

Tinker v. Des Moines / What is Symbolic Speech? When is it Protected?¹—Answer Key

Directions:

1. Read the **Background** section below.
 2. Complete the **Is it Protected?** table (page 3).
 3. Answer the **Questions to Consider** (page 5).
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Background

First Amendment to the U.S. Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people to peaceably assemble and to petition the government for a redress of grievances.

Is all speech free?

The freedom of speech clause of the First Amendment guarantees the right to express information and ideas. On its most basic level, it means a person can express an opinion without fear of censorship by the government, even if that opinion is an unpopular one. It protects all forms of communication: spoken words, books, art, newspapers, music, telecommunications, social media, and more.

However, this protection does not mean someone can say anything they want, wherever they want, or whenever they want. Speech that is not protected includes:

- fighting words—words that cause distress or incite violence
- obscene expressions
- lies told about someone that results in damage to their reputation

What is symbolic speech?

Sometimes speech is spoken or written. Sometimes speech is symbolic or an action. **Symbolic speech** is conduct that expresses an idea. Sit-ins, flag waving, demonstrations, and wearing political buttons are examples of symbolic speech. While most forms of conduct could be said

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to express ideas in some way, only some conduct is protected as symbolic speech. **In analyzing such cases, the courts ask whether the speaker intended to convey a particular message and whether it is likely that the message was understood by those who viewed it.** To convince a court that symbolic conduct can be prohibited or punished and not protected as speech, the government must show it has an important reason for prohibiting it. However, the reason cannot be that the government disapproves of the message conveyed by the symbolic conduct. So, just as there are limitations on the extent to which “free speech” applies to the spoken word, there are restrictions on the actions that people seek to have protected as symbolic speech.

Is it Protected?

Examine the actions on this handout. Based on the information you have just read, determine if each action listed is a form of constitutionally protected “symbolic speech.” In the last column, provide a brief rationale for your response.

Action	Check if applicable (✓)			Is the action a form of constitutionally protected “symbolic speech?” Why/Why Not?
	Conveys Message	Message Understood by Viewer	Important Gov’t Reason Exists	
In order to protest against a former employer, a person joins a picket line. State law says picketing is illegal. The person is arrested and fined \$100.	✓	✓		Yes. In <i>Thornhill v. Alabama</i> (1940), the Court ruled that the law prohibiting picketing was invalid because it did not inherently pose a “clear and present danger.”
A person burns a draft card to express opposition to the war. Federal law says that burning draft cards is a crime.	✓	✓	✓	No. In <i>United States v. O'Brien</i> (1968), the Court ruled that the law was justified because it furthered an important government interest.
A person taped a peace symbol to an American flag and then hung the flag upside down in the window of their apartment. An upside-down flag is typically a symbol of distress or danger. This person believed the nation was in trouble. They were arrested and convicted of violating a state law against improper use of the flag.	✓	✓		Yes. In <i>Spence v. Washington</i> (1974), the Court reversed Spence’s conviction and pointed out 4 factors: 1. The flag was privately owned. 2. The flag was on private property. 3. There was no risk of “breach of peace”, incitement to riot, or disorderly conduct. 4. Spence’s actions were symbolic speech. The Court rejected the state’s arguments concerning the importance of respect for our national emblem.

In response to increasing racial tensions on campus, school officials banned images of the Confederate flag from a high school. A group of students filed suit saying they should be allowed to wear shirts to school depicting the Confederate flag to show their pride in their Southern heritage.				No. In <i>Barr v. LaFon</i> (2008), a federal judge upheld the ban, as did the Sixth U.S. Circuit Court of Appeals, saying that school officials could reasonably predict that images of the Confederate flag would “substantially and materially disrupt the school environment.” In 2009, the Supreme Court declined to hear this case, leaving in place the lower court’s decision.
An organization applies for a permit to hold a demonstration on the National Mall. Members plan to erect “tent cities” to demonstrate the plight of the homeless. The permit was denied on the grounds that camping is forbidden on the Mall.				No. In <i>Clark v. CCNV</i> (1984), the Court ruled that the government can restrict the time, place, and manner of demonstrations, the government had a legitimate interest in the upkeep of the parks, and there were other ways for the group to express their message.
New Hampshire’s state motto—“Live Free or Die”—appears on license plates. A person covers “or Die” on the grounds that it goes against their religious and political beliefs. They are convicted of violating a state law, fined, and sentenced to jail time.				Yes. In <i>Wooley v. Maynard</i> (1977) the Court said the state could not require people to use these license plates. It said, among other things, that it is okay for “individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable.”

Questions to Consider

1. Name some other forms of symbolic speech that should be protected:
Student answers will vary but may include burning the flag to protest government policies (as in *Texas v. Johnson*), wearing black to show mourning, not speaking to call attention to a cause or wearing a political button.
2. What forms of symbolic speech might the government have an important reason to prohibit?
Student answers will vary but may include when the symbolic speech might jeopardize the safety of others or the security of the nation.