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Paul F. Campos
University of Colorado Law School

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Paul F. Campos†

The apex of American legal thought is embodied in two types of writings: the federal appellate opinion and the law review article. In this Article, the author criticizes the whole enterprise of doctrinal constitutional law scholarship, using a recent U.S. Supreme Court case and a Harvard Law Review *article as quintessential examples of the dominant genre. In a rhetorical tour de force, the author argues that most of modern constitutional scholarship is really advocacy in the guise of scholarship. Such an approach to legal scholarship may have some merit as a strategic move towards a political end; however, it has little value as scholarship, the goal of which is to seek truth. As a formerly monolithic legal system becomes more culturally heterogeneous, judges and academics no longer share as many assumptions about social truth. Hence, they have an increasing need to mask political judgments in order to avoid the contentious political battles that this increased diversity produces. Legal academia's present obsession with defending constitutional law as something more than an ad hoc rationalization of what are essentially political choices suggests that the present genre of constitutional scholarship may well have outlived its usefulness as a discursive form.*

> The difference between the concept of "knowing" and the concept of "being certain" isn't of any great importance at all, except where "I know" is meant to mean: "I *can't* be wrong." In a lawcourt, for example, "I am certain" could replace "I know" in every piece of testimony. We might even imagine its being forbidden to say "I know" there.

† Associate Professor of Law, University of Colorado School of Law. A.B. 1982, M.A. 1983, J.D. 1989, University of Michigan. A version of this paper was given at the University of San Diego Legal Workshop.

—Ludwig Wittgenstein[1]

How does one gain admittance to the law? At the beginning of his journey the legal acolyte, whether student or practitioner, will find himself in the midst of a vast plain. Here he will discover a motley assortment of paralegal training schools, traffic courts, county zoning boards, and other humble institutions on the fringes of the legal order.

As he moves through this egalitarian landscape he will begin to notice the subtle but persistent incline that marks the social topography of his profession. He will pass gentle hills upon which stand night law schools affiliated with local colleges and wander through pleasant valleys enlivened by the rococo decor of municipal courts and city jails. Eventually, panting with exertion, he will wend his way through the steep cliffs and ravines that harbor the regional law schools, appellate court systems, and legislative bodies of the various states.

Yet he will, if courage should prove equal to desire, come at last to the base of those mountains guarding the sheer rock face of the legal hierarchy: the great national law schools and their enduring objects of study, the nation's federal courts. And, if after labors worthy of a Hercules or a Hillary he has mastered even these dizzy heights, he will be rewarded with a vision of surpassing grandeur: the unconquerable summits of the Harvard Law School and of the Supreme Court of the United States.

Looming together in that crystalline air, resplendent beneath the eternal sun of natural justice, these two proclaim as if with one voice to those who seek to know the law that their arduous pilgrimage has at long last reached its rightful end.

I

A. Gatekeepers of the Law

The central question of American legal thought remains the question of authority. Lawyers seek authority for their arguments; courts, for their opinions; scholars, for their conclusions.[2] All these enterprises inevitably focus on the search for authoritative legal texts. American legal thought has come to rely on two distinct discourses for authoritative guidance: federal appellate court opinions produced by judges and their clerks, and scholarly articles written by law professors and edited by student-run law journals.

The quest for binding texts has, through both its own internal logic and the logic of social organization, created a more or less universally

1. LUDWIG WITTGENSTEIN, ON CERTAINTY ¶ 8 (Denis Paul & G.E.M. Anscombe trans., G.E.M. Anscombe & G.H. von Wright eds., 1969).

2. Hence the legal culture's obsession with footnoting, shepardizing cases, etc.

recognized hierarchy for these writings.[3] At the apex of one discourse are the opinions of the United States Supreme Court; its twin peak in the field of legal scholarship is securely held by those texts which appear in the pages of the *Harvard Law Review.*

These parallel sources of authoritative guidance represent just one example of the symbiotic relationship that links the Law School and the Court. For example, in this century Harvard graduates have dominated the Court's composition, supplying not only the lion's share of the justices themselves, but also a greatly disproportionate percentage of the Court's clerks—that protean and mysterious mandarin class which seems to control more and more of the actual workings of our government's judicial branch.[4]

Nevertheless, the most visible public link between Harvard and the High Court remains the annual issue of the Law Review devoted to a minute analysis of the Court's previous term. Known colloquially as the "Harvard Foreword," its arrival is eagerly anticipated by the elite segments of legal academia. Within the issue, they will find a lead article analyzing some large issue of constitutional law, a "comment" often undertaking a similar task through the lens of a particular Court opinion, and an extensive series of casenotes, authored by the Review's editors, surveying the Court's work over the last year. The issue concludes with a comprehensive statistical dissection of each justice's vote in every case decided by the Court during the previous term. It involves no exaggeration to characterize this issue of the *Harvard Law Review* as the annual *pièce de résistance* of American legal scholarship.

My aim in this article is to undertake a critical reading of a typical contribution to this exemplary forum. I wish to emphasize from the outset that my primary purpose is neither to criticize a particular political viewpoint nor the performance of an individual scholar, but rather to describe and evaluate the dominant genre of American legal thought, especially as that genre manifests itself in what is now called constitutional scholarship.

In short, this critique is based on the assumption that the innocent reader who seeks what is best in contemporary legal thought will be directed by the hierarchical impulses of an entire profession to look amid the pages of this particular issue of this particular review for something that one can truly call law. But first, we must narrow our gaze.

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3. For an interesting discussion of the hierarchy's sociological significance, see JOSEPH VINING, THE AUTHORITATIVE AND THE AUTHORITARIAN 63-75 (1986).

4. The depth of the legal academy's fantasies regarding the potential for maintaining a kind of interlocking directorate between itself and the Court was illustrated recently by the rumors that Michael Dorf, clerk to Justice Kennedy and factotum to Professor Tribe, had allowed his true master's invisible hand to influence the *Casey* decision. *See* Tony Mauro, *Some Dispatches from the Battle Zone,* LEGAL TIMES, Aug. 31, 1992, at 10; Terence Moran, *Kennedy's Constitutional Journey,* LEGAL TIMES, July 6, 1992, at 1.

B. Texas v. Johnson

On June 21, 1989, the United States Supreme Court announced that burning the American flag as an act of political dissent was protected expression under the First Amendment, and that, therefore, the State of Texas could not criminalize such an act.[5] The decision proved to be extraordinarily controversial. Although the Court itself was sharply divided on the question, the overwhelming weight of public opinion condemned the decision, and a nearly-unanimous Congress quickly passed a statute designed to protect the flag within the contours outlined by the Court.[6] After the Court struck down this statute,[7] Congress nearly mustered the two-thirds majority necessary to override these decisions via a constitutional amendment.[8]

Faced as it was with the unwholesome spectacle of a fractured Supreme Court imposing five-minths of its views on a rebellious polity, one might expect that legal academia would react much as it has in the past to such situations: various scholars would produce either convoluted justifications for the triumph of fundamental individual rights over the fury of the mob or angry polemics condemning the Court for failing to respect the principle of legislative supremacy. Both sorts of texts would, of course, consider it imperative to rail against the unprincipled lawlessness of the arguments proffered by their ideological counterparts.

This has indeed happened.[9] The examination of a paradigmatic product of this process can provide valuable insights regarding the current state of constitutional law and its accompanying scholarship. Thus we come to Professor Akhil R. Amar's article, *The Case of the Missing Amendments:* R.A.V. v. City of St. Paul,[10] published in the Supreme Court issue of the *Harvard Law Review.* Professor Amar devotes much of his piece to an extensive doctrinal analysis of *Texas v. Johnson.* The hierarchical bonafides of this legal text are impeccable: it is, after all, the product of a full professor of constitutional law at Yale Law School, glossing a First Amendment opinion of the United States Supreme Court, published within the pages of the most important issue of the legal academy's most prestigious review.[11] The article's exalted pedigree all but explicitly declares that it should be taken as a kind of Arnoldian touch-

5. Texas v. Johnson, 491 U.S. 397, 399 (1989).

6. Flag Protection Act of 1989, Pub. L. No. 101-131, 103 Stat. 777 (1989).

7. United States v. Eichman, 496 U.S. 310, 312 (1990).

8. The proposed amendment received solid majorities in both the House and the Senate, but fell short of the necessary two-thirds support. *See* 136 CONG. REC. S8736-37 (daily ed. June 26, 1990); 136 CONG. REC. H4087-88 (daily ed. June 21, 1990).

9. *See, e.g.,* Frank Michelman, *Saving Old Glory: On Constitutional Iconography,* 42 STAN. L. REV. 1337 (1990); Daniel H. Pollitt, *The Flag Burning Controversy: A Chronology,* 70 N.C. L. REV. 553 (1992); Geoffrey R. Stone, *Flag Burning and the Constitution,* 75 IOWA L. REV. 111 (1989).

10. 106 HARV. L. REV. 124 (1992).

11. That is, this article represents the confluence of the legal culture's preeminent intellectual, sociological, and textual markers.

stone for the best of what has been thought and said by our most eminent legal scholars.

Before examining what Professor Amar has to say, I must ask the reader to imagine that she is protected by a veil of ignorance. She should imagine that she knows nothing about constitutional law or its accompanying scholarship—that she is, as it were, a Person Sitting in the Darkness. I will address my comments to such a reader, for only such readers will have wholly evaded the effects of an American legal education and will therefore have avoided incurring a set of conceptual disabilities which tend to obscure certain otherwise uncontroversial truths.[12]

II

Some of the assertions in this part of my argument have been made before, perhaps many times. Their originality interests me less than their possible truth.

A. An "Easy" Case

> *It is precisely to resolve the most difficult, the most uncertain, disputes that we have judges. Compelled to decide such cases, many judges pretend—sometimes to themselves as well as to the world—that what they have done is added two and two and gotten four, so that anyone who disagrees with their decision is crazy, or that what they have done is chosen Right over Wrong, so that anyone who disagrees with the decision is morally obtuse.*[13]

Two basic inquiries regarding the state of the law should always remain distinct from each other: attempting to determine what the law is in a given context, and answering the question of what the law should be. Thus, the proposition "*A* has a right to do *X*" could mean either (1) the rules of our society give *A* the right to do *X*, or (2) it would be best if our society had a rule which gave *A* the right to do *X*. Note that, depending upon the interpretive context, either of these propositions could be self-evidently correct while the other remained extremely controversial.[14]

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12. *See* Pierre Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801, 808-43 (1991). Schlag has noted the potential impact of such disabilities on legal scholarship:

> Is good judgment here something more than a nice name for arresting certain potentially problematic lines of inquiry? And if so, is "good judgment" all that different from "lack of imagination" or "intellectual mediocrity?"
>
> . . . [I]t may in some sense be correct to say that the rule of law "works" because the legally trained have acquired through years of arduous training serious perceptual and intellectual deficits and limitations.

Pierre Schlag, *The Problem of the Subject*, 69 TEX. L. REV. 1627, 1665 (1991).

13. RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 233 (1990).

14. For an eloquent argument that the second proposition ought not to imply the first, see Felix Frankfurter's dissent in West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 646-71 (1943) (Frankfurter, J., dissenting) (arguing that despite his strong personal disdain for West Virginia's flag-salute statute, the Constitution does not prohibit it).

The contours of this normative inquiry are far from static. The best law must serve the needs of society, yet society and its needs are subject to change, at times in response to the law itself. Indeed, precisely because the justificatory basis of various rights is always magnified or eroded by the shifting social context within which those rights are exercised, the normative question of which rights should now be enlarged or curtailed will often be the source of interminable controversy, even when, as a descriptive matter, the current scope of those rights is not in question.

One way of approaching the conflict engendered by *Texas v. Johnson* is to ask if the Court, by declaring Johnson's flag burning to be protected expression, was making descriptive claims, normative claims, or both kinds of claims about the Constitution and the law. When characterizing the Court's statement, the following permutations are possible: 1) "The First Amendment requires us to protect this activity; therefore whether or not we think it should be protected is an irrelevant question"; 2) "The First Amendment requires us to protect this activity; furthermore this activity *should* be protected"; 3) "The First Amendment requires us to protect this activity; despite our normative disagreement with the First Amendment's mandate, we are compelled to so rule"; 4) "It is unclear what the First Amendment requires, but we believe this activity should be protected; therefore we have interpreted the First Amendment so as to protect it"; or 5) "This activity should be protected; therefore we have created a rule to protect it."

Which permutation the interpreter adopts will determine whether she considers *Johnson* to be a hard or an easy case. Needless to say, it will seem a very easy case indeed if the interpreter subscribes to the second permutation, believing that the law is what it should be. In such cases, there occurs in the mind of the fortunate interpreter a kind of harmonic convergence between descriptive and normative claims, and she will immediately enter into a blissful state of reflective equilibrium.

