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The Sacred Flag and the First Amendment

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INTRODUCTION

The American flag is a rectangular piece of cloth with the colors red, white and blue arranged in stars and stripes. Standing alone, like markings on a piece of paper, the flag lacks meaning. Possible meanings emerge only when this piece of cloth is seen and interpreted, just as the meanings of markings on a piece of paper arise only when they are apprehended as words of a language. Like the interpretation of such words,¹ the meanings attributed to the American flag depend on what the viewer brings to the activity of viewing. The piece of cloth can yield aesthetic meanings by virtue of its shape, color and design. Indeed, numerous artists have made aesthetic use of the American flag.² Similarly, viewers are likely to perceive cognitive and emotional meanings from the cloth and its symbolic configurations.

These observations draw from semiotic theory and structuralist studies of language.³ In semiotic terms, the American flag is a signifier and the various aesthetic, intellectual and emotional meanings that may be attached to it are signifieds. What is signified by the American flag has no natural or necessary relationship to that signifier; rather, what is signified by the American flag is solely a function of socially created conventions.⁴ Just as words have no meaning apart from the conventions of the language in which they appear, and apart from their relation to other words in that language,⁵ the American flag similarly has no meanings apart from those conventionally given to it by those who see it.

In the case of the American flag, many conventionally agreed upon meanings have not only intellectual content but emotive content as well. Many Americans feel strongly about the flag, seeing within its borders a patriotic symbol of both the nationhood and the ideals of the United States.

1. See, e.g., S. FISH, *IS THERE A TEXT IN THIS CLASS?* (1980).

2. See the amicus curiae brief filed on January 25, 1989, by sixteen famous artists (Jasper Johns, Robert Rauschenberg and Claes Oldenburg among them) in support of the defendant in *Texas v. Johnson*, 109 S. Ct. 2533 (1989).

3. See Sturrock, *Introduction*, in *STRUCTURALISM AND SINCE: FROM LÉVI-STRAUSS TO DERRIDA* (J. Sturrock ed. 1979) [hereinafter *STRUCTURALISM*].

[A] true ('serious') structuralist is to be recognized by the use he makes of a number of technical terms, taken over, as it happens, from structural linguistics. One of these terms is *sign*, which is central to the 'lexicon of signification.'

This lexicon derives from the work of the Swiss linguist Ferdinand de Saussure (1857-1913), whose theoretical work on natural or human language in the early years of the present century lies behind all of modern structuralism.

[This includes his] insights into the basic unit of any language, the linguistic sign. [A]ny word in a language is a sign, and language functions as a system of signs.

Id. at 5-6.

4. *Id.* at 8-9.

5. *Id.*, see *infra* notes 89-98 and accompanying text (containing further discussion of signifier and signified in the context of the *Johnson* decision).

Indeed, as Chief Justice Rehnquist noted, many approach the American flag "with an almost mystical reverence regardless of what sort of social, political, or philosophical beliefs they may have."⁶

In this Article, I explore the deeply theoretical implications of the Supreme Court's controversial 1989 decision in *Texas v. Johnson*.⁷ The *Johnson* Court held, 5-4, that the Constitution prohibited Texas from punishing a person who burned an American flag as a means of political protest under a criminal statute which in part defined the criminal conduct in terms of its offense to the viewers of the conduct.⁸ In Part I, after commenting briefly on earlier flag-related Supreme Court case law as well as the Court's 1990 decision in *United States v. Eichman*,⁹ I evaluate Justice Brennan's opinion for the Court in *Johnson*. I conclude that Justice Brennan's opinion is a significant first amendment opinion reminiscent of Justice Harlan's landmark opinion in *Cohen v. California*.¹⁰

In Part II, I analyze the unusual substance and rhetoric of Chief Justice Rehnquist's dissenting opinion in *Johnson*.¹¹ Taking seriously the dissent's aversion to *desecration*, I examine what it means to *sacralize* an object, focusing on the connection between the symbolic and the sacred. Assisted by the insights of theologian Mircea Eliade regarding the sacred,¹² I suggest that the dissenters improperly conflated signifier and signified to derive an understanding of the American flag as in fact *sacred*. I then argue that it is this move which accounts for the dissent's insistence that the desecration of the flag should not be protected by the first amendment.¹³

In Part III, I consider the implications of understanding the American flag as sacred. I first explore the possible outcome of *Johnson* had the Court approached it as an establishment of religion case. I then discuss the similarities between the Court's current establishment of religion approach

6. *Johnson*, 109 S. Ct. at 2552 (Rehnquist, C.J., dissenting).

7. 109 S. Ct. 2533 (1989). Justice Brennan wrote the majority opinion, while Chief Justice Rehnquist and Justices White and O'Connor joined in dissent. *Id.* at 2548. Justice Stevens filed a separate dissent. *Id.* at 2555.

8. *Id.* at 2548.

9. 110 S. Ct. 2404 (1990).

10. 403 U.S. 15 (1971). I will premise this conclusion on the rhetoric used, the straightforward first amendment approach taken, and the arguments of the dissent that Justice Brennan's opinion fails to address. See *infra* notes 82-88 and accompanying text.

11. 109 S. Ct. at 2548.

12. See *infra* notes 102-19 and accompanying text.

13. As I will argue, treating the flag as sacred amounts to exempting it, and therefore flag burning, from the first amendment-world altogether.

Helpful law review articles dealing with flag burning and symbolic speech include Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975); Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 UCLA L. REV. 29 (1973); and Note, *Symbolic Conduct*, 68 COLUM. L. REV. 1091 (1968).

to displays of a crèche scene¹⁴ and the dissent's approach in *Johnson*. In Part IV, I analyze the implications of treating *Johnson* as a civil religion case and inquire what loss may inure to our sense of political community as a result of the Court's decision.

That many consider the flag a sacred patriotic symbol exemplifies what Nietzsche described as a society's aesthetic impulse to create myths.¹⁵ To the extent that the cohesiveness of the American political community depends on the existence of myth, any diminution of the flag as a sacred patriotic symbol may adversely affect an individual's sense of connection to the political community. Correspondingly, an individual may become less willing to participate in self-government. In light of these concerns, one could make a strong argument that *Johnson* unduly promoted individual liberty at the expense of political community.

Nevertheless, I suggest in Part V that, all in all, *Johnson's* lessons outweigh its potential disadvantages. Even apart from its articulation of traditional first amendment principles, *Johnson's* lessons include: a deep understanding of what the American flag as patriotic symbol represents; the triumph of reason and, therefore, of the Enlightenment; and, finally, important insights about symbols, their manufacture and manipulation by those in positions of power, and the difference between symbols and truth. Thus, I defend *Johnson* for its educational functions even though I find patriotic symbols important to the sense of political community in the United States.

I. THE FLAG AND FIRST AMENDMENT PRINCIPLES

A. *The Constitutional Background of Flag Desecration*

*Texas v. Johnson*¹⁶ was by no means the first Supreme Court decision concerning the American flag in a first amendment setting. As early as 1943, in *West Virginia State Board of Education v. Barnette*,¹⁷ the Court ruled that public schools could not force students to salute and pledge allegiance to the flag. Justice Jackson, in a justly famous quote, declared: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics,

14. See, e.g., *Lynch v. Donnelly*, 465 U.S. 668 (1984) (a city's display of a crèche was not violative of the establishment of religion clause); see *infra* text accompanying notes 135-42.

15. See *infra* text accompanying notes 153-61; see also Nahmod, *Section 1983 Discourse: The Move from Constitution to Tort*, 77 GEO. L.J. 1719 (1989) (discussing Nietzschean theories of language and rhetoric).

16. 109 S. Ct. 2533 (1989).

17. 319 U.S. 624 (1943), *overruling* *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940). An earlier case upholding a state statute prohibiting the commercial use of the American flag, *Halter v. Nebraska*, 205 U.S. 34 (1907), did not implicate the first amendment because it had not yet been held applicable to the states. See *infra* text accompanying notes 122-24 where *Halter's* reasoning is addressed.

nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”¹⁸

While *Barnette* dealt with compelled symbolic speech, *Street v New York*¹⁹ involved the application of a criminal statute to a defendant who protested the shooting of a civil rights leader by burning an American flag while exclaiming: “‘We don’t need no damn flag. . . . If they let that happen to Meredith we don’t need an American flag.’”²⁰ Instead, the Court held that the statute was unconstitutional as applied to Street “because it permitted him to be punished merely for *speaking* defiant or contemptuous words about the American flag.”²¹ Because the statute prohibited both public exhibits of “contempt by words or acts” toward the American flag and its public mutilation, defilement or defacement, the Court managed to sidestep the issue in *Johnson* that centered on the mere act of flag burning independent of oral expression.

In 1974, the Court again avoided the *Johnson* issue in *Smith v. Goguen*.²² *Goguen* involved a defendant who wore a small cloth replica of the American flag sewn to the seat of his pants. After wearing the patch in public, Goguen was convicted of violating a statute which made it a crime to publicly mutilate, trample upon, deface or treat contemptuously the American flag. The Court emphasized that the defendant was not prosecuted for physical desecration and determined that the statute, insofar as it referred to “publicly [treating] contemptuously the flag of the United States,” was void for vagueness.²³

In the same year the Court once again avoided the issue in *Spence v Washington*.²⁴ In *Spence* the defendant was convicted under a flag misuse statute that prohibited the exhibition of any American flag to which was attached or superimposed “‘any . . . word, figure, mark, picture, design, drawing or advertisement.’”²⁵ In protest of the United States invasion of Cambodia and the Kent State killings, the defendant had draped an American flag outside the window of his apartment. Affixed to the flag was

18. *Barnette*, 319 U.S. at 642. Justice Frankfurter dissented in a lengthy opinion. Justice Frankfurter’s opening has become equally famous:

One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution. Were my purely personal attitude relevant I should wholeheartedly associate myself with the general libertarian views in the Court’s opinion, representing as they do the thought and action of a lifetime. But as judges we are neither Jew nor Gentile, neither Catholic nor agnostic.

Id. at 646 (Frankfurter, J., dissenting).

19. 394 U.S. 576 (1969).

20. *Id.* at 579 (citation omitted).

21. *Id.* at 581 (emphasis added).

22. 415 U.S. 566 (1974).

23. *Id.* at 582.

24. 418 U.S. 405 (1974) (per curiam).

25. *Id.* at 407 (footnote omitted) (quoting WASH. REV. CODE § 9.86.010 (1974)).

removable tape in the shape of a peace sign. The Court described the act as the "expression [of an idea] in the context of activity"²⁶ and held that the statute was unconstitutionally applied to the defendant. It reasoned: "There was no risk that [defendant's] acts would mislead viewers into assuming that the Government endorsed his viewpoint. [Also, he] did [not] permanently disfigure the flag or destroy it. [H]is message was direct, likely to be understood, and within the contours of the First Amendment."²⁷

In each of the latter three cases—*Street*, *Smith* and *Spence*—at least three Justices dissented, foreshadowing the 5-4 split in *Johnson*. In *Street*, four Justices criticized the majority for avoiding what they thought was the pivotal question: "whether the deliberate act of burning an American flag in public as a 'protest' may be punished as a crime."²⁸ In *Smith*, as in *Spence*, three Justices argued for the constitutionality of criminal statutes if "designed to preserve the physical integrity of the flag, and not merely to punish those who would infringe that integrity for the purpose of disparaging the flag as a symbol."²⁹ However, it was only in *Johnson*, decided in 1989, that the Court first squarely faced the question of the constitutionality of a state's flag desecration statute as applied to flag burning in political protest.³⁰ One year later, in *United States v*

26. *Id.* at 414 n.8.

