1-1-1990

By What Authority: Reflections on the Constitutionality and Wisdom of the Flag Protection Act of 1989

David L. Faigman

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

Part of the Constitutional Law Commons

Recommended Citation

Available at: https://repository.uchastings.edu/hastings_constitutional_law_quaterly/vol17/iss2/3

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 Constitutional Law Quarterly by an authorized editor of UC Hastings Scholarship Repository. For more information, please contact wangangela@uchastings.edu.
By What Authority?: Reflections on the Constitutionality and Wisdom of the Flag Protection Act of 1989

By David L. Faigman*

Over 150 years ago Alexis de Tocqueville observed in his seminal work, Democracy in America, that "I know of no country in which there is so little independence of mind and real freedom of discussion as in America."1 The political firestorm that has followed Texas v. Johnson,2 the "flag-burning" case, demonstrates the continuing truth of Tocqueville's words. Democracy's principal failing, Tocqueville believed, lay in the timidity of America's leaders when confronted by the suffocating tide of popular opinion.3 In the President and in Congress such timidity of spirit is currently ascendant. The Flag Protection Act of 1989 (the Act) represents a recent example of the irresolute vision of this nation's leadership. Its passage was an effort to avoid responsibility for defending the fundamental principle of freedom of speech against the shrill voice of the majority, as well as to avoid the responsibility attending enactment of a constitutional amendment.4 But this effort lacks integrity, as a matter

---

* Assistant Professor of Law, University of California, Hastings College of the Law. B.A. 1979, State University of New York, College at Oswego; M.A. (Psychology) 1984, J.D. 1986, University of Virginia.

I would like to thank my many colleagues who commented on drafts of this Essay. I am especially indebted to Ray Forrester, Elizabeth C. Johnsen, William B. Lockhart, Scott E. Sundby, and Diane E. Turriff for their thoughts and comments. This Essay builds upon my earlier work appearing as Confronting the Tyranny of the Majority, 8 S.F. BARRISTER L.J. 3 (1989).

3. See TOCQUEVILLE, supra note 1, at 265-68.
5. See, for example, Senator Kennedy's remark in the floor debate that "[t]he proposed statute is supported in good faith by many who see it as the only means of heading off a constitutional amendment." 135 CONG. REC. S12576 (daily ed. Oct. 4, 1989). And Senator Grassley undoubtedly captured the mood of Congress when he observed, "I understand that the pressure on my colleagues to support a statutory response is great. After all, who among us can safely vote against a bill styled to protect our flag from desecration." Id. at S12587.
of both constitutional law and political principle.

Current debate over the Act has focused on its constitutionality under the First Amendment as well as on the wisdom of such an action as compared to amending the Constitution. This Essay also considers the constitutionality of the Act, but it focuses on the text of the Constitution rather than the Bill of Rights. Specifically, Congress has not declared, and a search of the text of the Constitution does not reveal, the source of power for its action. It must be, therefore, that the Act's proponents are relying on some theory, as yet unarticulated, involving the "penumbra" of Article I to support Congress' authority to protect the flag. Yet these very proponents of flag protection adamantly reject any similar penumbral searches in the Bill of Rights. It is inconsistent for adherents to the original intent doctrine to decry an expansive interpretation of the protections contained in the Bill of Rights while simultaneously advocating an expansive interpretation of the enumerated powers expressed in Article I. This Essay argues that unless proponents of the Act accept some theory of substantive development of the Constitution, authority for the Act is absent from Article I. Even if Congress lacks the power to protect the flag legislatively, however, a comparable outcome can be achieved through constitutional amendment or, alternatively, through state legislation in the manner of the federal Act. Because, through one means or another, Congress or the states might still provide safe sanctuary for the flag, this Essay concludes by examining the wisdom of insulating the flag from the fires of political dissent.

I. Background

If Tocqueville erred in any way in his extraordinary analysis of American democracy, it was in underestimating the future power of the judiciary to check the caprices of the majority. This power is eminently observable in Johnson, in which a divided Court upheld Gregory Lee Johnson's right under the First Amendment to express his disapproval of

---

6. For those uncomfortable with the term "penumbra," a term eschewed by the Court in favor of "substantive due process," an alternative wording in the context of Article I might be "substantive due power." I use the term penumbra in this Essay as a rhetorical device to refer to constitutional interpretation involving the search for those values "‘so rooted in the traditions and conscience of our people as to be ranked as fundamental.’" Palko v. Connecticut, 302 U.S. 319, 325 (1937) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)); see generally Brest, The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship, 90 YALE L.J. 1063 (1981). Ultimately, commentators who are critical of the right of privacy when it is found in the penumbra of the Bill of Rights are also critical of that right when it is found in the Due Process Clause of the Fourteenth Amendment. This Essay is directed at those commentators who are critical of a fundamental rights search in the Bill of Rights but who also accept a fundamental powers analysis in Article I.
the Reagan administration by burning an American flag outside the 1984 Republican National Convention.\textsuperscript{7} With full recognition of the importance of the question and the emotions that the question elicited,\textsuperscript{8} the Court upheld the fundamental and transcendent value of free political expression.

The Texas statute at issue in \textit{Johnson} prohibited the intentional or knowing desecration of the American flag "in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action."\textsuperscript{9} As Texas conceded in oral argument, Johnson’s action of burning the flag was expressive conduct and thus fully within the scope of the First Amendment.\textsuperscript{10} The First Amendment is not absolute, however, and Texas forwarded two arguments for removing Johnson’s conduct from constitutional protection. First, Texas argued that flag-burning created an imminent harm of a breach of the peace.\textsuperscript{11} Second, Texas asserted a compelling interest in preserving the flag as a symbol of nationhood.\textsuperscript{12}

The Court rejected Texas’ claim that flag burning inevitably resulted in breaches of the peace, pointing out that no such breach had occurred in this case.\textsuperscript{13} More importantly, the Court held that the mere possibility that such a deplorable act might give offense cannot be the measure of constitutional protection. It is political dissent intended to provoke unpopular response in the "marketplace of ideas" that is most in need of protection.\textsuperscript{14}

In responding to Texas’ second claim, that it had an interest in preserving the flag as a symbol of nationhood and national unity, the Court marshaled its strongest arguments. As the majority noted, basic to the First Amendment is the principle "that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."\textsuperscript{15} The First Amendment bars the government from acting as arbiter of its citizens’ ideas. Buttressing this argument, the Court stressed that America’s strength lies in its tolerance of dissent, even dissent that impinges on views so generally embraced as to be thought beyond reproach.\textsuperscript{16} What is more trenchant, after all, than the

\textsuperscript{8} See \textit{id.} at 2547-48; \textit{id.} at 2548 (Kennedy, J. concurring).
\textsuperscript{9} \textbf{TEX. PENAL CODE ANN.} § 42.09 (Vernon 1989).
\textsuperscript{10} \textit{Johnson}, 109 S. Ct. at 2540.
\textsuperscript{11} \textit{id.} at 2540.
\textsuperscript{12} \textit{id.} at 2542.
\textsuperscript{13} \textit{id.} at 2541.
\textsuperscript{14} \textit{id.} at 2546.
\textsuperscript{15} \textit{id.} at 2544.
\textsuperscript{16} \textit{id.} at 2547.
spectacle of a political dissenter standing upon the pulpit of the First Amendment claiming that America does not tolerate dissent. By burning the American flag, Gregory Lee Johnson inadvertently illustrated, better than a thousand Fourth of July rockets, what this country stands for.

Immediately following the decision, a collective outcry of condemnation erupted. The initial reaction was a call for a constitutional amendment, a sentiment seconded by President Bush. Most legislators followed the President’s timorous lead, fearing that, otherwise, they would find themselves drowned in the roaring political tide. In an effort to avoid the political whirlpool of opposing a constitutional amendment, but also to avoid the responsibility of standing against the prevailing current, many legislators proposed, and Congress quickly passed, a statute establishing criminal penalties for anyone who “knowingly mutilates, defaces, burns, maintains on the floor or ground or tramples upon any flag of the United States.” Unfortunately for Congress, the ship they constructed in such haste has a leak.