Professor Amar appears to have achieved such a state. He is quite certain that *Texas v. Johnson* was correctly decided: "[N]otwithstanding the sound and fury of its initial critics on and off the Court, *Texas v. Johnson* was plainly right, and even easy—indeed, as right and easy a case in modern constitutional law as any I know."[15] *Johnson* is such an easy case that Professor Amar uses its self-evident correctness as the basis for contrast with a more complex decision, *R.A.V. v. City of St. Paul:*[16]

> My choice of *Johnson* as the best window into *R.A.V.* reflects more than the obvious surface similarities between cross burning

15. Amar, *supra* note 10, at 125.

16. 112 S. Ct. 2538 (1992) (holding a "bias-motivated" crime ordinance unconstitutional).

> and flag burning . . . . It also reflects my belief that *Johnson* illuminates with exceptional clarity, and in a way few other cases do, much of the hard core of the First Amendment. To understand *Johnson* . . . is, I believe, to understand the heart of our First Amendment Tradition. Conversely, *to fail to see that* Johnson *is an easy case is, quite bluntly, to misunderstand First Amendment first principles.*[17]

This is a remarkable claim. How, the Person Sitting in the Darkness might well ask, could this be? How is it that forty-eight states and the District of Columbia came both to enact and routinely enforce flag desecration laws?[18] How is it that the vast majority of Americans could desire that such laws remain in place, even after the Court had announced and demonstrated that such laws were obviously unconstitutional? Most puzzling of all, how did four of the Supreme Court's nine justices fail to recognize what was so plainly the case?

Professor Amar has an answer to these questions. Those who support flag desecration statutes either do not understand the law, or, like the dissenting justices, have chosen the lawless and unprincipled path of attempting to enforce their own political preferences in the face of fundamental legal obligation. The dissenters on the Court were, according to Professor Amar,

> uncomfortable with the knowledge that they were simply making up—out of whole cloth, as it were—a flag exception. They felt compelled to at least go through the motions of standard doctrinal argument. But in the process they said things that utterly warped the basic framework of the First Amendment Tradition . . . .[19]

The law then is clear. Only willful ignorance or, worse, the illicit seductions of politics can explain these widespread failures to acknowledge such obvious truths.

B. Texts

And yet potentially embarrassing questions remain. Where, the Person Sitting in the Darkness will want to know, is this law that exhibits such clarity? Why isn't a simple reference to it enough to shame the dissenters into silence? Because the Person Sitting in the Darkness has not yet benefitted from the special insights imparted by a legal education, she may well imagine that we should answer this question by *reading* the particular law that makes *Texas v. Johnson* such an easy case. The law in question is the First Amendment to the United States Constitution,

17. Amar, *supra* note 10, at 133 (emphasis added) (citations omitted).

18. *See* Texas v. Johnson, 491 U.S. 397, 427-28 & n.1 (1989) (Rehnquist, C.J., dissenting).

19. Amar, *supra* note 10, at 145.

and it reads in relevant part, "Congress shall make no law . . . abridging the freedom of speeeh . . . ."[20]

Even without the privilege of having had her mind honed by legal academics, the Person Sitting in the Darkness will recognize that the text of the First Amendment does not appear to address the question of flag burning. She will therefore be surprised to hear that a perfectly respectable school of constitutional interpretation has argued that the unaided text of the First Amendment can answer this precise question. The most distinguished judicial exponent of this view, Hugo Blaek, claimed to believe that by simply giving the words of the First Amendment their "ordinary" meaning, a judge could answer any question pertaining to that text without reference to history, precedent, or the judge's own beliefs and preferences.[21] Hence judges could answer controversial questions of textual interpretation in a neutral and objective fashion.

Now it must be admitted that this idea has a certain crude force.[22] Questions regarding the authority of a judge's interpretation of the Constitution's text could be avoided by putting forth the claim that no "interpretation" was taking place: the judge was merely giving the meaning to the words that any ordinary reader would acknowledge they in fact had.

In practice, however, the method is nothing but an empty rhetorical device, although its emotive force is sufficiently powerful so as to allow many intelligent persons to hide this fact from themselves. The method isn't workable precisely because the idea of an acontextual interpretation is incoherent. Is flag burning "speech"? The only possible answer to this question is, it depends.[23] It depends on whom you ask and under what circumstances. And there is no neutral way to determine whose opinion on these matters counts. Justice Black's "ordinary meaning" approaeh is therefore a conceptual straw man, obscuring the actual method by which an interpreter of a text chooses to ascribe meaning to what we assume are legal commands.

The so-called "bare text" of the First Amendment cannot supply any help to those who wish to determine if flag burning is a protected activity. We can begin to answer this or any other First Amendment

20. U.S. CONST. amend. I.

21. For a good example of Black's strict ordinary meaning approach, see Griswold v. Connecticut, 381 U.S. 479, 509 (1964) (Black, J., dissenting).

22. Hence the recent revival of "textualism" in judicial and legal academic discourse. *See* Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231 (arguing that "plain meaning" is regaining both rhetorical and decisional importance in Supreme Court adjudication).

23. *See* Paul Campos, *Against Constitutional Theory*, 4 YALE J.L. & HUMAN. 279, 282-85 (1992) (discussing why textual interpretation is necessarily a product of the interpreter's assumptions concerning the intentions of the text's author).

question only by first asking which opinions about the meaning of the constitutional text count and which do not.

C. *Histories*

Now it would not be at all surprising if by this point in our inquiry the Person Sitting in the Darkness betrayed a certain impatience with the process. "Of course," we could imagine her saying, "the meaning of a law can't be determined by merely examining its text. We must discover what the authors of that text meant to say." This is indeed the case. Therefore it is now necessary to ask, who are the authors of the First Amendment? To the Person Sitting in the Darkness, this will appear to be a truly simple-minded question. She has, after all, not yet learned to think like a lawyer, let alone like a professor of constitutional law. Yet the question is not, at least as it relates to matters of legal *practice,* a simple one.

If we assume that the authors of the First Amendment are the framers of the Bill of Rights, we are immediately confronted with a dearth of information regarding whether or not these distant figures considered flag burning to be protected by the Free Speech Clause.[24] The safest guess (and it can be little more than that) is that the framers never considered the question.[25]

Once this assumption has been made, we are left with several alternatives. First, we could adhere to a rigorous nominalism and conclude that the First Amendment applies only to those instances of its potential applicability actually contemplated by the framers. This approach is universally rejected by constitutional theorists. Such an interpretation of the free speech clause would, for instance, make it inapplicable to a televised political address. The utter impracticality of such a result for the purposes of judicial review relegates any discussion of this view to the supposedly trivial (i.e., politically irrelevant) world of linguistic philosophy.

Second, we could attempt to determine what the framers would have thought of flag burning had they in fact considered the question. Note the radically counterfactual character of such an inquiry: we must either imaginatively reconstruct a social and intellectual universe inhabited by persons who we have good reasons to suspect were fundamentally different than ourselves, or we must imaginatively transport those alien subjects into the present world and acquaint them with the ineluctable strangeness of our own beliefs and conflicts.

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24. As to the applicability of the First Amendment to the states, I simply pass over the cabalistic intricacies of the Incorporation Doctrine, which must remain as obscure to the uninitiated as the indeterminate viability of Schrödinger's quantum cat, or the tenets of the Nicene Creed.

25. *See* Robert J. Goldstein, *The Great 1989-1990 Flag Flap: An Historical, Political, and Legal Analysis,* 45 U. MIAMI L. REV. 19, 37 (1990) ("Although a scattering of flag desecration incidents speckled American history . . . none of them aroused any form of institutionalized legal response until shortly before 1900.").

The former method may produce an answer which is marginally more plausible than the latter, but it will then be necessary to justify denying the advantages of our own knowledge and experience to our revivified authors. The second approach avoids this problem at the cost of having to ask questions of the "what would James Madison have thought of the Vietnam War" variety. The complexity of the intervening history makes this type of question almost impossible to answer.[26] Both methods will yield answers whose relative plausibility will tend to correlate with the predisposition of the interpreter's audience to agree with the method's announced result.

A final alternative (indeed, the alternative of choice among legal scholars who claim to believe that the intent of the framers should be an important factor in constitutional interpretation) is to abstract the whole question of intent to a high level of generality. According to these writers, we should not ask what the framers thought or would have thought about flag burning; rather, we should attempt to describe correctly the *principle* of free expression which the framers were striving to constitutionalize through the enactment of the First Amendment. Because this interpretive strategy is closely related to, and perhaps indistinguishable from, other efforts to use "principles" to answer questions of constitutional interpretation, we can defer the question of its utility until we examine the broader issue of the usefulness of claims about general constitutional principles in regard to the adjudication of specific constitutional cases.

If the framers of the First Amendment have failed to provide us with answers to our questions about flag burning, can we look for authoritative guidance elsewhere? Can we, as it were, find another group of authors who have endowed this text with sufficient authority—through the act of giving it a binding and specific meaning—so as to provide answers to these questions?[27]

Here at last we have reached the rhetorical precincts inhabited by *Texas v. Johnson.* Indeed, if the Person Sitting in the Darkness had been bequeathed the advantages of a legal education, she would have recognized the essentially unreal quality of the foregoing discussion. To read

26. *Cf.* Jorge Luis Borges, *Pierre Menard, Author of the* Quixote, *in* LABYRINTHS 36, 41-42 (Donald A. Yates & James E. Irby eds., 1964) ("To compose the *Quixote* at the beginning of the seventeenth century was a reasonable undertaking, necessary and perhaps even unavoidable; at the beginning of the twentieth, it is almost impossible. It is not in vain that three hundred years have gone by, filled with exceedingly complex events. Amongst them, to mention only one, is the *Quixote* itself.").

27. As I have argued at length elsewhere, the meaning of a text must be understood to be identical to the intentions of its author(s). *See* Campos, *supra* note 23. It follows that the meaning of the constitutional text can change only if we ascribe a new set of authors to the same set of marks, thereby generating a new text. This new text would be verbally identical with, but semantically different from, the older Constitution. Paul Campos, *That Obscure Object of Desire: Hermeneutics and the Autonomous Legal Text,* 77 MINN. L. REV. 1065 (1993).

the Court's opinion (and in this regard *Johnson* is a wholly typical case) is to become aware that few things could be less relevant to contemporary First Amendment law than the text of the Amendment itself and the intentions of those persons whom the innocent lay reader would consider the Amendment's authors.

With the notable exception of a brief introductory remark and two throwaway sentences near the end of the opinion (notable because their brevity and context merely emphasize the irrelevance of such lines of inquiry), the Court does not even consider whether the text of the First Amendment or the views of its authors shed any light on the question.[28] Justice Brennan's attention is almost entirely directed toward what his recent predecessors on the Supreme Court have had to say about the First Amendment. This approach, of course, is the essence of the doctrinal style of constitutional adjudication. It is not surprising that we who are indoctrinated to recognize *this* style as "law" will hardly even notice that it *is* a style; to notice the technique would be much like a skilled basketball player consciously taking note of the fact that he dribbles the ball when he brings it up court. Yet it may not escape the notice of a naive observer that there is something peculiar about a brand of "interpretation" that doesn't even bother to pretend that it is anything but an extension of arguments waged by several similar texts—texts which themselves have also studiously ignored the putative object of interpretive inquiry.[29]

The plausibility of the doctrinal style in legal argumentation depends upon the assumption that a court's previous decisions impel—or at the very least strongly suggest—a certain result for the case at hand. This claim is central to Justice Brennan's argument. How persuasively is it made?

D. Doctrines

Justice Brennan begins his analysis by noting that it is first necessary to "determine whether Johnson's burning of the flag constituted expressive conduct."[30] If the conduct was not expressive, no First Amendment question is presented. Justice Brennan then cites various cases involving flags in support of the proposition that if the context of a particular case indicates that the proscribed conduct was "sufficiently imbued with elements of communication,"[31] the protections of the First Amendment are available to the litigant. The opinion reviews the facts at issue and con-

28. *See* Texas v. Johnson, 491 U.S. 397, 404, 417-18 (1989).

29. The (mis)use of the word "interpretation" to characterize a host of disparate activities is examined in Campos, *supra* note 27.

30. *Johnson,* 491 U.S. at 403.

