The Comparative Law of Flag Desecration: The United States and the Federal Republic of Germany

Peter E. Quint

Follow this and additional works at: https://repository.uchastings.edu/hastings_international_comparative_law_review

Part of the Comparative and Foreign Law Commons, and the International Law Commons

Recommended Citation


Available at: https://repository.uchastings.edu/hastings_international_comparative_law_review/vol15/iss4/2

This Article is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings International and Comparative Law Review by an authorized editor of UC Hastings Scholarship Repository. For more information, please contact wangangela@uchastings.edu.
I. INTRODUCTION

In the American constitutional system, as in many others, freedom of speech generally is viewed as an individual right. Yet, even though the initial focus is on individuals, definition of this right often depends on the weight of governmental interests and the implications of related political and social structures. Because the relationship between speech and politics is particularly close, the definition of "freedom of speech" is often intertwined with the underlying presuppositions of the political system and past or present assessments of its stability.

This relationship between speech and political structures is particularly evident in the case of political speech, which may stir individuals and groups to action or which may exert a more subtle influence on the nature and continuity of political processes. An examination of issues involving political speech must not only assess the weight to be given to certain governmental interests but, in some instances, go further and consider whether certain plausible governmental interests are legitimate in a particular constitutional system. Accordingly, decisions on political speech often illuminate certain fundamental presuppositions of a constitutional system. A comparative examination of decisions in different systems, therefore, may suggest interesting differences in these presuppositions, even between constitutional systems that generally belong to the same political tradition.

While the constitutional systems of the United States and the Fed-

---

1. All translations are by the author unless otherwise noted.
eral Republic of Germany share many underlying principles, they also differ in a number of important ways. Some of the most interesting differences are reflected in their treatment of certain forms of political speech. Certainly these distinctions arise from differences in social outlook and history—both the overwhelming influence of disparate twentieth century developments and the more subtle, but also extremely important, differences in earlier historical periods. Yet the lessons of history must continually be re-examined in light of evolving contemporary reality.

This Article will explore these themes through an examination of contemporaneous American and German decisions on the evocative topic of flag desecration. Part II of this Article discusses the relevant First Amendment background and analyzes the majority and dissenting opinions in the American flag-burning cases, focusing on the governmental interests discussed (and not discussed) in those opinions. Part III will then examine the jurisprudence of the German Constitutional Court in its flag desecration decision, including the state interests it acknowledges.

II. THE AMERICAN FLAG-BURNING CASES

A. Background

In 1984 Gregory Lee Johnson, a political protester, publicly burned an American flag near the Republican National Convention to express his disapproval of the renomination of President Reagan. As a result, Johnson was convicted under a statute of the State of Texas that prohibited the desecration of "venerated objects," including the "state or national flag."² The statute defined desecration to include physical mistreatment of the flag in a manner known to give serious offense to observers.³

Although the act of flag-burning does not involve the utterance of words, Johnson’s case raised important issues of free expression. The Supreme Court has long recognized that certain types of conduct, referred to as symbolic speech, may merit protection by the First Amendment.⁴ Conduct constitutes symbolic speech if the actor intends to convey an idea and if onlookers will understand that an idea is being communicated.⁵ The act of flag-burning thus may qualify as symbolic

---

³. TEX. PENAL CODE ANN. § 42.09(b).
speech.

Although Johnson was the first flag-burning case in the Supreme Court, it was decided against a background of prior cases in which the Supreme Court had considered disrespectful or unconventional uses of the flag. In Halter v. Nebraska, for example, the Court found that a state could prohibit the use of the flag’s image in a commercial advertisement. Halter was the first and last flag-related case decided by the Supreme Court in which no apparent context of political protest was present.

The first set of flag desecration cases arose out of the political struggles of the Vietnam War. In Street v. New York, the Court struck down a conviction because it might have been based on contemptuous words addressed to the flag; such a conviction was clearly unconstitutional. In Smith v. Goguen, the Court reversed the conviction of a defendant who “publicly [treated] contemptuously the flag of the United States” by wearing a four-by-six inch flag sewn on the rear of his blue jeans. According to the Court, the requirement that the action be “contemptuous” was unconstitutionally vague. Finally, in Spence v. Washington, the Court reversed the conviction of a student who had attached a peace symbol to the flag and displayed it upside down, as a protest against the American invasion of Cambodia and resulting violence at Kent State University in 1970. The Court noted that in this case—unlike the later flag-burning cases—the defendant had not destroyed the flag or permanently disfigured it.

7. Halter was decided before the Court had found that federal free speech principles applied against the states and long before commercial speech received constitutional protection.

Other early cases in the Supreme Court involved various forms of flag observances. In Stromberg v. California, 283 U.S. 359 (1931), the Court struck down a statute prohibiting the display of a red flag as a symbol of “opposition to organized government”—a statute directed at the nascent Communist movement in the United States. Id. at 361. The Court found that the statute was unconstitutionally vague and indefinite because it might penalize “peaceful and orderly opposition to government.” Id. at 369. The onset of World War II and accompanying patriotic pressures evoked a memorable debate in the Supreme Court over rules requiring school children to salute the flag and to recite the “Pledge of Allegiance.” In Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940), the Court upheld such a statute. Three years later in West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943), the Court overruled Gobitis and—in Justice Jackson’s celebrated opinion—declared that “no official . . . can force citizens to confess by word or act their faith” in any political orthodoxy. Id. at 642.

10. Id. at 576.
12. Id. at 415. For another flag desecration case of the Vietnam era, decided by the
Perhaps the most important symbolic speech case in the Supreme Court arose during the Vietnam era. In *United States v. O'Brien*, the Court affirmed convictions of defendants who had burned their selective service registration cards as a protest against the war. The Court implied, however, that if the governmental interest in question is related to the suppression of expression, that interest must be tested by the more stringent standards applicable to the regulation of the content of speech. In *O'Brien*, the Court indicated that the interest asserted by the government—preserving an efficient conscription system—was an interest “unrelated to the suppression of free expression” and thus could justify penalizing defendant’s symbolic speech through the application of the less stringent test.