27. *Id.* at 414-15. *Spence* was relied upon in *United States ex rel. Radich v. Criminal Court*, 385 F. Supp. 165 (S.D.N.Y. 1974), which involved an art gallery's display of sculpture-like "constructions" created by an artist. Three of the forms were "an object resembling a gun caisson wrapped in a flag, a flag stuffed into the shape of a six-foot human form hanging by the neck from a yellow noose, and a seven-foot 'cross with a bishop's mitre on the headpiece, the arms wrapped in ecclesiastical flags and an erect penis wrapped in an American flag protruding from the vertical standard.'" *Id.* at 168 (citation omitted) (quoting *People v. Radich*, 53 Misc. 2d at 718, 279 N.Y.S. 2d at 682). Reasoning from *Spence*, the court ruled that the proprietor's conviction for violating a New York statute which prohibited casting contempt on the American flag violated the first amendment. The court determined that the forms were intended to convey a political message and that such a message was understood by viewers. The court also noted that, while it dealt with the issue before it as symbolic speech, it just as well could have put the decision in "pure speech" terms given "the artistic, political and controversial significance of the sculptures." *Id.* at 174 n.34 (citation omitted) (quoting *Goguen v. Smith*, 471 F.2d 88, 100 n.18 (1972)).

28. *Street*, 394 U.S. at 595 (Warren, C.J., dissenting) (quoting *People v. Street*, 229 N.E.2d 187, 189, 20 N.Y.2d 231, 234 (1967)).

29. *Smith*, 415 U.S. at 598 (Rehnquist, J., dissenting); accord *Spence*, 418 U.S. at 420-21 (Rehnquist, J., dissenting).

30. Because the Texas statute, see *infra* note 34, defined the criminal act in terms of offense to others, *Johnson* did not address the broader question of whether Congress or the states can impose criminal sanctions in order to protect the physical integrity of the American flag apart from any connection to "the suppression of free expression." *United States v. O'Brien*, 391 U.S. 367 (1968). One argument for the constitutionality of such legislation is that, because it would purport to focus solely on the physical integrity of the flag, it would be unrelated to the suppression of free expression and therefore would be tested by the

Eichman,³¹ the Court again faced this question, this time in connection with a federal statute.

B. The Supreme Court's Johnson and Eichman Decisions

1. *Texas v. Johnson*³²

At the 1984 Republican National Convention in Dallas, Texas, Gregory Lee Johnson burned an American flag. While the flag was burning, he and other protestors chanted, "America, the red, white, and blue, we spit on you."³³ Johnson was subsequently arrested and convicted for violating a Texas statute prohibiting the desecration of a venerated object.³⁴ On appeal, the Texas Court of Criminal Appeals reversed, ruling that the defendant's conviction violated the first amendment.³⁵ After granting certiorari, the Supreme Court, in an opinion by Justice Brennan, affirmed, 5-4.³⁶

In his opinion, Justice Brennan emphasized that the defendant's conduct was clearly expressive conduct to which the first amendment applied.³⁷ This

relatively lenient *O'Brien* standard.

I seriously doubt, however, whether such a statute can ever be constitutional. The flag conventionally conveys a particular patriotic message and, thus, legislation directed against flag mutilation is neither content-neutral nor viewpoint-free. See Nimmer, *supra* note 13, at 57 ("A flag desecration statute is, then, in essence a governmental command that one idea (embodied in the flag symbol) is not to be countered by another idea (embodied in the act of flag desecration)."); see also Ely, *supra* note 13, at 1507-08 (footnote omitted) ("[An improper use statute] is, at best, analogous to a law prohibiting the interruption of patriotic speeches, and that is a law that is hardly 'unrelated to the suppression of free expression.'"). But see *Hearings Before the House Judiciary Comm., Subcomm. on Civil and Constitutional Rights*, 101st Cong., 1st Sess. 24 (1989) (testimony of Laurence H. Tribe) (arguing against a constitutional amendment in response to *Johnson* and in favor of a federal statute protecting the physical integrity of all American flags); Stone, *Flag Burning and the Constitution*, 75 IOWA L. REV. 111 (1989) (suggesting that a properly drafted statute prohibiting physical impairment of the flag might survive a first amendment challenge).

In *United States v. Eichman*, 110 S. Ct. 2404 (1990), the Court held that such a statute, the Federal Flag Protection Act of 1989, is unconstitutional as applied to political protest. See *infra* text accompanying notes 60-76.

31. 110 S. Ct. 2404 (1990).

32. 109 S. Ct. 2533. In Tushnet, *The Flag-Burning Episode: An Essay on the Constitution*, 61 U. COLO. L. REV. 39 (1990), Mark Tushnet argues that the flag-burning episode is a "constitutional moment" (using Bruce Ackerman's term) because of the way the polity of the United States responded to the Court's decision in *Johnson*.

33. *Johnson*, 109 S. Ct. at 2536.

34. The Texas statute, "Desecration of Venerated Object," made criminal the intentional or knowing desecration of "a state or national flag." "Desecrate" was defined as "deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe his action." TEX. PENAL CODE ANN. § 42.09 (Vernon 1989). Note the criterion of offense to others and thus the non-private nature of desecration as defined.

35. *Johnson v. Texas*, 755 S.W.2d 92 (Tex. Crim. App. 1988).

36. *Johnson*, 109 S. Ct. 2533.

37. *Id.* at 2541.

fact had been conceded by Texas. For the majority the question turned on the proper first amendment test to be used. There was no showing that the defendant intended to incite imminent lawless conduct or was likely to bring it about. Similarly, the defendant's conduct did not constitute "fighting words."³⁸ Thus, under established first amendment principles, Texas did not have an interest in preventing breaches of the peace.³⁹

The second interest asserted by Texas—preserving the flag as a symbol of nationhood and national unity—was a legitimate interest but one that was related to expression. Hence, the relatively lenient first amendment standard of *United States v. O'Brien*,⁴⁰ the draft-card burning case, was inapplicable to the defendant's conduct. Noting that the Texas statute was not aimed at the physical integrity of the flag but rather at "protect[ing] it only against impairments that would cause serious offense to others," the Court applied "the most exacting scrutiny" and held the statute unconstitutional as applied to Johnson.⁴¹ Because Texas argued that the defendant conveyed a message casting "doubt on either the idea that nationhood and national unity are the flag's referents or that national unity actually exists,"⁴² the statute ran afoul of the first amendment's "bedrock principle [that government] may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."⁴³

The Court also rejected the contention that governments have the power to limit a symbol's meaning.⁴⁴ Justice Brennan then concluded: "We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents."⁴⁵ Justice Kennedy concurred,⁴⁶ stressing the difficulty of concurring in a decision so personally distasteful to him. Still, he determined that the first amendment dictated the Court's conclusion even though he agreed that "the flag holds a lonely place of honor in an age when absolutes are distrusted and simple truths are burdened by unneeded apologetics."⁴⁷

Chief Justice Rehnquist, joined by Justices White and O'Connor, dissented.⁴⁸ He focused primarily on the "unique position" of the American

38. *Id.* at 2542.

39. *Id.* at 2541-42.

40. 391 U.S. 367 (1968).

41. *Johnson*, 109 S. Ct. at 2543.

42. *Id.* at 2544.

43. *Id.*

44. In support of this point, the Court relied on *Schacht v. United States*, 398 U.S. 58 (1970), which held unconstitutional a federal statute allowing actors portraying members of one of the armed forces to "wear the uniform of that armed force [only] if the portrayal does not tend to discredit that armed force." *Id.* at 60 (emphasis in original) (quoting 10 U.S.C. § 772(f) (1956)).

45. *Johnson*, 109 S. Ct. at 2547-48.

46. *Id.* at 2548 (Kennedy, J., concurring).

47. *Id.* (Kennedy, J., concurring).

48. *Id.* (Rehnquist, C.J., dissenting).

flag "as the symbol of our Nation, a uniqueness that justifies a governmental prohibition against flag burning in the way [the defendant] did here."⁴⁹ His opinion recounted the history of the American flag and the flag's relation to the founding of the United States, the extent to which it was visible in various wars, including the Civil War, and its symbolic value in circumstances where many lost their lives. Noting that millions of Americans regard the flag with "mystical reverence," Chief Justice Rehnquist quoted portions of Emerson's "Concord Hymn" and the national anthem, as well as Whittier's patriotic poem "Barbara Frietchie" in its entirety.⁵⁰

On the first amendment merits, Chief Justice Rehnquist contended that burning the American flag was the same as uttering fighting words which the first amendment does not protect. For Chief Justice Rehnquist, burning the flag was "no essential part of any exposition of ideas, and at the same time it had a tendency to incite a breach of the peace."⁵¹ He further characterized flag burning as the equivalent of an "inarticulate grunt or roar"⁵² the sole function of which is to antagonize others. In addition, he suggested that Texas was not punishing the defendant's ideas but only his use of this particular symbol.⁵³ He concluded: "The Court decides that the American flag is just another symbol, about which not only must opinions pro and con be tolerated, but for which the most minimal public respect may not be enjoined."⁵⁴

Justice Stevens also dissented,⁵⁵ arguing that first amendment "rules that apply to a host of other symbols, such as state flags, armbands, or various privately promoted emblems of political or commercial identity, are not

49. *Id.* (Rehnquist, C.J., dissenting).

50. *Id.* at 2552 (Rehnquist, C.J., dissenting).

51. *Id.* at 2553 (Rehnquist, C.J., dissenting).

52. *Id.* (Rehnquist, C.J., dissenting).

53. *Id.* at 2554 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist appears to argue that there are other equally effective and constitutionally protected ways for persons like Johnson to express contempt for the American flag and the United States. This suggestion—that the availability of other vehicles and forums for expression is relevant to the constitutionality of governmental attempts to regulate speech—also appears in those cases approving the regulation of certain kinds of government property not found to be public forums. *See, e.g.,* *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 813-16 (1984) (upholding an ordinance prohibiting the posting of signs on public property when applied to persons who placed political campaign signs on public utility poles). The Court stated:

[A] restriction on expressive activity may be invalid if the remaining modes of communication are inadequate. To the extent that the posting of signs on public property has advantages over [other] forms of expression, there is no reason to believe that these same advantages cannot be obtained through other means. [N]othing indicates that the posting of political posters on public property is a uniquely valuable [vehicle] of communication, or that appellees' ability to communicate effectively is threatened by ever-increasing restrictions on expression.

Id. at 812 (citations omitted).

54. *Johnson*, 109 S. Ct. at 2555 (Rehnquist, C.J., dissenting).

55. *Id.* (Stevens, J., dissenting).

necessarily controlling. [T]his case has an intangible dimension that makes those rules inapplicable."⁵⁶ In his view, what the defendant *did* had nothing to do with "disagreeable ideas" but instead constituted "disagreeable conduct that diminishe[d] the value of an important national asset."⁵⁷ For Justice Stevens, Johnson's method of expression, not the expression itself, was properly punishable by Texas. Terming the flag a national asset, yet admitting it is intangible, Justice Stevens compared the government's power to prohibit flag desecration with the power to prevent someone from spraying paint on the Lincoln Memorial as a form of protest.⁵⁸ In both cases, government would be preserving the quality of an important national asset.

2. *United States v Eichman: Johnson* Revisited

One year after *Johnson*, the Court decided *United States v Eichman*.⁵⁹ In *Eichman*, the Court held that the Federal Flag Protection Act of 1989⁶⁰ (the "Act"), passed in response to *Johnson*, could not constitutionally be applied to punish persons burning the flag in political protest.⁶¹ Writing again for a bare majority, Justice Brennan determined that the Act was not significantly different from the Texas statute invalidated in *Johnson*.⁶² He observed that—although the Act did not purport to target expressive conduct on the basis of message content but was, instead, arguably directed at the

56. *Id.* at 2556 (Stevens, J., dissenting).

