FREEDOM OF SPEECH AND THE PRESS: LIMITED TEXTUAL DEFINITIONS AND THE FALLACY OF SYMBOLIC SPEECH

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This study demonstrates the limited oral definition of "speech" in the First Amendment and that symbolic speech is a judicial usurpation of the Amendment Clause. One thesis here is that ambiguity in the language of the Constitution can in most cases be resolved by textual meaning in its social context at the time of ratification. This method is greatly assisted in some cases by application of the common-law canons of documentary construction. As to the original Constitution and the Bill of Rights, this method requires that lawyers search for meaning in eighteenth century English language. The appropriate definitions of constitutional terms are found in eighteenth century dictionaries and documents that illustrated those terms.¹ It is generally understood that the changed meaning of words over time is not an approved method in Article 5 to amend the Constitution. Yet, most briefs in Constitutional cases do not devote a section to the original meaning of language. Consequently, many Supreme Court opinions fail to treat this fundamental issue.

The objective here is to review two of the key civil rights in the First Amendment by assembling the established original limited definitions of language and demonstrate where the Supreme Court has violated basic set theory. The background is the separation of governmental powers and the checks and balances this is designed to create.² Professor Alexander Bickel reviewed the history and explained why the judiciary was to be the least dangerous branch.³ Maximum governance by an appointed judicial elite in the Supreme Court majorities was rejected by the framers and the ratifiers. Lawmaking
was delegated to the legislatures in the nation and in the states as the primary characteristic of representative government. The presumption of constitutionality of statutes was to be overcome by the judiciary only when the laws violated the clear meaning of originally delegated powers or the listed constitutional limitations.

This study explains that the definition of "speech" in the Constitution is limited to oral statements in public controversies. It was this limited definition that Justice Hugo Black said was absolute. The other main use of "speech" as a synonym for interpersonal speaking would have legal impact in oral crimes and torts.

The second main issue treated here is the creation of symbolic speech by the judiciary to include non-oral physical expressions. It is truly amazing that the Supreme Court briefs and opinions plus the writings of legal commentators fail to meet this issue. The Court generally depends on the briefs of Counsel to raise such fundamental issues. Lawyers educated in the common law system are taught to give weight to precedents. When facing a case in constitutional law, they may not realize that another key aspect of available argument is the original meaning of constitutional language.

**NATURE OF DEFINITIONS: MINIMIZING AMBIGUITY**

Definitions are not right or wrong. They are more useful, less useful, or useless. They are the primary explanations of the signs by which human beings communicate. In any field of endeavor in which, over time, the specialists have created a technical vocabulary, the need for rigor and general consensus in definitions is the ideal objective which in practice cannot be reached. While total efficiency in communication is an unattainable ideal, articulation of definitions in order to reassure other parties in
negotiations that there is agreement on meanings is useful. In law, the scope of key definitions may determine the scope or breadth of the contested legal rules, either restricting or enlarging the application of the law to actual cases.

A first step in the effort to reduce ambiguity in definitions is to recognize that technical meanings of legal terms will likely have narrower meanings than the same terms have in ordinary English. The technical terms are elements of a system of legal classification. The scope of the law, like medicine or the other sciences, is so extensive that ideas must be divided in classes before specialists can begin to communicate. In error, even justices Holmes and Brandeis failed to realize that the commercial law (law merchant) is not a subset of the common law. A general field of law may be thought of as comparable to a genus and a particular legal rule as a species. It is important not to define any field of law in terms of another. For example, the common-law right to privacy is state law, but there is no comparable limitation in the U.S. constitution.

Search for subjective intent of framers and ratifiers is impossible. The convention of 1787 was deliberately closed to all outsiders and no official report made on the speeches in order to bar the influence of statements of leaders on the interpretation of the final document. This was later emphasized by James Madison: "As a guide in expounding and applying the provisions of the Constitution, the debates and incidental decisions of the Convention can have no authoritative character." Since no official record of proceedings of the framers was made, none could be sent to the ratifying conventions. Those who voted for ratification voted for the language in the text, not the unknown subjective thoughts of 55 framers. The predominance of the text also applies to the amendments. As Justice Horace Gray noted, "Doubtless the intention of the Congress
which framed and of the states which adopted [the Fourteenth] Amendment of the
Constitution must be sought in the words of the Amendment; and the debates in Congress
are not admissible as evidence to control the meaning of those words.”

Law students must be warned that language changes over time though usually
quite slowly. In an adversary legal system, however, lawyers may engage in word magic,
redefining legal terms and phrases so that they lead to the creation of legal rules that
support the lawyer's side of the litigation. The opponent must be alert to point out that
redefining legal concepts in order to expand or contract the scope of legal rules is a mere
device and not sound legal argument.

