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NORTH CAROLINA LAW REVIEW

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Volume 68 | Number 1

Article 12

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11-1-1989

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## Recommended Citation

Arnold H. Loewy, *The Flag-Burning Case: Freedom of Speech When We Need It Most*, 68 N.C. L. REV. 165 (1989).

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## ESSAY

# THE FLAG-BURNING CASE: FREEDOM OF SPEECH WHEN WE NEED IT MOST

ARNOLD H. LOEWY†

### I. MORAL LEGITIMACY

On June 22, 1989, the two leading stories on the front page of the *New York Times* and many other American newspapers were "Justices, 5-4, Back Protester's Right To Burn The Flag"<sup>1</sup> and "Chinese Execute 3 In Public Display For Protest Role."<sup>2</sup> To fully appreciate the interrelationship of these stories, imagine the switch of one vote in the flag-burning case, *Texas v. Johnson*,<sup>3</sup> so that Texas had prevailed. The first *New York Times* headline might have read: "Justices, 5-4, Uphold Imprisonment For Protester Who Burned The Flag." A neutral newspaper such as the *Tokyo Times* might have had the following headline: "Chinese and American Protesters Convicted."

Lest there be any doubt about the similarity of the protests, compare the perspective of the protesters. Respondent Gregory Johnson and his friends perceived themselves to be international Communists, who were generally protesting the renomination of President Ronald Reagan at the 1984 Republican National Convention and specifically protesting the American flag as a symbol of international oppression.<sup>4</sup> The Chinese demonstrators were making a democratic challenge to Communist oppression. Only the most chauvinistic American could claim that a Communist's challenge to United States policies differs in principle from a democratic challenge to Chinese policies.

Relevant differences, of course, do exist between Johnson's original conviction and the Chinese convictions. First, the severity of the penalties is strikingly different.<sup>5</sup> Second, Johnson had greater procedural protection. His case reached the Supreme Court nearly five years after his protest. During that interval, three other courts heard his case.<sup>6</sup> Finally, Johnson's conviction limited

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1. See, e.g., *N.Y. Times*, June 22, 1989, at 1, col. 5.

2. See, e.g., *id.* at col. 4.

3. 109 S. Ct. 2533 (1989). The Court in *Johnson* held that it was unconstitutional under the first amendment to convict Johnson under a Texas flag desecration statute. *Id.* at 2548.

4. *Id.* at 2536-37.

5. At Johnson's trial, he was sentenced to one year in prison. *Id.* at 2537. Some of the Chinese demonstrators were executed; others were sentenced to long prison terms. See *N.Y. Times*, *supra* note 2, at 1, col. 4.

6. A trial court convicted Johnson, an intermediate appellate court affirmed his conviction,

only *how* he could protest, not *whether* he could protest. Such was not the case with the Chinese protesters, some of whom were punished merely for speaking and demonstrating.<sup>7</sup> While these distinctions must be noted, they should not be overemphasized. The first two relate to our commitment to proportional punishment and procedural due process. They are not related to freedom of speech at all. The third distinction, though more significant, is still somewhat illusory. If the Chinese students were punished for putting their Statue of Liberty in Tiananmen Square<sup>8</sup> on the ground that this particular form of criticism was too inflammatory, we would not have been satisfied with the explanation that only one form of protest had been stifled. At best we would have considered it only slightly less offensive than an outright ban on dissent. It is, of course, easier to see the impact of a "how" limitation—a limitation restricting the manner of protest—when we support the dissenters.

Perhaps a true "how" limitation would not have seemed so bad to us. If the Chinese generally prohibited erecting statues in Tiananmen Square, the impact of that limitation on the right to dissent would have seemed more justifiable. Those of us who love the flag and all that it represents may be tempted to accept Johnson's conviction as analogous to such an anti-statue statute.