57. *Id.* at 2557 (Stevens, J., dissenting).

58. *Id.* Clearly, Justice Stevens chose the wrong analogy because the Lincoln Memorial is public property while the Texas statute and others like it, including the recently enacted federal legislation, *see infra* note 60, apply to privately owned flags. However, I do not suggest that private ownership, standing alone, is dispositive of the first amendment issue. For example, the constitutionality under the first amendment of government's aesthetic regulation of land use is not determined solely by the private ownership of such property. See the well known case of *People v. Stover*, 12 N.Y.2d 462, 191 N.E.2d 272, 240 N.Y.S.2d 734 (1963), which rejected the first amendment argument of landowners who regularly hung clotheslines with old clothes in their front yard as a form of protest against high taxes imposed by a city, and upheld an ordinance that prohibited clothes lines in a front yard abutting a street.

59. 110 S. Ct. 2404 (1990).

60. This statute, which amends 18 U.S.C. § 700(a), provides in relevant part:

Whoever knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States shall be fined under this title or imprisoned for not more than one year, or both.

This subsection does not prohibit any conduct consisting of the disposal of a flag when it has become worn or soiled.

As used in this section, the term "flag of the United States" means any flag of the United States, or any part thereof, made of any substance, of any size, in a form that is commonly displayed.

18 U.S.C.A. § 700(a)(1)-(b) (West Supp. 1990).

61. *Eichman*, 110 S. Ct. at 2409.

62. *Id.*

physical integrity of the flag—the government’s asserted interest was nevertheless related to the suppression of free expression and concerned with content.⁶³ To the government’s argument that there was “a perceived need to preserve the flag’s status as a symbol of our Nation and certain national ideals,”⁶⁴ Justice Brennan responded: “But the mere destruction or disfigurement of a particular physical manifestation of the symbol, without more, does not diminish or otherwise affect the symbol itself in any way. For example, the secret destruction of a flag in one’s own basement would not threaten the flag’s recognized meaning.”⁶⁵

Thus, the government’s interest in protecting the flag arose only when a person treated the flag in a way that communicated a message inconsistent with those specified ideals. Justice Brennan supported this assessment by commenting that the Act’s reference to mutilating, defacing, defiling and the like “unmistakably connotes disrespectful treatment of the flag and suggests a focus on those acts likely to damage the flag’s symbolic value.”⁶⁶

Thus, the Act had the same “fundamental flaw” as the Texas statute in *Johnson*: “[I]t suppresses expression out of concern for its likely communicative impact.”⁶⁷ Declining to reevaluate the holding in *Johnson*, Justice Brennan applied “the most exacting scrutiny” and found that the government’s interest did not justify the Act’s interference with first amendment rights.⁶⁸ The Act was therefore unconstitutional as applied to the defendants’ political protests. Justice Brennan concluded: “Punishing desecration of the flag dilutes the very freedom that makes this emblem so revered, and worth revering.”⁶⁹

Justice Stevens, joined by Chief Justice Rehnquist and Justices White and O’Connor, dissented.⁷⁰ Harking back to his dissent in *Johnson*, Justice Stevens declared that the government has a legitimate interest in preserving the symbolic value of the flag because it “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.”⁷¹ Justice Stevens characterized *Eichman* as involving a question of judgment: “Does the admittedly important interest in allowing every speaker to choose the method of expressing his or her ideas that he or she deems most effective and appropriate outweigh the societal interest in preserving the symbolic value of the flag?”⁷²

63. *Id.*

64. *Id.* at 2408.

65. *Id.*

66. *Id.* at 2409.

67. *Id.*

68. *Id.*

69. *Id.* at 2410.

70. *Id.* (Stevens, J., dissenting).

71. *Id.* at 2411 (Stevens, J., dissenting).

72. *Id.*

Answering this question in the negative, Justice Stevens asserted that the individual interest in expression was outweighed by the fact that tolerance of flag burning would "tarnish" the value of the flag as a national symbol.⁷³ Justice Stevens maintained that, because of the actions of political leaders and the Court in *Johnson*, the "symbolic value of the American flag is not the same today as it was yesterday."⁷⁴ Despite *Johnson*, Stevens felt constrained to dissent and not simply follow stare decisis because "the considerations identified in my opinion in *Texas v. Johnson* are of controlling importance in this case as well."⁷⁵

Eichman is largely a derivative decision. Justice Brennan's majority opinion in *Eichman* added relatively little to his earlier and more extensive opinion in *Johnson*. Similarly, Justice Stevens' dissenting opinion added little to his *Johnson* dissent. What's more, the *Eichman* dissent lacked the historical and poetic flourishes found in Chief Justice Rehnquist's *Johnson* dissent. For the purposes of this Article, therefore, it is *Johnson* that merits attention.

C. *Johnson's Majority Opinion Analyzed*

1. *Johnson*: An Easy First Amendment Case

Despite the vigor of the dissent, *Johnson* posed an easy first amendment issue for several reasons. It involved concededly expressive conduct—so intended and understood—dealing with a political issue: national unity. *Johnson* was thus readily distinguishable from *United States v. O'Brien*.⁷⁶ Although both are symbolic speech cases, the government's interest in *Johnson* was directly related to expression, unlike the government interest in draft registration implicated in *O'Brien*. In addition, *Johnson* was rendered more straightforward because the Court dealt with the constitutionality of the Texas statute as applied, and not its facial constitutionality. In so doing, and by emphasizing that the Texas statute defined desecration in terms of serious offense to persons observing the conduct, the Court avoided the broader (and perhaps more difficult) question of whether a state can protect the physical integrity of the flag through a statute that does not focus on offense to others.⁷⁷

73. *Id.* at 2412 (Stevens, J., dissenting).

74. *Id.*

75. *Id.*

76. 391 U.S. 367 (1968).

77. See *supra* note 30 (containing a brief discussion of the first amendment validity of such a statute as applied to political protest); see also *supra* note 60 (where the Federal Flag Protection Act of 1989 is set out in relevant part). If this Act had been held constitutional in *Eichman*, then the use of the American flag in such art works as Scott Tyler's controversial

Johnson posed an easy first amendment issue for another reason: the result is consistent with mainstream first amendment theories. Under Alexander Meiklejohn's self-governing theory of the first amendment,⁷⁸ the clear political content of the expressive conduct in *Johnson* is at the core of the first amendment and thus should be protected. Similarly, under the marketplace of ideas theory,⁷⁹ both the intellectual and emotive⁸⁰ content of the expressive conduct make a contribution to the ongoing national debate

"What is the Proper Way to Display the American Flag" would be prohibited. This work, exhibited at the School of the Art Institute of Chicago in early 1989 by a young artist-student, included an American flag on the floor adjacent to a wall from which a shelf protruded. There was a photographic montage on the wall above the shelf which included photographs of political protestors. In addition, on the shelf was a book in which viewers were asked to record their impressions. The controversial aspects of this work included the placement of the flag on the floor, together with the likelihood that those wishing to write their impressions would have to step on the flag in order to do so. See Wilkerson, *Veterans Protest Flag Exhibit at Art Institute*, N.Y. Times, Mar. 2, 1989, at A19, col. 1.

Johnson is conspicuously silent about the use of the American flag in works of art, especially in light of the amicus curiae brief filed in the Supreme Court by famous artists, many of whom have used the American flag for aesthetic purposes. See *supra* note 2. This silence is, of course, explainable by the facts in *Johnson* itself, which involved the use of the American flag for political protest. Nevertheless, the Court's silence is consistent with what I have elsewhere called the marginalization of artistic expression in first amendment jurisprudence. See Nahmod, *Artistic Expression and Aesthetic Theory: The Beautiful, the Sublime and the First Amendment*, 1987 Wis. L. Rev. 221.

78. According to Meiklejohn:

When men govern themselves, it is they—and no one else—who must pass judgment upon unwisdom and unfairness and danger. Just so far as, at any point, the citizens who are to decide an issue are denied acquaintance with information or opinion which is relevant to that issue, just so far the result must be ill-considered. It is that mutilation of the thinking process of the community against which the First Amendment is directed. The principle of the freedom of speech is a deduction from the basic American agreement that public issues shall be decided by universal suffrage.

A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 26-27 (1948) (emphasis in original).

79. This theory is based in large measure on John Stuart Mill's *On Liberty* (1859), written after the first amendment was ratified. In his famous marketplace of ideas dissent in *Abrams v. United States*, 250 U.S. 616, 630 (1919), Justice Holmes contended that "the best test of truth is the power of the thought to get itself accepted in the competition of the market."

80. Although speaking in *Cohen v. California*, 403 U.S. 15 (1971), about what he termed "linguistic expression"—the defendant there publicly wore a jacket on which was written "Fuck the Draft"—Justice Harlan could just as well have been describing flag burning when he asserted:

[L]inguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.

Id. at 26.

about what the United States represents. Finally, those espousing a self-fulfillment theory of the first amendment⁸¹ would surely agree that the expressive conduct in *Johnson* promoted Johnson's personal self-fulfillment.

2. Rhetoric, Methodology and the *Cohen* Case

The Court's opinion in *Johnson* is striking for its restrained rhetoric, its methodology and its refusal to respond in kind to the emotional arguments of the dissenters. All of this seems clearly intended to cool what could have turned into a highly charged debate among the Justices about patriotism. Consider Justice Brennan's rhetoric. His opinion is for the most part matter-of-fact in the way it sets out generally applicable first amendment principles. Even when he commented on the flag, Justice Brennan recognized that it is singular primarily because of the concepts that it represents. His major rhetorical flourish was his argument to the dissenters:

[P]recisely because it is our flag that is involved, one's response to the flag-burner may exploit the uniquely persuasive power of the flag itself. We can imagine no more appropriate response to burning a flag than waving one's own, no better way to counter a flag-burner's message than by saluting the flag that burns, no surer means of preserving the dignity even of the flag that burned than by according its remains a respectful burial. We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents.⁸²

Likewise, the Court's first amendment methodology in *Johnson* was intended to cool debate. The Court calmly marched from one aspect of traditional first amendment analysis to another. In this respect, *Johnson* is reminiscent of Justice Harlan's landmark opinion in *Cohen v. California*.⁸³ Like the defendant in *Johnson*, the defendant in *Cohen* had engaged in expressive "conduct"—wearing a jacket on which was written "Fuck the Draft"—that constituted highly emotional and offensive expression whose cognitive message could have been communicated otherwise. In *Cohen*, Justice Harlan employed a step-by-step analysis of the traditional first amendment categories of unprotected speech and found none applicable to the challenged provision.⁸⁴

81. See, e.g., M. REDISH, *FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS* (1984); Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45 (1974). Redish speaks of "the instrumental value in developing individuals' mental faculties so that they may reach their full intellectual potential," as well as "the inherent value in allowing individuals to control their own destiny." M. REDISH, *supra*, at 30.

82. *Johnson*, 109 S. Ct. at 2547-48.

83. 403 U.S. 15 (1971).

84. *Id.* at 18-22. For example, Justice Harlan observed that *Cohen* did not involve obscene speech, fighting words, a hostile audience or a captive audience. All of this, of course, is equally true of *Johnson*, notwithstanding Chief Justice Rehnquist's unfounded contention that the defendant's conduct constituted fighting words.