The entire literature commenting on the First Amendment fails to treat the
ambiguity in the word "speech". Different definitions of "speech" in 1791 depended on
the context in which the word was used. The limited definition of "speech" that led to
constitutional protection was oral statements in public controversies. Few authors have
recognized this essential limitation. The origin was in the English Bill of Rights of
1689. It mandated: "That the freedom of speech, and debates or proceedings in
Parliament ought not to be impeached or questioned in any court or place out of
Parliament.” A similar protection for members of the U.S. Congress is in Article 1,
Section 6 of the Constitution: "for any Speech or Debate in either House, they shall not
be questioned in any other place.” It was this protection of speech in public
controversies that was extended to all persons in the First Amendment. One may think
firstly and most often of political issues such as those before our legislatures. But the
general concept would extend to the issues in contest between scientists, social scientists,
theologians, humanists, philosophers and many other groups of individuals.
The relationships of the constraints in the First Amendment require the application of elementary set theory. The key terms must be stated in the 18th century English of 1791. As defined in Samuel Johnson's dictionary, the most general term for human communication is not in the First Amendment. The primary term for the set is "expression." It was defined by lexicographer Johnson as "The Act or Power of Representing Anything." It is essential to observe that the term "expression" is a very large set. In addition to oral and printed methods, there are many hundreds of physical acts that communicate viewpoints. Kisses, hugs, help to the disabled, and desecration of American flags are a few examples.

It is important basic set theory that a set and a subset can never be synonyms. Speech and press are distinct and together are a very small part of expression. Many authors have been in error when treating the word "expression" as merely the sum of speech and press. Thomas I. Emerson is a sad example. His *The System of Freedom of Expression* erroneously treats speech and press as if they were so described.

Speech was defined by Johnson as "The power to articulate utterance; the power of expelling thoughts by vocal cords." Thus, speech in 1791 was limited to oral communication. This was restated by George Hay in 1799, as follows: "It is obvious in itself, and it is admitted by all men, that freedom of speech, means the power uncontrolled by law, of speaking either truth or falsehood at the discretion of the individual, provided no other individual be injured. This power is, as yet, in its full extent in the United States."

In order to understand the limited definition of "freedom of speech" in Eighteenth Century America, one finds the colonists read the works of the English political writers in
the Whig tradition. But Gordon and Trenchard’s *Cato’s Letters* was the most popular, quotable and esteemed source of political ideas in the colonial period. In *Cato’s Letters*, it is clearly explained that freedom of "speech", as there distinguished from freedom of the press, is concerned with verbal linguistic commentary on the controversial issues of the day.\(^{18}\)

The resolutions and proposals for the Bill of Rights indicate that "speech" was limited to oral linguistic comment. Madison’s resolution to the Congress on June 8, 1789 contained the follow proposed addition to Article 1, Section 9: "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments."\(^{19}\) The House Committee Report of July 28, 1789 proposed the language "The freedom of speech... shall not be infringed," and the House Resolution of August 24 used the same language.\(^{20}\) On September 4, the Senate agreed to amend the language to "Congress shall make no law abridging freedom of speech."

The other main definition of "speech" is as a synonym for "speaking," any oral interpersonal communication other than that concerning public issues. Private speaking to others may be on any topic. It does not reach the context of constitutional protection. Most speaking raises no legal issues. Those that do, such as oral crimes and oral torts, usually are heard in state courts. Oral threats of physical harm and oral defamation are key examples. One outstanding example of offensive speaking not protected from prosecution is *Chaplinsky v. New Hampshire*.\(^{21}\) On a city street, defendant called complainant "a goddamned racketeer and a damned fascist." He was convicted of violating a state statute prohibiting assertion of offensive, derisive or annoying words to another in a public place. This oral offense was speaking but clearly not "speech" in its
limited constitutional definition. The Supreme Court affirmed, holding that "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."  

When Professor Alexander Meiklejohn wrote his major article, *The First Amendment Is an Absolute*, he defined "Freedom of Speech" in the same limited way as explained here. He adopted the view of Justice Hugo L. Black that there are "absolutes" in the Bill of Rights. Black admitted that much of the English language has multiple meanings, and that the social context is important in defining terms as used in the Bill of Rights. He quotes Madison that these limitations point "sometimes against the abuse of Executive power, sometimes against the Legislative, and in some cases against the community itself; or in other words, against the majority in favor of the minority." He then noted Madison's speech to Congress that under the First Amendment "The Right to freedom of speech is secured; the liberty of the press is expressly declared to be beyond the reach of this government."

Press meant communication by printed documents such as newspapers, magazines, books and pamphlets. Citing the First Amendment, George Hay asserted: "That by the words "freedom of the press" is meant a total exemption of the press from legislative control, will further appear, from the following cases, in which it is manifest, that the word freedom is used with this signification and no other." Freedom of the press was neither equated with nor viewed as a derivative of freedom of speech. Nine of the eleven original states that adopted revolutionary constitutions protected freedom of the press; only one protected speech. Freedom of the press and its limits in wartime
were explained by Justice Oliver Wendell Holmes in 1918. His three opinions are widely considered the foundation of the topic in the modern era.