*Johnson* was decided against the background of these cases; even apart from the specific symbolic speech decisions, however, a consideration of general First Amendment principles, which the Supreme Court has developed over the past decades, indicated without much doubt that Johnson's conviction was unconstitutional. At the heart of the case was the State's attempt to penalize the sort of ideas that Johnson intended to communicate by his action; under the facts of the case, the statute seemed to serve no other plausible governmental interest. But the First Amendment ordinarily prohibits penalizing the expression of ideas, except for certain narrowly-defined exceptions—for example, where there

---

14. Id. at 377.
17. Id. at 377-82. For another important symbolic speech case of the Vietnam era, see *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503 (1969) (schoolchildren wearing black arm bands to protest the Vietnam War were exercising free speech protected by the First Amendment).
Comparative Law of Flag Desecration

is an “imminent” danger of violence or other “substantive” evil;\textsuperscript{18} where the ideas are couched in the form of “fighting words” which invite an immediate violent response;\textsuperscript{19} or where the communications are obscene or libelous, under special regulations protecting political and other public speech.\textsuperscript{20}. Because Johnson’s communication of ideas did not fall within such an exception, it clearly seemed protected by the First Amendment.\textsuperscript{21}

Because the applicable First Amendment principles seemed so clear, the Court’s decision finding Johnson’s conviction unconstitutional should not have been a surprise.\textsuperscript{22} Yet for all of its apparent simplicity, the case evoked four dissents in the Supreme Court, a passionate public response, a new flag desecration statute enacted by Congress, and serious calls for a constitutional amendment. An observer of this turmoil might conclude that the objections to the decision arose from emotions of patriotic and nationalistic mysticism and consequently ignored—or at least undervalued—the important interests served by freedom of expression.

B. The American Flag-Burning Decisions: The Majority’s View

In reversing Johnson’s conviction, the Supreme Court generally followed its jurisprudence as set forth above. First, the Court found that in the context of a demonstration against President Reagan’s renomination, Johnson’s act of flag-burning clearly constituted a form of expression which was intended to convey an idea and which was understood by the audience to do so.\textsuperscript{23}

To determine whether this expression could be penalized, the Court then examined the State’s asserted interest in the flag-burning statute. It was necessary to identify the State’s interest with precision to determine whether that interest was “related to the suppression of free expression,” as indicated by \textit{United States v. O’Brien}.\textsuperscript{24} If the interest was indeed re-

\begin{itemize}
    \item 20. See, e.g., Miller v. California, 413 U.S. 15, 24 (1973) (speech is not obscene if “taken as a whole, [it has] serious literary, artistic, political, or scientific value”); \textit{New York Times} v. Sullivan, 376 U.S. 254 (1964) (public official could only recover damages for defamatory falsehood if statement was made with knowing falsity or reckless disregard of the truth).
    \item 24. \textit{United States v. O'Brien}, 391 U.S. 367, 377 (1968); see supra notes 13-17 and accompanying text.
\end{itemize}
lated to suppression of free expression, it would be subject to very stringent scrutiny; if the interest was not so related, the Court would apply the more deferential standard under the *O'Brien* test.\(^\text{25}\)

In examining Texas’ purported governmental interests, the Court first rejected the State’s argument that the conviction could be justified as an attempt to prevent breaches of the peace. Although the act of flag-burning offended some onlookers, no breach of the peace appeared imminent.\(^\text{26}\) To penalize expression under this theory, a showing of imminent violence on the record was essential; because the basic function of free expression is to evoke sharp debate, the State may not presume that every offensive communication will give rise to violence.\(^\text{27}\) Moreover, Johnson’s acts did not fall into that narrow category of face-to-face insults that can be punished as “fighting words.”\(^\text{28}\)

The Court also found that the State’s interest in “preserving the flag as a symbol of nationhood and national unity”\(^\text{29}\) did not support the conviction. According to the Court, this interest is related to the suppression of free expression because, in asserting this interest, the State was trying to discourage the communication of a message arising from flag-burning.\(^\text{30}\) Moreover, the statute only penalized destruction of the flag under circumstances that would cause “serious offense.”\(^\text{31}\) Thus, the State was punishing messages of a particular content, and the Court found that the state’s interest must be subjected to “the most exacting scrutiny.”\(^\text{32}\) Punishment in these circumstances is unconstitutional because there is a “bedrock” First Amendment principle that “the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”\(^\text{33}\) Indeed, the intellectual

---

\(^\text{25}\) Johnson, 491 U.S. at 407.
\(^\text{26}\) *Id.* at 407-10; cf. *Brandenburg* v. Ohio, 395 U.S. 444 (1969). Interestingly, the Court did not decide whether the state’s interest in preventing breaches of the peace—if that interest were implicated on the record—would be an interest that was related to the suppression of free expression under *O’Brien*. *Johnson*, 491 U.S. at 407 n.4.
\(^\text{27}\) Johnson, 491 U.S. at 408-09.
\(^\text{28}\) *Id.* at 409.
\(^\text{29}\) *Id.* at 410.
\(^\text{30}\) The State, apparently, is concerned that [flag-burning] will lead people to believe either that the flag does not stand for nationhood and national unity, but instead reflects other, less positive concepts, or that the concepts reflected in the flag do not in fact exist, that is, that we do not enjoy unity as a Nation. These concerns blossom only when a person’s treatment of the flag communicates some message, and thus are related ‘to the suppression of free expression’ within the meaning of *O’Brien*.
\(^\text{31}\) *Id.* at 411.
\(^\text{32}\) *Id.* at 412 (citing *Boos* v. *Barry*, 485 U.S. 312 (1988)).
\(^\text{33}\) *Id.* at 414.
diversity protected by the First Amendment extends even to views and expressive actions with respect to the flag, and hence a state may not "foster its own view of the flag by prohibiting expressive conduct relating to it." Thus, the majority concluded that affirming Johnson's conviction would allow the government to "ensure that a symbol be used to express only one view of that symbol or its referents," a result that violates the First Amendment.

This was the first case in which the Supreme Court held that flag-burning could constitute protected expression, and it evoked a great public outcry. A year earlier, George Bush in his presidential campaign had effectively attacked his opponent Michael Dukakis because, as Governor of Massachusetts, Dukakis had raised constitutional objections to a statute requiring that the "Pledge of Allegiance" to the flag be recited in public schools. This, along with Bush's campaign appearance at a flag factory, was a telling political stroke. Many politicians feared that if they failed to oppose the Supreme Court's decision, similar political retribution could be exacted against them. Some politicians called for a constitutional amendment to "overrule" the Johnson decision. Instead, Congress enacted the Flag Protection Act of 1989, which made it a criminal offense to mutilate, deface, defile, or burn the flag. The Act did not require that this action be done in a manner that would cause offense to onlookers, as required by the Texas statute at issue in Johnson. Proponents of the statute argued that removing any possible focus on the flag burner's state of mind or specific message would cure the constitutional problems found by the Court in Johnson.