31. *Id.* at 404-05 (quoting Spence v. Washington, 418 U.S. 405, 409 (1974)).

cludes that Johnson's conduct meets this test.[32]

Justice Brennan then explains that since flag burning in these circumstances constitutes expressive conduct, the Court must determine if the State's interest in regulating this conduct is related to the suppression of free expression.[33] If so, then a stringent test is applied to measure the permissibility of the State's action.[34]

The State of Texas asserted two interests it claimed to be pursuing when it criminalized flag desecration: "preventing breaches of the peace and preserving the flag as a symbol of nationhood and national unity."[35] Justice Brennan concludes that the first interest was not implicated on the facts of this case: no breach of the peace in fact occurred, and Johnson's expressive conduct was not of such a nature as "to provoke the average person to retaliation, and thereby cause a breach of the peace."[36] The opinion emphasizes that a reasonable onlooker would not have regarded Johnson's flag-burning "as a direct personal insult or an invitation to exchange fisticuffs."[37]

Therefore, the validity of the statute must stand or fall on the basis of the state's second asserted interest, preserving the flag as a symbol of nationhood and national unity. This interest is clearly "related to expression in the case of Johnson's burning of the flag,"[38] and it follows that the less rigorous test announced in *United States v. O'Brien*[39] for regulation of noncommunicative conduct is inapplicable.[40] The constitutionality of the statute will therefore be upheld only if "the State's asserted interest in preserving the special symbolic character of the flag [can withstand] 'the most exacting scrutiny.' "[41]

Justice Brennan then purports to apply this test to the State's admittedly valid goal of preserving the flag's special symbolic character. He cites many cases which he says stand for the "bedrock principle" that "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[42] The opinion goes on to speculate whether the state might nevertheless protect one national symbol from the public opprobrium of dissenters. Such protective measures cannot be upheld, even in the interest of national unity, because it would prove impossible for courts to draw a principled line:

32. *See id.* at 405-06 (noting additionally that the state of Texas conceded this point in oral argument).

33. *See id.* at 407.

34. *Id.* at 412.

35. *Id.* at 407.

36. *Id.* at 409 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 574 (1942)).

37. *Id.*

38. *Id.* at 410.

39. 391 U.S. 367 (1968).

40. *Johnson,* 491 U.S. at 410.

41. *Id.* at 412 (quoting Boos v. Barry, 485 U.S. 312, 321 (1988)).

42. *Id.* at 414.

> Could the government, on this theory, prohibit the burning of state flags? Of copies of the Presidential seal? Of the Constitution? In evaluating these choices under the First Amendment, how would we decide which symbols were sufficiently special to warrant this unique status? To do so, we would be forced to consult our own political preferences, and impose them on the citizenry, in the very way that the First Amendment forbids us to do.[43]

Yet in the end the potential clash between legal principle and political necessity is avoided altogether:

> We are fortified in today's conclusion by our conviction that forbidding criminal punishment for conduct such as Johnson's will not endanger the special role played by our flag . . . .
>
> We are tempted to say, in fact, that the flag's deservedly cherished place in our community will be strengthened, not weakened, by our holding today. . . .
>
> The way 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.[44]

Thus, although the Court "[does] not doubt that the government has a legitimate interest in making efforts to 'preserv[e] the national flag as an unalloyed symbol of our country,' "[45] this interest cannot, in this particular case, "withstand the most exacting scrutiny" when presented as a sufficient justification for the Texas law. Indeed, striking down the law as unconstitutional[46] will, ironically enough, prove to be an even *more* efficacious method for pursuing the State's laudable goal of preserving the flag as a symbol of national unity.

E. Uncertainties

The foregoing section reviewed a typical example of how the doctrinal style of legal argument is currently deployed to answer questions concerning fundamental constitutional rights. In fact, an author can almost see the heads of his imagined audience nod in agreement (and, we must confess, in boredom) as the argument mechanically rolls along down the well-worn tracks of First Amendment jurisprudence. Yet a crepuscular suspicion lingers on the horizon of consciousness, like a distant and terri-

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43. *Id.* at 417.

44. *Id.* at 418-19.

45. *Id.* at 418 (quoting Spence v. Washington, 418 U.S. 405, 412 (1974)) (alteration in original).

46. To be precise, the Court did not hold the statute facially invalid, but merely invalid as applied to Johnson. *Id.* at 403 n.3. However, the impact of the statute, as limited only to non-expressive desecration of the flag, is likely to be negligible. *See id.* (indicating that the statute could apply to a tired person dragging a flag through the mud, knowing that such an act would likely offend others).

ble sun: in the end, does all this tediously stylized rhetoric actually help decide anything?

Let us abandon the doctrinal train of thought before it deposits us at its too-familiar station, and join the Person Sitting in the Darkness. She is, after all, likely to ask a number of embarrassing questions.

Perhaps foremost among these is why the elaboration of precedent—even assuming it *does decide* the case at hand—*should decide* the controversial question. We can of course favor her with the conventional wisdom of our calling, stressing the importance of stability and predictability in legal decisionmaking, the need to constrain the unelected judiciary, the axiomatic imperative that cases be decided in a "principled" as opposed to an "ad hoc" manner, etc. The conventional explanation has two flaws: it doesn't describe what the Supreme Court actually does, and it fails to explain what the Court should in fact do.

When the Supreme Court decides questions concerning constitutional rights, it routinely ignores even the pretense of following its own precedent.[47] For example, the most famous of all flag cases, *West Virginia State Board of Education v. Barnette,* explicitly reversed a three-year-old holding of the Court on precisely the same issue.[48] Although *Barnette* provides a somewhat spectacular example of the phenomenon, it is unusual only insofar as it *explicitly* repudiates the relevant precedents. As many scholars have noted, some of the most celebrated holdings in the Court's history have treated the extant case law with a demure indifference that demonstrated little or no concern for the supposed virtues of *stare decisis*.[49]

Indeed, when we give these virtues of *stare decisis* a closer look in the specific context of constitutional decisionmaking, it becomes difficult to criticize the Court for the contempt it so often displays toward this most celebrated of common law principles. Consider the claim that following precedent leads to stability and predictability in adjudication. To the extent that the elements of a particular dispute are "on all fours" with the existing case law, this claim has considerable validity. Yet stability and predictability are but two of a host of potential adjudicative virtues, which sometimes complement each other, but are often found to be in conflict. After all, the political trials of dissenters by the courts of a totalitarian regime will be conducted according to rules that generate

47. *See, e.g.,* United States v. Barnett, 376 U.S. 681, 699 (1964) ("This Court has shown a readiness to correct its errors even though of long standing.").

48. 319 U.S. 624 (1943) (reversing Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940)). *See infra* text accompanying notes 146-54.

49. Much of the liberal legal scholarship of the last two decades can be understood as an *ex post facto* attempt to justify the Warren Court's promiscuous jurisprudential creativity. *See, e.g.,* JOHN H. ELY, DEMOCRACY AND DISTRUST (1980); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (1978); Ronald K.L. Collins & David M. Skover, *The Future of Liberal Legal Scholarship,* 87 MICH. L. REV. 189 (1988).

eminently predictable results—yet the stability and predictability of such proceedings hardly count in their favor. As Justice Brandeis emphasized, the proposition that "it is more important that the applicable rule of law be settled than that it be settled right" has its limits, especially in the field of constitutional interpretation: "*Stare decisis* is usually the wise policy . . . even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions."[50]

The argument for *stare decisis* as an instrument for constraining judges is subject to similar criticism. Why should judges or (again, especially) justices be constrained by their own or their predecessors' prior mistakes? Such an argument purports to alleviate the problem of judicial error through the act of enshrining it. Additionally, claims in favor of "principled" as opposed to "ad hoc" decisionmaking also lose much of their force if the invoked principle leads to the systematic continuation of otherwise discredited policies, simply in order to avoid the embarrassment of acknowledging that courts sometimes change their minds. To say the least, when the Supreme Court is faced with a particular constitutional controversy, the assertion that the Court should *in this instance* follow the explicit or implicit direction of its previous holdings is always highly contestable.

But let us assume ("for the purpose of argument" as lawyers like to say) that we agree *Texas v. Johnson should* be decided by following the rules laid down in previous cases. Then we must ask whether these rules actually decide the issue for us. The whole purpose of Justice Brennan's rhetoric is to convince us that they do. Let us subject that claim to—if not "the most exacting" then at least *some*—critical scrutiny.

Justice Brennan's argument depends upon three assertions: Johnson's conduct was speech; it was not the kind of speech left unprotected by the First Amendment; and the government attempted to punish Johnson's speech without a sufficiently compelling reason for doing so.[51] These assertions are all vulnerable to numerous lines of attack. I will focus on just two.

First, depending on one's political tastes, *Texas v. Johnson* seems like an ideal opportunity for invoking the never-repudiated "fighting words" doctrine announced in *Chaplinsky v. New Hampshire.*[52] *Chaplinsky* upheld a conviction under a state statute that made it unlawful to "address any offensive, derisive or annoying word to any other

50. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406-07 (1932) (Brandeis, J., dissenting) (citations omitted).

51. *See supra* text accompanying notes 30-45.

52. 315 U.S. 568 (1942).

person . . . in any street or other public place."[53] The defendant had called a local marshal "a God damned racketeer" and a "damned Fascist" and opined that "the whole government of Rochester are Fascists."[54]

In upholding the conviction, a unanimous Court argued that "there are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."[55] One class of such unprotected speech includes " 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[56] The Court added that "[i]t has been well observed 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."[57]

A public flag burning as a form of political protest could be plausibly characterized along such lines, and Chief Justice Relnquist's dissent argues that it should be. Indeed, as the dissent points out, in the 1970s the highest courts of New Hampshire, Iowa, and Ohio upheld flag burning statutes on quite similar grounds.[58]

Justice Brennan, of course, disagrees. For him, the proposition that "[n]o reasonable onlooker would have regarded Johnson's generalized expression of dissatisfaction with the policies of the Federal Government as a direct personal insult or an invitation to exchange fisticuffs"[59] is so obvious that there is no need to argue for its validity. The opinion practically takes judicial notice of this purported fact.

Now, this characterization of Johnson's actions and the likely response of "reasonable onlookers" is, on its face, utterly preposterous. Consider the following analogy. Suppose Johnson had been a member of the Ku Klux Klan and, at a rally to honor Martin Luther King on the slain civil rights leader's birthday, Johnson urinated on a photograph of King in order to symbolically express his "generalized sense of dissatisfaction with the policies of the Federal Government," to the extent that those policies required honoring King's birthday. What would we think of an opinion that flatly asserted that "no reasonable onlooker" would have regarded this action "as a direct personal insult"? What if the "unreasonable" onlookers happened to be African-American? Would we

53. *Id.* at 569.

54. *Id.*

55. *See id.* at 571-72.

56. *See id.* at 572.

57. *Id.*

58. Texas v. Johnson, 491 U.S. 397, 431 (1989) (Rehnquist, C.J., dissenting) (citing State v. Waterman, 190 N.W.2d 809, 811-12 (Iowa 1971); State v. Royal, 305 A.2d 676, 680 (N.H. 1973); State v. Mitchell, 288 N.E.2d 216, 226 (Ohio 1972)).

59. *Id.* at 409.

not think that such an assertion displayed a gross disregard for the sensibilities of these onlookers? At the very least, wonld we not demand that an opinion that declared such conduct to be protected speech either repudiate the fighting words doctrine or give some sort of explanation as to *why* such "speech" was not as provoking to its intended audience as calling a town marshal a "God damned racketeer"?[60]

How does this hypothetical case differ from *Texas v. Johnson?* Justice Brennan's argument gives us no clue as to whether it does or not. In fact, the difficult question of whether or not flag burning should be treated as a species of fighting words is never actually addressed by the opinion, because somehow the truth of the matter is, we are apparently supposed to believe, too self-evident to require argument.

If we accept as axiomatic the proposition that this case should be decided on the basis of the existing precedents, and then proceed to ignore the implications of the most obviously troubling line of doctrine blocking our decisional path, then surely we will at last have managed to create—if only by definitional fiat—the delightful jurisprudential world of the "easy case." Justice Brennan has created such a world. Having assumed away or ignored what appear to be the really difficult questions, he has left himself the pleasant task of determining whether Texas' interest in preserving the flag as a symbol of national unity can withstand the presumptively overwhelming burden of "strict scrutiny" when it is balanced against the expressive rights of Johnson. And yet a persuasive answer to even this radically simplified question proves to be beyond the resources of this example of contemporary constitutional doctrine.

Justice Brennan's "strict scrutiny" of the remaining decisive constitutional question bears a startling resemblance to the nonexistent scrutiny that he applied to the fighting words argument. As we saw, his analysis contains two discursive components, which might be labeled respectively "where do we draw the line" and "what problem"?[61]

The fact that these arguments are standard equipment in every lawyer's bag of rhetorical tricks should not disguise their essential emptiness. Consider the assertion that if we protect the flag from desecration in the interests of national unity, we will be unable to stop tumbling down the slippery slope to the point where the thought police will be empowered to quell any criticism of the Great Leader's latest speech. This terrifying

60. Players of the doctrinal game will "distinguish" *Chaplinsky* from *Johnson* on the following grounds: fighting words involve direct personal insults rather than "generalized" political speech, no matter how provocative. Yet, the assertion that calling a New Hampshire village marshal a fascist in the middle of World War II constituted "nonpolitical speech" is only slightly less incredible than the belief that burning the flag and chanting anti-American obscenities in front of a crowd of conservative Texans is not intended to insult them personally.

The ability of doctrinal scholars to maintain such beliefs unhappily suggests that nothing short of verbal dynamite is likely to rouse the makers of "fine distinctions" from their dogmatic slumber.