II. A Federal Government of Enumerated Powers

Article I, section 1 of the Constitution provides that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States;” it does not grant all legislative power to Congress. Indeed, the Bill of Rights was originally deemed redundant by many drafters of the Constitution because it was generally supposed that a government of enumerated powers could not legislate in the areas to be protected by a Bill of Rights. As Alexander Hamilton explained, “Why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?” In fact, not only was a Bill of Rights deemed superfluous, it was considered perilous. Hamilton’s argument seems prescient today:

[B]ills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution but would even be dangerous. They would contain various exceptions to powers which are not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there

The Bill of Rights operates to check government power, not to confer power onto the government. As Hamilton anticipated, this elementary principle has become blurred over time, and the powers of the federal government today reach areas that Hamilton surely would have found surprising. Nonetheless, though expansive, the powers of the federal government are not plenary. Thus, Congress must find a grant of authority, either explicitly in the text or implicitly in the shadow cast by the text, upon which to base enactment of the Flag Protection Act of 1989. This section examines the possible sources of this power.

A. The Commerce Clause

The Commerce Clause has become the wellspring of a vast array of federal powers. Under the Court's interpretation of the clause, it sometimes appears that Congress has the power to enact virtually any legislation. The Court has upheld Congress' power to regulate commerce in cases where the economic effect on interstate commerce was indirect and seemingly marginal. As long as the activity exerts a substantial aggregate effect on interstate commerce, it may be federally regulated. As Chief Justice Rehnquist has emphasized, however, "[i]t would be a mistake to conclude that Congress' power to regulate pursuant to the Commerce Clause is unlimited." In fact, unless the Commerce Clause is unlimited, it cannot supply the authority for federal flag protection. First, it is highly speculative that flag burning affects interstate commerce at any level. If it does so at all, it most likely facilitates commerce by the need for more flags. Moreover, Congress made no statement accompanying the Act or in the committee reports specifying the source of its authority as the Commerce Clause or, for that matter, any other section of the Constitution. Ab-

---

21. Id.

22. The Johnson Court did not consider the power of Congress to legislate in this area, nor did it need to, since a state statute was involved. The Court did observe as follows: "There is, moreover, no indication—either in the text of the Constitution or in our cases interpreting it—that a separate juridical category exists for the American flag alone." Johnson, 109 S. Ct. at 2546.

23. See, e.g., Perez v. United States, 402 U.S. 146, 154 (1971) (Congress could criminalize purely intrastate "extortiionate credit transactions" because of their effect on interstate commerce); Wickard v. Filburn, 317 U.S. 111, 127-28 (1942) (Congress could control home wheat production because of substantial economic effect of home consumption by many farmers.).


sent some explicit statement that it was resting on its commerce powers, the Court should not stretch plausibility to supply that statement. 27 Finally, the object of the Commerce Clause is commerce, and burning flags is simply not an economic activity. To broaden the interpretation of the Commerce Clause to private noneconomic acts that might affect interstate commerce would extend Congress' power to all private acts.

B. The War Power

Another possible basis for upholding Congress' enactment of the Act might be the war powers of Article I, section 8, subsections 11 and 15. Subsection 11 grants Congress the power "[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water," and subsection 15 provides "for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions." But neither individually nor together do these sections grant to Congress the power to protect the flag within the United States.

One of the most important functions the national flag performs is to represent the United States abroad. Inherent in Congress' power to make war and provide for the common defense lies also the power to direct that the American flag be carried by the military into battle and that it accompany the military in times of peace. This authority, however, does not necessarily extend to controlling the actions of United States citizens toward the flag at home during peacetime. No relationship can be shown between protecting the flag from internal dissent during peacetime and Congress' ability to carry out the mandate of subsection 11.

Subsection 15 also does not provide a basis for Congress' effort to protect the flag. Although this subsection contains the tempting language referring to the power to "suppress insurrections," this power is

"Congress's power to protect the physical integrity of the flag has never been questioned, and is consistent with its authority to protect symbols and landmarks." S. Rep., supra, at 4. The House report does not address the source of power for the Act.

Congress' failure to specify the source of power for the Act may be explained by the fact that none of the debaters had any motivation for identifying authority for the Act. Traditional "strict constructionists," though often troubled by federal power, favor flag protection in almost any form. Traditional "loose constructionists" have less fear of federal power, and here sought to avoid tampering with the Bill of Rights at any cost. Hence, ideologues on both sides leaped immediately to debate the scope of the Bill of Rights, failing to read the constitutional text along the way.

27. See Bogen, The Hunting of the Shark: An Inquiry Into the Limits of Congressional Power Under the Commerce Clause, 8 Wake Forest L. Rev. 187, 198 (1972) ("[W]here the relationship of the law to interstate commerce is not readily apparent, the Court should require Congress to relate the law to its impact on interstate transactions. This could assist in focusing Congressional concern on the proper issues.").
limited to the more parochial concern of Congress' power to call forth the militia. One might speculate that when called forth, the militia might be directed to carry the American flag, but subsection 15 cannot reasonably be construed to grant the power Congress has asserted in order to protect the flag.

It may be argued that implicit in the war power exists the power to make the flag a national symbol, and that this power necessarily confers the authority to protect that symbol. The existence of such inherent powers is the subject of the next part in which I consider whether flag protection is one of those fundamental powers discernible in Article I.

C. A Penumbra Theory of Article I

In his most recent book, Judge Bork criticizes the *Johnson* Court for nullifying the manifest will of the majority of Americans by invalidating the laws of forty-eight states and the federal government which prohibited “desecration or defilement of the American flag.” He appears to base his argument, and I presume the federal power to legislate, on the fundamental value of the flag as symbol of the United States. Chief Justice Rehnquist explicated this argument in his dissent in *Spence v. Washington*, asserting that the “true nature of the State’s interest... [is] one of preserving the flag as ‘an important symbol of nationhood and unity... [T]he flag is a national property, and the Nation may regulate

28. See, e.g., Stearns v. Wood, 236 U.S. 75 (1915); In re The Brig Amy Warwick, 67 U.S. 635 (1862); Perpich v. United States, 880 F.2d 11 (8th Cir. 1989) (en banc).
30. Id. at 128. Judge Bork has not specifically addressed the question of Congress' authority to pass flag protection legislation. In comments before the House Judiciary Committee he argued that although *Johnson* was incorrectly decided, it could not be avoided through legislation. He advocated enactment of a constitutional amendment to protect the flag because he believed the Act would not pass scrutiny under *Johnson*’s interpretation of the First Amendment. Bork, *Flag Burning Should Be Unconstitutional*, Newsday, Aug. 9, 1989, at 63 (excerpt of testimony before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee, August 1, 1989). Nonetheless, Judge Bork’s comments clearly indicate that he would not question Congress’ power to enact such legislation if *Johnson* had been decided in favor of Texas. See supra note 29 and accompanying text.

