)).
\textsuperscript{101} Id. at 799.
\textsuperscript{102} Id.
Sch[o]enberg, or Jabberwocky verse of Lewis Carroll,"103 the courts either do not mention the second half of the statement, or break the statement into two. The Sixth Circuit acknowledged the "particularized message" element, yet used Hurley to define what "particularized message" means by leaving out the express language in Hurley that criticized this strict message element. It said, "The threshold is not a difficult one, as 'a narrow, succinctly articulable message is not a condition of constitutional protection.'... Otherwise, the First Amendment 'would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Sch[o]enberg, or Jabberwocky verse of Lewis Carroll."104 The Ninth Circuit simply stated that a narrow, succinctly articulable message was not a condition for protection.105 They did not even reference the "particularized message" criticism or how Spence seemingly falls short of protecting artistic endeavors. Thus, it appears as though the two circuits use Hurley as a way of qualifying and defining some elements of the Spence Court's test rather than using it as binding precedent.

III. DRAWING ON THE OLD TO FORM THE NEW—A DYNAMIC TEST

In an area of law that is largely fact-specific, it is difficult to define a uniform test that is able to adequately adapt to each new form of symbolic speech that appears in courts. Each day, Facebook, Twitter, Instagram, Pinterest, and all other forms of social media redefine how we express ourselves as a society. Surely, in 1974 when the Court adopted the Spence test, judges could not anticipate that one day, society could express its likes through a thumbs up symbol on the Internet or its emotions through smiley faces in text messages. Courts were still getting used to the introduction of the peace sign.106 However, the fact that the Spence test has withstood centuries of criticism and is still cited by most courts as the primary test in symbolic speech claims shows that the Spence test does not lack merit. In fact, with a little alteration, the original Spence test proves to be the perfect balance of strictness and flexibility to adequately adapt to the changing needs of today's society.

A. The Criticism of Spence

In order to create an altered version of the Spence test, it is essential to first analyze the ways in which the test is lacking. Spence has met great criticism in the area of artistic endeavors. As Hurley noted, a strict "particularized" message, as it was understood by the Hurley Court and adopted by some later courts, would be

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104 Blau, 401 F.3d at 388.
105 Kaahumanu v. Hawaii, 682 F.3d 789, 798 (9th Cir. 2012).
problematic in protecting artistic works.\textsuperscript{107} One critic notes that "[t]he \textit{Spence} formulation may encompass most speech and symbolic conduct, as well as much art, but it certainly does not include everything that one might regard as 'expressive.'\textsuperscript{108} He argues that \textit{Spence} would not reach many films, including Disney's \textit{Fantasia}, since some films do not include dialogue.\textsuperscript{109} Additionally, he argues that the \textit{Spence} test would not reach classical music or even avant-garde film.\textsuperscript{110} Others criticize \textit{Spence} because they feel its test does not protect those art forms where the speaker intends different meanings for different audiences.\textsuperscript{111}

However, proponents of the \textit{Spence} test recognize the weakness of these arguments. One scholar has stated that Justice Souter's "concern for the \textit{Spence} test's under appreciation of abstractness and silly rhymes seems misplaced" in \textit{Hurley} because the examples Souter lists as artistic forms of communication would be protected in other ways.\textsuperscript{112} He argues that the Jabberwocky verse of Lewis Carroll, the paintings of Jackson Pollock, and even the music of Arnold Schoenberg could be protected as pure speech, a doctrine that may be similar to symbolic speech, but is treated very differently.\textsuperscript{113}

However, there is a way to amend \textit{Spence} to reconcile it with \textit{Hurley} so that it can challenge most of these criticisms. First, the Court must re-emphasize the importance of context in deciphering whether conduct is imbued with elements of communication and even whether the conduct sends a "particularized message." Second, the Court can change two words of \textit{Spence}'s second prong in order to make the test better suited to protect those art forms that intend a different message for different audiences.