34. Id. at 415.
35. Id. at 417.
36. See, e.g., Bernard Weinraub, Bush Seeking Way to Circumvent Court's Decision on Flag Burning, N.Y. TIMES, June 27, 1989, at A1 (President Bush "very, very troubled" by flag-burning decision); Robin Toner, Bush and Many in Congress Denounce Flag Ruling, N.Y. TIMES, June 23, 1989, at A8 ("lawmakers lined up on Capitol Hill to denounce the Supreme Court ruling:" according to one senator, the Court "humiliated the flag:" according to another, the soldiers who raised the American flag at Iwo Jima in World War II "were symbolically shot in the back" by the Court's decision). See also Robert J. Goldstein, The Great 1989-1990 Flag Flap: An Historical, Political, and Legal Analysis, 45 U. MIAMI L. REV. 19, 27 (1990) (1.5 million persons sign petitions disapproving Johnson decision).
37. See Goldstein, supra note 36, at 65.
39. The Flag Protection Act also omitted the requirement that the defendant "cast contempt" on the flag, as set forth in an earlier federal statute. See 18 U.S.C. § 700(a).
40. For a discussion of the events that led up to the enactment of the new federal statute, see GERALD GUNTHER, CONSTITUTIONAL LAW 431-33 (Frederick Schauer ed., 11th ed. Supp. 1990). See also Frank Michelman, Saving Old Glory: On Constitutional Iconography, 42 STAN. L. REV. 1337 (1990); Statutory and Constitutional Responses to the Supreme Court Deci-
The new Flag Protection Act, however, was short-lived. In *United States v. Eichman*,41 decided in 1990, the Supreme Court struck down convictions under the Act. The Court’s majority refused to reconsider its decision in *Texas v. Johnson* and found that the new federal statute was not significantly different from the Texas law.42 Although the Act did not specifically require that the defendant “seriously offend” onlookers or “cast contempt” on the flag, the Act’s language (“mutilates, defaces, ... defiles,” etc.) generally limited its prohibition to conduct manifesting disrespect towards the flag.43 In any event, the interests asserted by the government for preserving the flag as a symbol remained the same. According to the Court, “the Act still suffers from the same fundamental flaw [as in *Johnson*]: it suppresses expression out of concern for its likely communicative impact.”44 This decision, like *Johnson*, provoked controversy. An attempt was made to amend the Constitution, but it failed in the House of Representatives for lack of the requisite two-thirds approval, although it did garner a majority.45 After some time for reflection, then, a certain measure of common sense seems to have prevailed. Among other things, many members of Congress were reluctant to pass an amendment which, for the first time, would have abolished individual rights that the judiciary had found were constitutionally protected.46

C. The American Flag-Burning Decisions: The Dissents

Neither of the decisions in the flag-burning cases was unanimous. In *Johnson* and *Eichman*, the Justices were divided five to four, and the same Justices formed the majority and minority blocs in both cases.

The dissenting opinions of Chief Justice Rehnquist (in *Johnson*) and Justice Stevens (in *Johnson* and *Eichman*) followed two somewhat different lines of argument. The dissents, however, were similar in their expression of almost religious emotions toward the flag47 and in the

---

42. *Id.* at 2408-09.
43. *Id.* at 2409.
44. *Id.*
45. See Gunther, supra note 40, at 440. The proposed amendment also failed to receive the requisite two-thirds majority in the Senate. *Id.*
47. See generally Nahmod, supra note 21.
romantic emphasis on war and death that marks both opinions. Rehnquist’s dissent began with a review of the role of the American flag in the Revolutionary War, the War of 1812, the Civil War (including a complete quotation of a well-known 60-line poem celebrating the flag), the First and Second World Wars, the Korean conflict, and the war in Vietnam. Rehnquist asserted that Americans view the flag with “an almost mystical reverence” and with “uniquely deep awe and respect.” In light of this history and “almost mystical reverence,” Rehnquist argued that the First Amendment should not protect desecration of the flag.

In the main argument of his opinion, Rehnquist seemed to concede that penalizing flag desecration would indeed limit the content of expression. He nonetheless maintained that a special exception should be created from the general First Amendment doctrine prohibiting limitations on the content of expression. This limitation would be justified by analogy to other exceptional limitations on the content of expression, such as those found in the “fighting words” doctrine of Chaplinsky v. New Hampshire. Like the expressive expletives that the Supreme Court found could be punished in Chaplinsky, the act of flag-burning in Johnson “was no essential part of any exposition of ideas” and also “had a tendency to incite a breach of the peace.” Even though the action was expressive, it was apparently not an essential part of an exposition of ideas because it was “rather inarticulate” and because the ideas it conveyed could have been “conveyed just as forcefully in a dozen different ways”—that is, presumably, by other forms of speech or symbolic action. By implication, therefore, Rehnquist rejected the view that each form of words or symbolic expression carries its own specific meaning which cannot be duplicated precisely by any other form of expression.

49. Id. at 429.
50. Id. at 434.
52. Id.
53. Id.
54. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). In this decision, the Supreme Court upheld the conviction of a defendant who had stated to a police officer, “you are a ‘goddamned racketeer’ and a ‘damned Fascist and the whole government of Rochester are Fascists or agents of Fascists.’” The Court found that these statements (made directly in the presence of the person being addressed) were “‘fighting’ words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.” Id. at 572.
55. Johnson, 491 U.S. at 430.
56. Id. at 431-32.
57. Compare Cohen v. California, 403 U.S. 15, 26 (1971) (forbidding particular words
In sum, the expression contained in the act of flag-burning was "of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed" by the public interest in avoiding a probable breach of the peace."58 Indeed, in a later passage Rehnquist seemed to analogize flag-burning to considerably more serious offenses: "Surely one of the high purposes of a democratic society is to legislate against conduct that is regarded as evil and profoundly offensive to the majority of people—whether it be murder, embezzlement, pollution, or flag burning."59

Chief Justice Rehnquist, therefore, apparently conceded that to allow penalization of flag-burning would be to limit expression, but he argued that such a limitation could be justified by other factors. In contrast, Justice Stevens in his dissenting opinions in Johnson and Eichman seemed to argue that, in penalizing flag desecration, the government was not asserting an interest in regulating the content of expression.60 Stevens began his dissent in Johnson by emphasizing the "unique" problem involved in flag-burning which raises an "intangible dimension."61 The case was unique because the flag plays a central role as a symbol of freedom, equal opportunity, and other American "aspirations."62 Although the flag conveys an important message, Stevens maintained that the state's interest in "preserving the quality" of that symbol was not related to the suppression of specific ideas conveyed by the flag-burners.63 In Texas v. Johnson, Stevens argued that the state has an interest in protecting the symbol in the eyes of the viewers, regardless of what specific message was intended to be conveyed by the burners.64 Thus, as Stevens pointed out in Eichman, the "Government's legitimate interest in preserving the symbolic value of the flag is . . . essentially the same regard-