The proposed constitutional amendment endorsed by President Bush states: “The Congress and the States shall have power to prohibit the physical desecration of the flag of the United States.” In this form, the amendment confers power onto Congress in the manner of Article I, but is ambiguous as to its effect on the First Amendment. Ironically, therefore, this amendment would resolve the present criticism over Congress’ authority to protect the flag, but leaves unresolved the issue so far the subject of most debate: the effect of the First Amendment on efforts to protect the flag. See Hearings on Measures to Protect the Physical Integrity of the American Flag: Hearings Before the Senate Judiciary Committee, 101st Cong., 1st Sess. 549-55 (1989) (testimony of Walter Dellinger).
those who would make, imitate, sell, possess, or use it.” \(^\text{32}\) Nevertheless, the principle of the national flag as the symbol of nationhood is not explicit in the Constitution; this suggests that specific guarantees in Article I have “penumbras, formed by emanations from those guarantees that help give them life and substance.” \(^\text{33}\)

But identifying powers within the penumbra of Article I is fraught with difficulties. Principal among these is the lack of textual guidance. If the power is not contained in the text, how can we be sure it is justified? Judge Bork has made this very argument, but in another context:

[T]he choice of “fundamental values” by the Court cannot be justified. Where constitutional materials do not clearly specify the value to be preferred, there is no principled way to prefer any claimed human value to any other. The judge must stick close to the text and the history, and their fair implications, and not construct new rights. \(^\text{34}\)

If the power to protect the flag were to be recognized, how should the scope of that power be ascertained? Again, Judge Bork made the point well: “We are left with no idea of the sweep of the [right] and hence no notion of the cases to which it may or may not be applied in the future.” \(^\text{35}\) In Johnson, Justice Brennan echoed Judge Bork's concern:

To conclude that the Government may permit designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernible or defensible boundaries. Could the Government, on this theory, prohibit the burning of state flags? Of copies of the Presidential Seal? Of the Constitution? \(^\text{36}\)

When the Court protects “fundamental values” not explicitly enumerated in the text of the Constitution, it is susceptible to the criticism of acting as a super legislature. Judge Bork has repeatedly warned that when the Court fails to abide by those neutral principles specified in the Constitution, it simply substitutes its own value preferences for those of the majority. \(^\text{37}\) This is an illegitimate practice in a democratic society. \(^\text{38}\)

---

\(^{32}\) Spence v. Washington, 418 U.S. 405, 421-22 (1974) (Rehnquist, J., dissenting) (quoting Smith v. Goguen, 415 U.S. 566, 587 (1974) (White, J., concurring)); see also Goguen, 415 U.S. at 586-87 (White, J., concurring) (“[It is well within the powers of Congress to adopt and prescribe a national flag and to protect the integrity of that flag. . . . [T]he flag is an important symbol of nationhood and unity. . . .”).


\(^{34}\) Bork, Neutral Principles and Some First Amendment Problems, 47 IND. L.J. 1, 8 (1971) (criticizing the Griswold Court’s identification of the right of privacy in the penumbra of the Bill of Rights).

\(^{35}\) Bork, supra note 30, at 9.

\(^{36}\) Johnson, 109 S. Ct. at 2546.

\(^{37}\) Bork, supra note 30, at 3.
In *Bowers v. Hardwick*, the Court, in an opinion by Justice White, joined by Chief Justice Burger and Justices Rehnquist, O'Conner and Powell, refused to extend the right of privacy to consensual adult homosexual conduct on this very basis: "The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution." Yet the Court has often stepped into the mire and selected out for special protection certain values not explicitly stated in the Constitution. In fact, every member of the present Court has accepted at one time or another the need to supplement the express words of the Constitution. Perhaps we should have more confidence in the Court’s ability to identify

---

38. Id. at 1-2.
40. Id. at 194.
41. Justice Brennan’s view that the Bill of Rights is broader than the guarantees expressed therein is well known. See Brennan, *Color-Blind, Creed Blind, Status Blind, Sex-Blind, It’s All There, In the Fourteenth Amendment. But Why Are These Principles Under Relentless Attack Today?*, 14 Hum. Rts. No. 2, 30 (1987). Justice Blackmun similarly accepts a broad vision of the Constitution, as reflected in his majority opinion in *Roe v. Wade*, 410 U.S. 113 (1973), in which he concluded “that the right of personal privacy includes the abortion decision” made by a woman. *Id.* at 154. Chief Justice Rehnquist has also recognized the need to supplement the Constitution. In fact, in his dissent in *Roe*, 410 U.S. at 172-73, he stated that the liberty protected by the Fourteenth Amendment “embraces more than the rights found in the Bill of Rights.” Justice Marshall, who had joined the *Roe* majority, also identified the “right to marry” as a fundamental right deserving fourteenth amendment protection in *Zablocki v. Redhail*, 434 U.S. 374, 384-86 (1978). In *Turner v. Safley*, 482 U.S. 78, 95-96 (1986), Justice O'Connor extended the holding in *Zablocki* to prison inmates, concluding that there is a “constitutionally protected marital relationship in the prison context.” *Id.* at 96. (The *Turner* court, however, did not apply a compelling state interest test, finding that “even under the reasonable relationship test, the marriage regulation [did] not withstand scrutiny.” *Id.* at 97. See also Clark v. Jeter, 108 S. Ct. 1910, 1914-16 (1988) (Justice O'Connor, for a unanimous court, applied intermediate scrutiny in striking down Pennsylvania’s six-year limitations period for child support actions involving illegitimate children.). Justice White, writing for the majority in *Bowers v. Hardwick*, 478 U.S. 186 (1986), in which the Court refused to find that homosexuals have a fundamental right to engage in consensual sexual relations, nonetheless accepted the line of decisions that defined the privacy rights conferred by the Constitution. *Id.* at 190. Recently, Justice Scalia, in an opinion upholding the imposition of the death penalty on a 16-year-old and a 17-year-old offender under *Stanford v. Kentucky*, 109 S. Ct. 2969 (1989), reiterated that the Court uses “‘evolving standards of decency,’” *id.* at 2974 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)), while interpreting the Amendment “‘in a flexible and dynamic manner.’” (quoting Gregg v. *Georgia*, 428 U.S. 153, 171 (1976)). He added that “in determining what standards have ‘evolved’ [in the present case], we have looked [to the conceptions of decency] of modern American society as a whole.” *Id.* at 2974. Justice Stevens, who was also a member of the *Roe* majority, clarified his support for the interest in liberty in his concurrence in *Thornburgh v. American College of Obstetricians*, 476 U.S. 747, 773-82 (1986). While the dissenting Justice White denied that a woman has a fundamental right to choose an abortion over childbirth, Justice Stevens stated that he believes that the liberty interest “is significantly broader than Justice White does,” *id.* at 772, and unequivocally affirmed
those principles "‘so rooted in the tradition and conscience of our people as to be ranked as fundamental.'” 42 In *Moore v. City of East Cleveland,* 43 in a plurality opinion, Justice Powell, joined by Justices Brennan, Marshall, and Blackmun, argued that the Court could conduct the appropriate inquiry. Justice Powell urged that "limits on substantive due process come [from] careful ‘respect for the teachings of history [and] solid recognition of the basic values that underlie our society.'” 44 But many academic commentators, with Judge Bork being one of the most visible, have steadfastly refused to accept any substantive development of the Bill of Rights.

Judge Bork, however, implicitly accepts the lesson of *Griswold* when he argues that the American flag can be protected by Congress. In effect, Judge Bork has found the American flag to be one of those principles "‘so rooted in the tradition and conscience of our people as to be ranked as fundamental.'” 45 Although Judge Bork finds no shadow cast by the Bill of Rights, he readily accepts the shadow cast by Article I. As for the dangers of "substantive due power," Judge Bork apparently agrees with Justice Powell’s statement in *Moore* that limits come from "careful ‘respect for the teachings of history [and] solid recognition of the basic values that underlie our society.'” 46 For example, in singling out the flag for special treatment, Judge Bork observed as follows:

The national flag is different from other symbols. Nobody pledges allegiance to the Presidential seal or salutes when it goes by. Marines did not fight their way up Mount Suribachi on Iwo Jima

that the post-conception decision to bear a child is an individual decision in one of the "sensitive areas of liberty" protected by the Constitution, id. at 777.

Justice Kennedy supported a broad interpretation of the Constitution during the hearing for his Supreme Court nomination before the Senate Judiciary Committee. In response to questions by committee member Senator Patrick J. Leahy, Justice Kennedy said, “I think that the concept of liberty in the due process clause is quite expansive, quite sufficient to protect the values of privacy that Americans legitimately think are part of their constitutional heritage.”