61. *See supra* text accompanying notes 35-46.

descent is inevitable once courts surrender the "principled" position that *no* actions which symbolize disagreement with the government may be banned because of the potential effects of such symbolic disagreement, and replace it with the "political" judgment that some symbolic speech may be banned because of its content.

The slippery slope argument is almost always an embarrassment to readers who possess even a modicum of critical skill. Its use in *Texas v. Johnson* proves to be no exception to this rule. As others have noted, all slippery slope arguments can be simply turned around and sent down the other side of the argumentative slope.[62] In *Johnson*, this flaw is painfully obvious, which of course does not stop the Court from ignoring it. Here, the other side of the slope leads meluctably towards anarchy and toleration of any misconduct smacking of expressiveness. Rather than bore the reader with tedious elaboration, I will cite the following word pairs:

Freedom/Anarchy
Authority/Tyranny
Community/Uniformity
Liberty/Alienation

As for the claim that a "principled" decision protects no symbol from desecration, while a decision that spares a symbol of national unity from public outrage is, by way of contrast, "political," it should be unnecessary to emphasize the absurdity of labeling a preferred line of demarcation "nonpolitical"—*any* particular line merely celebrates a *different* politics than that of the condemned choice.

What are we left with if the slippery slope slides both ways and there is no nonpolitical method of drawing the line? Since Supreme Court doctrine acknowledges the permissibility of censorship if the State's interest outweighs the speaker's interest, the Court is obliged to balance the two. Without bona fide neutral principles to fall back on, then quite literally *everything* turns on the Court's political judgment regarding the proper allocation of social space for what remain two legitimate conflicting interests.[63]

It is at this rhetorical crossroads that Justice Brennan makes his most implausible move. Despite the presence of the disputing parties before him, he argues that in fact there is *no* conflict of interests. The State's interest in preserving the flag as a symbol of national unity is best served by *striking down* the flag desecration law. The State's asserted interest simply disappears, and no further scrutiny of conflicting social needs is required.

62. *See* Frederick Schauer, *Slippery Slopes,* 99 HARV. L. REV. 361, 381 (1985) ("[I]n virtually every case in which a slippery slope argument is made, the opposing party could with equal formal and linguistic logic also make a slippery slope claim.").

63. *See* Robert F. Nagel, *Unfocused Governmental Interests,* 55 ALB. L. REV. 573, 577-82 (1992).

This recharacterization involves, given the facts of the case, a rather remarkable assertion. If such statutes are really superfluous, how do we account for their presence in virtually every American jurisdiction? If the Court can simultaneously affirm the interests of both the individual and the State, how are we to account for the furious dissent from these comforting conclusions by half of Justice Brennan's colleagues? The case does not tell us. Justice Brennan presents no evidence for his decisive claim. He is, after all, engaged in the high task of constitutional interpretation.

Let us give Justice Brennan the benefit of the doubt. Let us assume he recognizes these incongruities and that he understands the difficulty of his task. The opinion can then be reinterpreted as *strategic denial* of these very same difficulties. Yet even if we accede to this rehabilitative interpretation of *Johnson,* we are left to answer a troubling question: what, in the end, is the purpose of such a disingenuous performance? Another analogy may help us divine the ultimate point of Justice Brennan's jurisprudential Potemkin village.

F. Anarchy in the U.S.

Suppose Johnson had not burned the American flag. Suppose instead that Johnson was a deeply committed anarchist who believed that private property was a form of theft. Imagine that he addressed a political rally in front of the corporate headquarters of IBM with these words:

> Brothers and sisters, you see before you seven flagpoles bearing seven American flags. What does IBM say these flags symbolize? It says they symbolize the sanctity of private property—of IBM's property—and that this sacred value will be protected by all the force of the State. This, they say, is the will of the people. But I hear a different voice: a voice that asks why this corporate person should have seven pieces of cloth waving uselessly in the air when natural persons sleep on this very street every night, without even a single blanket to ward off the evening's chill! This voice—the *real* voice of the people—commands that we ruin the sacred truths of private ownership. I will honor this voice by lowering one of these flags so that the people may put it to better use. By handing it over to you, I affirm that our claims to the earth's goods are sanctified by our human needs, and not by the violence of the word "property."

According to the logic of *Texas v. Johnson,* how should we treat a statute which criminalizes Johnson's taking of the flag? Does such a taking constitute expressive conduct? Do the facts of this case indicate that Johnson's conduct was "sufficiently imbued with elements of communication"? *Johnson* gives us no basis to say that it was not.

Is the State's regulation of the conduct related to the suppression of

free expression? The State can hardly argue that its statute is "merely" designed to protect private property rights, for that is precisely the ideological position which Johnson's taking of the flag protests. Johnson's message is clear: goods are to be redistributed on the basis of need, without regard to the State's illegitimate claims about the legal status of private property. The State's aim is to protect the very ownership interests which Johnson's symbolic speech argues are not protected. Therefore both the statute's purpose and its effect are intimately related to the active suppression of Johnson's message.[64] The question then, is quite straightforward: does the State's interest in protecting private property rights withstand "the most exacting scrutiny" when it is offered as a justification for curtailing Johnson's freedom of expression?

We can perhaps now begin to understand why Justice Brennan might have intentionally deployed a rhetorical smoke screen to obscure the actual choice the Court faced in *Johnson*. As the anarchic analogy emphasizes, the byzantine moves of the doctrinal game cannot, in the end, move us any closer to neutrally resolving such cases. The Court must choose between important conflicting social interests, and in doing so, it must make an essentially *political* judgment.[65]

As we have seen, the contemporary delineation of a constitutional right almost never involves textual interpretation in any useful sense of that phrase and is, at best, very loosely connected to whatever the Court has said before on related matters.[66] The doctrinal approach is, in short, an almost purely rhetorical activity bereft of any significant descriptive depth.

Seen in this light, the discursive structure of *Texas v. Johnson* can be understood as an elaborate façade. The justifying purpose of the façade is to obscure the process by which the Court transformed its belief that flag burning should be a protected form of political protest into a supposedly pre-existing legal rule, which the Court then deployed to answer the relevant questions of constitutional law.[67] Yet, as the foregoing analysis should have made clear, law (to paraphrase Mae West) has precious little

64. Free speech doctrinalists would no doubt claim that property laws are not directed primarily at the anarchist's *message*, but at the *means* he uses to express that message. Exactly so—in this context, such laws operate in precisely the same manner as, and are functionally identical to, flag desecration statutes.

65. The essential malleability of precedent is, of course, the great lesson of legal realism: a lesson which each generation of doctrinal scholars learns and then promptly forgets. *See, e.g.*, EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 1-8 (1948); KARL N. LLEWELLYN, THE COMMON LAW TRADITION 62-120 (1960); Max Radin, *Case Law and Stare Decisis: Concerning* Prajudizienrecht in Amerika, 33 COLUM. L. REV. 199, 208-12 (1933).

66. See Campos, *supra* note 23, for an extended discussion of this claim.

67. Whether or not iudividual justices or, for that matter, individual scholars recognize the strategic nature of the larger discourse that shapes "their" particular texts is another question. *See infra* text accompanying notes 116-20.

to do with it.[68]

III

Interpreted as a straightforward piece of legal reasoning, *Texas v. Johnson* is a shoddy performance: once subjected to the gentlest critical pressure, the opinion simply collapses. As we have seen, things become somewhat more interesting if we take Justice Brennan's argument to be essentially strategic and turn to the substance of the underlying normative claims.

What are these claims? Let us return again to Professor Amar. When we last left him, Professor Amar was fulminating against the lawless and unprincipled *Johnson* dissenters, who perversely refused to admit that *Johnson* was "as right and easy a case in modern constitutional law" as has yet been seen. Given the utterly unpersuasive quality of *Johnson's* doctrinal rhetoric, Professor Amar has some explaining to do.

A. A Matter of Principles

What do the dissenters refuse to acknowledge? They have closed their eyes, Professor Amar informs us, to "basic First Amendment principles."[69] It is "these principles—the hard core of a hard-won tradition"—that make *Johnson* the paradigmatic easy case.[70] To understand *Johnson* "is, I believe, to understand the heart of our First Amendment Tradition. Conversely, to fail to see that *Johnson* is an easy case is, quite bluntly, to misunderstand First Amendment first principles."[71] Our principled traditions, our traditional principles—these eloquent muses of constitutional jurisprudence make the correct result in *Johnson* a matter of pellucid clarity.

In order to understand what "our First Amendment Tradition" requires, we need to identify the elements signified by the awesome orthography of that particular phrase. It would appear that something more grandiose than the doctrinal elaborations of the Supreme Court is being evoked—some Burkean vision of the organic authority of the past, perhaps. Yet Professor Amar's argument makes it plain that whatever interest he has in our national traditions is colored by his political inclinations. His historical enthusiasms are reserved exclusively for *West*

68. Here I am speaking of "law" in the sense of the *ex post facto* application of autonomous decisional rules which predetermine the case's outcome.

69. Amar, *supra* note 10, at 132, 145.

70. *Id.* at 132. Those familiar with the sociolinguistics of Lakoff and Johnson may suspect that this continual invocation of the "hard core" may have something to do with the fuzzy ontology of that "hard-won tradition." *See* GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY 25-33 (1980).

71. Amar, *supra* note 10, at 133.

Virginia State Board of Education v. Barnette[72] rather than for *Chaplinsky v. New Hampshire*;[73] for *Tinker v. Des Moines Independent School District*[74] and not for *Dennis v. United States*;[75] for (we may assume) the Freedom of Information Act over the Sedition Act of 1798. "[O]ur First Amendment Tradition" does, after all, include the prosecution of Eugene Debs in the halls of the Supreme Court, as well as the unrestrained labors of the House Un-American Activities Committee, to note just a couple of counter-examples to the conventional Whig history.

Professor Amar would of course deny he has such a revisionist view of history. Such examples are terribly unfortunate swervings from the integrity of our libertarian traditions, properly understood. The following narrative would, no doubt, qualify for a similar dismissal:

> Neither the federal nor the state courts were significant protectors of free speech prior to 1919, when Justices Oliver Wendell Holmes and Louis Brandeis dissented in *Abrams v. United States*. Despite periods of harsh suppression, the courts made no important attempts to enforce the right either at the end of the eighteenth century or throughout the nineteenth. In the decades preceding World War I, the Supreme Court assumed that speech could be restricted if its content had a "bad tendency" and rejected virtually every free speech claim made during that period. One scholar has even characterized first amendment case law prior to 1919 as a "tradition of [judicial] hostility."[76]

To ignore the strong anti-libertarian strain found throughout American history, including much of America's *legal* history, is to eviscerate the very idea of a national tradition. Because it denies these complexities, "our First Amendment Tradition" turns out to be nothing more than a highly selective editing of the past for rhetorical purposes. As such, it mirrors Justice Brennan's tendentious parsing of precedent in *Johnson* itself.

We can now turn directly to Professor Amar's claims about "First Amendment first principles." He announces that when the Supreme Court "recognized" a First Amendment right to burn the American flag, it was affirming "at least five basic First Amendment principles."[77] These principles are described as follows:

"Principle One: Symbolic Expression is Fully Embraced by the First Amendment."[78]

"Principle Two: Government May Not Regulate the Physical

72. 319 U.S. 624 (1943). *See supra* text accompanying notes 48-49.
73. 315 U.S. 568 (1942). *See supra* text accompanying notes 52-57.
74. 393 U.S. 503 (1969).
75. 341 U.S. 494 (1951).
76. ROBERT F. NAGEL, CONSTITUTIONAL CULTURES 27 (1989) (alteration in original).
77. Amar, *supra* note 10, at 133.
78. *Id.* (emphasis omitted).

Medium with the Purpose of Suppressing the Ideological Message."[79]

"Principle Three: Political Expression—Especially Expression Critical of Government—Lies at the Core of the First Amendment."[80]

"Principle Four: Courts Must Guard Vigilantly Against De Jure and De Facto Discrimination Against Disfavored Viewpoints."[81]

"Principle Five: Exceptions to These Principles Must Not Be Ad Hoc."[82]

Stirring words indeed. It is simply remarkable what occurs when a contemporary legal theorist begins to repeat the word "principle." All across the ideological spectrum, from Alexander Bickel and Robert Bork to Ronald Dworkin and Laurence Tribe, the continuous chanting of this polysyllabic mantra seems to produce a positively narcotic effect on the higher cognitive functions of constitutional scholars.[83] I challenge my readers to undertake an empirical inquiry: find a typical passage of constitutional theory in which the term "principle" appears to shoulder much of the semantic burden and replace the magic word with another trisyllable, preferably one that will preserve the passage's soothing trochaic lilt. I suggest "albatross." Is any significant information lost thereby?[84]

What exactly *is* the ontological status of these marvelous creatures that supposedly supply answers to our most recondite constitutional questions? What epistemological problems does this status pose for what purports to be the interpretation of our fundamental law? Or, as the Person Sitting in the Darkness might put it, what are these things, and how do they tell us what we need to know?[85]

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79. *Id.* at 137 (emphasis omitted).