Unfortunately, such reasoning does not wash. Texas did not forbid all American flag burning, only that which the burner "knows will seriously offend one or more persons likely to observe or discover his actions."<sup>9</sup> We would not be pleased with a Chinese conviction predicated on bringing a statue into the Square by one who "knows that he will seriously offend one or more persons likely to discover his action." More significantly, the Texas statute only protected the State or National flag. Consequently, one burning a foreign flag to the horror of devotees of that country's policies could not be punished.<sup>10</sup> To analogize to the Chinese hypothetical, a law forbidding Statues of Liberty, but no other statues, from being erected in Tiananmen Square would be far removed from a "how" limitation on the right to dissent. I am not suggesting that all "how" limitations are constitutionally permissible. Indeed, quite clearly all are not.<sup>11</sup> It is imperative, however, that we not sugarcoat a content-based, indeed viewpoint-based, discrimination under the benign mantle of a mere manner of protest regulation.

Another possible distinction between flag burning and the Chinese protests is that we seek protection from the emotional trauma of a burning flag, whereas

706 S.W.2d 120 (Tex. App. 1986), and the Texas Court of Criminal Appeals reversed his conviction on first amendment grounds, 755 S.W.2d 92 (Tex. Crim. App. 1988), *aff'd*, 109 S. Ct. 2533 (1989).

7. See Doerner, *The Face of Repression*, TIME, July 3, 1989, at 27.

8. Tiananmen Square is a large public square adjacent to the Chinese capital in Beijing.

9. TEX. PENAL CODE ANN. § 42.09(b) (Vernon 1974 & Supp. 1989).

10. Actually, "[o]n the same day as [Johnson's] arrest, a number of demonstrators burned the national flag of a foreign country. This action lead (sic) to a physical brawl; nevertheless, no arrests under section 42.09 were made in connection with the incident." *State v. Johnson*, 755 S.W.2d 92, 94 n.3 (Tex. Crim. App. 1988).

11. For example, in *Cohen v. California*, 403 U.S. 15 (1971), the Court held that a state cannot ban certain language from public discourse even if it is prepared to do so uniformly. *Id.* at 26. Consequently, it reversed the conviction of a man for wearing a jacket emblazoned with the words "Fuck the Draft." *Id.* at 16-17.

the Chinese government is worried about the dissenters' ideas being taken seriously. Many efforts to punish free speech in America, however, are motivated by a desire to protect our emotions rather than quiet our fears that obnoxious ideas will prevail.<sup>12</sup> If such reasons were acceptable, little would be left of freedom of speech as we know it. Indeed, if such were the international standard, it would not have been difficult for the Chinese leaders to have claimed that their national psyche could not stand the emotional turmoil caused by the radical students in Tiananmen Square.

Compare the other great suppression incident of 1989, Iran's call for the execution of author Salman Rushdie, predicated entirely on the emotional impact of his novel *The Satanic Verses*.<sup>13</sup> As we listened to Iranian explanations of the insult perpetrated upon Islam by this book, we recoiled in horror at their lack of regard for freedom of speech.<sup>14</sup> But I have little doubt that individual citizens of that theocratic nation felt as much pain from Rushdie's words as our most patriotic citizens felt from Johnson's flag burning.

It is surely no answer to say that Rushdie merely wrote words but Johnson committed an act. It is the perceived assault from either message—not the form—that causes the pain. Indeed, supporters of flag desecration laws typically rely on the "fighting words" doctrine that allows convictions for verbal insults uttered during face-to-face confrontations.<sup>15</sup> The only discernible distinction between the two situations is the rather ethnocentrically myopic view that our sense of serious emotional insult is justified whereas theirs is not.

## II. FLAG CONSECRATION: THE COURT'S OPINION

Near the end of Justice Brennan's opinion for the Court, he observed: "We do not consecrate the flag by punishing its desecration, for in doing so we dilute

12. The Skokie litigation could be so categorized. See *Collin v. Smith*, 578 F.2d 1197 (7th Cir.), cert. denied, 439 U.S. 916 (1978). The court in *Collin* struck down a Village of Skokie ordinance making it a misdemeanor to disseminate any material promoting and inciting racial or religious hatred. *Id.* at 1207. Jewish survivors of the Holocaust tried to prevent a Nazi organization from marching in front of the Skokie Village Hall while wearing Nazi uniforms complete with swastikas. *Id.* at 1199. The Village argued that the "infliction of psychic trauma" on the residents was a substantive evil that they had a right to prohibit, but the court rejected this argument. *Id.* at 1205-07.