Nomination of Anthony M. Kennedy to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Committee on the Judiciary, 100th Cong., 1st Sess. 165 (1987). Nonetheless, witnesses who spoke in opposition to Justice Kennedy’s nomination questioned his belief in individual rights. Molly Yard, president of the National Organization of Women, based her criticism on his decisions on the Court of Appeals of the Ninth Circuit. For example, she stated that Justice Kennedy’s support for the right of privacy in *Beller v. Middendorf,* 632 F.2d 788 (1980), was easily superseded by governmental interests. Nomination of Anthony M. Kennedy: Hearings, supra, at 358.


46. *Moore,* 431 U.S. at 503 (quoting *Griswold,* 381 U.S. at 501 (Harlan, J., concurring)).
to raise a copy of the Constitution on a length of pipe. Nor did forty-eight states and the United States enact these laws to protect these symbols from desecration.\(^{47}\)

Perhaps it is too late to doubt the Court's mandate to protect certain fundamental principles not enumerated in the Constitution. The Constitution simply cannot provide concrete answers to the sundry problems for which we consult its hallowed words. Hence, the issue is not whether the Constitution should be supplemented, but rather which of its sections require supplementing and what values qualify as supplements. I shall not attempt to address these questions exhaustively. My present goal is more modest, limited to a brief discussion of whether the body of the Constitution should be treated differently from the amendments and whether flag protection is a fundamental value within the penumbra of Article I.

1. *Interpreting the Text Consistently with the Amendments*

The Bill of Rights was conceived as a counterbalance to the powers of the federal government. In 1789 the Bill of Rights was a virtual nullity because the founders interpreted the principle of enumerated powers literally.\(^{48}\) Hence, the power of the federal government was not substantial, limited to only a few spheres of activity, and the Bill of Rights had little more than symbolic importance. At least since the time of *Gibbons v. Ogden*,\(^{49}\) however, the power of the national government has been interpreted broadly and today we typically fail even to consider the basis for Congress' power to legislate. The original balance struck between the text and the amendments of the Constitution thus changed with increasingly expansive interpretations of federal power; in order to re-establish that balance, life had to be breathed into the Bill of Rights. Indeed, in order to remain faithful to the original structure of the document, the Bill of Rights has to expand in proportion to the constitutional text.

Proponents of federal legislation protecting the flag must rely on a very broad interpretation of Article I. Without such a theory, Congress does not have the authority to legislate in this area. It is of course ironic that many of these proponents adamantly oppose similarly broad constructions of the Bill of Rights. But the balance between the text and the amendments is too closely calibrated to allow different modes of interpretation. As the sword of government authority enlarges, so must the shield protecting individual liberty. Thus, the task of identifying those

---

47. R. Bork, *supra* note 29, at 128.
49. 22 U.S. (9 Wheat.) 1 (1824).
principles "so rooted in the tradition and conscience of our people as to be ranked as fundamental" should be the same in Article I as it is in the Bill of Rights.

2. Is Flag Protection a Fundamental Value?

Strictly as a matter of Congress' Article I power, to adjudge the American flag a fundamental principle is unremarkable. From the dawn of the American Republic the stars and stripes has symbolized the history and aspirations of the nation. Judge Bork is certainly correct in finding special significance in the American flag above and beyond other cherished symbols. And notwithstanding Justice Brennan's concern over the limits of Congress' power to protect symbols, the flag's distinctive features justify finding such power in Article I. Implicitly relying on a fundamental values analysis, the Senate Judiciary Committee quoted Justice Holmes, in a history of Chief Justice John Marshall, as follows:

The flag is but a bit of bunting to one who insists on prose. Yet, thanks to Marshall and the men of his generation—and for this above all we celebrate him and them—its red is our lifeblood, its stars our world, its blue our heaven. It owns our land. At will it throws away our lives.

As long as proponents of flag protection accept a broad theory of constitutional interpretation, the Act appears to withstand a challenge under Article I. Protection of the national flag is one of those fundamental interests identifiable within the penumbra of Article I and probably to
be found, ultimately, within the Necessary and Proper Clause. This conclusion does not mean, however, that the First Amendment does not place a check on this power, nor does it mean that Congress ought to wield that power. The first issue, the Act's constitutionality under the First Amendment, is beyond the scope of the present Essay. As for the second question, the Essay began with concern over Congress' reluctance to confront majority caprice. It concludes, therefore, by considering the wisdom of protecting the flag, by legislation or constitutional amendment, from the fires of political dissent.

III. Conclusion: The Wisdom of Protecting the Flag

Without doubt, an American flag burned in hatred prompts in the hearts of most Americans a similar sentiment against the dissenter. So often, as with the Nazis who marched in Skokie, those who take shelter in the First Amendment are those who hold its protections in contempt. But the genius of the Constitution lies in its indifference to the individual's cause; our scheme of government does not sacrifice individuals for the satisfaction of the majority. It is not only the Nazis who need protection, as little as they deserve it, but every one of us might have occasion to invoke the patronage of the Bill of Rights.

Frequently enough in our history dissenters might have fought against government oppression by using the burning flag as the ultimate symbol of patriotism. Surely, as the Court observed in Johnson, the framers did not hold the Union Jack in reverence. Burning the Ameri-

54. See McCulloch v. Maryland, 17 U.S. (4 Wheat) 316 (1819); see also Smith v. Goguen, 415 U.S. 566, 586 (1974) (White, J., concurring) ("Congress may provide for the general welfare, control interstate commerce, provide for the common defense, and exercise any powers necessary and proper for those ends. These powers, and the inherent attributes of sovereignty as well, surely encompass the designation and protection of a flag.").

55. The first two courts to consider the constitutionality of the Flag Protection Act invalidated it on first amendment grounds. United States v. Eichmann, No. CR89-0419 (D.D.C. March 5, 1990) WL 23807; United States v. Haggerty, No. CR89-315R (W.D. Wash. Feb. 21, 1990) WL 26813. Of special note in Eichmann is the court's discussion of the argument the United States House of Representatives made before it. According to the court, "[t]he House claims that the government seeks to protect the state's sovereign interest in the flag. ... The House argues that 'while the public may generally look to the flag for symbolizing values such as patriotism ... the government has in the flag an incident of sovereignty, with definite concrete legal significance.' " Eichmann, WL 23807 at 13-14 (quoting Motion of the Speaker and Leadership Group of the U.S. House of Representatives in Opposition to Defendants' Motion to Dismiss, at 3). The court, however, did not discuss the authority for the Act's passage in light of the sovereignty interest, but instead limited its analysis to rejecting the House's claim that the sovereignty interest rendered the Act content-neutral and thus not subject to strict scrutiny. Id. at 14.

56. Johnson, 109 S. Ct. at 2546.
can flag following Dred Scott\textsuperscript{57} or Korematsu,\textsuperscript{58} or during the McCarthy witchhunts, would have demonstrated the highest allegiance to the enduring values of this Nation. Today's dissent has often proved itself to be tomorrow's consensus. Many of this Nation's greatest victories, such as the battles for civil rights and equality for women, were fought against the "tyranny of the majority." Sometimes these battles demand extraordinary means.

Chief Justice Rehnquist in his Johnson dissent argued that "the American flag has occupied a unique position as the symbol of our Nation, a uniqueness that justifies a governmental prohibition against flag burning."\textsuperscript{59} But the flag's uniqueness also makes political dissent directed at it uniquely potent. A nation's commitment to freedom of speech is measured by the intensity of the dissent it tolerates. In West Virginia State Board v. Barnette,\textsuperscript{60} Justice Jackson explained the lesson well: "[F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order."\textsuperscript{61}

Chief Justice Rehnquist also pointed to the Americans who have fought and died defending the flag in order to illustrate the special place the flag occupies in this Nation.\textsuperscript{62} But it was not the flag that so many died to defend; it was the Nation and its principles. Although the flag is a powerful symbol of all this Nation stands for, it is still only a symbol. Ironically, the flag as a symbol incorporates the principle that potentially leads to its own physical destruction. But whatever number of flags are burned, the flames consume only the corporeal object; the history, traditions, hopes, and dreams the flag embodies cannot be so easily destroyed. Indeed, the values that the flag symbolizes are more likely to be laid to ashes by the lack of fortitude demonstrated by this country's leaders than by the burning of American flags in dissent. In protecting a symbol, in elevating form over substance, the flag may be protected, but a principle is lost.