\textit{B. Re-focusing on Context—Getting Back to Original Spence}

The \textit{Johnson} Court did the \textit{Spence} test a huge disservice when it re-stated the elements of the test without the original emphasis on surrounding circumstances.\textsuperscript{114} While few courts have noted this discrepancy because they tend to discuss context separately from the test,\textsuperscript{115} re-emphasizing a surrounding circumstance element in the \textit{Spence} test could help ease some concerns about the "particularized message" element. Context is the core of communication. Communication has been defined as "socially situated meaning-making,"\textsuperscript{116} and it has been noted that "[m]eaning

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\textsuperscript{107} \textit{Hurley}, 515 U.S. at 569.
\textsuperscript{108} Salamanca, \textit{supra} note 48, at 165.
\textsuperscript{109} \textit{Id}.
\textsuperscript{110} See \textit{id}.
\textsuperscript{112} McGoldrick, \textit{supra} note 6, at 50.
\textsuperscript{113} \textit{Id}.
\textsuperscript{115} See, \textit{e.g.}, \textit{id}.
\textsuperscript{116} \textit{Michael J. Papa et al., Organizational Communication: Perspectives and Trends} 3 (2008).
occurs when information is placed within a context."\(^{117}\) Even elementary school children are taught the importance of context in constructing meaning when they are instructed to use context clues to help them decipher unfamiliar words.\(^{118}\) Similarly, a look at surrounding circumstances should be key when courts try to decipher whether a particularized message is present in a case.

Surrounding circumstances can even help form a particularized message out of those abstract methods of communication the Hurley Court was concerned Spence may overlook, such as the music of Arnold Schoenberg. For example, with their atonality, twelve-tone technique, and lack of lyrics, Schoenberg’s musical compositions may not seem to send any message but one of chaos.\(^{119}\) Any layperson listening to Schoenberg would be hard pressed to determine a particular message that Schoenberg was trying to send. However, knowing the surrounding circumstances such as Schoenberg was born to a Jewish family and lived in the time of Nazi Germany,\(^{120}\) or that he wrote a piano piece in the shadow of his good friend’s death,\(^{121}\) make it more plausible that a particularized message did exist. Thus, courts need to highlight the importance of context in symbolic speech cases.

Context is even more important when one considers that the original purpose of the Spence test was to protect expressive conduct, not objects.\(^{122}\) Thus, while the Hurley Court criticized that Spence would not protect the paintings of Jackson Pollock, the music of Arnold Schoenberg, or the Jabberwocky verse of Lewis Carroll,\(^{123}\) it is arguable that this was not the purpose of the Spence test in the first place. Instead, an actor can obtain protection only when he puts those items into action or when he sends a message to others by using symbols. On its own, a paper copy of Schoenberg’s musical composition will likely not be protected by Spence’s symbolic speech test, but if a person is arrested for playing Schoenberg on a bus or on a street corner in a country where Schoenberg music is banned, he may likely obtain First Amendment protection if he can show there was a particularized message behind such performance and that others were likely to interpret a similar message when they heard it. For example, if college students living in Nazi Germany played Schoenberg music from the windows of their dorms when such music was banned in Germany in the 1930s,\(^{124}\) then that is likely to send a message of protest.

\(^{117}\) Id. at 21.


\(^{120}\) Mark DeVoto, Arnold Schoenberg and Judaism: The Harder Road, TUFTS, http://www.tufts.edu/~mdevoto/Schoenberg.pdf (last visited Apr. 11, 2015).


\(^{122}\) Spence v. Washington, 418 U.S. 405, 411 (1974) ("We are confronted . . . with a case of prosecution for the expression of an idea through activity.").


\(^{124}\) DeVoto, supra note 120.
In fact, a few months after the Spence decision, the United States District Court for the Southern District of New York re-examined the role context plays in cases involving symbolic speech. The New York Court of Appeals heard People v. Radich\textsuperscript{125} four years before Spence. In that case, the court held that a New York statute prohibiting public defilement of the American flag did not infringe on an art gallery owner's First Amendment right to display works of art depicting the American flag in nontraditional means.\textsuperscript{126} The gallery in this conflict featured constructions of the American flag covering an erect penis and in the shape of a six-foot human hanging from a yellow noose.\textsuperscript{127} Anti-war protest music played on a tape recorder as visitors viewed the installments.\textsuperscript{128} The gallery owner claimed the exhibition was his way of expressing disapproval of America's involvement in the Vietnam War.\textsuperscript{129}