Justice Harlan ultimately concluded in *Cohen* that the merely offensive, even immature, nature of the defendant's expression constitutionally could not be punished. He maintained that distinguishing the words used by the defendant from any other offensive words was not possible because "one man's vulgarity is another's lyric."⁸⁵ In addition, he observed that particular "words are often chosen as much for their emotive as their cognitive force . . . which, practically speaking, may often be the more important element of the overall message sought to be communicated."⁸⁶ Finally, he contended that banning particular words creates "a substantial risk of suppressing ideas in the process."⁸⁷

Justice Brennan's opinion for the *Johnson* Court proceeded in much the same deliberate manner. First, Justice Brennan characterized the challenged conduct as expressive in nature. Next, he surveyed the various first amendment categories and the corresponding tests. Finally, he concluded that the first amendment protected the defendant's flag burning. This approach, like Justice Harlan's, reflects a desire to defuse the first amendment issue and to approach it primarily in traditional constitutional terms. Indeed, *Johnson's* reasoning tracks *Cohen's*. This is evidenced by Justice Brennan's arguments that the offensiveness of flag burning should not serve as grounds for punishment, that flag burning communicates a message different from and more powerful than its verbal equivalent, and that "[t]o 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."⁸⁸

II. THE SACRED FLAG

A. *The Johnson Dissenters' View of the Flag*

Chief Justice Rehnquist's dissent reveals what was, for him, truly at stake in *Johnson*. His use of patriotic rhetoric and his lack of legal analysis suggest that he and the other dissenters believed that there was little need to respond to the Court's opinion on the first amendment merits. Their patriotic rhetoric emphasized the unique status of the American flag throughout American history, its use in wartime and the "almost mystical reverence" with which it is regarded by Americans.⁸⁹

85. *Id.* at 25.

86. *Id.* at 26.

87. *Id.*

88. *Johnson*, 109 S. Ct. at 2546. By way of example, Justice Brennan speculated about prohibiting the burning of state flags, copies of the Constitution and copies of the presidential seal. *Id.*

89. *Texas v. Johnson*, 109 S. Ct. 2533, 2552 (1989) (Rehnquist, C.J., dissenting).

Chief Justice Rehnquist's opinion, which quotes poetry and the national anthem, seems intended to generate more of an emotive response than an intellectual one. Ironically, that was the result when Johnson burned the American flag in protest. Additionally, Chief Justice Rehnquist attempted to characterize the flag as an indispensable participant in American history, from the nation's birth to the present. Moreover, in doing so in the context of flag burning, Chief Justice Rehnquist conflated signifier—the flag—and signified—what the flag represents—and suggested that one who physically harms an American flag is at the same time harming the nation.⁹⁰ Under this view, the flag not only represents the nation but, in some important sense, it *is* the nation.⁹¹

In contrast to Chief Justice Rehnquist's analysis of the history and role of the flag itself, he expended minimal effort on several unpersuasive first amendment arguments, including an unfortunate comparison between flag burning and fighting words.⁹² The fighting words doctrine, to the extent it remains valid first amendment law,⁹³ requires a face-to-face confrontation that clearly was not present in *Johnson*. He also compared flag burning to an "inarticulate grunt or roar"⁹⁴ even though neither the civility nor the clarity of expression constitutes a proper first amendment basis for punishment after *Cohen v. California*.⁹⁵ Finally, he maintained that Texas was not punishing the defendant's ideas but only his use of a special symbol, even though the Texas statute, which was activated by a viewer's offended reaction, applied to anyone engaged in obviously political protest.

In short, Chief Justice Rehnquist's analysis asserted that the American flag is so singular that it should not be subject to the usual first amendment principles but should instead constitute a special class of one. Chief Justice Rehnquist thus argued that the American flag does not belong to the world of the first amendment at all.⁹⁶ Justice Stevens more forthrightly argued

90. I understand this harm to the nation to be different from any "profound offense" caused to individuals by such conduct. See 2 J. FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW—OFFENSE TO OTHERS* 50 (1985) (containing a discussion of profound offense from a liberal perspective).

91. The defendant in *Johnson* also identified the flag with the nation when he chanted—while the flag was burning—"America, the red, white, and blue, we spit on you." *Johnson*, 109 S. Ct. at 2536 (emphasis added).

92. *Id.* at 2553 (Rehnquist, C.J., dissenting). For a discussion of fighting words in first amendment analysis, see *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

93. Since *Chaplinsky*, the Court has not upheld as constitutional a single conviction based on the presence of fighting words.

94. *Johnson*, 109 S. Ct. at 2553 (Rehnquist, C.J., dissenting).

95. 403 U.S. 15 (1971) (discussed *supra* notes 83-87 and accompanying text).

96. This position is very different from the usual hierarchical approach to the first amendment whereby political speech is afforded maximum first amendment protection, commercial and "indecent" speech somewhat less, and obscene speech no first amendment protection whatsoever. According to the Chief Justice, flag burning is not subject to traditional first amendment principles at all because, as argued at length in this Article, the American

this position in *his* dissenting opinion.⁹⁷ More important, though, is what underlies both dissenting opinions: the belief that our secular political community requires patriotic symbols such as the flag much as religious communities require religious symbols. The dissenting opinions demand that the American flag be treated as *sacred*, a concept to which I now turn.

B. *The Concept of the Sacred*

The distinction between the sacred and the non-sacred⁹⁸ appeared several millennia ago in Western religion. Although it did not originate with Judaism,⁹⁹ the Pentateuch emphasizes the distinction between "Koh'desh" (the sacred or holy) and "Chol" (the non-sacred or non-holy), for example, in connection with the Israelites (the "holy people") and the land of Israel (the "holy land").¹⁰⁰ The concept of the sacred was carried over into Christianity, but it was not until the twentieth century that it began to be studied comparatively.¹⁰¹

Rudolf Otto is widely credited with the seminal analysis of the sacred in which he examined the "characteristics of this frightening and irrational experience" of the sacred.¹⁰² More recently, theologian Mircea Eliade addressed the question of the sacred, focusing "not [as Otto had] on the relation between the rational and nonrational elements of religion but the *sacred in its entirety*."¹⁰³ Eliade articulated a comprehensive theory regarding religion and, in particular, the ways in which humanity divides time, space and matter into the two realms of the sacred and the non-sacred, or the holy and the non-holy.

Eliade began his analysis with a discussion of those ways in which the sacred manifests itself in human life through what he calls *hierophany*, that is, the sacred literally making itself seen.¹⁰⁴ According to Eliade, the history of religion is, in essence, a series of these hierophanies. Each of these

flag is sacred.

For criticism of the Court's hierarchical approach as it affects the first amendment protection of artistic expression, see Nahmod, *supra* note 77.

97. *Johnson*, 109 S. Ct. at 2555 (Stevens, J., dissenting).

98. The word "sacred" derives from the Latin "sacer" which means "set off" or "restricted." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1083 (2d ed. 1982).

99. See generally E. DURKHEIM, THE ELEMENTARY FORMS OF THE RELIGIOUS LIFE (J. Swain trans. 1954) (the sacred force in society that sets apart or forbids certain things is society itself).

100. E.g., *Leviticus* 19:1-2 ("And the Lord spoke unto Moses, saying. Speak unto all the congregation of the children of Israel, and say unto them, Ye shall be holy, for I the Lord your God am holy.").

101. See generally R. OTTO, THE IDEA OF THE SACRED (Eng. trans. 1928).

102. M. ELIADE, THE SACRED AND THE PROFANE 9 (1957).

103. *Id.* at 10 (emphasis in original).

104. *Id.* at 11.

hierophanies represents the same phenomenon: a manifestation of a wholly different reality. Further, the worship of seemingly ordinary places and things, such as rocks or sacred groves, is in fact a recognition of the hierophany rather than a veneration of the object itself. This is true because the object, while remaining itself, has become transformed, through the hierophany, into another supernatural reality. As in the Catholic mystery of transubstantiation, the object retains all the substance and accidents of its original nature while also assuming the substance of the sacred object.¹⁰⁵

1. Sacred Space

For Eliade, the primal religious experience is the recognition that space is not homogeneous; it is divided into the sacred and the profane, with only the sacred space having structure or significance. "The manifestation of the sacred ontologically founds the world."¹⁰⁶ For Eliade, the recognition of the sacred establishes the foundation or focal point of the world, around which all non-sacred reality revolves.¹⁰⁷

Eliade argued that consecration of space—the home, for example—is most commonly accomplished through the re-enactment or retelling of the creation narrative.¹⁰⁸ He noted that the making of a home is the "*creation of the world that one has chosen to inhabit*."¹⁰⁹ According to Eliade, there are two ways of doing this: either by orienting the dwelling to the divine (by orienting it to the holy directions or by symbolically installing the *axis mundi*) or by repeating through ritual re-enactment the creation of the world. This consecration of the dwelling was transferred to the consecration of more

105. *Id.* at 12.

106. *Id.* at 21.

107. Eliade cited a number of examples of this process as it regards space, from the ordinary modern experience of crossing the threshold of a church to the treatment of the threshold of human habitation, where many rituals have long been practiced. He also cites a number of historical and scriptural references to places regarded as holy after some manifestation of the divine in that place, for example, Beth-el, so called by Jacob after the God of Abraham appeared to him there in *Genesis* 28:12-19. M. ELIADE, *supra* note 102, at 26. He also noted that new territory is frequently adopted by the manifestation of the holy in that space as, for example, the setting up of an altar in the Vedic religion. *Id.* at 30. The similarity to the placing of an American flag on the moon in 1969 by the first person there is striking.

108. For example, for the Achilpa tribe of Australia, the central creation narrative involves the divine being setting up the sacred pole (*kauwa-auwa*), anointing it with blood and then ascending on it into the sky. This sacred pole becomes the cosmic axis and is central to the life of the Achilpa, so much so that the destruction of the pole can lead to complete social disintegration of the tribe. *Id.* at 33. A similar pattern is repeated in religions in which a particular space becomes the center of the world through a re-enactment of the cosmological narrative, a paradigm seen in numerous religions. Among the examples Eliade provided are Babylonian religion, the Chinese capital, and the rock upon which the Jerusalem temple was built. In each of these cases, the world of the people is centered around the holy place, and reality moves outward from there. *Id.* at 36-42.

109. *Id.* at 51 (emphasis in original).

formal holy places, when buildings such as churches and temples began to be built specifically for holy purposes.¹¹⁰

2. Sacred Time

According to Eliade, time, like space, is similarly divided into the sacred and the profane. Sacred time does not pass and is of infinite duration. The sacred time of a religious festival, for example, brings to the present the "*primordial mythical time*."¹¹¹ For Christians the Eucharist Mass is the re-enactment or memorializing of the crucifixion. It also constitutes participation in the perpetual Last Supper of which it is an earthly re-creation.¹¹²

Time also is sacralized through history. As Eliade observed, this may be seen in many religions, as in the Greek myths.¹¹³ But it is most clearly seen in the Judeo-Christian tradition, with its repeated appearances of the divine in the history of the people. Historical time is thus transformed into sacred time.

3. Sacred Things

Eliade next considered the sacralization of nature and natural objects, notably water. Eliade found that it is from water, which is invariably viewed as pre-existent, that creation comes. Thus, water always represents creation or the possibility of re-creation.¹¹⁴

From the symbolism of water, Eliade explored the ways in which cultures adopt other symbols. In particular, he examined the symbols adopted by Christianity.¹¹⁵ He also considered the sacralization of life as a whole, whereby the human body is made sacred through ritual and becomes a realization of the cosmos.¹¹⁶ At the same time, he described the many symbols present in this sacralization, from domestic objects to funerary objects, each of which is made holy in itself. Eliade further assessed rites of passage, initiation and rebirth, and examined how these convert the human body and related objects into religious symbols.

110. *Id.* at 52-65.

111. *Id.* at 68 (emphasis in original).

112. Eliade noted that for many primitive cultures the world equals time. Their languages use the same words to refer to the passage of a year as they do to refer to the world. Thus, each new year is a new creation. *Id.* at 73. Consequently, many religions ritually relate the new year to a new creation. *Id.* at 77-78.

113. *Id.* at 68-113.

114. Examples include the flood in Genesis and the Christian rite of baptism in which a human being dies and is reborn. *Id.* at 133-36 (baptism).