59. Id. at 435. As indicated in the text, Rehnquist in this argument seems to acknowledge that the state's interest in penalizing flag-burning is related to the suppression of free expression, but he asserts that a special exception should be created for these penalties. In some other passages of his dissent in Johnson, however, Rehnquist seems to be adopting a position closer to that of Justice Stevens, discussed infra notes 60-67 and accompanying text. See also Smith v. Goguen, 415 U.S. 566, 599 (1974) (Rehnquist, J., dissenting).
61. Johnson, 491 U.S. at 436.
62. Id. at 437.
63. Id. at 438-39.
64. Id.
less of which of the many different ideas may have motivated a particular act of flag burning.\textsuperscript{65} Since, in Stevens' view, the speaker may express the same ideas by other means and since the importance of protecting the flag's symbolic value against "being tarnished" outweighs the speaker's interest in the choice of this particular means, Stevens would have upheld the convictions.\textsuperscript{66} As was true of Rehnquist's dissent, Stevens' opinion seemed to reject the Court's earlier view that a choice of a particular form or method of expression cannot readily be separated from the content of that expression.\textsuperscript{67}

In reviewing the arguments of the dissenters, it is interesting to notice what sorts of interests they accept as valid government interests and what sorts of interests they do not mention.\textsuperscript{68} The dissenters find that there may be an interest in forestalling a viewer's violent reaction to the ideas expressed, a long-standing governmental interest acknowledged in First Amendment adjudication.\textsuperscript{69} There also may be an interest in preserving the sensibilities of patriotic individuals whose feelings may be injured by being forced to witness flag desecration.\textsuperscript{70}

Especially in \textit{Eichman}, the dissenters emphasized the government's interest in the flag's power to convey the message of certain attributes of American government to others, including persons in other countries and "dissidents." In this view, the symbolic value of the flag represents a form of governmental speech, and the "tarnishing" of that symbolic value is equivalent to an interruption of the governmental speech.\textsuperscript{71} Hence, the government's interest lies in allowing the country's flag to

\textsuperscript{65} Eichman, 110 S. Ct. at 2411.

\textsuperscript{66} This argument does not appear to meet the majority's objection that the government's interest is an interest in \textit{furthering} a message of a specific content—the government's own view of the flag—even though the particular speaker may be interfering with this interest in one of a number of different ways.

\textsuperscript{67} See supra note 57 and accompanying text.

\textsuperscript{68} Cf. Nimmer, supra note 21, at 52-57.

\textsuperscript{69} See, e.g., Texas v. Johnson, 491 U.S. 397, 430 (1989) ("tendency to incite a breach of the peace"), 431 ("inherently inflammatory") (Rehnquist, C.J., dissenting). Cf. Feiner v. New York, 340 U.S. 315 (1951). As noted above, the Court's majority also might have accepted this interest if the likelihood of a breach of the peace had been adequately presented by the record. See Johnson, 491 U.S. at 407-09.

\textsuperscript{70} See Johnson, 491 U.S. at 432 ("form of protest that was profoundly offensive to many") (Rehnquist, C.J., dissenting); 438 ("concept of 'desecration' [turns on] whether those who view the act will take serious offense") (Stevens, J., dissenting); cf. Miller v. California, 413 U.S. 15, 24 (1973) (obscenity of work depends in part on whether it is "patently offensive"). For devastating criticism of arguments asserting this interest, see Arnold H. Loewy, \textit{The Flag-Burning Case: Freedom of Speech When We Need It Most}, 68 N. CAR. L. REV. 165, 166-67 (1989).

\textsuperscript{71} See Johnson, 491 U.S. at 437 (Stevens, J., dissenting); cf. Ely, supra note 15, at 1504.
continue to express certain ideas without having that message impaired or interrupted by the ideas of others:

[T]he flag uniquely symbolizes the ideas of liberty, equality, and tolerance—ideas that Americans have passionately defended and debated throughout our history. The flag embodies the spirit of our national commitment to those ideals. The message thereby transmitted does not take a stand upon our disagreements, except to say that those disagreements are best regarded as competing interpretations of shared ideals. . . . To the world, the flag is our promise that we will continue to strive for those ideals. To us, the flag is a reminder both that the struggle for liberty and equality is unceasing, and that our obligation of tolerance and respect for all of our fellow citizens encompasses those who disagree with us—indeed, even those whose ideas are disagreeable or offensive.\footnote{72}

According to Chief Justice Rehnquist, the government’s interest in keeping the symbolic message of the flag unimpaired can be viewed as a form of property interest in the flag. Even when the tangible cloth belongs to a private individual, the government retains an intangible property interest in the design and its message—an interest that is perhaps analogous, although in an attenuated way, to copyright.\footnote{73} The government has apparently acquired this interest under something like a labor theory of intangible symbolic value:

‘when a word [or symbol] acquires value “as the result of organization and the expenditure of labor, skill, and money” by an entity, that entity constitutionally may obtain a limited property right in the word [or symbol]’ . . . . Surely Congress or the States may recognize a similar interest in the flag.\footnote{74}

It is difficult to accept these fanciful arguments or even to understand them fully.\footnote{75} Certainly Justice Stevens’ interpretation of the symbolic meaning of the flag in \textit{Eichman} is highly personal. To Stevens the

\footnotesize{\begin{itemize}
\item \textit{Cf. Ely, supra note 15}, at 1482-83 (state’s interest in prohibiting flag desecration “seems scarcely articulable, let alone strong”).
\end{itemize}}
flag may symbolize American diversity and tolerance; to others it may symbolize military power. Which message does the state have an interest in preserving? As for Rehnquist’s property theory, one obvious problem is that nothing in the flag burners’ actions involved the commercial appropriation of others’ trademarks or work product which lies at the heart of the doctrine that Rehnquist invokes.

Indeed, the distinct oddness of the dissenters’ arguments raises the question of why they feel compelled to go to such imaginative, indeed whimsical, lengths in order to devise an interest that the state legitimately can assert. Perhaps one reason for these inventive exercises is that the dissenters feel that they are barred from asserting one obvious interest which some drafters of flag-burning statutes probably had in mind and which, if articulated, would at least be more readily intelligible than the gossamer theory of property spun by Chief Justice Rehnquist—that is, the state’s interest in protecting the flag, and hence the state itself, from contemptuous and potentially debilitating political attack.  

Indeed, the state’s interest in protecting itself and its political structure through punishing flag desecration is one obvious interest that the dissenters do not assert. Although the flag could be characterized as “the visible symbol embodying our Nation,” 77 or “an important symbol of nationhood and unity,” 78 neither of the dissenters in Johnson and Eichman relies on the view that the state’s interest in prohibiting flag-burning is its interest in preserving the nation. Neither Rehnquist nor Stevens argues that the flag as a symbol should remain “unimpaired” because it represents the essence of the nation and because its impairment might weaken the power of the state and lead to overthrow of the government or rejection of its underlying principles. Thus, none of the Justices defends flag desecration statutes on the ground that attacking the flag amounts to attacking and weakening the government; even in the views of the dissenters, flag desecration is not equivalent to seditious libel. 79

The reasons the dissenters avoided any theory of seditious libel are

77. Johnson, 491 U.S. at 429 (Rehnquist, C.J., dissenting).
79. For one historian’s definition of seditious libel in Anglo-American law, emphasizing the difficulty of the concept, see LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 8 (1985):
Seditious libel has always been an accordion-like concept, expandable or contractible at the whim of judges. Judged by actual prosecutions, the crime consisted of defaming or contempting or ridiculing the government: its form, constitution, officers, laws, conduct, or policies, to the jeopardy of the public peace. In effect, any malicious criticism about the government that could be construed to have the bad tendency of lowering it in the public’s esteem, holding it up to contempt or hatred, or of disturbing the peace was seditious libel. . . .
clear enough—they lie in the history and development of First Amend-
ment doctrine. The initial series of First Amendment cases in the
Supreme Court dealt with problems of "sedition," and the Court's doc-
trine in this area ultimately came to require a "clear and present danger"
of violent attempts to overthrow the government before seditious speech
could be penalized. Of course, nothing that approaches violent over-
throw (or even attempted violent overthrow) is evident in any of the flag-
burning cases.