See also *Brandenburg v. Ohio*, 395 U.S. 444 (1969). The Court in *Brandenburg* reversed the defendant's conviction under an Ohio Criminal Syndicalism statute. *Id.* at 445. The defendant spoke at a Ku Klux Klan rally in which participants, outfitted in hooded Klan regalia, burned a large wooden cross. *Id.*

On the other hand, officials may have prosecuted some civil rights demonstrators out of fear that the community would accept their ideas. See *Cox v. Louisiana*, 379 U.S. 536 (1965). Even in *Cox*, however, the emotional wound of seeing black students protesting racial segregation in the South must have influenced the prosecution. The Supreme Court reversed the defendants' convictions on free speech grounds. *Id.* at 558.

13. S. RUSHDIE, *THE SATANIC VERSES* (1988). For a full account of this worldwide controversy, see Smith, *The New Satans*, TIME, March 6, 1989, at 36-38.

14. We also recoiled at their lack of regard for procedural or jurisdictional due process, and for their lack of any sense of proportionality in punishment. As with the Chinese, however, these were additional wrongs. We were independently upset with their disregard for freedom of speech.

15. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). In his *Johnson* dissent, Chief Justice Rehnquist relied on precisely that reasoning. *Johnson*, 109 S. Ct. at 2552-53 (Rehnquist, C.J., dissenting) (discussed *infra* in text accompanying notes 35-37).

the freedom that this cherished emblem represents."<sup>16</sup> The negative form of this observation understates the significance of the decision. The Court could have written: "By reversing the conviction of this flag desecrator, we consecrate the flag as a symbol of liberty. From this day forward, our Nation can condemn other nations that limit dissent, secure in the knowledge that our own house is in order." While prudence, self-restraint, and an appropriate sense of judicial modesty may have precluded such language, the Court's decision has raised, not lowered, the significance of Old Glory.<sup>17</sup>

Before concluding that the first amendment protected Johnson's flag burning, the Court had to determine that it was speech. Although Texas conceded that Johnson had engaged in "expressive conduct,"<sup>18</sup> the Court felt it necessary to demonstrate the prudence of that concession. It quoted Johnson's explanation for his conduct: "The American Flag was burned as Ronald Reagan was being renominated as President. And a more powerful statement of symbolic speech, whether you agree with it or not, couldn't have been made at that time. It's quite a just position [juxtaposition]. We had new patriotism and no patriotism."<sup>19</sup> With Johnson's explanation in the record, the Court had no difficulty concluding that the first amendment was implicated.

Although Johnson was engaged in symbolic speech, the Court emphasized that "[t]he Government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word."<sup>20</sup> Relying on *United States v. O'Brien*,<sup>21</sup> a case that upheld a conviction for burning a draft card, the Court reaffirmed its rejection of "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."<sup>22</sup> What differentiated *Johnson*, however, was that the flag burner was punished, not in spite of his message, but because of his message. As the Court succinctly put it: "[Government] may not . . . proscribe particular conduct *because* it has expressive elements."<sup>23</sup>

The Court made short work of Texas' claimed justification for the statute. Texas first argued that the statute was necessary to prevent a breach of the peace. In response, the Court emphasized that the state introduced no evidence suggesting that the peace was either breached or likely to be breached.<sup>24</sup> Texas also argued that the flag should be preserved as a symbol of national unity, but the Court found this claim to be related to the content of Johnson's expression

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

17. The same cannot be said for those public officials (including the President) who would overturn *Johnson* by constitutional amendment. See, e.g., *What Price Old Glory?*, TIME, July 10, 1989, at 23; see also *infra* text accompanying notes 59-60 (discussing the implications of such an amendment).

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

19. *Id.* at 2540 (quoting the record in the case).

20. *Id.*

21. 391 U.S. 367 (1968).

22. *Johnson*, 109 S. Ct. at 2539 (quoting *O'Brien*, 391 U.S. at 376).

23. *Id.* at 2540.