In *Schenck v. United States*, defendant head of the minute Socialist Party was charged with conspiring with his members to violate the Espionage Act of 1917. They had printed 15,000 leaflets against U.S. entry into World War I and mailed them to men who had been conscripted into the armed forces. The charge was efforts to cause insubordination in the armed forces and obstructing recruiting and enlistment. Defendants were convicted in spite of the fact that very few men would respond. They knew that refusal to report when conscripted would mean conviction and jail.

Justice Holmes affirmed the convictions, explaining the importance of the wartime context. He then violated the legal maxim, *ex facto jus oritur* (the law arises out of the facts) and switched from freedom of the press pleaded by defendants to *obiter dictum* on limits to freedom of speech. He then returned to freedom of the press and emphasized the circumstances, the war in which the leaflets were distributed. His conclusion was: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

In *Frohwerk v. United States*, Justice Holmes affirmed another conviction under the Espionage Act of 1917. This case was against the publishers of a newspaper, the *Missouri Staats Zeitung* for publishing 12 articles in order to cause disloyalty, mutiny, and refusal to serve in the armed forces of the United States. The motion to dismiss had mistakenly referred to the First Amendment as to free speech. Instead of correcting this,
Holmes in *obiter dictum* cites the *Schenck* case on the scope of free speech in the First Amendment.

Justice Holmes dissented in *Abrams v. United States* concerning the application of the Espionage Act of May 16, 1918. The five defendants were Russian Jewish immigrants to the United States who described their tiny group as "anarchists." They were charged with printing and distributing 5,000 circulars in one small section of New York City in opposition to the U.S. Army extending its final wartime action to stopping a part of the new Russian Revolution. Without congressional declaration of war against the Russians, volunteer marines and soldiers, already in service, were sent to the Pacific Coast areas of Vladivostok and Murmansk. Holmes again, as in *Schenck*, errs in deviating from freedom of the press by referring to when the United States constitutionally may punish "speech" that produces a clear and imminent danger. He explains that "as against dangers peculiar to war, as against others, the principle of the right to free speech is always the same." One may conclude that Holmes' confusion of the press and speech led generations of scholars into like confusion.

**CONTESTS OVER SYMBOLIC SPEECH**

In *Brown v. Louisiana*, the Court held that the conduct of African-Americans who remained standing or sitting in a public library after being refused service, constituted expression within the protection of the First Amendment:

As this Court has repeatedly stated, these rights [of freedom of speech, assembly and petition] are not confined to verbal expression. They embrace appropriate types of action which certainly include the right in a peaceable
and orderly manner to protest by silent and reproachful presence, in a place
where the protestant has every right to be, the unconstitutional segregation of
public facilities.\textsuperscript{35}

Since the African-Americans had been denied equal protection of the laws in
violation of the Fourteenth Amendment, their continued presence in the library was merely
part of their earlier valid verbal demand for equal service. The Court could have upheld
their continued presence in the library as part of their right to equal protection that here
overrode the state’s breach-of-peace statute rather than labeling their action symbolic speech
under the First Amendment.

Cases combining speech plus physical conduct led to a two-level theory for First
Amendment cases. The speech or press activities received the highest level of judicial
protection while the accompanying physical conduct was subjected to regulation.\textsuperscript{36} This
was followed by the development of the theory that physical acts could be classified as
symbolic speech and receives the same protection as speech.\textsuperscript{37} The cases relating to flag
desecration and similar physical acts of protest are treated in the next section. The most
striking recent case, unrelated to flags or protest, illustrates the extent of judicial mislabeling
of purely physical conduct as symbolic speech. In \textit{Barnes v. Glen Theatre, Inc.},\textsuperscript{38} the theatre
company brought an action for injunction to prevent Indiana from enforcing its public
indecency law against nude dancers performing in its lounge. A state statute required the
dancers to wear minimal cover, known in the theater as "pasties" and "G-strings." Since the
statute applied to nudity, and the dancers could legally perform in an almost nude state with
pasties and G-strings, the District Court denied the injunction on the ground that the addition
of nudity to erotic dancing was not "expressive activity protected by the Constitution of the United States."³⁹

The Court of Appeals heard the case en banc and reversed the District Court. It held that non-obscene nude dancing performed for entertainment is expression(speech) protected by the First Amendment and that the public indecency statute was an improper infringement because its purpose was to prevent the message of eroticism and sexuality conveyed by the dancers.⁴⁰ Ignoring the finding of fact by the trial judge, the majority in the Court of Appeals found an erotically significant difference between dancing wearing pasties plus G-string and dancing nude.