The abhorence most feel toward flag burning, coupled with the political advantages legislators gain by forbidding such action, creates an imminent danger of crippling an enduring principle of this nation. Tocqueville saw the tranquilizing effect public opinion has on a democracy's

\textsuperscript{57} Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).
\textsuperscript{58} Korematsu v. United States, 323 U.S. 214 (1944).
\textsuperscript{59} Johnson, 109 S. Ct. at 2548 (Rehnquist, C.J., dissenting).
\textsuperscript{60} 319 U.S. 624 (1943).
\textsuperscript{61} Id. at 642.
\textsuperscript{62} Johnson, 109 S. Ct. at 2550-51.
leaders. He observed in 1831 that "[i]n that immense crowd which throngs the avenues to power in the United States, I found very few . . . who displayed that . . . candor and . . . independence of opinion which frequently distinguished the Americans in former times, and which constitutes the leading feature in distinguished characters wheresoever they may be found." It remains to be seen whether the leaders of today can match the independence of opinion of the leaders who implanted the principle of freedom of speech in this nation's law.

63. TOCQUEVILLE, supra note 1, at 267.
Pure Symbols and the First Amendment

By CALVIN R. MASSEY*

When people converse in a common language, mutual understanding is the usual result. To be sure, miscommunication does occur through confusion on the part of the speaker, employment of terms that carry different meanings to speaker and auditor, inattention, and a host of other human failings that add up to ambiguity. Literary deconstructionists go so far as to claim that all language is indeterminate,¹ and wrestle over the possibility of shared meaning in any given community.² If such difficulties are encountered in ordinary speech, one might suppose the task of divining meaning to be even more uncertain when symbols are employed as communicative devices. A moment's reflection, however, will suggest that the problems are quite similar. Consider the swastika: emblem of Nazi hatred or Buddhist mandala? A symbol, like a word, is not a "crystal, transparent and unchanged; . . . [but] the skin of a living thought[,] and may vary greatly in color and content according to the circumstances and the time in which it is used."³ Despite the vagaries of language as a communicative medium, communication occurs through its use. Perhaps symbols, even more than words, contain a distilled clarity that overcomes the ordinary difficulties of communication, and facilitates mutual understanding.

Consider the American flag, a symbol adopted by the nation’s government for the purpose of sending some message to the community. Or consider a crucifix, crèche, or menorah—symbols laden with particular religious meaning. What is the message conveyed by these symbols?

---

¹ For a general survey of the issue, see Heller, Structuralism and Critique, 36 STAN. L. REV. 127 (1984).
² See, e.g., J. White, When Words Lose Their Meaning: Constitutions and Reconstructions of Language, Character, and Community (1984); S. Fish, Is There a Text in This Class?: The Authority of Interpretive Communities (1980); White, Law as Language: Reading Law and Reading Literature, 60 TEX. L. REV. 415 (1982); Fish, Working on the Chain Gang: Interpretation in Law and Literature, 60 TEX. L. REV. 551 (1982).
What consequences flow from the fact that it is a government that chooses to speak through the symbol? May a government mandate that its symbolic speech remain a soliloquy or, once the speech has been uttered, does the community of auditors acquire a right to reply in kind? Both Texas v. Johnson,\(^4\) last term's flag-burning case, and County of Allegheny v. American Civil Liberties Union,\(^5\) which considered the governmental establishment of religion implicit in official display of a crèche and menorah, asked and answered these questions, albeit implicitly. It is my intention here to render more explicit the Court's resolution of these issues and, along the way, to speculate upon the emotional explosion that Johnson evoked and its meaning to freedom of speech.\(^6\)

I. The Flag and Free Speech

During the 1984 Republican National Convention, Gregory Johnson publicly burned an American flag as part of a political demonstration both protesting the Reagan Administration and condemning the United States. Johnson was subsequently convicted of desecration of a venerated object, an offense that required proof of Johnson's knowing or intentional physical mistreatment of the flag "in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action."\(^7\) His conviction was overturned by the Texas Court of Criminal Appeals on the ground that application of the Texas "desecration" statute to Johnson's flag-burning violated the speech clause of the First Amendment.\(^8\) The United States Supreme Court affirmed.\(^9\)

In its appeal to the Supreme Court, Texas conceded that Johnson's

---

6. When "freedom of speech" is mentioned, most Americans reflexively think of the First Amendment. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . "). By the incorporation doctrine this guarantee has long been enforced against the states. See, e.g., Fiske v. Kansas, 274 U.S. 380 (1927). But even prior to adoption of the Constitution the states provided their own independent guarantees of freedom of speech. See, e.g., Pennsylvania's 1776 Constitution ("the people have a right to freedom of speech"). 5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL ChARTERS, AND OTHER ORGANIC LAWS 3081-92 (F. Thorpe ed. 1909); 8 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 277-85 (W. Swindler ed. 1979). These guarantees continue to exist independently of the federal Constitution and carry different substantive meaning. See, e.g., People ex rel. Arcara v. Cloud Books, Inc., 68 N.Y.2d 553, 503 N.E.2d 492, 510 N.Y.S.2d 844 (1986) (interpreting the free speech provision of New York's Constitution more expansively than the United States Supreme Court has interpreted the federal analogue).
7. TEX. PENAL CODE ANN. § 42.09(b) (Vernon 1989).
conduct was expression, which brought the case squarely within the framework erected by the Court to test the limits of governmental control of symbolic speech. Most important, of course, is the four-part test of United States v. O'Brien, which permits governmental regulation of the "non-speech" or "conduct" element of symbolic speech if the government can first establish an interest for the regulation that is strong, legitimate, and not related to suppression of the speech element. Texas offered two interests as sufficient legitimate interests unrelated to suppression of the speech element of Johnson's flag-burning; both were ultimately rejected, although for slightly different reasons.

Texas contended that its governmental interest in preventing breaches of the peace was sufficiently legitimate and unrelated to suppression of speech to uphold Johnson's conviction under the desecration statute. The problem with this argument was two-fold. First, there already existed another Texas statute forbidding breach of the peace that could have readily accomplished Texas' stated objective. The desecration statute was thus not necessary, a fact that cast considerable doubt on the legitimacy of the asserted interest. Second, the interest advanced by Texas was one that related rather directly to the speech component of Johnson's flag-burning. Stripped of its rhetorical husk, the argument advanced by Texas was that the state could "ban the expression of certain disagreeable ideas on the unsupported presumption that their very disagreeableness will provoke violence." In order to prevail on this theory, Texas would have had to establish that Johnson's flag-burning either fell within the narrow category of fighting words "likely to provoke the average person to retaliation, and thereby cause a breach of the peace," or was "directed to inciting or producing imminent lawless action and was likely to incite or produce such action." Texas was unable to carry this burden; indeed, it appeared not even to try very hard, for it claimed that the Chaplinsky and Brandenburg standards were satisfied merely by a showing of possible violence. Predictably, the Court concluded that

10. Id.
12. Id. at 377.
13. Tex. Penal Code Ann. § 42.01 (Vernon 1989). The statute prohibits, among other actions, the use of "abusive, indecent, profane, or vulgar language," § (a)(1), and offensive gestures or displays that tend to incite an immediate breach of the peace, § (a)(2).
17. Johnson, 109 S. Ct. at 2542 (Texas argued "that it need only demonstrate 'the potential for a breach of the peace.'") (quoting Brief for Petitioner at 37) (emphasis added).
possibility was simply not enough.\textsuperscript{18}