24. *Id.* at 2541.

and therefore impermissible.<sup>25</sup> The Court did not deny the state's interest in encouraging proper respect for the flag—indeed it affirmed that interest. The Court held, however, that compulsion was not a constitutionally permissible means to encourage that end.<sup>26</sup>

### III. THE DISSENTS

Much of Chief Justice Rehnquist's dissent supports the communicative nature of the flag. The Chief Justice quite poignantly portrayed the flag's symbolic significance by skillfully interweaving *Concord Hymn*, *The Star Spangled Banner*, and *Barbara Frietchie*,<sup>27</sup> causing at least this commentator to shed a tear over Barbara Frietchie's symbolic heroism. Such illustrations confirm the Court's judgment that one who burns what symbolizes so much is conveying a deep disrespect for this nation that probably cannot be expressed so clearly in any other way. If any words could convey contempt for our country as well as the burning of the symbol for which Barbara Frietchie would have sacrificed her old grey head, I have yet to hear them.

Perhaps the core of the Chief Justice's opinion is his assertion that "[t]he flag is not simply another 'idea' or 'point of view' competing for recognition in the marketplace of ideas."<sup>28</sup> If he is right about that then he is right about the case. But he is not right about that! More than forty-five years ago, in another case involving the flag,<sup>29</sup> Justice Jackson, typically regarded as a conservative jurist, announced what has become core first amendment doctrine: "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, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."<sup>30</sup>

Because the Chief Justice did not view the flag as a participant in the marketplace of ideas, he found it unnecessary to respond to Justice Jackson's classic admonition. Justice Stevens' dissent, however, does attempt an answer. After first noting the obvious absence of compulsion to support the flag, Stevens contended:

The content of [Johnson's] message has no relevance whatsoever to the case. The concept of 'desecration' does not turn on the substance of the message the actor intends to convey, but rather on whether those who view the *act* will take serious offense. Accordingly, one intending to convey a message of respect for the flag by burning it in a public square might nonetheless be guilty of desecration if he knows that others—perhaps simply because they misperceive the intended message—will be seriously offended. Indeed, even if the actor knows that all possible witnesses will understand that he intends to send a

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25. *Id.* at 2542.

26. *Id.* at 2547.

27. *Id.* at 2548-50 (Rehnquist, C.J., dissenting).

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

29. *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

30. *Id.* at 642.

message of respect, he might still be guilty of desecration if he also knows that this understanding does not lessen the offense taken by some of the witnesses. Thus this is not a case in which the fact that "it is the speaker's opinion that gives offense" provides a special "reason for according it constitutional protection."<sup>31</sup>

Stevens deserves credit for at least trying to respond to the constitutional prohibition against prescribed orthodoxy. Clearly, however, a statute prohibiting burning a cross or wearing a swastika that the actor knows will seriously offend one or more persons likely to observe or discover his actions is based on the substance of the speaker's message. Laws prohibiting flag burning, cross burning, and swastika wearing are all predicated on the offensiveness of the message. Thus, unless Rehnquist's withdrawal from the marketplace of ideas theory is justifiable, both dissenting opinions are indefensible.

The Chief Justice offered three arguments in his dissent. First, he argued by analogy to *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*,<sup>32</sup> in which the Court had held that the USOC's work in developing the Olympics entitled them to exclusive use of the name, thereby allowing them to obtain an injunction against the San Francisco group's attempt to sponsor an event known as the "Gay Olympics."<sup>33</sup> Rehnquist concluded: "Surely Congress or the States may recognize a similar interest in the flag."<sup>34</sup> The problem is that the interests are not similar. Without question, after the *San Francisco* decision, a "Gay Olympics" committee member could have burned the Olympic flag in disgust. Similarly, if Gregory Johnson had flown the American flag over his international Communist office and labeled it "International Division of the United States Government," I have little doubt that he could have been enjoined. Misleading labels can be proscribed; criticism cannot.

Rehnquist next argued that Johnson's flag burning "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."<sup>35</sup> This statement interweaves three separate arguments. First, flag burning is not essential because there are other ways of conveying the same message. Standing alone, of course, this argument is irrelevant since there are always other ways to convey a message. If a message can be conveyed by four different methods, no one of them would be necessary because the speaker could have used one of the other three. For this reason, the Court has said that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."<sup>36</sup> Presumably, this reasoning applies to alternate means of expression as well as alternate locales.