The Supreme Court reversed the Court of Appeals by a vote of 5 to 4, but 8 of the 9 justices held that nudity in dancing for entertainment was expression protected by the First Amendment, namely symbolic speech. Chief Justice William Rehnquist, writing for three members of the majority, held that the application of the Indiana statute to the nude dancing had not violated the First Amendment even though such dancing was expressive conduct within the outer perimeters of the First Amendment.⁴¹ The public indecency statute was clearly within the state’s constitutional power and the statute’s purpose was to protect societal order and morality. The statute thus furthered a substantial governmental interest and was unrelated to the suppression of free expression.⁴² Here the incidental restriction on First Amendment freedom by the minimal statutory requirement of pasties and G-string did not deprive the dance of whatever erotic message it conveyed. Lastly, the restriction was no greater than was essential to the furtherance of the governmental interest to bar nudity.

Only Justice Antonin Scalia, concurring in the reversal, found the public indecency statute to be a general law regulating physical conduct and not specifically directed at
speech. It was therefore not subject to First-Amendment scrutiny at all. Noting the dissent of Judge Frank Easterbrook in the Court of Appeals, Scalia reiterated the fact that the state statute did not regulate dancing, but only public nudity. The statute was not concerned with messages of eroticism but with public decency, including the physical conduct of public nudity in all public places and circumstances. If the people of Indiana, through the legislative process, chose to adopt a moral bias against nudity into statute, it was not necessary to justify the statute by proving that some persons were offended by nudity. Scalia was the only justice to explore original definitions and note that the First Amendment explicitly protects the freedom of speech and of the press--oral and written language--not “expressive conduct.” He then went on to try to explain his vote with the majorities in the flag-burning cases, where admittedly communicative physical conduct was held to violate the First Amendment.

One of the earliest sources of confusion over symbolic speech was Stromberg v. California. Defendant director of a Communist youth camp was convicted under California’s red-flag law of leading the young campers in pledging allegiance to the red flag. The statute made it a felony to display the red flag as a symbol of opposition to organized government, or stimulus to anarchistic action or as aid to seditious propaganda. The Supreme Court, by a vote of 7 to 2, correctly reversed the conviction because the statute was vague and indefinite. It was held repugnant to the guaranty of liberty in the Fourteenth Amendment. But the briefs and the opinion of Chief Justice Charles E. Hughes erroneously center on freedom of speech. The red flag could possibly relate to freedom of the press. It was a piece of red print cloth or cloth dyed to simulate red print. The closest analogy in the field of communications is the printed one-page hand-bill. There was no evidence here of
incitement to anarchy or sedition. However, this case is an oft-cited precedent for symbolic speech.\textsuperscript{48}

The Supreme Court, without reference to the original technical legal meaning of "freedom of speech" has engaged in an uneven expansion of the concept of symbolic speech to cover communication by physical conduct. In \textit{United States v. O'Brien},\textsuperscript{49} the Court upheld the conviction of the defendant for burning his draft card in violation of a federal statute making the destruction a crime. Chief Justice Earl Warren, for the Court first held that the statute on its face concerned physical acts and did not abridge free speech. "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."\textsuperscript{50}

Having defined the category of this act as non-speech, Warren unfortunately equivocated. He stated that even on the assumption that the communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it is not in this case protected. "[W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedom is not greater than essential to the furtherance of that interest."\textsuperscript{51} This four-part test was \textit{obiter dictum}. Nonetheless, it was adopted in a number of later cases on flag desecration.

The Court next held that an act of physical conduct in protest of the Vietnam war was symbolic speech protected by the First Amendment. In \textit{Tinker v. Des Moines School District},\textsuperscript{52} students had been suspended from school for wearing black armbands, and an action for injunction by the parents was dismissed by the district court.\textsuperscript{53} The Supreme
Court reversed the judgment by a vote of 7 to 2. Justice Abe Fortas, for the Court, held that this physical act was symbolic speech. Students, who would not be allowed any classroom time to make a verbal antiwar speech, had a constitutional right to engage in symbolic speech in all their classes. Justice Black dissented to this transfer of control of public school pupils from elected state officials to the Supreme Court. Since this was not a regulation of the content of the asserted symbolic speech, the issue was the necessary reasonable regulation of the time, place and manner of the alleged "speech." Black concluded that the issue of whether this type of non-verbal expression detracted from the assigned learning of other students was one for decision by school officials.

In Cohen v. California, the defendant was convicted of disturbing the peace by offensive conduct in wearing a jacket bearing the words "Fuck the Draft" in the corridor of the courthouse. The word "fuck" did not mean sexual intercourse in this context and was not obscenity, but it was found offensive to the public. There is no suggestion that there would have been prosecution if "fuck" had been replaced by "stop", "terminate", "repeal" or "evade." Hence, this was not a prosecution to stop the publication of the content, an anti-draft message on a jacket. The brief for the State of California argued that Cohen had engaged in offensive conduct in violation of Section 415 of the California Penal Code and not in speech protected by the First Amendment. Nevertheless, the U.S. Supreme Court reversed the conviction by a vote of 5 to 4. Justice John M. Harlan, for the majority, held that Cohen’s conviction for printing "Fuck" on his jacket, not being obscenity or fighting words, rested squarely upon his exercise of “freedom of speech.” The danger of censorship of content provoked the court to protect offensive language even though, in this case, a strong anti-draft printing could have been affected without the offensive word.
Harlan wrote that the First Amendment also protects the emotive function of speech, including immoderate language.