80. *Id.* at 140 (emphasis omitted).

81. *Id.* at 142 (emphasis omitted).

82. *Id.* at 144 (emphasis omitted).

83. One consequence of the widespread dependence on "principles" is that scholars often fail to recognize their own addiction:

> The Bork hearings momentarily illuminated doubts about legal scholarship that have been obscured for a long time. . . .
>
> . . . [T]he most conscientious doubts about Bork's fitness were directed, not at his political beliefs, but at his intellectual qualities. These qualities are widely shared among law professors (although they are not, of course, universal) and are especially visible in the writings of the elite theorists who tend to represent our professional aspirations. The best reason to oppose Bork, in short, was that he reminded us of ourselves; if we rightfully condemned him, we condemned our profession. Indeed, I suspect that mixed in with all the other fuel that fed the intense, almost exhilarated academic opposition to Bork was something close to self-hatred.

Robert F. Nagel, *Meeting The Enemy,* 57 U. CHI. L. REV. 633, 636-37 (1990) (reviewing ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990)).

84. Of course in one sense significant information *is* lost. The text will be stripped of a soothing abstraction, a discursive opiate that carries within the golden haze of its linguistic penumbra all sorts of subtextual reassurances, i.e., "this is law, not politics," "these assertions are the product of systematic thought," or "have a nice jurisprudential day."

85. The problematic status of "principles" in constitutional theory was brought to my attention by Steven D. Smith, and my thoughts on the subject have been influenced greatly by

B. *Law with the Net Down*

We have already seen the problems that arise when we attempted to locate the source of the *specific* proposition that there is a constitutional right to burn the flag. These problems are only exacerbated if the word "principle" is meant to signify a *general* proposition that provides useful guidance in deciding a wide variety of cases. The difficulty follows from the commonplace critical insight that the more general the proposition, the more readily it can be attributed to a host of otherwise dissimilar texts.[86]

Consider, for example, the claim that the First Amendment "contains" the principle that the state can restrict speech only if the bad social effects of the speech outweigh the positive consequences of allowing such speech to continue unburdened by state censorship. One merely needs to define "positive consequences" and "bad effects" at a moderately abstract level to reconcile this statement with any Supreme Court precedent, not to mention with our fragmentary knowledge of the intent of the framers. Indeed, *Texas v. Johnson,* which might at first glance appear to be the most libertarian of precedents, seems to all but explicitly embrace this very proposition. After all, if we accept Justice Brennan's reasoning we must conclude that upholding the censorious statute will have a more detrimental effect on the state's asserted interests than allowing speech of this kind to remain unmolested by state regulation. Hence, the bad social effects of flag burning clearly do not outweigh the positive consequences of requiring the state to tolerate such speech. It is, one might say, an easy case.

Now consider the proposition that the First Amendment stands for an altogether different principle: the state can never restrict political speech without a compelling reason for doing so. Obviously, *Johnson* provides no evidence to the contrary, but neither does any other case, once we undertake the simple task of fitting the relevant facts snugly within the indeterminate confines of the asserted principle. Does *Chaplinsky* contradict this view? Of course it doesn't—if we conclude that the state has a compelling interest in preventing breaches of the peace, or in protecting the reputations of its officers, or in maintaining

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conversations with him. *See* Steven D. Smith, *Idolatry in Constitutional Interpretation,* 79 VA. L. REV. 583, 619-25 (1993).

86. This generality of the principle does not, of course, determine how exactly the principle ought to be defined:

> [I]f a neutral judge must demonstrate why principle *X* applies to cases *A* and *B* but not to case *C* . . . he must, by the same token, also explain why the principle is defined as *X,* rather than *X minus,* which would cover *A* but not cases *B* and *C,* or as *X plus,* which would cover all cases, *A, B* and *C.*

Robert H. Bork, *Neutral Principles and Some First Amendment Problems,* 47 IND. L.J. 1, 7 (1971). As Paul Brest and others have pointed out, this powerful objection applies equally well to Bork's own views. *See* Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship,* 90 YALE L.J. 1063, 1090-92 (1981).

minimally civil standards of public behavior, or . . . and so on, ad infinitum.

The problem can be stated succinctly: in the realm of constitutional adjudication, principles which are general enough to generate interpretive consensus are too elastic to actually help decide cases, while principles which are specific enough to decide cases will rarely produce interpretive consensus. We can all agree, I suppose, that the First Amendment does or should stand for the principle that government cannot censor speech without a good enough reason for doing so.[87] As soon as we begin to give that claim a more precise content, however, discord is sure to erupt.

Thus the problem of determining the source of constitutional principles is inextricably connected to the question of whether they are useful for deciding constitutional cases. If it is claimed that the document's text, or the intent of the framers, or the Court's precedents constitutionalize a particular principle, the plausibility of this claim will almost always be inversely related to the principle's heuristic value.[88] A striking example of this phenomenon is provided by most proponents of "originalism," who counsel us to enforce only those principles actually chosen by the framers and no others, before proceeding to define these principles in such a general fashion that quite literally *no particular result* is required—or even foreclosed—by their ecumenical procedures.[89]

Professor Amar's First Amendment first principles provide a paradigmatic example of these tendencies. Furthermore, the grandiose significance which he attaches to the understanding and acceptance of his anointed propositions[90] makes them an irresistible target: one would be a

87. Again, Robert Nagel provides an incisive formulation: "[W]hole libraries of modern constitutional interpretations can be reduced to this sentence: Anything can be forbidden or permitted if there is sufficiently good justification." Robert F. Nagel, *The Thomas Hearings: Watching Ourselves,* 63 U. COLO. L. REV. 945, 951 (1992).

88. Another possibility is that constitutional principles could be derived directly from moral or political theory. "Easy cases" would then be those that evoked the moral consensus of the community as a whole. The uselessness of this standard for the purposes of constitutional adjudication should be obvious enough.

Comparing JOHN RAWLS, A THEORY OF JUSTICE (1971) with ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974) provides an interesting illustration of the inherently unworkable nature of such an approach. Rawls and Nozick are both brilliant moral philosophers who have constructed comprehensive theories of the just society. Despite the parallel endeavors, they manage to come to radically different conclusions on almost everything, thus illustrating that "the moral consensus of the society as a whole" isn't going to be easy to attain on *any* significant issue. *Cf.* BORK, *supra* note 83, at 255: "If the greatest minds of our culture have not succeeded in devising a moral system to which all intellectually honest persons must subscribe, it seems doubtful, to say the least, that some law professor will make the breakthrough any time soon."

89. Michael J. Perry provides a state-of-the-art example of this "originalism" in *The Legitimacy of Particular Conceptions of Constitutional Interpretation,* 77 VA. L. REV. 669, 696 (1991) ("To enforce a constitutional norm according to its original meaning is, therefore, to enforce the norm according to both the specific and the general aspects of that meaning.").

90. *See supra* text accompanying note 17.

poor sport indeed to pass up an invitation to burst these overinflated conceptual balloons.

C. Signs and Symbols

"Principle One: Symbolic Expression is Fully Embraced by the First Amendment."[91] The *Johnson* court, according to Professor Amar, embraced this principle when it noted that " 'the distinction between written or spoken words and nonverbal conduct . . . is of no moment where the nonverbal conduct is expressive, as it is here, and where the regulation of that conduct is related to expression . . . .' "[92]

This is all fine until you stop to wonder just what symbolic expression is (or, more siguificantly, what intentional action *isn't* symbolic). Take the case of rape. Surely Professor Amar wouldn't accord First Amendment protection to a rapist, but his boldly-stated Principle One, taken literally, would allow a rapist to make out a prima facie case that his conduct was indeed protected expressive conduct. Feminist scholars have demonstrated in rich detail just how expressive the rapist's actions often are: he is saying, in effect, "my access to sexual pleasure through the subordination of my victim's will is of greater importance than her right to physical and psychological integrity."[93]

The regulation of this conduct through the criminal code condemns (at least in theory) both the idea and the rapist's nonverbal expression of it, in harsh and unequivocal terms. If symbolic expression—the rapist's symbolic expression of his contempt for women, the thief's for property rights, the murderer's for the lives of others—is "fully embraced" by the First Amendment, then *every* expressive act condemned and penalized by the state must be subjected to the "most exacting scrutiny."

Professor Amar's treatment of the *O'Brien* case further illustrates his failure to recognize that his first principle is hopelessly vague. *O'Brien* upheld the constitutionality of a statute under which an anti-Vietnam war demonstrator was convicted for burning his draft card in an act of symbolic protest.[94] Professor Amar claims that *O'Brien* "dramatically supports the *Johnson* holding,"[95] because the case illustrates the principle that the government may punish symbolic speech only if the relevant statute does not represent "unconstitutional motivations that

91. Amar, *supra* note 10, at 133.

92. *Id.* at 136 (quoting Texas v. Johnson, 491 U.S. 397, 416 (1988)) (omissions in original).

93. *See, e.g.*, SUSAN BROWNMILLER, AGAINST OUR WILLS: MEN, WOMEN, AND RAPE (1975); SUSAN ESTRICH, REAL RAPE (1987); CATHERINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 171-83 (1989). I am aware that some readers will consider the suggestion that rape could be considered an act of political expression outrageous. I use the example precisely to illustrate the dangerous plasticity of general principles when one attempts to apply them to actual events.

94. United States v. O'Brien, 391 U.S. 367, 372 (1968).

95. Amar, *supra* note 10, at 138.

hide behind a seemingly neutral law."[96] In *O'Brien,* the Court concluded that the government had issued draft cards for, in Professor Amar's words, "legitimate identification purposes."[97] Therefore, the neutral purpose behind the statute was to prevent draft fraud and maintain an efficient draft, rather than the illegitimate purpose of punishing those who chose to protest the war itself by burning their draft cards.[98]

This analysis collapses the moment we recognize that there is nothing "neutral" about the government's desire to maintain an efficient draft. "Legitimate identification purposes" remain neutral—legitimate, that is, from a perspective that seeks to "flush out unconstitutional motivations"[99]—for exactly as long as we define neutrality in a narrow enough fashion. According to *O'Brien's* logic, a protester who burned his draft card to symbolize his general disgust with the government's efficient bureaucratization of human relationships would have no standing to make a First Amendment claim. His beliefs would simply be in conflict with an axiomatically correct ideological position—"bureaucratic efficiency is a legitimate government goal"—a position which Professor Amar cannot even begin to see *is* ideological, and which he therefore assumes falls outside the ambit of his magnificently vague first principle.

These criticisms are even more clearly applicable to Professor Amar's *"Principle Two: Government May Not Regulate the Physical Medium with the Purpose of Suppressing the Ideological Message."*[100] To agree with this proposition, we must first define "physical medium" and "ideological message" in restricted and unavoidably controversial ways, and we must assume that these two elements of a communicative act can always be effectively distinguished. Consider Professor Amar's claim that those who opposed the *Johnson* decision failed to understand the *symbolic nature* of the flag and flag burning:

> Again and again, they confused *the physical and the symbolic* in speaking of their desires to protect the "physical integrity" of the flag. But *the* flag is, in its deepest sense, not physical. Like a word, it is a symbol, an idea. It cannot be destroyed; it is fireproof. One can destroy only single manifestations, iterations, or copies of the symbol.[101]

Note the reliance on the separation of terms. If, however, the physical and symbolic elements of a particular communicative act are not distinct from each other, then "regulating the medium" will prove to be insepara-

96. *Id.* at 139.
97. *Id.* at 138.
98. *Id.*
99. *Id.* at 139.
100. *Id.* at 137.
101. *Id.* at 135 (first emphasis added). This gets things exactly backwards. If history is any guide, the American flag will cease to exist as a meaningful symbol long before the last "iteration or copy" of it disappears from the earth. *See infra* notes 102-05 and accompanying text.

ble from suppressing the message. This follows from the troublesome fact that all semantically meaningful acts, from intentionally employing formal mathematical symbols to intentionally shooting the President, have both a symbolic meaning and a physical manifestation of that meaning. That meaning can always, with more or less success, be translated into linguistic signifiers: "the area of a circle equals the length of its radius squared multiplied by the following sum"; "I am shooting a famous man because I want to impress the woman who obsesses me."

This last example illustrates how, despite Professor Amar's optimistic ontology, certain messages can indeed destroy valued "ideas." Now as Professor Amar rightly notes, ideas are not easily destroyed. For example, in a sense, "the President" is "a symbol, an idea": one cannot shoot "the" president only "a" president.[102] In the very same sense, "private property" represents an "idea": when a thief steals a flag, he has not destroyed the *idea* of private property. Yet suppose one lived in a "society" where all respect for the property rights of others had disappeared, and where no other authoritative mechanism for resolving claims to scarce resources had subsequently arisen. For those caught up in such a Hobbesian nightmare, the idea of private property would be quite meaningless—it *would* have been effectively destroyed.