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31. *Johnson*, 109 S. Ct. at 2557 (Stevens, J., dissenting) (quoting *FCC v. Pacific Found.*, 438 U.S. 726, 745 (1978) (plurality opinion)).

32. 483 U.S. 522 (1987).

33. *Id.* at 528.

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

35. *Id.* at 2553 (Rehnquist, C.J., dissenting) (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942)).

36. *Schneider v. State*, 308 U.S. 147, 163 (1939).

Second, because of flag burning's potential to cause a breach of the peace, it is analogous to fighting words and is therefore an inappropriate method of expression. This reasoning is beset by classic problems of both overinclusion and underinclusion. It is overinclusive because it includes many flag burnings, such as the one at bar, that did not threaten a breach of the peace. It is underinclusive because it excludes many other symbols, such as a Ku Klux Klan burning cross or a Nazi swastika, that also may cause a breach of the peace. Moreover, the Court's observation that Texas already has a breach of the peace statute confirms "that Texas need not punish this flag desecration in order to keep the peace."<sup>37</sup>

Finally, the Chief Justice points to the alleged ineffectiveness of Johnson's protest. Rehnquist contends that Johnson's act of flag burning "conveyed nothing that could not have been conveyed and was not conveyed just as forcefully in a dozen different ways [and] is the equivalent of an inarticulate grunt or roar."<sup>38</sup> To the extent that the Chief Justice is arguing that flag burning is a particularly bad way to persuade the average American that America is rotten to the core, he is, of course, correct. It was not Johnson's intent to persuade the average American, however. Instead, he sought to convey the depth of his disgust with America, and I would like to see even one of the Chief Justice's rhetorical "dozen different ways" by which Johnson could have conveyed the depth of his disgust as forcefully.

Rehnquist next recounted the belief of former Justices Warren, Black, and Fortas that flag burning may be punished. He quoted Warren and Black simply to indicate their beliefs.<sup>39</sup> He noted that Justice Fortas once wrote: "'A flag may be property, in a sense; but it is property burdened with peculiar obligations and restrictions. Certainly . . . these special conditions are not *per se* arbitrary or beyond governmental power under our Constitution.'"<sup>40</sup> Whatever else might be said of the Fortas quote (and it was from a dissenting opinion), it is not a carefully crafted argument. The statement presumes no need for reasoned justification and, consequently, provides none.

Borrowing from an earlier opinion by Justice White,<sup>41</sup> the Chief Justice then argued that "[t]here would seem to be little question about the power of Congress to forbid mutilation of the Lincoln Memorial. The flag is itself a monument, subject to similar protection."<sup>42</sup> There are, however, two major distinctions between mutilation of the Lincoln Memorial and Johnson's flag burning. First, the monument mutilator's act is criminal irrespective of her viewpoint. She should be punished even if she extolled the virtues of the United States in

37. *Johnson*, 109 S. Ct. at 2542. For a more detailed explanation of the inapplicability of the fighting words doctrine to flag desecration, see Loewy, *Punishing Flag Desecrators: The Ultimate in Flag Desecration*, 49 N.C.L. REV. 48, 80-84 (1970).

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

39. *Id.* at 2554 (Rehnquist, C.J., dissenting).

40. *Id.* (Rehnquist, C.J., dissenting) (quoting *Street v. New York*, 394 U.S. 576, 616-17 (1969) (Fortas, J., dissenting)).

41. *Smith v. Goguen*, 415 U.S. 566, 587 (1974) (White, J., concurring).

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

luminous spray paint on the Lincoln Memorial. Second, the United States owns the one defaced Lincoln Memorial. A protester could not be punished for defacing her own model of the Lincoln Memorial.<sup>43</sup> Conversely, one can and should be punished for defacing a flag *owned* by the United States Government.<sup>44</sup>

In his penultimate paragraph, Rehnquist excoriated the Court for "conclud[ing] its opinion with a regrettably patronizing civics lecture."<sup>45</sup> He then concluded the paragraph with his own civics lecture: "Surely one of the high purposes of a democratic society is to legislate against conduct that is regarded as evil and profoundly offensive to the majority of people—whether it be murder, embezzlement, pollution, or flag burning."<sup>46</sup> Democratic theory, of course, expects elected representatives to decide when and how to punish killers, thieves, and those who despoil the environment. It does not, however, contemplate majority control of minority expression. A Justice who chastises his brethren for giving a civics lecture at least ought to take care that his own lecture is good civics. The Court's was; Rehnquist's was not.