Justice Harry Blackmun, for the dissenters, began "Cohen’s absurd and immature antic, in my view, was mainly conduct and little speech." He cited Justice Frank Murphy’s earlier dictum that lewd and obscene words neither contributed to the expression of ideas nor possessed any "social value" in the search for truth. It seems that both Justices Harlan and Blackmun mistakenly treated Cohen’s physical act as at least in part "speech."

**FLAG DESECRATION CASES**

*Street v. New York* was the first case concerning the illegality of flag burning. A New York law made it a misdemeanor to "publicly mutilate, deface, defile, or defy, trample upon, or cast contempt upon either by words or act" any flag of the United States. Defendant, African-American heard the news report that James Meredith, the first African-American to enroll at the University of Mississippi had been shot by a sniper. He took his American flag to the street and set it on fire. He told a police officer, "We don’t need no damn flag. ... If they let that happen to Meredith we don’t need an American flag." Street was arrested and convicted for malicious mischief in violating the New York statute prohibiting desecration of the American flag. The Supreme Court reversed the conviction by a vote of 5 to 4. Justice Harlan, for the majority, held, that since there was no trial court opinion, defendant possibly could have been convicted "merely for speaking defiant or contemptuous words about the American flag." Harlan’s questionable opinion converted it to a pure oral speech case, not about flag burning.
The dissenters indicated that the majority had failed to reach the only issue in contest, the physical act of flag burning. Justice Black wrote:

> It passes my belief that anything in the Federal Constitution bars a state from making the deliberate burning of the American flag an offense. It is immaterial to me that words are spoken in connection with the burning. It is the *burning* of the flag that the State has set its face against.\(^{67}\)

Justice Fortas, in dissent, indicated that flag burning was not *sui generis*. A state statute making it a misdemeanor to burn any item on the public street could not be asserted to violate a citizens constitutional right if violated.\(^{68}\)

The next year the New York Court of Appeals in *People v. Radich*\(^ {69}\) affirmed the conviction for the display of a sculpture that defiled the United States flag. Defendant publicly displayed the flag in the form of the male sexual organ, erect and protruding from the upright member of a cross; also in the form of a human body, hanging from a yellow noose; and again, wrapped around a bundle resting upon a two-wheeled vehicle, a gun caisson.\(^ {70}\) The Court reiterated its view in the *Street* case that the statute was valid in relation to physical desecration of the flag. Regardless of the ideological views of the defendant, a reasonable man would consider the conduct here to dishonor the flag. The objective of the statute is not to limit freedom of speech or of the press to any person who wishes to protest governmental action. On appeal, an equally divided Supreme Court affirmed the judgment without opinion.\(^ {71}\)

In *Smith v. Goguen*,\(^ {72}\) defendant had been convicted in a Massachusetts trial court for violating a state law that made it illegal to publicly treat the flag contumaciously.\(^ {73}\) His physical conduct was having a small American flag sewn to the seat of his pants. His
petition in federal court for a writ of habeas corpus was granted and this was affirmed in the Supreme Court by a vote of 6 to 3. Justice Lewis Powell, for the majority held the Massachusetts law invalid on the due process doctrine of vagueness. The legislature failed "to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent 'arbitrary and discriminatory enforcement.'” Justice Byron White disagreed on the issue of vagueness, but concurred in the judgment on the basis that a flag sewn to the seat of the pants was symbolic speech protected by the First Amendment. Justice Blackmun dissented on the ground that the state law only protected the physical integrity of the flag and this conviction was for physical conduct.

*Spence v. Washington* concerned a conviction for violating the state statute that made it illegal to place any figure, mark, picture, or design upon any flag of the United States. Defendant had hung an American flag upside down from his apartment window and attached a peace symbol to the flag in protest of the war in Vietnam and Cambodia. Defendant’s conviction was affirmed in the Supreme Court of Washington. The U.S. Supreme Court reversed the judgment by a vote of 6 to 3 on the basis that defendant’s conduct was symbolic speech, citing *Stromberg v. California* as a leading authority. The Court listed important factors: (1) the flag was privately owned by Spence, (2) the flag was displayed on private property, (3) there was no evidence of any risk of breach of the peace, and (4) Spence had engaged in a form of communication. The Court held that there was no risk that Spence’s acts would mislead viewers into assuming that the government endorsed his viewpoint since the display was a protest. Furthermore, Spence’s acts had not significantly impaired any interest which the state might have in preserving the physical integrity of a privately owned flag.
The Supreme Court finally met the issue of physical conduct of burning of the flag in *Texas v. Johnson*. The statute made it illegal for a person intentionally or knowingly to desecrate a public monument, burial place or a 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 or discover his action." In protest to the Republican National Convention in Dallas in 1984, Johnson unfurled the American flag, doused it with kerosene, and set it on fire. While the flag burned, his fellow protesters chanted, "America, the red, white, and blue, we spit on you." Johnson was convicted of violating the statute, but his conviction was reversed by the Texas Court of Criminal Appeals on the ground that his conduct was symbolic speech protected by the First Amendment. The Supreme Court affirmed the dismissal by a vote of 5 to 4.