Similarly, feminists have pointed out that every time a man rapes a woman, he is not merely engaged in a physical act: he is also symbolically contesting the *idea* that the personal freedom of women should override the sexual desires of men. True, the rapist's actions destroy but a single "manifestation" or "iteration" of that idea; but a society that fails to enforce laws prohibiting rape effectively obliterates the very concept that women should be free from sexual coercion.[103]

Ultimately, no dispositive distinction between "mere speech" and "harmful action" can be maintained: all meaningful acts are in a significant sense speech acts.[104] Thus, when the government regulates the

102. The symbolic ontology of office is explored in ERNST H. KANTOROWICZ, THE KING'S TWO BODIES: A STUDY IN MEDIAEVEL POLITICAL THEOLOGY (1957). English and French legal theory held that the king's Dignity survived the outrages of mere human mortality, and royal funerals included an effigy symbolizing that Dignity, dressed in the king's coronation regalia, which was borne above the royal coffin. *Id.* at 419-37. "The jurists . . . discovered the immortality of the Dignity; but by this very discovery they made the ephemeral nature of the mortal incumbent all the more tangible." *Id.* at 436.

103. *See supra* note 93 and accompanying text.

104. For a (perhaps) slightly less expansive version of this claim, see PAUL RICOEUR, *The Model of the Text: Meaningful Action Considered as a Text, in* FROM TEXT TO ACTION 144, 152 (Kathleen Blamey & John B. Thompson trans., 1991) ("[A]n action, like a speech act, may be identified not only according to its propositional content but also according to its illocutionary force."). *See also* John H. Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis,* 88 HARV. L. REV. 1482, 1495-96 (1975) (Draft card burning "is an undifferentiated whole, 100% action and 100% expression. It involves no conduct that is not at the same time communication, and no communication that does not result from conduct.").

"physical medium" of a flag by declaring that it cannot be taken from its owner without his consent, it is explicitly suppressing one particular manifestation of the ideological message that to do so is an acceptable form of wealth redistribution. Again, Professor Amar's principle seems plausible only if we fail to recognize that there are *no* purely symbolic actions and that furthermore there exist no "neutral" or "nonideological" grounds for distinguishing between those symbolic actions whose physical modes of expression will be tolerated and those whose modes of expression will be suppressed. To proclaim that the anarchist can be prohibited from expressing his ideas by stealing flags, but cannot be stopped from broadcasting his views by burning them, is to say nothing more than that the citizenry's desire not to have "their" possessions taken from them is legally protected, while their desire to live in a society where the most revered symbol of communal life cannot be publicly outraged is not. It is, of course, circular reasoning to base the justification for allowing certain acts and punishing others on the existence of a "right" to own private property, and a "right" to burn the flag. And it is incoherent to claim that the government's prohibition of one activity is ideologically neutral, while its ban of another "suppress[es] the Ideological Message."[105] Stealing flags and burning them are both powerful instances of symbolic speech; both actions potentially violate the rights of others. Whether they do or not depends entirely on how we choose to define those rights and not at all on the delineation of generalized principles which purport to accomplish the impossible task of distinguishing between "the physical and the symbolic."

The emptiness of Professor Amar's remaining First Amendment first principles is now apparent. *"Principle Three: Political Expression . . . Lies at the Core of the First Amendment"*[106] has no methodological value whatsoever until we define "political expression," which, as we have seen, is an essentially contestable concept.[107] Just as some might characterize rape as a form of political expression, others would deny that flag burning was expressive enough to qualify as a form of "true" political discourse. The principle itself, of course, can offer no help in making these distinctions.

Furthermore, even if we assume that the relevant interpretive community can agree that flag burning *is* a form of political expression, we simply push the critical inquiry back one step, into the realm of determining what constitutes a "compelling state interest." This, too, is by its nature controversial—for if it weren't, there would be no case.

As for *"Principle Four: Courts Must Guard Vigilantly Against De*

105. *See* Amar, *supra* note 10, at 137 (emphasis omitted).

106. *Id.* at 140.

107. *See supra* text accompanying notes 87-88.

Jure and De Facto Discrimination Against Disfavored Viewpoints," [108] Professor Amar's quotation from *Johnson* captures the substance of his assertion: "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[109] It is difficult to overstate the naiveté of a view that depends upon the belief that this kind of pious sermonizing helps decide anything.

When has any government anywhere claimed to suppress an idea simply because society found the idea itself offensive? A legal system discriminates against the particular expression of an idea because it has determined that *this* particular expression of the idea has bad enough consequences to warrant its suppression. The name normally given to these discriminatory judgments is "law." A more accurate restatement of Professor Amar's circular principle would therefore be "courts must guard vigilantly against de jure and de facto discrimination against disfavored viewpoints, in those instances where such discrimination is in fact illegal."

Given all of this, Professor Amar's triumphant metaprinciple—*"Principle Five: Exceptions to These Principles Must Not Be Ad Hoc"* [110]—brings to mind Oscar Wilde's comment on the death of Little Nell: one must truly have a heart of stone to read these words without laughing. How can we possibly know if an exception to these principles is "ad hoc," when the principles themselves are so general in their potential applications that they are rendered utterly useless for most jurisprudential purposes? Or, to put it another way, these principles will only seem useful if a substantial ideological consensus *already* exists among the relevant decisionmakers concerning the resolution of the political conflicts that gave rise to the controversy in the first place.

The essence of such a decisionmaking process is little different from the task that is faced by legal actors entrusted with the creation, rather than the interpretation, of legal rules. Such work cannot be characterized as *descriptive* inasmuch as it involves an essentially *normative* enterprise.[111] It follows that, if "constitutional interpretation" is properly

108. Amar, *supra* note 10, at 142.

109. *Id.* (quoting Texas v. Johnson, 491 U.S. 397, 414 (1989)). On the vain search for bedrock propositions, consider "The Philosophy Joke":

Student: O wise master, upon what does this world rest?

Sage: It rests upon the back of an enormous turtle.

Student: And upon what is this turtle?

Sage: The turtle floats in a boundless sea.

Student: And what supports this sea?

Sage: Why the bedrock, of course.

Student: And what is beneath the bedrock?

Sage: You idiot! The bedrock goes all the way down!

110. *Id.* at 144.

111. *See supra* text accompanying note 14.

understood as a creative (rather than as an interpretive) task, then it is of little ultimate significance that the text of the First Amendment, the intentions of the framers, and the Supreme Court's previous decisions are all highly indeterminate regarding the question of flag burning.

What matters, finally, is the normative judgment of the decisionmaker, who must decide not whether flag burning *is* protected by the Constitution, but rather *the question of whether it should be*. The awesome invocation of impossibly vague constitutional "Principles" is the preferred means by which contemporary players of the doctrinal game hope to mystify themselves and their imagined audience, and to repress the knowledge that *it is our relative confidence in answering this question, and this question alone,* which determines whether or not *Johnson* can even begin to be thought of as an "easy case."

IV

Professor Amar's article shares an interesting characteristic with the case it purports to explain. Each text, when read as a straightforward example of its putative genre (judicial opinion interpreting pre-existing legal rules; scholarly work increasing the store of human knowledge) can be fairly described as an appalling performance. Yet each can be partially rehabilitated—if it is decoded as an essentially *strategic* text; that is, a work that, as aficionados of the countergenre to which it secretly belongs will realize, is designed to obscure rather than to clarify the questions it claims to address.

A. Hard Questions

Once the doctrinal fog has evaporated, the significant normative questions presented by *Texas v. Johnson* can at last be confronted in a meaningful way. Should the democratic process be permitted to conclude that protecting the national flag from public dishonor overrides the liberty interests of individuals or groups who wish to dishonor the flag in the course of making a memorable statement? This question bifurcates into two separate queries: are flag desecration laws a bad idea, and are they a bad *enough* idea to trigger a judicial veto of the legislative process?

Answering the first question requires that we determine the relative importance of various social goods. How much do we value cultural cohesion and unity? How important is it to protect a certain social space in which idiosyncratic beliefs may be displayed without the threat of majoritarian censure? How heavily do we weigh the harm that is inflicted on those who are forced to tolerate the public mockery of symbols that are dear to them? How much conformity to norms of social behavior should the state be entrusted to enforce? Does a culture require *any* universally recognized totems of sacred significance?

These are difficult questions. In America today, anyone who can

answer them without hesitation is either incapable of appreciating their complexity, or is an unreflective ideologue (the latter condition may just be an intellectualized version of the former state). The conditions of contemporary American society insure that these questions will remain difficult, for in a morally heterogeneous culture such as ours, the tension between libertarian beliefs and communitarian values is constant and interminable.

In a sufficiently diverse and pluralistic society, no definitive answer can be given to the question of whether or not flag desecration laws are desirable.[112] Many people will favor such laws. By doing so they give their explicit or implicit allegiance, in this situation, to values on the communitarian side of the scale. Others will oppose such laws. For them, libertarian considerations will seem paramount—at least on this particular issue.

This point helps to clarify the contours of the second question: whether flag-burning laws are sufficiently bad to justify judicial veto. If we accept the proposition that, in a democratic system, morally contentious questions should usually be resolved on the basis of majoritarian preferences, if only because a diverse society lacks any more satisfactory method of resolution, a court would need an especially compelling reason to veto the answers given to such questions by the legislative process. Therefore, presumably, a court should not replace the legislative answer with its own unless, at the very least, its faith in the superiority of its own views is extremely strong.[113]

We are now in a position to understand the social reality that makes a strategic reading of Justice Brennan's opinion and Professor Amar's article plausible. Justice Brennan cannot, after all, simply announce that he is so confident in the superiority of libertarian values that he is overriding the polity's communitarian choice. That, needless to say, would be condemned as "lawless" and "unprincipled." Hence the opinion's elaborate doctrinal smoke screen: what remains an irreducibly difficult moral question for society as a whole (but not, we need hardly add, for Justice Brennan himself) is transformed into something quite different—a question of "constitutional law."

Professor Amar's helpful contribution to this process is to describe just how transparently correct Justice Breunan's answer really is—to explain why *Johnson* is "as right and easy a case in modern constitutional law as any I know." Professor Amar cannot, of course, undertake a straightforward justification of the case's underlying political choices. These choices, as we have seen, must remain controversial. Being a con-

112. More precisely, no such answer is possible in a society where political power has been sufficiently diffused so as to allow legitimate public conflict between different subcultures.

113. Courts then signal these types of foundational beliefs with sacral or fetishistic invocations of "the Constitution." *See* Campos, *supra* note 23, at 302-10.

temporary theorist of constitutional law, he responds to this repressed knowledge by emitting a mass of hopelessly opaque principles, much in the manner of a harried squid that makes good its escape behind a sudden cloud of impenetrable ink.[114]

Seen in this light, *Johnson* really does become an easy case. That is, from the perspective of an unreflective, dogmatic libertarian, the strategic nature of the rhetoric in both the opinion and the article is not merely necessary, but admirable. Such a person will at once recognize that the Justice and the professor both belong to that righteous remnant who cling to the one true faith, while all around them the benighted masses insist on wallowing in invincible ignorance.

That the democratic process has overwhelmingly rejected these flag-burning conclusions; that half one's judicial colleagues reject them; that such stalwart predecessors in the libertarian cause as Hugo Black, Abe Fortas, and Earl Warren rejected them out of hand[115]—all this is immaterial. Those who properly recognize *Johnson* as an easy case will be comforted by their knowledge that, although such disingenuous tactics might be condemned by some as too extreme, extremism in the defense of liberty is no vice.

B. Advocacy and Scholarship

The rhetoric of lawyers has never sat well with those who strive for truth: so much legal argument is by its very nature strategic and instrumental, rather than a candid statement of true belief.[116] Indeed, to ask a lawyer if he really *believes* all the assertions put forward in his brief is like asking a novelist if she really believes all the things her characters say: such questions reveal a fundamental misunderstanding of the respective enterprises.

Such questions become more meaningful, and more difficult to

114. As to whether Professor Amar (and, for that matter, Justice Brennan) "really believes" his arguments, see *infra* text accompanying notes 116-20; *see also* Nagel, *supra* note 83, at 633-37 (discussing Robert Bork's attacks on the legal academy's integrity in THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990)).

115. *See* Street v. New York, 394 U.S. 576, 605 (Warren, C.J., dissenting) ("I believe that the States and the Federal Government do have the power to protect the flag from acts of desecration and disgrace.... [I]t is difficnlt for me to imagine that, had the Court faced this issue, it would have concluded otherwise."); *id.* at 610 (Black, J., dissenting) ("It passes my belief that anything in the Federal Constitution bars a State from making the deliberate burning of the American flag an offense."); *id.* at 616-17 (Fortas, J., dissenting) ("[T]he flag is a special kind of personalty.... 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.") (citations omitted). All three of these statements, qnoted in Texas v. Johnson, 491 U.S. 397, 432-33 (1989) (Rehnqnist, C.J., dissenting), comprise what Professor Amar characterizes, with a near insolence that perfectly captnres the general tone of his piece, as "scraps of dicta ... none of which contains even a plausible argument." Amar, *supra* note 10, at 144.