115. Eliade's examination went beyond Christianity. For example, he noted that many religions once required that birth take place on the ground in order to symbolize the relationship with Mother Earth. *Id.* at 141-44. Similarly, the sacralization of the sex act may be seen as a re-enactment of the primordial act of creation. *Id.* at 144-47.

116. *Id.* at 175-79.

Eliade concluded his study with an examination of the presence of the sacred in modern life. He maintained that even modern, non-religious man is still surrounded by the sacred and by ritual, as reflected in political parties, the occult and philosophical movements such as those for sexual freedom.¹¹⁷ Eliade insisted: "[T]he majority of men 'without religion' still hold to pseudo religions and degenerated mythologies. There is nothing surprising in this, for . . . profane man is the descendant of *homo religiosus* and he cannot wipe out his own history . . ."¹¹⁸

C. *The Flag as Sacred Symbol*

Eliade's comprehensive theory of religion and the sacred is useful in understanding the *Johnson* dissent. Within the framework of Eliade's theory, the sacralization of time, place and matter re-creates the experience of the gods when they created the world and participated in its history. Analogously, applying that theory to *Johnson* suggests that for the *Johnson* dissenters the flag is a sacred *object* which must be "venerated" (a specifically religious term¹¹⁹ appearing in the Texas statute) because it has played a critical role in American history and because it embodies the American historical experience. Flying the flag and engaging in other related rituals represent the re-enactment of the creation of the republic and other important moments in its history, a re-creation that Eliade suggests sacralizes *time*. Special ceremonies such as the Pledge of Allegiance do so as well.¹²⁰ Furthermore, *space* is sacralized when the flag is flown over government buildings and at the sites of famous battles, or when it is placed on the moon by an astronaut. To employ Eliade's terminology, the flag is a hierophany, the sacred making itself seen.¹²¹

Through this discussion of the sacred, the style and substance of Chief Justice Rehnquist's dissenting opinion become considerably more understandable. While the flag symbolizes national unity to him, it also represents America's imagined past and present. It is no accident that Chief Justice Rehnquist made poetry and song—quintessential vessels for cultural myths—a crucial part of his story of the flag's participation in the birth and life of America. Patriotic poetry and song promote the notions that the flag is a vital component of the American experience and that it therefore deserves veneration. For Chief Justice Rehnquist, such veneration draws citizens

117. *Id.* at 206-07.

118. *Id.* at 209.

119. The word "venerate," meaning "to regard with respect, reverence or deference," comes from the Latin *venerari*, from *venus*, love. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1341 (2d ed. 1982).

120. Note that the Pledge of Allegiance refers explicitly to allegiance to the *flag*, not only to "the Republic for which it stands."

121. See *supra* text accompanying note 104.

within the American experience, invites vicarious participation in the birth of the republic and the various wars in which American blood was spilled in defense of that republic, and thus promotes their attachment to it.

An early example of such veneration of the flag is the statutory prohibition against commercial use of the flag upheld in *Halter v. Nebraska*.¹²² In *Halter*, the Court emphasized the uniqueness of the flag as a symbol:

[W]e are of opinion that those who enacted the statute knew, what is known to all, that to every true American the flag is the symbol of the Nation's power, the emblem of freedom in its truest, best sense. It is not extravagant to say that to all lovers of the country it signifies government resting on the consent of the governed; liberty regulated by law; the protection of the weak against the strong; security against the exercise of arbitrary power; and absolute safety for free institutions against foreign aggression.¹²³

The *Halter* Court's language intimates that permitting commercial use of the flag brings it into the commercial marketplace, the world of the profane, and thereby desecrates it. Similarly, the dissenters in *Johnson* believe that the flag does not belong in the first amendment marketplace of ideas unless it retains its sacred character.¹²⁴

When the dissenters in *Johnson* sacralize the flag and remove it from the world of the first amendment, they demonstrate the force of socially generated patriotic meanings of signifiers. Moreover, as I have argued, their move embodies a religious impulse. If my assessment is correct, it may be helpful to evaluate *Johnson* not only as a free speech case, but also from an establishment of religion perspective and, alternatively, from an American civil religion perspective.¹²⁵ Evaluating *Johnson* from a civil religion perspective reveals what the Court's decision may have cost the American political community.¹²⁶

122. 205 U.S. 34 (1907). The Court in *Johnson* distinguished *Halter* on two grounds: the first amendment had not yet been held applicable to the states and *Halter* involved commercial speech. *Johnson*, 109 S. Ct. at 2545 n.10.

123. *Halter*, 205 U.S. at 43.

124. Chief Justice Rehnquist made this point explicit when he asserted: "[The flag] does not represent the views of any particular political party, and it does not represent any particular political philosophy. The flag is not simply another 'idea' or 'point of view' competing for recognition in the marketplace of ideas." *Johnson*, 109 S. Ct. at 2552. The position that the American flag does not belong in either the marketplace of goods or that of ideas might be grounded on the views that marketplaces create changing values for their commodities while the value of the American flag should not vary.

125. For a definition and discussion of civil religion, see *infra* text accompanying notes 148-52.

126. Despite this cost, I later contend that even apart from the traditional first amendment principles it applied, *Johnson* was, on balance, a wise decision because of the crucial lessons it attempted to teach the American political community. See *infra* text accompanying notes 184-86.

III. ESTABLISHMENT OF RELIGION¹²⁷

Evaluating *Johnson* as an establishment of religion case suggests several interesting questions. First, what would the result have been in *Johnson* if establishment of religion standards, and not free speech standards, were used? Second, had the *Johnson* dissenters persuaded the majority, would the ruling have been consistent with the Court's decision in *Lynch v Donnelly*,¹²⁸ the crèche case?

A. *Establishment of Religion Applied to Johnson*

I have argued that a sacralizing impulse was at work in the *Johnson* dissent. Nevertheless, if the defendant in *Johnson* had challenged the Texas statute on establishment of religion grounds rather than on free speech grounds, punishing him for flag burning in violation of the Texas statute would not constitute an establishment of religion.

There are several reasons for this result. Although the *Johnson* dissenters sacralized the flag, they did not transform it into a symbol identified with any *particular* religion,¹²⁹ a move which would have run afoul of the establishment clause.¹³⁰ Rather, they treated it as a unique political and patriotic symbol. In this regard, government can speak in its own right in an attempt to convey political and patriotic messages, despite a claim based on the establishment clause, provided it does not coerce citizens into communicating those messages themselves.¹³¹

Two examples of this principle come readily to mind. First, in *West Virginia Board of Education v Barnette*,¹³² the Court held that a compulsory flag salute in public schools violated the first amendment. However, the Court made clear that states confront no first amendment hurdles in establishing a non-compulsory flag salute for the purposes of promoting

127. The first amendment reads in relevant part: "Congress shall make no law respecting an establishment of religion . . ." U.S. CONST. amend. I.

128. 465 U.S. 668 (1984).

129. In contrast, a statute prohibiting the burning of a cross or of a menorah would likely constitute an establishment of religion.

130. See *Frazee v. Illinois Dep't of Employment Sec.*, 489 U.S. 829, 830 (1989), which held, pursuant to the free exercise clause of the first amendment, that unemployment compensation benefits could not be denied to a person who refused to work on Sundays because he believed that "as a Christian, he could not work on the 'Lord's Day.'" The Court determined that it was irrelevant that this person was not a member of an established church or sect because his sincerity was not in doubt.

131. While I speak here of establishment of religion, the same holds true for free speech: government can engage in noncoercive and nonpartisan patriotic speech without violating the prohibition against infringing the freedom of speech. Indeed, the accompanying cases discussed in the text support this conclusion. See Shiffn, *Government Speech*, 27 UCLA L. REV. 565 (1980). See generally M. YUDOF, *WHEN GOVERNMENT SPEAKS* (1983).

132. 319 U.S. 624 (1943).

national unity and patriotism. Similarly, in *Wooley v. Maynard*,¹³³ the Court ruled that a state constitutionally could not punish persons who covered the motto "Live Free or Die" on passenger vehicle license plates if they disagreed with it on moral and religious grounds. Reasoning from *Barnette*, the Court identified the compulsory nature of the motto protected by statute as the objectionable feature. But the Court nowhere suggested—just as it did not in *Barnette*—that the state could not "communicate to others an official view as to proper appreciation of history, state pride, and individualism."¹³⁴

Consequently, applying an establishment of religion analysis—one based upon the position that government is attempting to sacralize the flag—would have led to a different result in *Johnson* itself. Although this approach provides some analytical insight into *Johnson*, it was the free speech position argued by the defendant that ultimately was accepted by the *Johnson* Court.

B. Consistency with *Lynch*

It is intriguing that the demand that the flag be sacralized in *Johnson* came from the very same Justices (with the exception of Justice Stevens) who had previously comprised (along with then Chief Justice Burger) the majority in *Lynch* in ruling that government can display the crèche in certain circumstances without violating the establishment of religion clause of the first amendment. In *Lynch* the Court determined that in the context of the challenged display the crèche was secular rather than sacred for establishment of religion purposes.¹³⁵ The Court thus appeared to desacralize the crèche in order to permit government to display it. In contrast, the *Johnson* dissenters sacralized the flag. It would seem, then, that the dissent in *Johnson* and the position of these same Justices in *Lynch* are inconsistent.

But this inconsistency is more facial than actual. After all, *Lynch* did permit the crèche to be displayed even though the cost was nominal for the sacred. The subtext of *Lynch* is that the crèche is indeed a religious symbol; secularizing it in *Lynch* was constitutionally necessary in order to allow its display. The crèche remained a sacred symbol even though the Court, with a wink and a nod, determined as an establishment of religion matter that its purpose and primary effect were not religious. Therefore, under the reasoning in *Lynch*, government can, without violating the establishment clause, appropriate a particular sacred symbol for political purposes.¹³⁶

133. 430 U.S. 705 (1977).

134. *Id.* at 717.

135. Thus, the Court did to the crèche what the songwriter Irving Berlin did to Christmas and Easter when he wrote "White Christmas" and "Easter Parade," two famous songs with no religious content whatsoever that secularized those holidays for many Americans.

136. See Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall—A Comment on Lynch v. Donnelly*, 1984 DUKE L.J. 770, 786 (criticizing *Lynch* as an example of "the appropriation of a particular religion or faith as a practice of government").

Similarly, under the reasoning of the *Johnson* dissent, government can, without violating freedom of speech, appropriate a particular patriotic symbol and convert it into a sacred one for political purposes.

The positions of the Justices in *Lynch* and the *Johnson* dissenters are not inconsistent for another reason. They adopt a similar first amendment methodology to the issues confronting them. In both cases Chief Justice Rehnquist and Justices White and O'Connor argued that there are, or ought to be, historical exceptions to the usual first amendment rules, whether they be establishment of religion rules or free speech rules. Thus, while the traditional three-part establishment of religion test was applied in *Lynch*, the Court's opinion emphasized "a significant historical religious event long celebrated in the Western World."¹³⁷ This historical emphasis allowed the Court to conclude that the celebration of Christmas and the depiction of its origins through the crèche were "legitimate secular purposes,"¹³⁸ and that "display of the crèche is no more an advancement or endorsement of religion than the Congressional and Executive recognition of the origins of the Holiday itself as 'Christ's Mass,' or the exhibition of literally hundreds of religious paintings in governmentally supported museums."¹³⁹

The Court's historically grounded reasoning in *Lynch* is best captured by the following:

It would be ironic, however, if the inclusion of a single symbol of a particular historic religious event, as part of a celebration acknowledged in the Western World for 20 centuries, and in this country by the people, by the Executive Branch, by the Congress, and the courts for 2 centuries, would so "taint" the city's exhibit as to render it violative of the Establishment Clause.¹⁴⁰

The Court even more explicitly relied on "unique history" in *Marsh v Chambers*¹⁴¹ when it upheld the opening of legislative sessions with prayers led by a state-employed chaplain against an establishment of religion challenge. After noting that the first Congress hired a chaplain in 1789, shortly before it agreed on the language of the first amendment, the *Marsh* Court explained:

[H]istorical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress—their actions reveal their intent.