Texas also claimed that its interest in preserving the flag as a symbol of nationhood and national unity was sufficiently legitimate and unrelated to suppression of Johnson's expression to bring the desecration statute within the lenient remainder of the \textit{O'Brien} test.\textsuperscript{19} The problem with this contention is that Texas' claimed interest—maintaining the integrity of the flag as symbol—is precisely coterminal with the expression that inheres in destroying that symbol as a means of negating its symbolic message. Accordingly, the Court concluded that Johnson was "outside of \textit{O'Brien}'s test altogether."\textsuperscript{20} But that, of course, did not end the inquiry, for even outside of \textit{O'Brien} the state's asserted interest might be sufficient if it could survive "the most exacting scrutiny" applied to statutes that prohibit speech that has a specified emotive impact on the audience.\textsuperscript{21} Texas' interest failed that scrutiny because it sought to maintain a governmental monopoly on the flag as a medium of symbolic speech. The Court stated, "If we were to hold that a State may forbid flag-burning wherever it is likely to endanger the flag's symbolic role, but allow it wherever burning a flag promotes that role... we would be saying that... the flag... may be used as a symbol... only in one direction."\textsuperscript{22}

This is the core of the matter. The flag is a virtually pure symbol: its meaning (and utilitarian function) is almost totally symbolic. Any nonsymbolic function of a pure symbol is so slight as to be overshadowed by the symbolic message. The flag is ordinarily used only as a symbol. When imagining its use as a dustrag, or a seatcover, or a window curtain, one is hard-pressed to extinguish the emotional overtones of its symbolic message. As Marshall McLuhan would have put it, the medium is the message. When a symbol possesses no significant meaning apart from its symbolic message, its physical integrity (the medium) cannot be protected without simultaneously both protecting its message and suppressing the symbolic message of disagreement implicit in destruction of the symbol. In this the flag is almost sui generis.

To understand more fully, consider the more usual case of a "mixed symbol," one that carries a symbolic message but also performs utilitarian functions that are not message-carrying. A Mercedes-Benz, for example, may convey a symbolic message of wealth and privilege but also

\begin{itemize}
\item \textsuperscript{18} Id.
\item \textsuperscript{19} Id.
\item \textsuperscript{20} Id.
\item \textsuperscript{21} Boos v. Barry, 485 U.S. 312, 321 (1988). In Boos the Court struck down a District of Columbia ordinance that prohibited public display of signs within 500 feet of embassies if the sign would bring the foreign government into "public odium" or "public disrepute."
\item \textsuperscript{22} Johnson, 109 S. Ct. at 2546.
\end{itemize}
simultaneously performs the prosaic function of transport. The United States Capitol or the White House may each be a symbol of the nation (or prominent political aspects thereof) but the buildings also perform the more mundane functions of office space, housing, assembly, and museum. To prohibit the destruction of the White House is quite justifiable, even when the bomber is acting out of a sincere desire to deliver a strong symbolic message, since the collateral (and nonsymbolic) aspects of the White House provide a nonspeech-related governmental interest in prohibiting the symbolic speech implicit in destruction of the symbol. The O'Brien test is a recognition of this fact, although it does not employ the usage of mixed or pure symbols.

By contrast, when pure symbols—those in which the symbol's corporeal existence is necessarily fused with the message it conveys—are protected by governments from physical assault, the government will be unable to advance an interest unrelated to speech because no such interest exists. To put it slightly differently, since pure symbols carry messages—and only carry messages—governments may not stop the conversation once one opinion has been uttered by exhibition of the symbol. When the arena of speech lies wholly in the realm of the purely symbolic, reply in kind is not only to be expected but deserves preservation, lest the guarantee of freedom of speech stop at the frontier of language and symbol.

Does this mean that some future Gregory Johnson is entitled to bomb the Washington Monument, or to ignite his American flag in a town square pungent with leaking natural gas? Hardly. Consider the cases separately. The Washington Monument is possibly not a pure symbol, for its function as a tourist attraction arguably overshadows its symbolic message of remembrance of President Washington. In the realm of the mixed symbol, an easy case can be made for a governmental interest unrelated to speech—public safety—sufficient to prohibit destruction of

---

23. It might be argued that this doctrine would prevent governmentally established and enforced monopolies in areas such as trademarks, since a trademark has a purely symbolic commercial message. The case of a commercial symbol and the extent of its protection against commercial invasion is quite different from the issue raised by parody of a trademark for wholly political, and noncommercial, purposes. Since trademark parodies undertaken as a means of artistic expression are entitled to some free speech protection, even when commercial gain may be an object, political parodies undertaken for no commercial advantage would seem presumptively protected by the First Amendment. See, e.g., Cliffs Notes, Inc. v. Bantam Doubleday Dell Publishing Group, Inc., 886 F.2d 490 (2d Cir. 1989); Rogers v. Grimaldi, 875 F.2d 994 (2d Cir. 1989) (commercial and artistically expressive trademark parodies subjected to a balancing of consumer confusion and first amendment interests). Under this rationale, San Francisco Arts & Athletics v. United States Olympic Comm., 483 U.S. 522 (1987), which upheld a congressionally established monopoly on the use of the term "Olympic," is a prosaic example of protecting a trademark from commercial exploitation by rivals.
the symbol. A similar argument can be made to suppress ignition of the flag in a cloud of natural gas. While in this case the flag is no less pure symbol, the collateral consequences of the symbolic speech are so large as to permit prohibition. This example is not materially different from the long-recognized set of circumstances that permit suppression of speech that is likely to produce imminent lawless action, or that permit reasonable regulation of the time, place, and manner of speech. Thus, the destruction of pure symbols, like any other form of symbolic speech, is ultimately subject to the same content-neutral, conduct-focusing standards applicable to all speech.

By contrast, the dissent’s approach to the problem of governmental protection of pure symbols was both to broaden ominously the “fighting words” exemption from free speech and to endorse suppression of symbolic speech so long as other means of speech are left open. Seizing upon Chaplinsky’s observation that “fighting words” are “no essential part of any exposition of ideas,” Chief Justice Rehnquist argued that flag-burning also was no essential part of any exposition of ideas. To the extent this passage may be taken to mean that content and form are separable—and thus that the state should be permitted to insist upon an undisturbing form of the message—it is readily evident that the premise upon which the dissent forms its judgment is simply not there. For in the case of pure symbols, both form and content, and medium and message are bonded into a single undifferentiated mass. Either the dissent failed to understand this point or, fully understanding it, was willing to embark upon the uncharted and stormy seas of content regulation. If that was indeed the dissent’s ambition, the dissenters owed us a glimpse of the test they would employ to filter acceptable content from the unacceptable. This they failed to do, although they did suggest that such prohibitions would be acceptable if they left the symbolic speaker with other modes of symbolic speech and the usual verbal forms of expression. But, once again, this is an approach that fails in the world of pure symbols, for the protected symbol carries a message unique to its status as a combined object and message. Response to that unique message may be fully possible only via the same combination of medium and message, since pure symbols are apt to be highly charged emotive devices.

27. Id.
29. Id. at 2554.
The high emotional pitch of pure symbols—whether flag, crucifix, or some other device—complicates considerations of free speech in a dialogue of symbol and its destruction. But the issue is even more complicated by the fact that Texas v. Johnson involved a meeting between two symbols: the pure symbol of the flag and the increasingly refined and pure symbol of free speech. Dean Lee Bollinger has argued that free speech requires a society that professes to protect it to allow the most distasteful ideas to be aired, in order to cultivate the virtues of tolerance and self-restraint.\(^{30}\) Cultivation of these virtues may be important in and of themselves, but Bollinger suggests that "toleration of undesirable and unwanted behavior . . . [illumines] troublesome tendencies within those wishing to be intolerant, often by the community’s engaging in self-restraint toward the very behavior it seeks to avoid."\(^{31}\) Tolerating abhorrent speech permits us to identify our biases, and perhaps enables us to purge ourselves of hidden intolerance. Paradoxically, societal growth and even transformation are accomplished by tolerating the conduct we seek to extirpate.