The brief for the State of Texas failed to make any argument on the original meaning of "speech" in the First Amendment that would establish that it had included only oral communication. Rather, it noted the recent cases that held non-verbal expression may constitute speech. Thus it admitted the existence of a balancing test to decide whether expressive conduct must give way to other societal interests. The brief then argued the right of the state to preserve the flag as a symbol of nationhood and national unity was a compelling state interest which superseded any First Amendment rights of individuals. It also argued that Texas had a legitimate interest in preventing breaches of the peace that could result from flag desecration.

Justice William Brennan, for the majority, observed that the "First Amendment literally forbids the abridgment only of 'speech'." But he asserted that conduct may be sufficiently imbued with elements of communication to fall within the scope of the First and
Fourteenth Amendments.\textsuperscript{92} It was obvious that the flag burning was expressive physical conduct of a political nature and counsel for Texas conceded this fact. Having found that this flag burning was symbolic speech, Brennan held that the Court must decide whether Texas had asserted an interest in support of Johnson’s conviction that was unrelated to the suppression of expression. As to the state’s interest in preventing breaches of the peace, there had been no evidence at the trial that the protesters or those offended by their behavior breached the peace.\textsuperscript{93} As to the state’s interest in preserving the flag as a symbol of nationhood and national unity, this is directly related to suppression of free expression as protected by the First Amendment. Johnson’s conduct would violate the statute only if it seriously offended others, and this condition demonstrates that the restriction in the statute is content based. Therefore, Brennan held that the Court must subject the state’s asserted interest in preserving the special symbolic character of the flag to the most exacting scrutiny.\textsuperscript{94}

Chief Justice Rehnquist wrote the first dissent. He asserted that the public burning of the flag by Johnson was not essential part of any exposition of ideas. Johnson was protected by law to make any verbal or printed denunciation of the flag he wanted.\textsuperscript{95} Rehnquist quoted Justices Black and Fortas, dissenting in \textit{Street v. New York}\textsuperscript{96} that this one limit on physical conduct is not a limit on speech. He quoted Justice Blackmun that the flag is a national monument subject to the same protection as other monuments.\textsuperscript{97}

Justice John P. Stevens, in his separate dissent, adopted the same theme, that expressive physical conduct is not speech. As to Johnson’s burning of the flag, Stevens wrote:
Had he chosen to spray-paint-- or perhaps convey with a motion picture projector--his message of dissatisfaction on the facade of the Lincoln Memorial, there would be no question about the power of Government to prohibit his means of expression. The prohibition would be supported by the legitimate interest in preserving the quality of an important national asset.

Though the asset at stake in this case is intangible, given its unique value, the same interest supports a prohibition on the desecration of the American flag.98

Strong negative reaction of the public and in the Congress to the majority decision in Texas v. Johnson led to calls for action.99 President Bush issued a call for constitutional amendment that received support from many members of Congress. Upon reflection, leaders of the House and Senate issued reports favoring a legislative solution.100 The result was the Flag Protection Act of 1989.101 Reflecting public sentiment, the final bill passed the Senate by a vote of 91 to 9 and passed the House by a vote of 371 to 43.102 The key section of the Act is an unqualified prohibition on physical flag desecration:

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.103

The background to the 1989 Act was the fact that the Supreme Court had earlier held a Massachusetts law criminalizing the treatment of the flag contumely as invalid for vagueness.104 Since the Federal Flag Desecration Act of 1968105 was written in terms of "knowingly casting contempt" on the flag by acts of desecration, the call was for elimination of the limiting terms, "casting contempt." In one of the few earlier convictions under 1968
Act, Justice Brennan wrote a dissent to a denial of certiorari and noted that "casting contempt’ meant "espousing unpopular political views." He viewed this conduct as establishing symbolic speech.

The second background fact was the state law in Texas v. Johnson that rested liability on the subjective reaction of the viewers of the desecration. The language of the Texas statute was "the actor knows will seriously offend one or more persons likely to observe or discover his action." It was thus reasonable for Congress to draft a statute which unconditionally protected the physical integrity of the flag, language that avoided contempt by the burner or serious offense by the viewer.

In United States v. Eichman, the government appealed two cases under the Flag Protection Act of 1989 in which district courts had held prosecutions to violate the First Amendment. Both district judges found that the flag burnings in their cases were for the purpose of political protest and that they were thus bound to follow the rule of Texas v. Johnson and dismissed the prosecutions. The courts rejected the argument that an unqualified statute designed to protect the physical integrity of the flag for everyone’s use and no one’s destruction distinguished this case from Johnson. The finding was that the object was still to preserve the flag as a symbol of the nation and could not be content-neutral. Consequently, burning of the flag for political protest was protected symbolic speech.