In a petition for habeas corpus heard four years after the Radich decision and only five months after the Spence decision, the District Court held that such a display was certainly protected by the First Amendment.\textsuperscript{130} The court looked to context when trying to discern whether Spence's "particularized message" requirement had been met.\textsuperscript{131} They said that since the owner exhibited these pieces at a time when America's involvement in the Vietnam War was most significant, and because the anti-war protest music intensified the symbolic nature of the gallery, it would be hard for visitors to miss the message the owner was trying to send.\textsuperscript{132} They said the owner's actions consisted of more than "mindless nihilism" and, indeed, contained a particularized message that was protected under the First Amendment.\textsuperscript{133} Thus, the symbolic speech analysis is likely to change from case to case depending on how an actor puts an object into action and depending on the context surrounding the conduct. Context can make or break whether particular conduct is protected.

\textit{C. Reconciling Spence with Hurley}

A number of minute, yet important, discrepancies regarding the interpretation of Spence and Hurley exist, and drawing attention to these misunderstandings may help articulate why minor changes to Spence will help solve decades of confusion. First, Hurley criticizes Spence, saying that a "narrow, succinctly articulable message is not a condition of constitutional protection,"\textsuperscript{134} but nowhere in the Spence opinion does the court ever make reference to a narrow or succinctly articulable

\begin{footnotesize}
\textsuperscript{126} Id. at 116–17.
\textsuperscript{127} Id. at 117.
\textsuperscript{129} Id.
\textsuperscript{130} Id.
\textsuperscript{131} Id.
\textsuperscript{132} Id.
\textsuperscript{133} Id.
\end{footnotesize}
message. Hurley cites to Spence after using this language, but modifies the citation with the introductory signal "cf."135 Despite using the "cf." to indicate that the proposition stated in Hurley was not the main proposition of Spence, but was only sufficiently analogous,136 later courts have interpreted this language as a definition of the term "particularized" used in the Spence opinion. Yet, there is no proof that such a definition paralleled what the Spence Court had in mind. In fact, a quick search for synonyms of "particularize" in a thesaurus reveals that "particularize" might mean "itemize," "enumerate," or "specify."137 It is arguably not synonymous with "narrow" or "succinctly articulate."

Since there is no proof that the Spence Court intended to define "particularized message" as one that was narrow or succinctly articulable, the Sixth and Ninth Circuit's approach to symbolic speech serves as the best approach to this element.138 These circuits view Hurley not as defining what a "particularized message" is, but rather as explaining what a "particularized message" is not. The person claiming free speech must still prove that their conduct sends a particular message, but the particular message does not have to be a narrow, succinctly articulable one.139 This approach will still liberalize the Spence test to some extent, but will also require effort on the claimant's part to show that their conduct was imbued with communicative elements. This will weed out any frivolous claims that have made a mockery of the First Amendment, such as Blau v. Fort Thomas Public School District.140 Such claims before found refuge in the liberal Hurley test and were far removed from the important cases concerning flag desecration and war protesting that were highly deserving of the court's time.

Second, it is important to acknowledge which prong of the Spence test caused the Hurley court unease. Many courts mention the Hurley liberalization when analyzing the first prong of the Spence test. However, the first prong is not a tough one to meet, even under what some consider the stricter test. A look at the Second Circuit's holding in Kerik reveals this. The lower court latched on to Hurley as a safety blanket when trying to define whether a mask would be protected as symbolic speech.141 Yet, the court of appeals had no problem reaching the same conclusion—that masks were symbolic speech—under the seemingly stricter Spence test.142 It was sufficient enough to meet the "particularized message" prong to say that the group intended to draw an association between the American Knights and the Ku Klux Klan.143 That message was specific.