This paradox may be understood best by drawing an example from humanistic psychology. Carl Jung posited that within every person lies a "shadow," a largely unconscious and morally uncontrollable collection of archetypal primitive emotions, judgments, and impulses that function as a dark side to every personality.\(^{32}\) The shadow has a tendency to escape recognition because it is usually projected onto some other person. Hence, when a person loathes someone else it may well be that the loathing is really of one’s own unrecognized evil.\(^{33}\) It is the rare person who moves beyond stubborn resistance to recognition of this projection, but once a person has done so—and faced "the relative evil of his nature"\(^{34}\)—he has begun the process of transforming and transcending his inner demon.

From a societal perspective, toleration of ugly speech, whether racist epithet or burning flag, may be the avenue to recognition of our collective shadow, the first step in its eventual voluntary extirpation by transformation. The intolerant impulse—banning racist speech or flag-burning—may have counterproductive long-term results, for it enables the society to tell itself (smugly and falsely) that it has no problem; the problem lies within those horrid offenders whom we have righteously muzzled. Pro-

\(^{31}\) Id. at 238.
\(^{33}\) Id. at 146.
\(^{34}\) Id. at 148.
jection of our evil onto others in order to escape recognition of it in our-
selves is as common to societies as individuals.

When free speech is viewed as a symbol of the aspirations of a com-
munity to tolerance, the grating deviations from our customary norms
test the limits of our aspiration and our commitment to the symbolic
ideal. Fidelity to free speech becomes the miner's canary of our aspira-
tion to tolerance. Thus it assumes a symbolic importance of its own,
quite transcendent of the value of speech it preserves. Free speech is
both a tangible doctrine to secure the open marketplace of ideas we re-
vere, and a placeholder for societal hopes that go far beyond speech it-
self—indeed, which go to the vision of meaning we have for our society.
When free speech is elevated to a plane of such symbolic importance, its
invocation in the dimension of flag-burning represents an intersection of
highly charged emotional vectors. Pure symbols, like pure hydrogen, are
volatile.

It is therefore hardly surprising that the reaction to Texas v. Johnson
has been so vehement. The call for a constitutional amendment, while
not ended, has been considerably muted. Nevertheless, the "Flag Pro-
tection Act of 1989" has become law, and has spawned almost immedi-
ate arrests for flag-burning. The issue will thus be revisited by the
Court, for the recent Act prohibits the knowing mutilation of the flag,
without regard to the emotive impact of the act upon any particular audi-
ence. In Johnson redux, the Court will be forced to consider the limits
of its commitment to the logic of pure symbols. If the purely symbolic
nature of the flag is the crux of Johnson, the Court will likely find the

35. Before the advent of sophisticated systems to measure the levels of coal gas in mines,
coal miners brought canaries into the shafts to test for presence of the deadly gas. The canaries
were more sensitive than humans; when the birds died, the miners were warned to evacuate.
My colleague Brian Gray brought this metaphor to my attention.

36. The Senate rejected a proposed amendment on October 19, 1989. See N.Y. Times, October
20, 1989, at A1, col. 1 (late ed.).


a flag on the steps of the U.S. Capitol was none other than Gregory Johnson. The next day,
formal charges under the Flag Protection Act were filed against Johnson's three compatriots,

The first judicial decision finding the Flag Protection Act unconstitutional was United
States v. Haggerty, No. CR89-315R (W.D. Wash. Feb. 21, 1990) LEXIS 1652, which invali-
dated the Act as applied to persons who burned the flag as part of a political protest.

39. The Act also requires immediate certification to the United States Supreme Court of
the question of the constitutionality of the Act, and mandates that the Supreme Court accept
jurisdiction and expedite decision.
1989 "Flag Protection Act" invalid. A contrary decision may send more mixed signals. Prudential conservation of the First Amendment from radical pruning by overwrought legislators may dictate judicial confusion of pure symbols and conduct, albeit at some considerable cost to the symbolic and substantive values imbedded in free speech. Or the Court may simply not be as wedded to the fusion of message and symbol as its Johnson opinion implies. We shall see.

II. Religious Symbols and the Establishment of Religion

Disagreement among the Justices in Johnson focused not on what the government said through the symbolic medium of its flag, but on the significance to free speech of the statement. In County of Allegheny v. American Civil Liberties Union, the government also spoke through symbols, but the Court was divided over what was said. During the Christmas season, the Allegheny County Courthouse displayed a crèche surrounded by poinsettias. The crèche was owned by the local Roman Catholic diocese, which fact was duly noted in the display, and occupied about one-half of the main staircase. One block away, the Pittsburgh city government displayed an eighteen-foot privately owned menorah on the outside of its municipal offices and a forty-five-foot decorated Christmas tree next to the menorah. The Court concluded that display of the crèche violated the Establishment Clause but display of the menorah did not.

In both instances the government spoke through the use of religious symbols, but a shifting coalition of Justices, pivoting upon Justices Blackmun and O'Connor, found greater significance for the Establishment Clause in the message communicated via the crèche than in that transmitted through the menorah. Justices Brennan, Marshall, and Stevens (the "secularists") joined Justices Blackmun and O'Connor in invalidating the crèche but dissented from their judgment upholding display of the menorah. Justices Rehnquist, Scalia, Kennedy, and White (the "ac-

40. In United States v. Haggerty, supra note 38, Judge Barbara Rothstein concluded that the governmental interests advanced in support of the Act were related to the suppression of expression precisely because the government employed the flag as a symbol. A Cook County (Chicago) Circuit Court judge has also read Texas v. Johnson in this fashion, relying upon it to strike down Chicago's ordinance banning flag desecration. Judge Kenneth Gillis enjoined enforcement of the Chicago ordinance, finding that it had a "deterrent effect on freedom of expression" and noting that "[w]hen the flag is displayed in a way to convey ideas, such display is protected by the First Amendment." N.Y. Times, Nov. 1, 1989, at B7, col. 4. (late ed.).
42. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . . "). The Establishment Clause has bound the states via the Fourteenth Amendment's Due Process Clause since Everson v. Board of Education, 330 U.S. 1, 15-16 (1947).
accommodationists") joined Justices Blackmun and O'Connor in upholding the menorah but dissented from the crèche decision. Because the effective balance of power on this issue was held by the centrist alliance of Justices Blackmun and O'Connor, it is important to understand the fashion in which they parse the establishment clause meaning of governmental use of religious symbols.

Modern establishment clause jurisprudence begins with *Lemon v. Kurtzman* and unravels shortly thereafter. Under *Lemon*, a governmental action survives scrutiny if it has a secular purpose, if its effect (regardless of purpose) neither advances nor inhibits religion, and if it does not involve excessive "entanglement" of government and religion.

In the context of governmental displays of religious symbols during December, the most recent word prior to *Allegheny* was *Lynch v. Donnelly*, in which the Court upheld municipal display of a crèche surrounded by various secular symbols of the season including Santa Claus and his fabled reindeer. Unfortunately, as Justice Blackmun candidly observed in *Allegheny*, "[t]he rationale of the majority opinion in *Lynch* is none too clear."

More lucid to Justice Blackmun was Justice O'Connor's *Lynch* concurrence, in which she sought to focus inquiry on whether the government had made "adherence to a religion relevant in any way to a person's standing in the political community." In Justice O'Connor's view, governments might do this in one or both of two ways: by entanglement with religion to such an extent that government loses its independence from religion, or by governmental "endorsement or disapproval of religion [that] . . . sends a message to the non-adherents [or religious believers] that they are outsiders, not full members of the political community."

Justice Blackmun stitched together the common reasoning of Justice O'Connor and the four *Lynch* dissenters in order to conclude that governmental use of religious symbols violates the Establishment Clause if "it has the effect of endorsing religious beliefs." But "the effect of the government's use of religious symbolism depends upon its context."