The appeal brief for the United States by Solicitor General Kenneth W. Starr, like the brief in Johnson, failed to include an argument on the original meaning of "speech" in the First Amendment that would establish that it included only oral communication. Once the brief admits that some expressive conduct is protected speech, it has to argue that the
Flag Protection Act is unique in guarding a national symbol. The brief emphasizes Congress’s considered legislative judgment that there is a compelling national interest in protecting the flag. The brief misconstrues speech to include speaking civil and criminal wrongs in order to show exceptions to the First Amendment. Slander and perjury are not types of speech and neither is expressive conduct.

The Supreme Court affirmed the district court judgments by a vote of 5 to 4. Justice Brennan, for the majority, began by noting that the Government conceded that defendants flag burning constituted expressive conduct. As in Johnson, he rejected the Government’s claim that flag burning was in a special class like obscenity or “fighting words” that did not enjoy the full protection of the First Amendment. He also noted but failed to give weight to the fact that the flag was originally adopted as an incident of sovereignty to designate the nationality of ships and not as a symbol of patriotism or national unity. As to the unqualified language of the statute designed to protect the physical integrity of the flag under all circumstances, Brennan concluded that it is nevertheless clear that Government’s asserted interest is related to the suppression of free expression. Defendants burned the flag because of its symbolic role. The broader language of the federal statute had the same flaw as the Texas statute in Johnson: it suppressed expression out of concern for its likely communicative impact. The astonishing aspect of this case is that the political liberal Brennan was joined by the political conservative Scalia who violated his own methodology of originalism in ignoring the 1791 meaning of speech as limited to oral communication. This dramatically illustrates the statement in Chapter 1 that 5 to 4 constitutional decisions in the Supreme Court have low epistemic value.
Justice Stevens, in dissent, did not emphasize the fact that flag burning is physical conduct, not speech. Nor did he note that the flag was an incident of sovereignty which Congress had the constitutional power to protect by enacting a statute mandating unconditional respect for its physical integrity. Rather, Stevens emphasized a balancing approach. Was the prohibition unrelated to suppression of the ideas the "speaker" sought to express? Did the prohibition interfere with the "speaker’s" ability to express ideas by other means? Was the "speaker’s" complete freedom to choose other means less important than the societal interest supporting the prohibition?

Stevens concluded that the Government should protect the symbolic value of the flag without regard to the specific content of the flag burner’s accompanying speech. The importance of the national symbol to the society outweighs the importance of the individual in preferring flag burning as means of communication.

CONCLUSION

Rigor in the use of the English language is a first essential of fairness in the American system of separated governmental powers. Citizens act in reasonable reliance that language in the Constitution and in statutes will be interpreted by the judiciary either in its established technical meaning if such exists or, if non-technical, in generally accepted usage. Freedom of speech, as an absolute prohibition on Congress to regulate the content of oral expressions of fact or opinion on the issues in contest in the society, was new technical language in the law. To the extent that the word "speech" was borrowed from the English parliamentary concept of free speech, it was clearly limited to oral expression. There is no
evidence that in 1791 Americans used the word "speech" for any activity other than oral expression.

The judicial protection of symbolic speech in the latter part of the twentieth century and its application to purely physical conduct is a radical change in the meaning of constitutional language. Deficient appeals briefs by the opponents of this conversion of physical acts into "speech" must take part of the blame. Communicative physical conduct can take thousands of different forms. Flag burning, nude dancing, wearing armbands and wearing yarmulkes are only first examples. It is probable that every political and social interest group has a few extremist members who wish to engage in physical acts to attract attention to their causes. Vegetarians, Armenians or environmentalists may engage in a misdemeanor to tape a black shroud around the Washington Monument at the 10-foot level and pass out handbills explaining their cause. The handbills are protected by freedom of the press. The demonstrators would argue that the black shroud, not damaging to the monument, is symbolic speech protected by the principle expounded by the Court in *Texas v. Johnson* and *United States v. Eichmann*.

Non-lawyers are astounded that the Supreme Court majority labeled the physical act of flag desecration as a type of speech. Only lawyers, living in a world of artificial linguistic constructs, could conceive of such misuse of the English language. Some lawyers are highly paid to engage in word magic in order to win lawsuits. It is no wonder that the ultimate master of the English language, William Shakespeare, expressed a negative view of lawyers.
Footnotes:


5. Justice Brandeis's decision in the common-law tort case of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), was clearly a correct application of Section 34 of the Judiciary Act of 1789, which was limited to common law legal actions. His great error was the overruling the commercial (law merchant) case of *Swift v.*

6. In Griswold v. Connecticut, 381 U.S. 479, 522-23 (1965), Justice Black dissented to the Court's usurpation of the amending power in order to create a constitutional right of privacy. Black explained: “The Due Process Clause with an “arbitrary and capricious” or “shocking to the conscience” formula was liberally used by this Court to strike down economic legislation in the early decades of this century, threatening, many people thought, the tranquility and stability of the Nation. See, e.g., Lochner v. New York. That formula, based on subjective considerations of “natural justice,” is no less dangerous when used to enforce this Court's views about personal rights than those about economic rights. I had thought that we had laid that formula, as a means for striking down state legislation, to rest once and for all in cases like West Coast Hotel Co. v. Parrish; Olsen v. Nebraska ex rel. Western Reference & Bond Assn., and many other opinions.”