The Supreme Court clarified and reinforced its views on seditious libel in New York Times v. Sullivan, decided in 1964. In that case the Court engaged in a retrospective consideration of the Sedition Act of 1798, a Federalist Era statute that prohibited verbal attacks on the gov-
ernment or government officials. The Court concluded that the Sedition Act was unconstitutional and emphasized that the "central meaning of
the first amendment" protects the ability of citizens to direct verbal at-
tacks against government officials and the government itself. Any ac-
nowledgment that the government has a legitimate interest in
penalizing individuals who criticize its basic principles—whatever the
means of expression employed—would contravene that fundamental
First Amendment doctrine, at least when there is no clear and present
danger of violent action.

Prosecutions for flag burning may well seem like prosecutions for seditious libel. See Michelman, supra note 40, at 1348; cf. Senate Hearings, supra note 40, at 309, 316, 330-31 (testimony of Prof. Michael E. Parrish, arguing that proposed flag-burning amendment would re-introduce concepts of seditious libel); House Hearings, supra note 40, at 224 (testimony of Prof. Charles Fried comparing crime of flag burning to crimes of lèse majesté and lèse nation in France). As noted in the text, however, the dissenting judges in the Supreme Court have avoided this theory. See supra notes 77-78 and accompanying text. It has been suggested that certain remarks of Justice Stevens in Johnson embody a revival of ideas of seditious libel, or at least ideas that are "too close [to it] for comfort," see Michelman, supra note 40, at 1348, but the discussion of the German Flag Desecration case, infra notes 84-135 and accompanying
text, will illustrate that there is a difference between a frank avowal of the central ideas of seditious libel and the convoluted theories of the dissenters in the American cases.


81. The question of a localized violent reaction to flag-burning raises a separate issue. The Court seems to indicate that this possibility might justify restriction of flag-burning under some circumstances. See supra notes 26-27 and accompanying text; cf. Feiner v. New York, 340 U.S. 315 (1951). In neither Johnson nor Eichman, however, was the possibility of a violent reaction indicated on the record.

82. 376 U.S. 254 (1964).

83. Id. at 273-76; see Harry Kalven, Jr., The New York Times Case: A Note on "The Central Meaning of the First Amendment," 1964 SUP. CT. REV. 191; Michelman, supra note 40, at 1348, 1348 n.40.
Perhaps the Court’s majority feared that a different result in Johnson or Eichman might have had the covert effect of re-introducing certain notions of seditious libel as constitutionally permissible—after all, Justice Brennan, who wrote the two flag-burning decisions, also was the author of the Court’s opinion in New York Times v. Sullivan. But the dissenters also seemed to avoid asserting that protecting the state from being weakened or destroyed by criticism justifies penalizing the act of flag-burning.

In this respect, the convoluted arguments of the dissenting Justices may represent a form of tribute to the rejection of concepts of seditious libel in American constitutional law. Indeed, the certainty with which First Amendment doctrine has turned its face against ideas of seditious libel has come to be a fundamental characteristic of American free speech law. It is a characteristic, however, that is not shared by many other legal cultures, including that of Germany. The American position may bespeak a particular confidence that the basic structure of government is safe from internal danger. Legal cultures which lack this assurance, or which retain doctrines derived from a period in which this assurance was lacking, may take quite a different position on the question of seditious libel.

III. THE GERMAN FLAG DESECRATION CASE

The German Flag Desecration case, decided in 1990, is contemporaneous with Johnson and Eichman. It is different in many ways from the American cases, but at least one of the central issues—the nature of the state’s asserted interest or interests in prohibiting flag desecration—raises identical problems.

The defendant in this case was the owner of a bookstore which sold copies of a paperback book, “Just Leave Me in Peace” (“Lat mich blo in Frieden”), a collection of anti-militarist poetry and prose. The back cover of the book consisted of a photo-collage. On the lower half of the cover was a black and white photograph of a military ceremony in which soldiers held an unfolded flag of the Federal Republic of Germany. The upper half of the picture consisted of a color photograph of a male figure urinating. The two pictures were put together in such a way that “the urine was directed onto the unfolded flag.” The defendant, who sold copies of the book, was charged with the crime of “defaming the federal


85. Id. at 280.
At the outset, certain obvious factual distinctions from the American flag-burning cases are apparent. Because this case does not involve the physical destruction of a flag, it may somewhat resemble the American case of *Street v. New York*, \(^87\) in which contemptuous words were directed toward the flag. On the other hand, the German case also seems to have elements of *Spence v. Washington* \(^88\) and *Smith v. Goguen*, \(^89\) in that the flag is defaced or misused rather than destroyed. \(^90\) Yet the German case is not quite like those cases either, because the alleged “defacement” is not of an actual flag but of a black-and-white photographic image of the flag. \(^91\)

In examining the German decision, we find ourselves in a constitutional universe that is quite different from that of the American cases. Moreover, the factual differences between the cases may involve differences in applicable doctrine. Consequently, a preliminary issue of some complexity—Germany’s constitutional jurisprudence on artistic expression—must be examined before it will be possible to reach the central question that the German and American decisions have in common.

A. Freedom of Artistic Expression as an Independent Constitutional Guarantee

An important difference between the free speech law of the American and the German constitutional systems is that the German constitut-

---

86. This is a criminal offense (*Defamation of the state and its symbols*) under section 90a of the German criminal code [*Strafgesetzbuch*] [StGB], which declares,

   (1) Whoever publicly, in an assembly or through the distribution of publications...
   1. insults or maliciously casts into contempt the Federal Republic of Germany or one of its states or its constitutional order, or
   2. defames the colors, the flag, the coat of arms or the anthem of the Federal Republic or one of its states,
   will be punished by imprisonment of up to three years or by a fine . . . .

   A companion case—also involving a conviction under criminal code section 90a(1)(2)—was decided in the same opinion as the case discussed in the text. In the companion case, a magazine editor was convicted for publishing a satire on the seizure and suppression of the book *Just Leave Me in Peace*. The magazine printed the two photographs of the photo-collage separately and invited readers to put them together. Judgment of Mar. 7, 1990, 81 BVerfGE at 285-86.