116. The most famous critique of rhetoric remains Plato's *Gorgias. See Gorgias, in* THE COLLECTED DIALOGUES OF PLATO 229, 232-49 (Edith Hamilton & Hnntington Cairns eds., 1961).

answer, when they are directed at judicial rhetoric. Whether or not and to what extent judges should be candid when they purport to explain the basis for their decisions remains a controversial issue.[117] It can be argued that those who deploy power in the struggle to achieve justice must, perhaps, sometimes employ bad soldiers in the service of a good cause. Thus, people who remain convinced that to punish flag burning is deeply immoral are unlikely to be much troubled by the specious arguments that Justice Brennan enlists in pursuit of his noble end. Politics is rarely a pure endeavor, and those who advocate social change cannot normally afford to hone an ambivalent and textured sensibility toward the great issues their work addresses.

Scholarship is, or should be, another matter. A scholar seeks truth.[118] Scholarly inquiry has distinctive value to the extent, and only to the extent, that it makes the pursuit of truth its fundamental goal. One might even say that in their pure, theoretical forms the advocate and the scholar provide archetypal examples of Jürgen Habermas's well-known distinction between strategic communication and communicative action. The former activity is purely rhetorical; its arguments have no other purpose than to achieve some instrumental goal. Communicative action, by contrast, aims at "ideal speech" or "undistorted communication," the purpose of which is to establish, through unforced inquiry, what can and cannot be called true.[119]

These distinctions allow us to evaluate Professor Amar's article. As advocacy, this kind of writing may have its uses; as scholarship, it is essentially worthless.[120]

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117. On the desirability of candor in opinion writing, see Scott Altman, *Beyond Candor,* 89 MICH. L. REV. 296, 297 (1990) (arguing that judges should decide candidly but nonintrospectively); David L. Shapiro, *In Defense of Judicial Candor,* 100 HARV. L. REV. 731, 736-38 (1987) (stating that candor should not be sacrificed in favor of other goals).

118. Scholars seek other things, too, of course: money, fame, social change, etc. It is generally recognized, however, that these other goals are often impediments to scholarly inquiry, in ways that are mostly irrelevant to the work of the advocate.

119. *See generally* JÜRGEN HABERMAS, COMMUNICATION AND THE EVOLUTION OF SOCIETY (Thomas McCarthy trans., 1979); 1 JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION (Thomas McCarthy trans., 1984). Habermas emphasizes that his typology is analytical and heuristic rather than a description of social reality, which in turn implies that almost any text will have strategic dimensions, whatever pretensions it may entertain of representing pure communicative action. (I am indebted to Pierre Schlag for this point.)

120. I say "essentially" rather than "utterly" because the arrogance of Professor Amar's pronouncements has the beneficial effect of helping unmask the emptiness of the entire enterprise. In this sense, "bad" doctrinal constitutional law scholarship is to be much preferred over "good." If every constitutional advocate were blessed with the intellectual abilities and anti-intellectual commitments of, say, Ronald Dworkin (LAW'S EMPIRE (1986)) or Laurence H. Tribe (AMERICAN CONSTITUTIONAL LAW (2d ed., 1988)), legal scholarship could hardly hope to escape from the labyrinth of constitutional principle.

C. *Analysis Terminable and Interminable*

How does a text that is in fact nothing more than a rather mediocre amicus brief come to be held up as a paradigm of legal scholarship? The reasons are undoubtedly multifarious and complex, so I will limit myself to a few tentative suggestions.

The syndrome that produces what has been aptly dubbed "advocacy scholarship" has many causes.[121] Among these we might list the overemphasis legal academics place on the decisions of the Supreme Court, and the resulting obsession with so-called questions of constitutional law; the related phenomenon whereby law professors project themselves into the role of the appellate court judge and consequently feel compelled to pronounce judgment on various questions of social policy;[122] and—what is perhaps the root psychological source of the syndrome—the unhealthy urge to indulge in power worship that has distorted so much of Western intellectual life in the modern world.[123]

Doctrinal constitutional law provides a perfect conduit for these impulses. It is a field that has very little meaningful descriptive content,[124] allowing the scholar-advocate to imagine he is participating in the creation of fundamental social policy. Because constitutional law deals in such issues, it gives full rein to certain grandiose pretensions of the American legal profession, which, as de Tocqueville noted long ago, has always aspired to fill the role of the aristocratic caste in the *novus ordo seclorum.*[125]

Perhaps most important of all, advocacy scholarship is ridiculously easy. What could be simpler than to demonstrate the existence of a constitutional right to *X?* The materials are so inherently plastic, and the protean rules of the game have been so thoroughly elaborated by one's distinguished predecessors, that any advocate with a solid grasp of the doctrinal moves taught in the first year of law school can "craft" a plau-

121. *See, e.g.*, Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987,* 100 HARV. L. REV. 761, 778 (1987) (calling upon legal scholars to abandon their current practice "in which political sallies are concealed in formalistic legal discourse" in favor of a "more candid literature").

122. This is a major theme of Pierre Schlag's work on normative legal thought. *See* Pierre Schlag, *Normative and Nowhere to Go,* 43 STAN. L. REV. 167 (1990); Pierre Schlag, *Normativity and the Politics of Form,* 139 U. PA. L. REV. 801 (1991); Pierre Schlag, *The Problem of the Subject,* 69 TEX. L. REV. 1627 (1991).

123. *Cf.* 4 GEORGE ORWELL, *The Prevention of Literature, in* IN FRONT OF YOUR NOSE: THE COLLECTED ESSAYS, JOURNALISM AND LETTERS OF GEORGE ORWELL, 1945-1950, at 59, 66 (Sonia Orwell & Ian Angus eds., 1968) ("To write in plain, vigorous language one has to think fearlessly, and if one thinks fearlessly one cannot be politically orthodox.").

124. That content consists of an especially weak form of *stare decisis. See supra* text accompanying notes 47-50.

125. *See* 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 272-80 (Phillips Bradley ed., Henry Reeve & Francis Bowen trans., 1945).

sible argument for his or her favorite ideological position without being subjected to the inconvenience of strenuous thought.

Such an enterprise cannot, of course, go on forever. A book advertisement in a recent issue of one of the nation's leading intellectual journals inadvertently captured the anxiety that this genre of legal thought is now producing among legal academics. The advertisement's promotional blurb was taken from a review of the book which had earlier appeared in the same journal:

> [This book amounts to] an energetic and often highly illuminating discussion of how constitutional interpretation inevitably involves substantive choices but is not *simply a matter of making things up* . . . . [It is] an unusually articulate contribution to the large number of recent works attempting to justify, to preserve, and to extend the work of the Warren Court.[126]

The book in question is *On Reading the Constitution,* co-authored by the reigning heavyweight champion of doctrinal constitutional law himself, Professor Laurence H. Tribe. The quote comes from a highly-ranked contender for the title, Professor Cass Sunstein. This blurb is packed with so many fascinating implications (note, for instance, the implicit conflation of "constitutional interpretation" with "the work of the Warren Court," and the symptomatic failure to acknowledge that this particular Court is no longer in session) that it really deserves an essay unto itself. Let us linger over a single telling phrase.

We are assured that constitutional interpretation "is not simply a matter of making things up." The logic of advertisement being what it is, the presence of this phrase indicates that the blurb's target audience may suspect that the very thing the phrase denies is indeed the case, and that consequently such suspicions must be calmed in order to lessen consumer resistance to the proffered good. Now compare Amar's attack on the *Johnson* dissenters:

> In the end, one searches the *Johnson* dissents in vain for any plausible legal argnment. . . .
>
> Indeed, the most interesting rhetorical move in the *Johnson* dissents came close to throwing down the mask, abandoning all pretense, and openly admitting the weakness of the dissenters' legal analysis. . . .
>
> The call was seductive, but almost literally lawless. . . .
>
> . . . .
>
> . . . The *Johnson* dissenters, to their credit, were uncomfortable with the knowledge that they were *simply making up*—out of

126. THE NEW REPUBLIC, May 6, 1991, at 29 (quoting Cass R. Sunstein, *The Spirit of the Laws, in* THE NEW REPUBLIC, Mar. 11, 1991, at 32, 34-36) (emphasis added).

whole cloth, as it were—a flag exception.[127]

Needless to say, the distinction between the principled elaboration of constitutional principles through a principled interpretation of the principal texts that make up the hard core of a principled enterprise, and the actual work product of nine elderly bureaucrats making up some rules in order to decide a case must, at all times, be rigidly maintained.

D. Losing Their Religion

Constitutional orthodoxy hinges on the following credo: because we are not simply making things up, we are constrained by disciplining rules.[128] Because we are constrained by disciplining rules, there are easy cases. Because there are easy cases, the resolution of *all* cases must involve something more than "naked policy claims."[129]

Professor Amar's argument follows this precise structure. By demonstrating how *Johnson* is an easy case, he lays the groundwork for his claim that the resolution of a hard case[130]—*R.A.V. v. City of St. Paul*—can be decided by means other than "simply" choosing between two compelling social imperatives. If, however, "we" are "simply making things up," then *every* Supreme Court decision that "interprets the Constitution" requires a difficult political choice between competing social goods. Worst of all, it becomes difficult to see why professors of constitutional law bring any special competence or insight to the making of such choices.

Again, the pretense of doctrine cannot be sustained indefinitely. And yet,

> 1937: "[N]ow with the shift by [Justice] Roberts [in *Jones-Laughlin,* overthrowing the Commerce Clause doctrines which the Court had used to strike down New Deal legislation], even a blind man ought to see that the Court is in politics, and understand how the Constitution is 'judicially' construed."[131]
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> 1956: "We may . . . invoke some twentieth-century official remarks from some Supreme Court Justices who seek to impress upon us in effect that it is not they that speak but the Constitution that speaketh in them. . . . [S]uch judicial denials of personal

127. Amar, *supra* note 10, at 144-45 (emphasis added). The technical term for Amar's style of interpretation is "projection."

128. *See* Owen M. Fiss, *Objectivity and Interpretation,* 34 STAN. L. REV. 739, 744 (1982) ("The interpreter is not free to assign any meaning he wishes to the text. He is disciplined by a set of rules . . . .").

129. *See* Amar, *supra* note 10, at 145.

130. "Hard" because Professor Amar has more sympathy for the expressive rights of traitors than for those of racists. One can, I should add, share this preference and still object to the demand that it be given the axiomatic status of a logical proposition.

131. Letter from Felix Frankfurter to Franklin D. Roosevelt (Mar. 30, 1937), *in* ROOSEVELT AND FRANKFURTER: THEIR CORRESPONDENCE, 1928-1945, at 392 (Max Freedman ed., 1967).

> power [make] me doubt either the capacity or the candor of the men who [make] them."[132]
>
> 1981: "[T]he controversy over the legitimacy of judicial review in a democratic polity—the historic obsession of normative constitutional law scholarship—is essentially incoherent and unresolvable."[133]

The specter of impending collapse has haunted several generations of orthodox scholarship. Nevertheless, each season's batch of law reviews unleashes a frightful torrent of texts that announce the discovery of ever-more exotic truths lurking amid the undiscovered countries of constitutional law. The lessons of legal realism seem not to have sullied this discourse, and an indignant armada of critical scholarship has apparently sunk without a trace.[134]

Still it must be emphasized, over and over again, that "constitutional interpretation . . . is not simply a matter of making things up."[135] What would we think of generals who spent all their time justifying the use of force? Of poets who were always explaining the purpose of poetry? Of politicians who were obsessed with affirming the value of politics? Would not such persons come to resemble, in Roberto Unger's memorable phrase, "a priesthood that had lost their faith and kept their jobs"?[136]

V

In an essay entitled "Notes on the Novel," José Ortega y Gasset asserted that "[a]nyone who gives a little thought to the conditions of a work of art must admit that a literary genre may wear out."[137] Ortega y Gasset believed that for those who aspired to write artistically significant novels, this possibility was fast becoming a reality.

> It is erroneous to think of the novel—and I refer to the modern novel in particular—as an endless field capable of rendering ever new forms. Rather it may be compared to a vast but finite quarry. There exist a definite number of possible themes for the novel. The workmen of the primal hour had no trouble finding new

132. THOMAS R. POWELL, VAGARIES AND VARIETIES IN CONSTITUTIONAL INTERPRETATION 28 (1956).

133. *See* Brest, *supra* note 86, at 1063.

134. *Cf.* Mark Tushnet, *Critical Legal Studies: A Political History,* 100 YALE L.J. 1515, 1543 (1991) (arguing that Critical Legal Studies remains an element of the pluralistic universe of the legal academy, but not much more).

135. *See supra* text accompanying note 126.

136. Roberto M. Unger, *The Critical Legal Studies Movement,* 96 HARV. L. REV. 561, 675 (1983).

137. JOSÉ ORTEGA Y GASSETT, *Notes on the Novel, in* THE DEHUMANIZATION OF ART AND OTHER WRITINGS ON ART AND CULTURE 51, 53 (1968).