135 Id.
136 See THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 1.2(a), at 55 (Columbia Law Review Ass'n et al. eds., 19th ed. 2010) ("[The] [c]ited authority supports a proposition different from the main proposition but sufficiently analogous to lend support.").
137 WEBSTER'S NEW WORLD ROGET'S A-Z THESAURUS 572 (Charlton Laird et al. eds., 1999).
138 See generally Kaahumanu v. Hawaii, 682 F.3d 789 (9th Cir. 2012); Blau v. Fort Thomas Pub. Sch. Dist., 401 F.3d 381 (6th Cir. 2005).
139 See Kaahumanu, 682 F.3d at 798; Blau, 401 F.3d at 388.
140 401 F.3d at 388–90.
141 Church of the Am. Knights of the Ku Klux Klan v. Kerik, 356 F.3d 197, 202 (2d Cir. 2004).
142 Id. at 205–06.
143 Id. at 206.
More likely than not, an actor has a reason or a motivation for his actions that he can specify. For example, even Arnold Schoenberg admitted that his music has some particular message behind it. In a letter to a Rabbi concerning Schoenberg's plans in the Anti-Semitism movement, Schoenberg wrote, "Please don't misunderstand me: I have no political ambition: my ambition would be fulfilled entirely on music paper, if I had any ambition at all." This suggests that Schoenberg used his music as a way of communicating messages. Thus, it seems rather easy to prove the first element of the Spence test. The real trouble lies with the second prong—that "the likelihood was great that the message would be understood by those who viewed it."245

The way it is worded, this phrase seems to imply that the exact particularized message that was found in the first prong of the test must be the one that observers interpret from the conduct. However, when one looks at art, music, or poetry, it is nearly impossible that the viewer, listener, or reader will interpret the exact message of the original sender. To fix this standard that is nearly impossible to overcome, yet still keep an element of strictness, the Court should amend the second prong of the Spence test to read, "the likelihood was great that a similar message would be understood by those who viewed it." Such a small word change can make a huge difference. It now leaves room to include artistic elements and even those art forms where the speaker intends different meanings for different audiences. For example, Arnold Schoenberg may have composed a piano piece in the shadow of his friend's death to communicate his despair, sadness, or even anger. However, if a listener is unaware of this friend's death, he could still take away a message of despair, sadness, or anger, and Schoenberg's work would still be protected as symbolic speech. The listener does not have to specifically discern that Schoenberg is upset because of a friend's death.

Yet, such language is still strong enough to ensure that less meritorious claims for symbolic speech are not afforded protection. For example, in State v. Green, the appellant claimed that his use of a pine tree shaped air freshener should be protected under the First Amendment.247 He claimed that the tree signaled to others that he appreciates nature and cares about the scent of his car.248 The Court of Appeals of Minnesota ruled that even if the appellant claimed a valid particularized message, an outsider who viewed the air freshener would not likely understand the particular message.249 Such a ruling would still prove to be valid under the "similar message" element of the proposed test. Even if the idea that the driver appreciated both nature and having a good smelling car was worthy of being considered a particularized message, there is little likelihood that others would

244 DeVoto, supra note 120.
246 Id. ("[T]he likelihood was great that the message would be understood by those who viewed it") (emphasis added).
248 Id.
249 Id.
understand that the driver intended to send that message, or any message, by hanging up a pine tree air freshener.

Thus, the new test for symbolic speech would read, "Conduct is protected as symbolic speech if [a]n intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that a similar message would be understood by those who viewed it." When considering whether a message is "particularized," it is not necessary that the message be narrow or succinctly articulable. This test combines the strengths of the Spence and Hurley tests, while eliminating their weaknesses.

CONCLUSION

It is impossible for the Court to predict where the great innovations of today will lead us tomorrow. This is especially true in the world of symbolic speech. However, remaining in a state of confusion by refusing to state a uniform test for symbolic speech is not the answer. Such confusion as to which test, Spence or Hurley, dictates can be a waste of time for courts that have to analyze each test before declaring which they will apply in a given case. A uniform test can lead to efficiency and can also cut down on frivolous claims since claimants will know the exact burden they have to meet. As it stands now, depending on which test a court ultimately applies a claimant may have a very tough burden or a very easy one. With the easy burden comes cases that lead farther and farther away from those original cases such as flag, peace signs, and war protests that truly mirrored what the First Amendment stands for—protecting society's passions. The new test articulated in this Note remains strict enough to protect the sanctity of the First Amendment by weeding out absurd fact patterns, while still leaving room for protection for those works of art that are meant to be abstract and hard to define. The Supreme Court should consider declaring this test as the uniform test for symbolic speech.