90. For a description of these American cases, see supra notes 8-12 and accompanying text.
91. For an American flag desecration case with facts similar to those of the German case, see *Korn v. Elkins*, 317 F. Supp. 138 (D. Md. 1970) (upholding First Amendment right to distribute picture of burning flag as cover of student publication).
tion (known as the Basic Law) contains several separate provisions dealing with various forms and modes of expression, while the Constitution of the United States contains only the spare wording of the First Amendment. All guarantees protecting expression in American constitutional law have been derived by courts from that delphic language, but interpretations of the Basic Law must examine several distinct provisions and determine into which provision a particular form of expression falls. Among other things, the Basic Law contains a specific provision guaranteeing artistic freedom, and, in contrast with American doctrine, the constitutional protection of art seems to be at least slightly stronger than the protection available for expressions of opinion and ordinary political speech.

In the German Flag Desecration case, the initial question presented was whether the photo-collage qualified as "art" protected by article 5, section 3 of the Basic Law. In answering this question the German Constitutional Court adopted a broad view of the term "art" and found that the collage qualified as such for two reasons. First, the form of photo-collage had become a "traditional form of pictorial art;" thus from the purely "typological" point of view, this work looked like art. Second, as a matter of content, the work represented "an independent statement that is capable of and requires interpretation [because it contains] a graphic and at the same time disorienting joinder of two activities of life." The fact that the photo-collage contained a political message did not deprive it of this artistic quality, the Court held, because art often contains a political message.

92. See, e.g., Grundgesetz [Basic Law] [GG] art. 5, §§ 1-2 (free expression of opinion; freedom of press); art. 5, § 3 (freedom of art, scholarship, research and teaching); art. 8 (right of assembly); art. 9 (rights of political parties); see generally Peter E. Quint, Free Speech and Private Law in German Constitutional Theory, 48 Md. L. Rev. 247, 250 (1989).
93. GG art. 5, § 3.
94. Quint, supra note 92, at 292-94.
96. Id. at 291.
97. Id.
98. Id. The Court found that the satiric commentary of the companion case, supra note 86, also qualified as "art." Id. at 291-92.

Throughout its opinion, the Court's discussion of artistic expression relied on its initial exploration of that subject in the famous Mephisto case, decided in 1971. Judgment of Feb. 24, 1971, BVerfG, 30 BverfGE 173 (F.R.G.). In Mephisto the Constitutional Court—by an evenly divided vote—upheld an injunction prohibiting the publication of a novel by Klaus Mann. The novel, which portrayed the career of an ambitious actor who collaborated with the Nazi regime, was based upon the life of Gustaf Gründgens, a well-known German actor who had been Klaus Mann's brother-in-law.

For a discussion of the Mephisto case, see Quint, supra note 92, at 290-318; for an edited
B. Freedom of Artistic Expression and Countervailing Constitutional Interests

A finding that expression qualifies as “art,” however, does not mean that it necessarily will receive constitutional protection. Under central doctrines of German constitutional law, the protection of various forms of expression is not absolute. For example, article 5, section 1 of the Basic Law generally protects expressions of opinion, but a related constitutional provision—article 5, section 2—provides that such expression may be limited by the “general laws.” As a consequence, the Constitutional Court has found that the values of political expression must be weighed individually in every case against the countervailing state or individual interests represented by a statute limiting expression.99 Even though artistic expression, unlike the expression of opinion, seems to be absolutely protected by article 5, section 3 of the Basic Law, the Constitutional Court has found that some artistic expression also may be restricted.100 The difference between the protection available to expressions of opinion and that available to art is that expressions of opinion may be qualified by “general laws”—statutory provisions generally limiting expression—while artistic expression may not be limited by statutes alone, but only by competing constitutional interests. This distinction, while significant in theory, may not be as important as it appears because, as will be seen in the Flag Desecration case, a countervailing governmental interest incorporated in a statute can often be found to reflect an interest of constitutional stature.101 In any event, under German doctrine, the decisions in cases involving artistic freedom—as in other cases of freedom of expression—are ultimately determined by a case-by-case balancing of the countervailing interests.


100. See Judgment of June 25, 1990, 81 BVerfGE at 292.

101. Quint, supra note 92, at 293-95, 298 n.169.
C. The State's Interest in Penalizing Flag Desecration

Since the Constitutional Court determined that the photo-collage was "art" under article 5, section 3 of the Basic Law, the next question was whether there was a countervailing constitutional interest and how that interest was to be weighed. At this point, we reach an issue that is central in the German case as well as the American cases—the nature of the government's interest in penalizing flag desecration.

_Mephisto_, the most important previous German case on artistic expression, had been a private defamation action.\(^{102}\) The Court recognized the countervailing constitutional interest in that case to be an individual constitutional "right of personality"—in effect, an individual's constitutional right to be free of libel.\(^{103}\) The Court could have accepted the argument, therefore, that the constitutional right of artistic expression can only be limited by a constitutional right of another _individual_, not by a countervailing interest of the state. The Court rejected this view, however. It declared that any kind of "constitutional determination" can limit the freedom of artistic expression, including constitutionally protected governmental interests.\(^{104}\) According to the Court, "An orderly human life in a community presupposes not only the mutual consideration of the citizens, but also a functioning state order, which is necessary in order to secure effective protection of basic rights in the first place."\(^{105}\) Indeed, the Court went further and denied that artistic expression could only be limited when it presented some form of clear and present danger: "Works of art which injure the constitutionally protected order are not restricted only when they directly endanger the existence of the state or the constitution."\(^{106}\) Rather, courts must weigh the values of artistic expression against the limiting constitutional interest in every case.\(^{107}\)

What was the constitutionally protected value that might limit artistic expression in this case? Article 22 of the Basic Law provides that the federal flag is black, red, and gold, and this provision might be found to give rise to an implied constitutional protection of the flag. In an interesting passage, the Court found that section 90a(1)(2) of the Criminal Code—the flag defamation statute under which the defendant was charged—did indeed rest on a constitutionally protected value, but that

---

102. See Judgment of Feb. 24, 1971, 30 BVerfGE 173; and _supra_ note 98.
103. _Id._ at 193-95.
105. _Id._
106. _Id._
107. _Id._ at 292-93.
this value did not arise directly or exclusively from article 22. Rather, the Court held that article 22 presupposes a more capacious constitutionally-protected value: "the right of the state to use such symbols in its self-representation" for the purpose of "appealing to the state-feeling (Staatsgefühl) of the citizens." Indeed, "as a free state, the Federal Republic is dependent on the identification of its citizens with the basic values symbolized by the flag," and the colors of the flag "stand for the free democratic basic order." From this analysis, the point of the countervailing constitutional value incorporated into section 90a becomes clear: "As the flag serves as an important means of [political] integration through the principal state goals which it incorporates," it follows that defaming the flag "can injure the authority of the state which is necessary for internal peace."