In conclusion, Rehnquist laments that "[t]he government may conscript men into the Armed Forces where they must fight and perhaps die for the flag, but the government may not prohibit the public burning of the banner under which they fight."<sup>47</sup> Even more poignantly, Justice Stevens concluded his dissent with the following:

The ideas of liberty and equality have been an irresistible force in motivating leaders like Patrick Henry, Susan B. Anthony, and Abraham Lincoln, schoolteachers like Nathan Hale and Booker T. Washington, the Phillipine Scouts who fought at Bataan, and the soldiers who scaled the bluff at Omaha Beach. If those ideas are worth fighting for—and our history demonstrates that they are—it cannot be true that the flag that uniquely symbolizes their power is not itself worthy of protection from unnecessary desecration.<sup>48</sup>

Stevens, unlike Rehnquist, at least recognized that our heroes fought for the ideas represented by the flag, and not for the flag itself. Unfortunately, his last clause is a *non sequitur*. The appropriate concluding sentence should have been: "If those ideas are worth fighting for—and our history demonstrates that they are—it must be true that the flag that uniquely symbolizes their power cannot be made the symbol of oppression by prosecuting those who foolishly believe that our flag does not represent these cherished values."

It is understandable that our President, Congress, legislators, and general populace who do not regularly study the first amendment would initially con-

43. This point was made by David Cole, Johnson's attorney, on *Nightline: Flag Burning* (ABC television broadcast, June 29, 1989) (videotape on file with the author).

44. Ironically, the flag that Johnson burned was stolen. See *Johnson*, 109 S. Ct. at 2536. Consequently, he should have been subject to criminal punishment. The Government did not make that an issue in the case. Thus, the case was decided on the assumption that the flag was his own. See *infra* text accompanying notes 52-54.

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

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

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

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

demn the *Johnson* decision. It is more difficult to rationalize the opinions of the Supreme Court dissenters who really ought to know better.

#### IV. IRONIES, PARADOXES, AND ENIGMAS

Rarely has any case been as beset with ironies, paradoxes, and enigmas as this one. By upholding the reversal of Johnson's conviction, the Supreme Court provided powerful evidence that Johnson's postarrest complaints about the country's intolerance to dissent were unjustified. Those who have attempted to overturn the decision by constitutional amendment or legislation, on the other hand, lend support to Johnson's claim of United States' intolerance.

Similarly, those who have contended that flag burning is not speech have proven that it is. For example, President Bush's visceral reaction to flag burning<sup>49</sup> is strikingly parallel to the Ayatollah Khomeini's reaction to Rushdie's novel.<sup>50</sup> Those citizens who would threaten violence to flag burners bear a frightening resemblance to the Islamic faithful who have threatened those selling *The Satanic Verses*.<sup>51</sup> The reaction to flag burning of those Americans who claim that flag burning is not speech closely parallels the reaction of the Islamic faithful to a book that undoubtedly is speech, and paradoxically proves that flag burning is in fact speech.

Yet another irony is that Johnson could have been convicted of a real crime if the Government had focused on what he did rather than on his offensive manner of displaying contempt for the nation. He was with a group that spray-painted several buildings, overturned potted plants, and stole an American flag from one of the buildings.<sup>52</sup> Johnson's association with the group quite probably would have been sufficient to impose liability,<sup>53</sup> thereby rendering this case truly analogous to spray-painting the Lincoln Memorial. In any event, he clearly destroyed property that he knew was stolen. Yet the government's insistence on prosecuting Johnson for flag burning transformed him from the petty vandal that he was into a first amendment hero complete with a national television appearance on "Nightline."<sup>54</sup>

Further irony inheres in the timing of this case. In 1982 the Court denied certiorari in *Kime v. United States*,<sup>55</sup> a case remarkably similar to *Johnson*, except that in *Kime* the Fourth Circuit had affirmed the flag-burning conviction. Consequently, when the Court granted certiorari in *Johnson* to review a flag-burning conviction that had been overturned, there was good reason to believe that the Court intended to reinstate the conviction.