---

43. 403 U.S. 602 (1971).
44. *Id.* at 612-13 (quoting Walz v. Tax Commission, 397 U.S. 664, 674 (1970)).
48. *Id.* at 688.
50. *Id.*
Applying these principles, Justices Blackmun, O'Connor, and their allies of the accommodationist block concluded that the menorah was acceptable because it was part of a pluralistic, and partially secular, display that conveyed a secularized message. The purity of the religious symbol was diluted, both by context (the presence of a larger Christmas tree and an utterly secular sign saluting liberty) and by the Court's conclusion that Chanukah is both a religious and a secular celebration. The first point assumes that pure symbols can be diluted—or adulterated—by association with other pure symbols. The presumed effect of such commingling of symbolic messages is delivery of an ambiguous message, much like a political candidate responding to inquiry about his position on abortion by saying "I remain resolutely opposed to abortion, but steadfastly supportive of a woman's right to undo an unwanted pregnancy." Joint display of the United States and Soviet Union flags may convey a message of friendship, or suggest that the United States is a communist dictatorship, or imply that the Soviet Union has become a representative democracy. The meaning of the message lies in the purposes of the exhibitor and the apprehensions of the viewer.

The second point is really a conclusion that the menorah may be a pure symbol in the sense that its function is almost wholly symbolic, but the message it carries is mixed, in that it is neither wholly religious nor entirely secular. Thus, from the perspective of pure symbols, the governmental display of the menorah is a case of speech sufficiently ambiguous to render its meaning unintelligible. Governments may speak through religious symbols if we can't understand what they are saying.

The same principles, applied to the crèche by Justices Blackmun, O'Connor, and their secularist allies, resulted in a conclusion that because its message was a sufficiently clear endorsement of religion, its effect was to advance religion. This symbol, carrying only a religious message, was inherently more pure than the menorah, and its context was not sufficiently diluted. Poinsettias, apparently, are not enough, but Santa and his reindeer are adequate dilutants. Left for another day are questions as to the efficacy of elves, mistletoe, and holly sprigs.

It is unfortunate that the Court chose to focus solely on the effect prong of Lemon, since employment of pure symbols, especially when diluted by association with other pure symbols, raises troublesome ques-

51. Id. at 3112-13.
52. Id. at 3112.
tions about the purpose of such display. Suppose that Pittsburgh exhibited together a crèche, a menorah, an image of the Buddha, a copy of the Koran, and a sign exhorting atheism. Is this sufficient dilution to satisfy the Allegheny refinement of Lynch and Lemon? If not, would the whole thing be saved by adding a few Christmas trees and Easter bunnies? Quite apart from the effect on the viewer of this commingling of symbols is the question of the government's purpose in choosing such a combination. Was it to ridicule religion or to express neutrality about any particular religion? How are we to know? Suppose that the government sincerely intended to express neutrality but the message to viewers was one of governmental hostility?

The secularists would resolve these issues by requiring that governments completely eschew the use of religious symbols; the accommodationists would tolerate governmental use of religious symbols so long as they are "[n]on-coercive" and merely a "passive acknowledgment of . . . practices that are accepted in our national heritage." While these groups bring widely divergent norms to the task of interpreting the Establishment Clause, they do agree that religious symbols are pure symbols. For that reason the secularists argue that such symbols should be forbidden to governments, for their use in isolation delivers a message that government is not neutral with respect to religion, and their use in association with other religious or secular symbols risks offense to religious practitioners, promotes divisiveness within the community, and fails to communicate neutrality. For the same reason—the purity of the religious symbol—the accommodationists argue for permitting governmental use, since the message is wholly symbolic, lacking the bite of coercion and carrying only acknowledgment of cultural heritage. Disagreement centers on the significance to the Establishment Clause of the pure symbol's message—both that intended to be delivered and that

54. The Court noted that there was no need to review Lemon's purpose or entanglement tests because those issues were not considered by the court of appeals. Allegheny, 109 S. Ct. at 3101 n.45. Nevertheless, some illuminating dicta in these directions would have been welcome.

55. The answer of the secularists is clearly "no." "There can be no doubt that, when found in . . . [the] company [of religious symbols], the [Christmas] tree, serves as an unabashedly religious symbol." Id. at 3126 (Brennan, J., concurring and dissenting).

56. But the secularists would tolerate such direct messages as the motto "In God We Trust," presumably because we don't. "[S]uch practices as the designation of 'In God We Trust' as our national motto, or the references to God contained in the Pledge of Allegiance can best be understood . . . as a form of 'ceremonial deism,' protected from establishment clause scrutiny chiefly because they have lost through rote repetition any significant religious content." Lynch v. Donnelly, 465 U.S. 668, 716 (1985) (Brennan, J., dissenting) (footnote omitted).

57. Allegheny, 109 S. Ct. at 3138 (Kennedy, J., concurring and dissenting).
actually received—rather than on the message itself or its purely symbolic quality.

The centrists, by contrast, see religious symbols as less pure, particularly when their message is obscured, diluted, or adulterated by association with other such symbols. The centrists seem more willing than either the secularists or the accommodationists to read diffuse and ambiguous meaning into governmental use of religious symbols. The centrists see a clear distinction “between a specifically Christian symbol, like a crèche, and more general religious references, like the legislative prayers”\footnote{58} at issue in \textit{Marsh v. Chambers}.\footnote{59} Neither the accommodationists nor the secularists see any significant distinction, for establishment clause purposes, between the messages conveyed in the two cases. But the centrists do agree that when the message is pure, and purely religious, its meaning is clear and governments may not transmit it. The debate between the centrists and both the other camps is over the purity of the message delivered by religious symbols. The accommodationists and secularists agree on the purity of the symbolic message but argue about its significance to the Establishment Clause.

\section{Conclusion}

The Court has recognized the power of symbolic communication, and appears to discern the difference between pure symbols (which function only as communicators and deliver a uniform, clear message), and mixed symbols (which perform both communicative and other functions, or which deliver an ambiguous message). But disagreement ranges about the significance to the Constitution of pure symbols. To confound the problem, only three (and perhaps as many as five) Justices maintained fully consistent positions in \textit{Johnson} and \textit{Allegheny} with respect to both recognition of pure symbols and their constitutional significance.

Justices Brennan and Marshall both recognize the pure quality of the symbols at issue and attach constitutional significance to that fact. Justice Blackmun generally recognizes the purity of the symbols (although he is more willing to find ambiguity with religious symbols) and finds constitutional significance in their purity.

Chief Justice Rehnquist and Justice White either fail to recognize the flag as pure symbol or attach no constitutional significance to the ramifications of that fact.\footnote{60} Both recognize the purity of religious sym-

\footnote{58. 109 S. Ct. at 3106.} \footnote{59. 463 U.S. 783 (1983).} \footnote{60. \textit{See} text accompanying notes 23-26.}
bols but find that purity to be of no importance to the Establishment Clause.

Justices O'Connor and Stevens likewise either fail to recognize the flag as pure symbol or find no constitutional significance in that purity. Both recognize the purity of religious symbols (though Justice O'Connor shares Justice Blackmun's doubts about their purity) but, unlike Justices Rehnquist and White, they ascribe establishment clause significance to pure religious symbols.

Justices Scalia and Kennedy are consistent in finding both flags and religious icons to be pure symbols, but they see significance in that recognition only when it comes to the Free Speech Clause. For these Justices, perhaps the pure symbolism of free speech is the added ingredient that leads them to hear the alarm bells of constitutional invalidity when confronted with governmental deployment of a pure symbol in a speech context, but to hear only silence when similarly pure symbols are used by governments in an establishment clause context.

These cases are only an early chapter in a new saga of constitutional development. The intersection of pure symbols with the Free Speech and Establishment Clauses will see more activity, and we will probably not have to wait very long for this judicial pot to boil. Unfortunately, it is considerably more difficult to divine what will come out of the pot.