7. Many commentators have noted the intention fallacy. For example, Charles Curtis writes: “The intention of the framers of the Constitution, even assuming we could discover what it was, when it is not adequately expressed in the Constitution, that is to say, what they meant when they did not say it, surely that has no binding force upon us. If we look behind or beyond what they set down in the document, prying into what else they wrote and what they said, anything we may find is only advisory. They may sit in at our councils. There is no reason why we should eavesdrop on theirs” (Lions under the Throne 2 [1947]). See Thomas Cooley, A Treatise on the Constitutional Limitations 80-81 (6th ed., Boston: Little Brown,


11. 1 Will. And Mary, sess. 2, C. 2 (1689).


22. *Chaplinsky* at 572.


25. See Black, supra, note 24.


29. The obiter dictum noted illegal oral communication of inciting riot by a person falsely shouting "fire" in a crowded theater. It had no relation to press or to speech in the limited constitutional definitions of the terms.


31. 249 U.S. 204 (1919).

32. 250 U.S. 616 (1919). The social context of anti-Semitism against the low-income Jewish immigrants may have influenced the conviction. The Supreme Court majority affirmance may have been based on a biased finding of facts of intent in the trial court. See Leonard Dinnerstein, Antisemitism in America 74-77 (New York: Oxford Univ. Press, 1994).


35. *Id.* at 141-42.


40. *Miller v. Civil City of South Bend*, 904 F. 2d 1081 (7th Cir. 1990).


44. *Id.* at 576.

45. 283 U.S. 359 (1931).

47. 283 U.S. at 368-69.

48. See Schneider v. Irvington, 308 U.S. 147, 160 (1939). Justice Roberts, for the Court, upheld the right to distribute handbills. On one page he refers to “liberty of free speech” (p. 163) and on the next he refers to “freedom of the press” (p.164).


50. 391 U. S. at 376.

51. Id. at 377.


54. 393 U.S. at 505.

55. Id. at 515.

56. The conviction was affirmed in Cohen v. California, 1 Cal. App. 3d 94, 81 Cal. Rptr. 503, 1969), citing Cantwell v. Connecticut, 310 U.S. 296, 308 (1940): “The offense known as breach of the peace embraces many varieties of conduct destroying or menacing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others.” (Emphasis added


60.  403 U.S. at 23-25.

61.  *Id.* at 27.  See critique of Robert F. Nagel, *Constitutional Cultures: The Mentality and Consequences of Judicial Review* 27-59 (Berkeley: University of California Press, 1989). “If judicial protection, as the chief mechanism for giving effective meaning to the first amendment, continuously creates that meaning by attempting to fit specific facts to grand theory, public sympathy for free speech will be jeopardized.”  *Id.* at 45-46.


65.  394 U.S. at 579.

66.  *Id.* at 581.

67.  *Id.* at 610 (Black, J., dissenting).

68.  *Id.* at 616-17 (Fortas, J., dissenting).


70.  *Id.* at 31.


75. 415 U.S. at 573.

76. *Id.* at 584-89 (White, J., concurring in the judgment).

77. *Id.* at 591 (Blackmun, J., dissenting).


79. Wash. Rev. Code Ann. §9.86020 (West 1988). This improper-use statute was separate and distinct from the state’s flag desecration statute.


81. 283 U.S. 359 (1931). See *supra* notes 45 to 47 and accompanying text.

82. 418 U.S. at 408-09.

83. *Id.* at 415.


86. *Johnson*, 491 U.S. at 399.


89. *Id.* at 463-74.
90. *Id.* at 475-81.

91. *Johnson*, 491 U.S. at 404.


95. *Johnson*, 491 U.S. at 430. See dissent of Justice Stevens, *Id.* at 437.


97. *Id.* at 434.

98. *Id.* at 438-39.


102. 35 Congressional Record 23420 (Senate) and 24180 (House) (1989).


110. *Id.* at 413-16.

111. *Id.* at 416-418.


113. *Id.* at 315.

114. *Id.* at 316. In affirming a conviction under the 1968 federal flag protection law, the Court of Appeals concluded “that the power to enact such legislation is an incident of sovereignty which inheres in the Government of the United States of America as a nation and which the Constitution recognizes and implements.” *Joyce v. United States* 454 F. 2d 971, 985 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 969 (1972).
115. 496 U.S. at 315.

116. *Id.* at 317.


118. 496 U.S. at 319.

119. *Id.* at 322.