Indeed, if the 1982 Court had heard *Kime*, it almost certainly would have

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49. See *supra* note 17.

50. See *supra* notes 13-14 and accompanying text. This comparison must be tempered by the President's moderation and sense of procedural due process.

51. See Smith, *supra* note 13, at 38.

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

53. See, e.g., *Tarpley v. State*, 565 S.W.2d 525 (Tex. Crim. App. 1978).

54. See *supra* note 43.

55. 673 F.2d 1318 (4th. Cir.), *cert. denied*, 459 U.S. 949 (1982).

upheld the conviction. The 1982 Court consisted of the four *Johnson* dissenters<sup>56</sup> plus then Chief Justice Burger, whose prior dissenting opinion indicated that he would have upheld a flag desecration conviction.<sup>57</sup> Thus, had Brennan's dissenting effort to grant certiorari succeeded, the Constitution likely would have permitted punishment for flag burning. The question was left open for the current Court to constitutionalize the practice only because those Justices who wanted flag burning to be punished voted to deny certiorari in *Kime*.

If these ironies weren't enough, the two Justices that swung the *Johnson* decision were Scalia and Kennedy, appointees who were attractive to President Reagan largely because of their conservative judicial philosophies. Maybe this is not so ironic, however, since conservative Justices are supposed to believe in strict construction of the Constitution, and one could hardly be more strict than to take the words of the first amendment seriously even when they hurt. As Justice Kennedy put it: "The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result."<sup>58</sup>

Perhaps the ultimate irony is that *Johnson* has done more to preserve the flag as a symbol of liberty than any prior decision, while the decision's detractors would allow real desecration of the flag by making it a symbol of political oppression.

#### V. THE HIDDEN DANGERS OF A CONSTITUTIONAL AMENDMENT OR STATUTE

Many of the arguments against a constitutional amendment or statute to overturn *Johnson* have already been explored. There are some hidden dangers, however, that may be even more ominous than those previously described.

By exempting only the American flag from desecration, we set that icon above all others. What does that say to the Holocaust survivor in Skokie, Illinois, who is told that despite her pain at the sight of Nazi marchers, the first amendment demands that she tolerate their uniforms and swastikas?<sup>59</sup> What does it say to the black man who feels the same about hoods and sheets and burning crosses, but is told that the first amendment demands tolerance?<sup>60</sup> It says that a majority of Americans can prevent the most painful attack possible on our sensibilities by constitutionalizing the right to punish the dissident that dares attack us. But those who for good reason have found a symbol other than a burning flag to be the most horrid attack upon them must tolerate it. This should not comfort those who truly believe in the flag's values.

If one were to suggest a more sweeping amendment forbidding all symbolic hatred, where could we draw the line? Would Republicans not be allowed to

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56. The four dissenters were Chief Justice Rehnquist, and Justices White, Stevens, and O'Connor. *Johnson*, 109 S. Ct. 2536.

57. See *Spence v. Washington*, 418 U.S. 405, 416 (1974) (Burger, C.J., dissenting).

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

59. See *Collin v. Smith*, 578 F.2d 1197 (7th Cir.), cert. denied, 439 U.S. 916 (1978).

60. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

desecrate donkeys, nor Democrats be allowed to desecrate éléphants? If we do not eliminate all symbolic hatred, we surely will exclude from protection someone whose pain would be equal to the average American seeing a burning flag, a Holocaust survivor seeing a swastika, or a black man seeing a burning cross. If we do outlaw all of these things, what becomes of our boast of freedom? Do we not then emulate the dictatorships we despise? We may become a kinder and gentler nation, and the Star Spangled Banner may still wave, but it would *not* be o'er the land of the free, nor the home of the brave.

The Supreme Court has struck a major blow for freedom in *Johnson*. Even if the Court were wrong, any constitutional amendment or statute that could be enacted would do more harm than good. The Court was not wrong, however. It did more to preserve the integrity of the flag than any of its critics. We should be thankful that prudence prevailed over passion and leave well enough alone.