In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative

137. *Lynch*, 465 U.S. at 680.

138. *Id.* at 685.

139. *Id.* at 683.

140. *Id.* at 686.

141. 463 U.S. 783 (1983).

sessions with prayer has become part of the fabric of our society. [I]t is simply a tolerable acknowledgment of beliefs widely held among the people of this country.¹⁴²

The Court's historical methodology in *Lynch* and *Marsh* is strikingly similar to that of the *Johnson* dissenters insofar as the dissenters emphasize the unique historical role of the American flag. In all three cases, history is used to explain why the usual first amendment rules do not apply to invalidate the challenged government conduct. However, there is at least one significant difference in these historical methodologies that should be noted. History was employed in *Lynch* and *Marsh* as part of a conventional originalist argument to the effect that the Framers either would have approved, or did in fact approve, the publicly supported display of a crèche and the hiring of a chaplain. In this sense, *Lynch* and *Marsh* were not exceptions to the first amendment at all.

In contrast, the *Johnson* dissenters did not make a conventional originalist argument. Instead, they contended that the "unique history" of the American flag warranted the creation of a special exception to the usual first amendment rules.¹⁴³ Under this approach, the flag would avoid the first amendment entirely, thereby going considerably beyond the rationales of *Lynch* and *Marsh*. The dissenters thus demonstrated that they were intent on sacralizing the flag. In so doing, the dissenters would permit government not to establish religion as such but rather to promote American civil religion.

IV. AMERICAN CIVIL RELIGION, MYTHS AND POLITICAL COMMUNITY

In *Johnson*, the dissenters viewed the flag as a sacred object whose veneration re-creates American history in the same way that the veneration of an Eastern Orthodox icon re-creates the religious experience that it represents.¹⁴⁴ As mentioned earlier,¹⁴⁵ veneration of the flag as an American patriotic symbol invites citizens to participate vicariously in important

142. *Id.* at 790, 792.

143. *Johnson*, 109 S. Ct. at 2548.

144. Weitzmann briefly describes the history of religious icons as follows:

The word "icon" in the broadest sense means simply "image," any image, but in the more restricted sense in which it is generally understood, it means a holy image to which special veneration is given. The icon plays a very specific role in the Orthodox Church, where its worship in the course of time became integrated into the celebration of the liturgy. [O]n the whole, holy images in the Latin West did not attain the same exalted position which they occupied in the life of the Orthodox believer. According to the Greek Church Fathers the icon was considered equal in importance to the written word, the appeal to the eyes being just as authoritative as that to the ears.

K. WEITZMANN, *THE ICON: HOLY IMAGES—SIXTH TO FOURTEENTH CENTURY* 7 (1978).

145. See *supra* text accompanying notes 119-26.

historical events, including the birth of the republic and the various wars in which the republic and its interests were defended. The feelings engendered by such vicarious participation have several characteristics. First, these feelings of involvement and re-creation of history do not depend on whether the history to which they pertain is actual or mythic.¹⁴⁶ Second, these feelings provide the individual with a sense of connection and attachment to a political community, a sense of belonging to a discrete group with shared political beliefs and values. This sense serves to bind the individual to a community that is transcendent and that is more important than any individual. I argue next, after first considering American civil religion and myths, that sacred patriotic symbols such as the flag are necessary for the maintenance and promotion of this transcendent sense of connection and attachment to the American political community.¹⁴⁷

A. American Civil Religion

The term "civil religion" originated in Rousseau's *The Social Contract*.¹⁴⁸ However, it was reintroduced into modern thought by Robert Bellah in 1967, in an influential essay, "Civil Religion in America."¹⁴⁹ According to Bellah, civil religion is a set of beliefs and attitudes that explain the meaning and purpose of a political society in terms of a transcendent spiritual reality. These beliefs and attitudes are held by people generally and expressed in public rituals, myths and symbols. Bellah maintained that the major civil religion events in American history are the Revolution, the Civil War, the deaths of Lincoln and Kennedy and the world wars.¹⁵⁰ For Bellah, these civil religion events have Biblical analogues or archetypes which include the Exodus, the Chosen People, the Promised Land and Sacrificial Death and Rebirth.¹⁵¹

Since Bellah, others have discerned five substantive themes in civil religion: (1) the political community should be guided by a transcendent principle of morality; (2) a faith in democracy as a way of life for all; (3) civic piety, or the belief that the exercise of the responsibilities of citizenship is good in and of itself; (4) a reverence for American religious folkways and (5) a

146. For example, see the description of the "first skirmishes of the Revolutionary War" contained in Ralph Waldo Emerson's "Concord Hymn" and the story in John Greenleaf Whittier's poem, "Barbara Frietchie," both noted in Chief Justice Rehnquist's dissenting opinion in *Texas v. Johnson*, 109 S. Ct. 2533, 2549-50 (1989) (Rehnquist, C.J., dissenting).

147. If this is so, then the claim that *Johnson* unduly promoted individual liberty at the expense of political community must be addressed. For a discussion of this point, see *infra* text accompanying notes 172-93.

148. J. ROUSSEAU, *THE SOCIAL CONTRACT*, bk. 4, ch. 8 (H. Tozer trans. 3d ed. 1948).

149. Bellah, *Civil Religion in America*, 96 *DAEDALUS* 1 (Winter 1967). See generally *AMERICAN CIVIL RELIGION* (D. Jones & R. Richey eds. 1974) (containing collection of essays discussing and interpreting the phrase "civil religion").

150. Bellah, *supra* note 149, at 16-18.

151. *Id.* at 18. According to Mark Tushnet, Bellah's definition of civil religion as "a true

belief that destiny has great things in store for the American people.¹⁵²

However American civil religion is defined, the American flag is surely one of its most powerful and dramatic national symbols. Not only is the flag employed in patriotic rituals, but for many it represents national unity, American political ideals and important historical events, mythical or otherwise. The flag thereby promotes American civil religion.

B. Myths

Nietzsche originated the provocative idea that the world is aesthetically self-creating.¹⁵³ Challenging the philosophical search for origins and being, Nietzsche insisted that all knowledge—metaphysics, science, religion, morality and art—is a manifestation of the will to live and the will to power.¹⁵⁴ For Nietzsche there are no absolutes; we can accord only aesthetic status to human knowledge because human knowledge arises from an aesthetically creative human impulse. More important for present purposes, Nietzsche maintained that even though this aesthetic approach does not provide access to reality, it does allow us to live through the creation of myths which provide a haven from the understanding that there are no absolutes.¹⁵⁵

According to Nietzsche, myths are a central and indispensable element of culture:

Without myth every culture loses the healthy power of its creativity: only a horizon defined by myths completes and unifies a whole cultural movement. Myth alone saves all the powers of the imagination and of Apollonian dream from their aimless wanderings. ! Even the state knows no more powerful unwritten laws than the mythical foundation that guarantees its connection with religion and its growth from mythical notions.¹⁵⁶

Nietzsche contended that Western culture has become too critical, skeptical and rational for its own good. In his view, creative culture requires that we live by a "common native myth, which would give to our culture a firm

religion, not 'religion in general' or diffuse religiosity" and "its use in the U.S. context are quite controversial and probably lack substantial scholarly support." M. TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 268 n.86 (1988). In Tushnet's view, civil religion "includes among its elements a diffuse religiosity, captured in the law by Justice Douglas' statement 'We are a religious people whose institutions presuppose a Supreme Being.'" *Id.* at 268 (quoting *Zorach v. Clauson*, 343 U.S. 306, 313 (1952)).

152. See Mirsky, *Civil Religion and the Establishment Clause*, 95 YALE L.J. 1237, 1253 (1986).

153. See A. MEGILL, *PROPHETS OF EXTREMITY: NIETZSCHE, HEIDEGGER, FOUCAULT, DERRIDA* 29-33 (1985).

154. F. NIETZSCHE, *THE WILL TO POWER* § 853 (W. Kaufmann & R.J. Hollingdale trans., W. Kaufmann ed. 1967).

155. See generally A. MEGILL, *supra* note 153, at 65-102 (chapter discussing Nietzsche and myth).

156. *Id.* at 75 (quoting F. NIETZSCHE, *THE BIRTH OF TRAGEDY*).

foundation and protect it from the dissolving effects of the historical process."¹⁵⁷ When myths outlive their usefulness, Nietzsche argued, they should be discarded and new ones developed.¹⁵⁸

Eliade and Nietzsche might disagree about the social utility of religion and its particular myths. Nevertheless, Eliade made a point about the pervasive importance of myths, similar to that made by Nietzsche, when he asserted:

[Modern] nonreligious man descends from *homo religiosus* and, whether he likes it or not, he is also the work of religious man The majority of the "irreligious" still behave religiously, even though they are not aware of the fact. We refer not only to the modern man's many "superstitions" and "tabus," all of them magico-religious in structure. But the modern man who feels and claims that he is nonreligious still retains a large stock of camouflaged myths and degenerated rituals.

A whole volume could well be written on the myths of modern man, on the mythologies camouflaged in the plays that he enjoys, in the books that he reads.¹⁵⁹

According to Nietzsche, Eliade and other thinkers,¹⁶⁰ then, myths are necessary for individuals and the societies in which they live. They supply meaning for individuals and their societies as well as provide an emotional connection for individuals as members of a political community. Indeed, Plato, whose *The Republic* has been described as "the true source of the entire tradition of political mysticism,"¹⁶¹ long ago recognized the function of myth. Plato argued that only those myths which serve the purposes of the political community should be permitted in the republic by the philosopher-kings.¹⁶² The flag as signifier represents what might be termed the myths of nationhood and national unity, myths which, according to the *Johnson* dissenters, render sacred the American flag.

157. A. MEGILL, *supra* note 153 at 75.

158. *See id.* at 82-84.

159. M. ELIADE, *supra* note 102, at 203-05.

160. Max Lerner made a similar point in 1937:

[A]ll peoples have one time had this sense of uniqueness and mission, although in the older cultures it tends to wear off and a revolution of some sort or other is needed to renew it. Robert Michels [in his *Der Patriotismus* (1929)] has spoken of the two basic myths of patriotism—the myth of unique national origin and the myth of unique national destiny. In America the two converged in the myth of a democratic revolution and a revolutionary democracy. Americans took great pride in their revolution, although it must be noted that the pride increased in retrospect as the revolution receded, the revolutionary energy ebbed and the democratic élan grew too dangerous for the men of substance.

Lerner, *Constitution and Court as Symbols*, 46 YALE L.J. 1290, 1295 (1937) (citations omitted) (footnote omitted).

161. R. NISBET, *THE SOCIAL PHILOSOPHERS: COMMUNITY & CONFLICT IN WESTERN THOUGHT* 7 (rev. ed. 1982).

162. *See generally* PLATO, *THE REPUBLIC* bk. III (F. Cornford trans. 1941) (dialogue prescribing suitable subjects and forms of literature for virtuous society).

C. Attachment to the American Political Community

Plato's *The Republic* "has had the effect of making the ideal of politics, of political power, of the political bond, of the political community, the most distinctive and most influential of all types of community to be found in Western philosophy."¹⁶³ According to Plato, feeling a part of a political community was a prerequisite for *The Republic's* all-encompassing political state.¹⁶⁴ I maintain that it is also indispensable for the effective functioning of the American republic.¹⁶⁵ True, there has been extensive discussion and debate among historians and constitutional scholars regarding the relevance for American political history and current constitutional doctrine of the

163. R. NISBET, *supra* note 161, at 3. Nisbet continues:

Whatever the signal differences between the two types of modern state [i.e., the democratic and the totalitarian], what they have in common is the ascendancy of the political bond over all others in society; of the political role over all roles of kinship, religion, occupation, and place; of the political intellectual over all other intellectuals; of political authority over all competing social and cultural authorities; and, finally, the proffer of the political state as the chief protection of man from the uncertainties, deprivations, and miseries of this world.