Thus, the countervailing interest recognized by the Court is the interest of the state in being free from attack on its basic principles and "authority," a freedom from a form of seditious libel that would "injure the authority of the state" and endanger "internal peace." In theory at least, this value might disfavor not only destruction or defacement of the flag but even verbal attacks on the flag. Indeed, the nature of the government's interest in punishing desecration of the flag—its interest in punishing a form of seditious libel—is underscored by the fact that the provision penalizing "defamation" of the flag is immediately preceded by a subsection that penalizes anyone who "insults or maliciously casts into contempt the Federal Republic of Germany or one of its states or its constitutional order." As discussed above, none of the Supreme Court

108. Id. at 293.
109. Id.
110. Id. Although the Court did not specifically mention it in its opinion, the point that the colors of the flag (black-red-gold) represent democratic values has some historical background. Black, red, and gold were the colors of the abortive liberal uprising of 1848-49 and of the democratic Weimar Republic—in contrast with the colors of the Bismarck Empire (black, red, and white), which were favored by the Nazi regime. Indeed, the Nazi party ridiculed the gold of the Weimar flag. See Judgment of Oct. 23, 1952, BVerfG, 2 BVerfGE 1, 62 (F.R.G.).
112. Id. at 294.
113. StGB § 90a(1)(1); see supra note 86. Criminal code section 90a(1)(1) therefore seems to be quite frankly a seditious libel statute of the type fundamentally rejected in the United States under the principles of New York Times v. Sullivan. See supra notes 82-83 and accompanying text. See generally Kalven, supra note 83.

For a detailed and illuminating discussion of the theoretical background of criminal code section 90a(1)(2), the flag desecration provision, see Thomas Würtenberger, Kunst, Kunstfreiheit und Staatsverunglimpfung (§ 90a StGB) 1979 JURISTISCHE RUNDSCIAU 309 (an article referred to by the Constitutional Court in the Flag Desecration Case):

[§ 90a(1)(2) acknowledges] the high rank of the state symbols for the life and continued existence of the state community. . . . State symbols like the flag or the anthem
Justices in Johnson and Eichman has invoked the interest in combatting seditious libel—presumably because the Court has generally rejected freedom from seditious libel as an appropriate governmental value in speech cases unless a “clear and present danger” of violent action is present. In contrast, the German law of free speech relies on a balancing of interests in each case, and no plausible interest can ordinarily be said to be totally excluded from the calculus. Moreover, it is clear in a number of areas of German constitutional law that the values of stability, “internal peace,” and “the authority of the state” to protect the democratic order are clearly recognized and accorded very significant weight.

In German constitutional doctrine, the view that the state and constitution are in need of rigorous, in fact “militant,” protection is generally associated with the phrase “the free democratic basic order,” which the Court also employs in the Flag Desecration opinion.114 This is one of the most important concepts in the Basic Law. A number of constitu-

“appeal directly to the state feeling.” As a necessary element of every “polity,” the state symbol has the important function of serving the “inner stability of the state community represented by the citizens.” . . . It is precisely the free democratic legal state [Rechtsstaat] of today that cannot do without the citizens’ consent to the basic values of the constitution. Its existence is to a great degree dependent on the “permanent mass loyalty” of the citizens. This fundamental meaning of the state symbols for the existence of the community, and for the integration of the citizen into the state community, is [reflected in StGB § 90a(1)(2).]

Id. at 311.

In a later passage the author continues:
At present . . . the state, the constitution and the symbols of state are subject to not inconsiderable attacks. . . . All-too-radical criticism of our democracy creates a consciousness that is antagonistically predisposed against any polity. . . . In light of the multifarious aggressions that increasingly force our political system onto the defensive, it should not be forgotten that the Weimar State was doomed to ruin as a result of constant attacks on its continued existence—as expressed, not least, in contempt for the symbols of that era.

Id. at 313.

For other provisions of the German Criminal Code that seem to be directed along the same lines, see StGB § 90 (defamation of the federal president); StGB § 90b (defamation of constitutional organs in a manner hostile to the constitution); StGB § 187a (calumny and defamation against persons in political life). See also 1991 NJW 1493 (BayObLG) (pacifist could be convicted for defaming soldiers of German army by declaring that “soldiers are potential murderers”). For a somewhat different view of StGB §§ 90a, 90b, however, see George P. Fletcher, Constitutional Identity, 14 CARDOZO L. REV. (forthcoming 1992).

Arguments focusing on the importance of the flag for maintaining the cohesion of the citizens and existence of the state were made in some of the early American flag cases. See Halter v. Nebraska, 205 U.S. 34, 42 (1907); Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 596-600 (1940); see also supra notes 6-7 and accompanying text. According to one commentator, these arguments fell into disfavor after the Court rejected such ideas in West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). Rosenblatt, supra note 12, at 208-12.

114. See supra note 110 and accompanying text.
tional provisions make clear that political parties, associations, and individuals may be penalized if they direct their activities, or even their expression, against the “free democratic basic order.” Although there has been substantial debate about the precise meaning of this phrase, it basically refers to underlying principles of democracy and human rights embodied in liberal Western constitutions. “Militant” constitutional protection of the free democratic basic order was part of a fundamental attempt to guard against a return of totalitarian forms such as fascism—against which the Basic Law was essentially a reaction—and to confront the East Bloc dictatorships that faced the drafters of the Basic Law in 1948-49. In the Flag Desecration case, the language of the Constitutional Court includes protection of the flag within the broader context of the “militant” protection of democratic institutions. Thus, protection of the flag forms one of the bulwarks guarding against subversion of the state—a goal that has characterized German constitutional law since the founding of the Federal Republic in the years following the destruction of the Nazi dictatorship.

D. Artistic Interpretation as a Constitutional Technique

In the Flag Desecration case, the Court’s conclusion that protection of the flag is a constitutional value did not necessarily mean that the conviction would be affirmed. The state’s constitutional interest in protecting the flag confronted the defendant’s constitutional interest in artistic expression, and the Court’s doctrine required that a weighing of those countervailing interests be undertaken in each case. Although the Constitutional Court typically employs an ad hoc balancing process in its cases involving freedom of expression, this method involves substantial uncertainty because it is difficult to predict how the balance might fall in any given case. This uncertainty is further increased because of the sharp distinction in the German legal system be-

---

115. See GG art. 18 (individual who misuses freedom of expression or certain other constitutional rights to oppose the “free democratic basic order” forfeits those rights); GG art. 21 (political parties seeking to injure or discard the “free democratic basic order” are unconstitutional); GG art. 9 (associations directed against the “constitutional order” are prohibited). See also the Klass case, Judgment of Dec. 15, 1970, BVerfG, 30 BVerGE 1 (F.R.G.) (“free democratic basic order” is a constitutional value that can justify measures such as electronic surveillance).