Id.

164. See generally PLATO, *supra* note 162, at bk. II (origins and composition of a city-state).

165. Political community is also related to economic community, a subject beyond the scope of this Article. Regarding economic community and the commerce clause, Justice Jackson stated in *H.P. Hood & Sons v. Dumond*, 336 U.S. 525 (1949):

The Commerce Clause is one of the most prolific sources of national power and an equally prolific source of conflict with legislation of the state.

[The] principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy, including the vital power of erecting customs barriers against foreign competition, has as its corollary that the states are not separable economic units.

Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

Id. at 534, 537-39.

Laurence Tribe, in his analysis of the Court's opinion in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), argued that there is an important theoretical connection between the commerce clause and political community: "Behind the Court's analysis in *Exxon* stands an important doctrinal theme: the negative implications of the commerce clause derive principally from a *political* theory of union, not from an *economic* theory of free trade. The function of the clause is to ensure national solidarity, not economic efficiency." L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 417 (2d ed. 1988) (emphasis in original).

The interstate privileges and immunities clause similarly promotes both economic and political community. As the Court asserted in *Toomer v. Witsell*, 334 U.S. 385 (1948) (footnotes omitted):

The primary purpose of this clause was to help fuse into one Nation a collection of independent, sovereign States. It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy. For protection of such equality the citizen of State A was not to be restricted to the uncertain remedies afforded by diplomatic processes and

ideals of classical republicanism, variously described as: direct political participation in self-government, distrust of centralized authority, and the subordination of private interests to those of the political community—civic virtue.¹⁶⁶ Whether the contours of these ideals are articulable does not matter; the fact remains that a democratic society—one in which persons participate in self-governance—requires some modicum of a shared community of understanding so that its members feel an attachment and allegiance to it.

Amy Gutmann's theory of democratic education supports this contention.¹⁶⁷ For Gutmann, democracy requires a shared community of understanding for which there are two conditions: a critical deliberative faculty—the ability to deliberate about moral questions, or *moral reasoning*—and an understanding of, and predisposition toward, life in democratic society—a willingness to deliberate about moral questions, or *moral character*. Focusing on ways to engender these conditions, and thus, on the proper nature of education in the United States, she explained: “[A] democratic state of education tries to teach virtue—not the virtue of the family state (power based upon knowledge), but what might best be called *democratic* virtue: the ability to deliberate, and hence to participate in conscious social reproduction.”¹⁶⁸

Gutmann's discussion of a shared community of understanding, coupled with her definition of moral character as a *willingness* to deliberate about moral questions, correctly assumes that a democratic political community requires of its members an emotional as well as a deliberative, rational and intellectual attachment to that community. Consequently, as indicated by the earlier discussion of the flag's role in American civil religion and its myths, an emotional attachment to the American flag as a sacred symbol of nationhood and national unity constitutes an important aspect of emotional attachment and allegiance to the political community as well. As Eliade observed: “A religious symbol conveys its message even if it is no longer *consciously* understood in every part. For a symbol speaks to the whole human being and not only to the intelligence.”¹⁶⁹ Because the Court's decision in *Johnson* removed the question of flag burning from the legislative

official retaliation.

Id. at 395. See also *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985), which, in holding violative of the interstate privileges and immunities clause a state rule limiting bar admission to local residents, stated that the clause “was intended to create a national economic union.” *Id.* at 279-80.

166. See, e.g., B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1976); G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787* (1969); Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1985); Sherry, *The Intellectual Origins of the Constitution: A Lawyer's Guide to Contemporary Historical Scholarship*, 5 CONST. COMM. 323 (1988); Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

167. A. GUTMANN, *DEMOCRATIC EDUCATION* (1987).

168. *Id.* at 46 (emphasis in original).

169. M. ELIADE, *supra* note 102, at 129 (emphasis in original).

process and thus refused to treat the flag as sacred, *Johnson* could erode attachment and allegiance to the American political community.¹⁷⁰

V. TOWARD A DEEPER UNDERSTANDING OF *TEXAS V. JOHNSON*

From the perspective of political community and the sacred, *Johnson* is considerably more problematic than it appeared when looked at solely through Justice Brennan's liberty-promoting first amendment lens. The special focus of this Article on the sacred is intended to demonstrate that socially generated meanings of the American flag and other patriotic symbols are both powerful and necessary for the coherence of the political community. Nevertheless, in this last Part, I defend *Johnson* as a wise decision by suggesting several educational justifications for its refusal to treat the flag as sacred.¹⁷¹ Even apart from elucidating well established first amendment principles, the Court in *Johnson* taught the American political community several vital lessons. The first lesson gleaned from *Johnson* is that a genuine respect for patriotic symbols cannot and should not be mandated by government. Second, the American flag represents, and the first amendment exemplifies, certain political principles grounded on the Enlightenment. The final and perhaps most important lesson is that no necessary relationship exists between symbols and truth or reality.

A. *Respect for Patriotic Symbols*

Patriotic symbols do not promote political community as effectively when government insists on their sacredness as they do when the community

170. Cf. W. BERNIS, *FREEDOM, VIRTUE AND THE FIRST AMENDMENT* (1957). Berns states:

American constitutional law regarding free speech and press has tended to proceed on the assumptions that free speech and press is a *right* and that virtue could be ignored by the Court, that the rightness or wrongness of speech or of the beliefs it expressed was immaterial to a just solution of controversies.

. The basic point is that the purpose of law is and must be to promote virtue, not to guarantee rights of *any* description.

. Men do live together, and living together, to say nothing of living well together, carries certain responsibilities. . .

The solution to the problem of freedom cannot be found in a test to replace the [clear and present] danger test; the solution to the problem of maintaining free government, government under which men are permitted to speak freely, lies in citizenship education, moral education.

Id. at 247-53 (emphasis in original).

171. These justifications, which are a mixture of classical liberal and communitarian elements, are not put forward as definitive but rather as invitations for future discussion and debate on this difficult subject. I should note that my position—that *Johnson's* classical liberal approach to flag burning and the first amendment is not fundamentally at odds with attachment and allegiance to political community—parallels the more general and comprehensive argument of Joel Feinberg who rejects the view that “the personal autonomy so treasured by liberals is incompatible with certain community values that most of us would be loath to give up.” 4 J. FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW—HARMLESS WRONGDOING* 81 (1988).

voluntarily assumes the symbol's sacred nature. True intellectual and emotional attachment to patriotic symbols, and allegiance to a political community, arise out of free choice, not coercion.¹⁷² Government, of course, plays a significant role in promoting patriotic symbols. By indicating that the majority of the political community believes that certain patriotic symbols are indeed deserving of respect, such governmental promotion has the full intellectual and emotional force of that community behind it. Obviously, this cannot help but influence individuals to share that sentiment; indeed, that is a primary purpose of this kind of government speech. Nevertheless, individuals should retain the choice whether to honor patriotic symbols like the flag because, when they do, their commitment is deeper than it would be otherwise. Such voluntarism is very different from what the *Johnson* dissenters sought: to force individuals to treat such patriotic symbols as sacred by criminalizing their "desecration."¹⁷³

Emphasizing voluntarism for patriotic symbols is supported by an interpretation of the free exercise and establishment of religion clauses which focuses on religious voluntarism.¹⁷⁴ This interpretation is based in part on the position of James Madison who, in addressing the manner in which true religious belief can be engendered, asserted "that Religion or the duty which we owe to our Creator and the Manner of discharging it, can be directed only by reason and conviction, not by force or violence."¹⁷⁵ It is also grounded on the assumption that the institutional independence of religious bodies from government strengthens these institutions by encouraging the purity and vitality of their beliefs partly through the free competition of those beliefs on their merits.¹⁷⁶ Similarly, government acts unwisely when it attempts to coerce individual respect for patriotic symbols.

172. In using the word "coercion" I do not mean to suggest that in *Johnson* Texas was unconcerned with preventing offense to those who already possessed patriotic feelings. After all, the very statute, the application of which was found unconstitutional, defined "desecrate" in terms of offense to others. See *supra* note 30. Nevertheless, to the extent that Texas required *all* persons to treat the flag with veneration, it clearly attempted to affect the conduct and the beliefs of persons who did not possess patriotic feelings (including Johnson himself). I acknowledge, though, that the Texas statute at issue in *Johnson* is less coercive than a statute requiring all persons to salute and pledge allegiance to the flag. Cf. *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (holding violative of the first amendment a requirement that public school students salute and pledge allegiance to the flag).

173. This argument assumes that "we can guardedly say that a self-conscious and critically reflective civil religion can play a positive role in cementing the communal symbolic life of American society," Mirsky, *supra* note 152, at 1255, so long as we do not ignore or forget the dangers of civil religion.

174. See, e.g., L. TRIBE, *supra* note 165, at 1160-66.

175. *Walz v. Tax Comm'n*, 397 U.S. 664, 719 (1970) (Douglas, J., dissenting) (quoting J. MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS, reprinted in 2 THE WRITINGS OF JAMES MADISON 183-91 (G. Hunt ed. 1901)).

176. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part II. The Nonestablishment Principle*, 81 HARV. L. REV. 513 (1968). The author maintains:

B. Political Disagreement, Modernism and Reason

The defendant's conduct in *Johnson* made an important educational contribution. Recall that the Court read Johnson's flag burning as an expression of doubt whether "nationhood and national unity are the flag's referents or that national unity actually exists."¹⁷⁷ This conduct effectively communicated the message that at least some individuals believe passionately that there are faults in American society and that the flag's conventionally accepted message of patriotism and unity does not necessarily reflect unanimity or satisfaction in the political community. His conduct was thus that of a self-declared political outsider¹⁷⁸ and "symbol-breaker."¹⁷⁹

The Court's interpretation of Johnson's conduct is distinctly *modernist* in nature: it did not seriously question the fundamental political and moral principles underlying the American system of government, principles grounded in the Enlightenment.¹⁸⁰ Rather, it challenged the United States to live up to those principles.

[B]oth religion and society will be strengthened if spiritual and ideological claims seek recognition on the basis of their intrinsic merit. Institutional independence of churches is thought to guarantee the purity of vigor of their role in society, and the free competition of faiths and ideas is expected to guarantee their excellence and vitality to the benefit of the entire society.

Id. at 517 (citations omitted).

177. *Texas v. Johnson*, 109 S. Ct. 2533, 2544 (1989).

178. See Sanford Levinson's insightful discussion on constitutional attachment—one's commitment to the Constitution—and the relevance of "good works or inner faith as indicia of attachment." S. LEVINSON, *CONSTITUTIONAL FAITH* 127 (1988); see also *id.* at 122-54.

179. Max Lerner envisioned an even broader education function of such "symbol-breaking" when, in writing about the Constitution and the Supreme Court as symbols after the Court had held invalid much New Deal legislation enacted to remedy the depression, he concluded:

With the lower-income groups [t]heir role—the role of the common man in every culture—has always been at once symbol-breaking and symbol-making. For the common man in the past the Constitution has been a symbol of hope and authority, and the judicial symbol one of protection. He has become the carrier of those symbols; to appease him and lash down his allegiance to the existing order have been their functions.

[T]he common man is again assuming his historic function of symbol-breaker and symbol-maker. Trade-union action, mass political action based upon common mass interests are capable of building new myths and are on the way to doing so. If these [majority] groups succeed in their efforts to make out of the Constitution once more an "instrument" for the common interest, the Constitutional symbol will get renewed strength; but the path toward such a reshaping of the Constitutional symbol lies necessarily through the decline and fall of the symbol of the divine right of judges.

Lerner, *supra* note 160, at 1318-19.

180. "[T]he project of modernity formulated in the 18th century by the philosophers of the Enlightenment consisted in their efforts to develop objective science, universal morality and law, and autonomous art according to their inner logic. [The ultimate goal was] the rational organization of everyday social life." Habermas, *Modernity—An Incomplete Project*, in *THE ANTI-AESTHETIC: ESSAYS ON POSTMODERN CULTURE* (H. Foster ed. 1983).

For a possible postmodern interpretation of the defendant's conduct, see *infra* note 183.

Justice Kennedy's concurring opinion in *Johnson* may reflect such a modernist attitude. He explained his joining the Court's decision:

I agree that the flag holds a lonely place of honor in an age when absolutes are distrusted and simple truths are burdened by unneeded apologetics.

Though symbols often are what we ourselves make of them, the flag is constant in expressing beliefs Americans share, beliefs in law and peace and that freedom which sustains the human spirit.¹⁸¹

With the dissenters, he shared a sense of what the American flag represents. Unlike them, however, he thought that denying first amendment protection to the defendant's conduct in *Johnson* would be to convert the American flag into an absolute, or sacred symbol. And as emotionally appealing as that was for him, it would have been inconsistent with "both the technical and the fundamental meaning of the Constitution."¹⁸² To his credit, Justice Kennedy resisted the nostalgia for an imagined past in which the belief in absolutes was taken for granted.¹⁸³

Furthermore, while *Johnson*'s conduct made an educational contribution, the Court's *Johnson* decision itself served an additional educational function. It declared that the American flag is not sacred in the sense that the dissenters claimed. Rather, *Johnson* determined that the flag represents certain political ideas and a unique government structure. Those who disagree with those ideas and that structure may communicate their disagreement by destroying the American flag, while those who reject such a position may respond with counterspeech. Even though communication through emotion is, after *Cohen*, entitled to considerable first amendment protection—the *Johnson* defendant himself communicated emotively—*Johnson* indicates that the first amendment embodies an Enlightenment preference for reason over emotion.¹⁸⁴ As Justice Brennan explained: "The way

181. *Johnson*, 109 S. Ct. at 2548 (Kennedy, J., concurring).

182. *Id.*

183. In addressing the absence of absolutes, Justice Kennedy also hinted at a more subversive *postmodern* interpretation of *Johnson*'s conduct. Regardless of *Johnson*'s intention, his conduct may be interpreted as expressing the opinion that the values which the American flag is thought by many to represent are illusory. This interpretation is distinctly *postmodern* because it repudiates not only the means for, and possibility of, bringing about law, peace and freedom, but the worthiness of these (and any other) Enlightenment goals. Unlike modernism, *postmodernism* therefore rejects the Enlightenment. See J. LYOTARD, *THE POSTMODERN CONDITION: REPORT ON KNOWLEDGE* 79-82 (G. Bennington & B. Massumi trans. 1984). For further discussion of modernism and postmodernism, but in an artistic expression setting, see Nahmod, *supra* note 77, at 249-52.

This hint of *postmodernity* might be what triggered the dissenting Justices' outraged response to the defendant's conduct. They may have perceived that he was not only criticizing America for failing to live up to its professed ideals but also was claiming that those ideals are not worth living up to.

184. That the free speech clause of the first amendment prefers reason to emotion is consistent with the following observation of Mark Tushnet, made in connection with his

to preserve the flag's special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong."¹⁸⁵ Consequently, whether one focuses on a first amendment theory of self-government, or the marketplace of ideas, or of individual self-fulfillment, the Court in *Johnson* reposed considerable confidence in reason and its ability to persuade.¹⁸⁶

C. Symbols, Truth and Reality

Americans live in a society permeated by symbols generated and manipulated by government, the media and business.¹⁸⁷ These symbols often have the effect of making us feel, think and act in certain ways. As Max Lerner wrote in 1937:

Men have always used symbols in the struggle for power, but only latterly have we grown aware generally of their importance. [O]ne

argument that the Supreme Court's establishment of religion and free exercise case law is confused: "Religion poses a threat to the intellectual world of the liberal tradition because it is a form of social life that mobilizes the deepest passions of believers in the course of creating institutions that stand between individuals and the state." M. TUSHNET, *supra* note 151, at 248. From Tushnet's perspective, the argument in this Article, as reformulated, would be that the passions generated by the flag similarly threaten the intellectual tradition of liberalism. Of course, Tushnet would not necessarily agree that the preference for reason over emotion, or the position taken in this Article regarding the sacred, is appropriate, since he went on to complain:

[C]onstitutionalists in the liberal tradition are committed to developing a law of religion even though they do not understand why they have to do so. They have lost that understanding because the liberal tradition has so increased its cultural authority that it is difficult to retrieve the republican tradition, which does make sense of the religion clauses

Id. But cf. Sherry, *Outlaw Blues*, 87 MICH. L. REV. 1418, 1425-27 (1989) (review of M. TUSHNET, *supra* note 151, that in part questions Tushnet's approach to religious liberty).

185. *Johnson*, 109 S. Ct. at 2547. This is followed by Justice Brandeis' famous rationale of the clear and present danger test in *Whitney v. California*, 274 U.S. 357, 377 (1927) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.").

However, it is important to observe that Justice Brennan did not preclude a response to a flag burner which

exploit[ed] the uniquely persuasive power of the flag itself. We can imagine no more appropriate response to burning a flag than waving one's own, no better way to counter a flag-burner's message than by saluting the flag that burns, no surer means of preserving the dignity even of the flag that burned than by according it remains a respectful burial.

Johnson, 109 S. Ct. at 2547. The Court's preference for the discourse of reason over that of emotion, as reflected in *Johnson*, is thus one of emphasis.

186. I want to make clear that my analysis is not intended to marginalize the place of emotion in first amendment theory. See Nahmod, *supra* note 77, at 245-47.

187. Few artists have made this point more effectively than Andy Warhol, through his representation of repeated product images, such as Campbell's Soup cans, as works of art. These images visually represent the cans of soup themselves and symbolically represent, among other things, conformity in an assembly-line society.

of the essential techniques of power-groups is to manipulate the most effective symbols in such a way that they become instruments of mass persuasion. Men are notably more sensitive to images than to logic, to the concrete symbol than to the abstraction. [T]hese techniques [of persuasion] depend for their effectiveness upon the symbols that they manipulate, and the symbols depend in turn upon the entire range of association that they invoke. The power of these symbols is enormous. Men possess thoughts, but symbols possess men.¹⁸⁸

Thus, symbols have political, social and economic implications for Americans as individuals and as members of a political community

Johnson's flag burning is a good example of the successful generation and manipulation of such symbols in an attempt to influence beliefs and behavior. In holding that this conduct was protected under the first amendment and that the flag is not sacred, the Supreme Court in *Johnson* educated the American political community about symbols. At a simple level, the Court made clear that the flag is a piece of cloth which may represent the United States and its principles but which is not identical with them.¹⁸⁹ A contrary conclusion would have amounted to idolatry, with the flag an object of worship.

Johnson also delivered a subtler and perhaps more crucial educational message to citizens of a democratic government: symbols do not always tell the truth and they do not necessarily constitute reality. This message dictates a posture of skepticism toward symbols manufactured and manipulated by government, the media and business. In a very real sense, such a skeptical posture can be termed *aesthetic*, because it is grounded upon a recognition of the power of all images. Just as images are manufactured and manipulated by artists for aesthetic purposes, a skeptical aesthetic posture regarding symbols insists that Americans recognize that symbols can be, and increasingly are, manufactured and manipulated by others for political, social and economic purposes as well.

The critic Walter Benjamin, in a famous and prescient essay addressing the impact of this unique twentieth century combination of politics and reproducible artistic images, observed:

An analysis of art in the age of mechanical reproduction lead[s] us to an all-important insight: for the first time in world history, mechanical reproduction emancipates the work of art from its parasitical dependence on ritual. To an ever greater degree the work of art reproduced becomes the work of art designed for reproducibility. But the instant the criterion of authenticity ceases to be applicable to artistic reproduction,

188. Lerner, *supra* note 160, at 1292-93 (emphasis in original) (citations omitted).

189. In semiotic terms, the lesson is that the signifier is not the same as the signified. See *supra* text accompanying notes 3-6.

the total function of art is reversed. Instead of being based on ritual, it begins to be based on another practice—politics.¹⁹⁰

Benjamin maintained that if the media became instruments of political control, self-government would be threatened. The Court's decision in *Johnson* thus constitutes a powerful warning to suspect government when it attempts to create sacred patriotic symbols.¹⁹¹

CONCLUSION

Johnson is an easy case if well-established first amendment principles are applied to it. Nevertheless, in focusing on the dissenting opinion of Chief Justice Rehnquist in *Johnson*, I took seriously his arguments for sacralizing the American flag when I extensively analyzed the concept of the sacred. Initially, those arguments led me to compare *Johnson* and the Court's establishment of religion doctrine. I then considered the implications of the flag for American civil religion and political community. Chief Justice Rehnquist's position also exposed the tension¹⁹² between a classical liberal view of the first amendment which prohibits the creation of sacred patriotic symbols and supports the individual's right to express her ideas and feelings without government interference, and a view of government which emphasizes political community and, if necessary, restricts the individual's right to express herself.¹⁹³

190. W. BENJAMIN, *ILLUMINATIONS* 226 (H. Arendt ed. 1968) (footnote omitted) (essay entitled *The Work of Art in the Age of Mechanical Reproduction*). See also *id.* at 249 n.12, 253 n.21, where Benjamin described the use by governments of film and radio for propaganda purposes. However, he also believed that the mass media could be a liberating force because they destroyed the primitive aspect of art that identified objects with their reproduced images.

Benjamin's warning about the power of symbols and their manipulation by government is reminiscent of, but very different from, Plato's insistence in *The Republic* that artists must be controlled by the ruling philosopher-kings so that only approved lies are disseminated for the good of society. Both Benjamin and Plato shared the view that symbols, aesthetic and otherwise, are powerful.

I thank John Stopford, Assistant Professor of the School of the Art Institute of Chicago, for calling my attention to Walter Benjamin's work.

191. A comparable warning is embedded in the opinion of Justices Brennan, Marshall and Stevens in *County of Allegheny v. American Civil Liberties Union*, 109 S. Ct. 3086 (1989). The Justices dissented with regard to the majority's finding that the display of a menorah placed next to a city's Christmas tree, accompanied by a statement referring to the city's "salute to liberty," was constitutional on the grounds that the city's message was not religious but patriotic. *Id.* at 3128. They observed that "the government's use of religion to promote its own cause is undoubtedly offensive to those whose religious beliefs are not bound up with their attitude toward the Nation." *Id.* at 3128.

192. Cf. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 603 (1990) (characterizing as a "paradox of public discourse" the suspension by first amendment doctrine of the norms that make possible the rational deliberation required for self-government and communication among communities).

193. See W. BERNIS, *supra* note 170, at 251 (emphasis in original) ("The basic point is that the purpose of law is and must be to promote virtue, not to guarantee rights of any description.").

Nevertheless, while conceding the power of the American flag as a socially created patriotic symbol, I ultimately rejected Chief Justice Rehnquist's call to sacralize the flag. Even if patriotic symbols are necessary for political community, sacralizing the flag is, on balance, unwise. We have come too far as a nation, with our tradition of tolerance for controversial and unsettling ideas, and should, by this time, be too mature as a political community to punish political heretics by establishing a blasphemy exception to the first amendment.