117. See, e.g., KOMMERS, supra note 98, at 222.


119. Id. at 292-94.

120. See Quint, supra note 92, at 287-88.
tween the Constitutional Court and the so-called “ordinary” courts, particularly the traditional civil and criminal courts. The Constitutional Court has held that because the balancing of constitutional interests takes place within the process of applying the ordinary civil and criminal law, the “ordinary” civil and criminal courts should ultimately perform this balancing.\textsuperscript{121} Of course, the Constitutional Court must exercise some supervision over the ordinary courts in the process of balancing to assure that constitutional values are properly observed. Moreover, the Court adjusts its scope of review according to the seriousness of the potential impact on individual rights.\textsuperscript{122} Thus, a heightened degree of review is exercised in criminal cases involving rights of communication.\textsuperscript{123} Yet even here the “ordinary” criminal courts may have the last word.

In the photo-collage case, however, the Constitutional Court found that the ordinary court had not performed the balancing properly and sent the case back to that court for reconsideration. Although the lower court had properly understood that the collage represented “art” protected by article 5, section 3 and also had attempted to balance the contending interests, the lower court had made an incorrect interpretation of the collage as a work of art.\textsuperscript{124} Drawing on the jurisprudence of the German supreme court of the Weimar period (Reichsgericht),\textsuperscript{125} the Constitutional Court noted that satirical works, such as the collage involved here, are composed of two elements—an “expressive core” (Aussagekern) and its figurative “form” of expression (Einkleidung).\textsuperscript{126} In the case of satire, the figurative “form” of expression is to be judged by a more lenient standard than the expressive core because the “transformation” that characterizes satirical art is an essential part of the “form.”\textsuperscript{127}

In judging satire, therefore, it was crucial to decide whether certain ideas belonged to the “expressive core” or only to the “form” of expression, and it was on this point that the Constitutional Court reversed the case.\textsuperscript{128} According to the lower court, contempt for the flag (and for the state symbolized by the flag) was the “expressive core” of the photo-

\begin{itemize}
  \item 121. Id. at 319-23.
  \item 122. Id.
  \item 125. Judgment of June 5, 1928, Reichsgericht in Strafsachen [Supreme Criminal Court], 62 Entscheidungen des Reichsgerichts in Strafsachen [RGSt] 183 (Germany).
  \item 127. Id. See also Judgment of June 3, 1987, 75 BVerfGE at 377-78.
\end{itemize}
collage and the military ceremony was only the “form” of expression in which this core was clothed. Rejecting that interpretation, the Constitutional Court argued that the “expressive core” was an attack against militarism—as represented in the military ceremony—and that the “state [was] the goal of the attack only insofar as it was responsible for the establishment of military service” and assisted the military by allowing it to use state symbols. Thus the “expressive core” only included an attack on militarism and not an attack on the flag and the state at all. This attack on militarism took the form of “the man urinating on the [flag] used at the ceremony,” and the form of satire enjoys a greater degree of latitude. If the lower court had understood this point, its balancing might have produced a different result. Thus, the Constitutional Court reversed the case and remanded it to the lower court for reconsideration using the proper standard and interpretation.

Although the Constitutional Court’s interpretation in this case is certainly plausible, the interpretation of the lower court could also be defended. In this light, the Court’s opinion seems to invoke its artistic interpretation as an adjunct to constitutional adjudication. Indeed, the Court found that its interpretation was correct and that of the lower court was a mistake (Fehldeutung). Because the Court was able to interpret this form of satiric expression as it did, it avoided the necessity of actually enforcing the stern seditious libel justification for protection of the flag that was set forth in the main theoretical portion of the Court’s opinion. This resolution might conceivably suggest that,
although the Court continued to assert strong principles of “militant” democracy in the abstract, it had its own doubts about stringently enforcing those values against the important individual interests embodied in the freedom of artistic expression.

IV. CONCLUSION

In sum, both the American and German decisions protect the expression involved in flag desecration against criminal penalty. Yet both are fragile decisions upholding freedom of expression.

It is true that there is nothing fragile or tentative about Justice Brennan’s opinions for the majority in the American cases. The majority firmly rejects the government’s asserted interests in the penalization of flagburning. Moreover, it seems unlikely that any of the Justices will seek to re-introduce explicit notions of seditious libel in this area. Indeed, American constitutional doctrine has set its face against this concept—most clearly in Brennan’s stirring opinion in New York Times v. Sullivan. Even the dissenting opinions in Johnson and Eichman do not argue that flag desecration should be penalized in order to protect the state from political attack that might lead to revolution. Yet these five to four decisions seem quite fragile in the present political context: two important members of the majority in these cases have since retired from the Court, including Justice Brennan, the author of both opinions. Although it is impossible to predict how their successors would vote on this or related issues, their departure in the current political climate must necessarily raise doubts about whether a new five-judge majority could be assembled for the results in Johnson and Eichman. Of course, the dis-
sents in Johnson and Eichman suggest that a reversal of these decisions would not be expressly grounded on notions of seditious libel, such as those set forth by the German Constitutional Court. Yet a reversal of these decisions would yield results that would be in at least tacit tension with the "central meaning" of the First Amendment as set forth in New York Times v. Sullivan. As a decision protecting the freedom of expression, the German Flag Desecration case is fragile for other reasons. Although the Court seemed to go out of its way to find grounds to reverse the lower court's penalization of expression, the German decision frankly asserts that the government has a constitutional interest in prohibiting flag desecration in order to protect the authority of the state and the "free democratic basic order." Thus, the government's constitutional interest in punishing flag desecration is its interest in being free from a form of seditious libel that is viewed as particularly damaging. Although the Court seemed reluctant to assert this interest in its most rigorous form, the Court's clear acknowledgment of the interest may raise dangers that are not entirely avoided by its decision in this specific case. These dangers may be particularly acute if the lower courts perform the ultimate weighing of the competing interests; in the flag desecration cases at least, the lower courts have sought to enforce the state's freedom from seditious libel much more vigorously than has the Constitutional Court. Perhaps the recognition of seditious libel in the German doctrine could have been justified in 1949 as an attempt to bolster the fragile democracy of the newly-formed Federal Republic. Now, however, the continued assertion of this interest raises the danger of suppressing a range of opposition speech that in no way actually threatens the stability of democratic institutions. Indeed, in the present era, when the eastern bloc has disintegrated and the democratic structures of the Federal Republic have proven themselves over a forty-year period, German scholars and jurists should re-examine whether this particular doctrine, supposedly favoring security, actually justifies the potential infringements of liberty that it ultimately entails.

139. 376 U.S. at 273-76.
140. See supra notes 128-34 and accompanying text; see also supra note 135.