> blocks—new characters, new themes. But present-day writers face the fact that only narrow and concealed veins are left them.
>
> With this stock of objective possibilities, which is the genre, the artistic talent works, and when the quarry is worked out talent, however great, can achieve nothing. Whether a genre is altogether done for can, of course, never be decided with mathematical rigor; but it can at times be decided with sufficient practical approximation.[138]

Although the point may be somewhat overstated,[139] Ortega y Gasset's view has considerable force. Serious artists do not have the option of simply repeating the rhetorical structures bequeathed to them by their most gifted predecessors. To do so would inevitably reduce their work to the sort of parody or pastiche that replaces creative ferment with a stylized, exhausted homage to the past.

The judicial opinion is a kind of literary form.[140] If a particular genre of this form is fated by the requirements of political legitimization to repeat a narrow range of discursive moves in the course of revisiting the same constricted list of interpretive materials, the consequences for the genre's long-term health will be dire.

A. The Decline of Doctrine

Doctrinal constitutional law is becoming an exhausted genre. This weariness is best illustrated by the generally deplorable state of its primary texts. The contemporary Supreme Court opinion has hypertrophied into a species of bureaucratized document, and as such it routinely displays all the persuasive power and aesthetic charm of a congressional subcommittee report.

It would be a mistake to assume that this crisis could be solved through the recruitment of abler, more eloquent persons to replace those who now perform the Court's work. Ortega y Gasset's observations concerning the finite possibilities of any particular genre suggest it is unlikely that this evident exhaustion can be attributed to inadequacies in the human components of the present system.

That system is, after all, faced with the daunting task of sheltering

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138. *Id.* at 54-55.

139. When we compare Tolstoy's *War and Peace* to Pynchon's *Gravity's Rainbow,* or Austen's *Pride and Prejudice* to Nabokov's *Lolita,* we perceive that the underlying formal assumptions of the older works no longer hold, and have been displaced by techniques which fundamentally alter the form of the genre. The nineteenth-century novel, with its claims to narrative transparency, integrated human character, and robust moral truth, has been superseded by discursive forms that challenge or invert those assumptions, and in the course of doing so produce texts that a Tolstoy or an Austen might not even recognize as novels.

140. *See* RICHARD WEISBERG, POETHICS 16-22 (1992) (noting that the judicial opinion is a form of "creative narration"); JAMES B. WHITE, JUSTICE AS TRANSLATION 215-25 (1990) (describing the judicial opinion as a "form of life" that contains its own distinctive ways of thinking and talking).

the whole sodden sandcastle of modern constitutional discourse—with its three-part tests, its ever-shifting "levels of scrutiny," its flimsy formulas and shopworn rhetoric—from the incoming tide of skepticism which the fundamental conflict and stress of a heterogeneous, ideologically fractured nation generates, and which inevitably erodes the former certainties of a formalistic legal culture.

Indeed the sandcastle itself—what Robert Nagel has labeled the "formulaic Constitution"[141]—has been erected in response to the very same social pressures that are fated to wash it away. The exhaustion undermining the doctrinal enterprise is the product of an ironic paradox. Homogeneous cultures (cultures recognizing a wide variety of axiomatic truths) are capable of sustaining a belief in the validity of those elaborate doctrinal arguments that themselves depend upon such axioms as must undergird any legal system. Yet for precisely the same reason that such cultures can sustain the belief, they have no real need for the justifications. Culturally diverse societies are in the opposite situation. They require formalistic justifications to help obscure the politically contentious nature of law, and yet the absence of widely accepted notions of truth leads to the eventual rejection of doctrinal justification when it becomes too obvious that such justifications are essentially tautological.[142]

Under these conditions, the doctrinal analysis of constitutional adjudication has become a degenerate enterprise. With the collapse of its underlying formal assumptions, it is no longer possible to mistake this sort of advocacy for serious scholarship. The only remaining possible justification is that such advocacy scholarship contributes to positive social change—yet this belief, too, is becoming more difficult to sustain.

Several factors undermine this justifying belief. Leaving aside the whole problem of reaching a satisfactory definition for "positive social change,"[143] we must note that very little evidence exists for the claim that constitutional scholarship has any effect whatsoever on constitutional adjudication. Such scholarship is rarely cited by the Supreme Court, and when it is, its impact (if any) on the adjudicative process remains obscure.[144]

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141. *See* Robert F. Nagel, *The Formulaic Constitution,* 84 MICH. L. REV. 165 (1985).

142. That is, the justifications become recognized as parasitic on a broadly shared consensus as to what constitutes axiomatic truth, which consensus, unfortunately, is just what such societies lack.

143. For a discussion of the deep ideological fissures which divide the most activist members of the contemporary American political scene, see JAMES D. HUNTER, CULTURE WARS (1991).

144. *See* Louis J. Sirico, Jr. & Jeffrey B. Margulies, *The Citing of Law Reviews by the Supreme Court: An Empirical Study,* 34 UCLA L. REV. 131, 134-35 (1986) (finding decreased judicial reliance on legal periodicals by the Supreme Court). Consider the following anecdote, as told by Professor Sanford Levinson:

> Justice Scalia visited the University of Texas last year, and I was placed at his luncheon table, as was his former colleague at the University of Chicago Law School, Douglas Laycock, now a colleague of mine at Texas. During the course of the

More fundamentally, recent historical scholarship has badly undermined the assumption that the decisions of the Supreme Court have a powerful impact on American political and social life. The long-term effect of the Court's jurisprudence on the questions it addresses is quite ambiguous, and in many cases it may actually retard the causes it is commonly supposed to advance.[145]

Why then does the *Harvard Law Review,* which still embodies the central ethos of American legal thought, continue to lavish so much attention on this dubious enterprise? I have suggested some reasons, and conclude by offering one more. Let us turn back to an example of constitutional discourse that was produced under significantly different interpretive conditions: conditions that provided a rich soil in which the finest flowers of the enterprise were permitted to bloom.

B. A Page of History

On June 3, 1940, in *Minersville School District v. Gobitis*,[146] the Supreme Court held that the First Amendment did not require public school officials to excuse the children of Jehovah's Witnesses from saluting the American flag, even though such salutes violated the tenets of their religious faith.[147] Eleven days later, the German army marched down the streets of the French capital.

Three years to the day after the fall of Paris, Justice Robert Jackson announced the opinion of the Court in *West Virginia State Board of Education v. Barnette*,[148] which overruled *Gobitis*.[149] This opinion dem-

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conversation, Justice Scalia made the altogether understandable point that he was much too busy to keep up with academic scholarship. That, in itself, was not disturbing, though it adds to my perplexity why scholars would believe that they could readily gain the attention of these busy officials. What *was* disturbing, however, was what I perceived as Scalia's barely concealed lack of interest when Laycock, one of the country's ranking scholars on the complex issues of religion and law, mentioned that he was about to publish an article taking issue with Scalia's extremely important and controversial opinion . . . in *Employment Division, Department of Human Resources of Oregon v. Smith*. . . .

I got no impression that Scalia was remotely interested in reading criticism of his opinion or, indeed, reflecting further on his approach. There was not even a standard gesture of pretending that he looked forward to getting Laycock's article. I was left with the feeling that to write an article with the expectation that it would be read by this particular Justice, at least, would be little more sensible than dropping a message into the ocean. If someone so distinguished, thoughtful, and personally known to Scalia as Laycock seems unable to gain a reading, I truly despair for the rest of us.

Sanford Levinson, *The Audience for Constitutional Meta-Theory (or, Why, and to Whom, Do I Write the Things I Do?),* 63 U. COLO. L. REV. 389, 405-06 (1992) (citations omitted).

145. *See* GERALD N. ROSENBERG, THE HOLLOW HOPE (1991) (arguing that Supreme Court decisions in the areas of school desegregation, voting rights, women's rights, and environmental litigation have had little impact on social reform).

146. 310 U.S. 586 (1940), *overruled by* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

147. *Id.* at 591-600.

148. 319 U.S. 624 (1943).

149. *Id.* at 642. The probable effect of the shifting fortunes of war on *Gobitis* and *Barnette* has been noted by Judge Posner. *See* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 147-

onstrates what a gifted writer can achieve when he is working at the center of a vibrant discursive genre. It therefore provides an ideal foil to *Johnson's* grating combination of formalist sophistry and dogmatic sanctimoniousness.

Given that he is about to overrule a case, Justice Jackson can hardly argue that his conclusion is impelled by precedent, and he naturally spends little time discussing the Court's previous decisions. He then acknowledges that the text of the First Amendment provides the decisionmaker with scant guidance. "[T]he task of translating the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century, is one to disturb self-confidence."[150]

One would expect that judicial self-confidence might be restored by evidence that the framers of those majestic generalities intended that they have a specific application to *this* case, and Justice Jackson's argument appears for a moment to veer in that complacent direction.[151] But then Justice Jackson permits subsequent history to make a troubling incursion.

> We must transplant these rights to a soil in which the *laissez-faire* concept or principle of non-interference has withered at least as to economic affairs, and social advancements are increasingly sought through closer integration of society and through expanded and strengthened governmental controls. These changed conditions often deprive precedents of reliability and cast us more than we would choose upon our own judgment.[152]

This remarkable admission signals Justice Jackson's awareness that neither the Constitution's text, nor the intentions of its framers, nor the history of its interpretation can decide the question before him. If he is to convince his audience that the Court has struck the proper balance between the demands of conscience and the imperatives of national unity, he can only do so through a rhetorical tour de force that argues for the validity of *this Court's* estimation of what under these circumstances constitutes the right balance between two compelling social interests.

Only after fully acknowledging the inherent difficulty of this task does he begin that brilliant peroration on the enduring value of civic tolerance for which the opinion is justly celebrated. "[W]e act in these mat-

48 (1990). In one of those coincidences that logicians loathe and poets love, the United States Congress has designated June 14 as Flag Day. *See* 36 U.S.C. § 157 (1988).

150. *Barnette*, 319 U.S. at 639.

151. Justice Jackson states, "These principles grew in soil which also produced a philosophy that the individual was the center of society, that his liberty was attainable through mere absence of government restraints, and that government should be entrusted with few controls and only the mildest supervision over men's affairs." *Id.* at 639-40.

152. *Id.* at 640.

ters," he admits, "not by authority of our competence but by force of our commissions."[153] He then turns to the pragmatic lessons of history:

> Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity. As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. . . . Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.
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> . . . .
>
> . . . We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great.[154]

This living voice, still warm and capable of earnest suasion, seems to call to us from out of a wholly different *kind* of enterprise than that which fuels the weary, mechanistic rhetoric of *Texas v. Johnson.* The arcane dogmas of contemporary First Amendment doctrine are absent, and we find in their place a measured, contingent discourse arguing for one particularistic vision of the social good: an argument made all the more powerful by its willingness to acknowledge the inherent limitations of its *judicial* source.

It would be a pointless exercise to bemoan the decay of judicial eloquence that has marked the decline of modern constitutional discourse. The power of Justice Jackson's rhetoric comes not only from his own considerable talents, but from the rich possibilities of a still-fresh genre. We must remember that *Barnette* was decided just two decades after the invention of the modern First Amendment, and that the encrustations of our baroque free speech doctrines had not yet mystified the pragmatic

153. *Id.*
154. *Id.* at 640-42.

essence of judicial review which Justice Jackson's candid argument so brilliantly vindicated, if only for that day and place.

The stubborn persistence of doctrinal constitutional scholarship can thus be traced, perhaps, to an understandable nostalgia for this once-vibrant enterprise. Articles such as Professor Amar's are striking examples of how, in its unending search for authoritative certainty, constitutional discourse is haunted by the memory of a relatively homogeneous legal culture, in which fewer fundamental premises were perceived as being in any sense contingent.

It is one of the many ironies of our present condition that, as a formerly monolithic legal system comes to reflect the diversity of the culture(s) it serves, the textured cadences of a *Barnette* give way to the shrill platitudes of a *Johnson*. In a sense, this perverse inversion of the process by which cultural confidence breeds judicial humility is not surprising. When social truth seems essentially contestable, judges cannot afford to be wrong. Hence they, and the academics who advocate the conclusions they reach, will continue to claim at every opportunity that what looks for all the world like a difficult political judgment is really just an easy legal case.

The present intellectual and aesthetic bankruptcy of constitutional doctrine all but guarantees that such easy cases will continue to make bad law—and even worse scholarship.

C. This Is Not a Flag

Images: the pale, dissatisfied face of Robert Jackson, turning over a single sentence for a twentieth time, searching for whatever oracular resonance will win him a fifth and decisive vote; the emblematic figure of Antigone as imagined in the mind of Sophocles, kneeling next to her brother's unsanctified corpse; a row of stricken faces along a Parisian street, watching their flag descend through the mild morning air of June 14, 1940; the tall, stoop-shouldered figure of Abraham Lincoln, brooding over the unappeasable faces of the Confederate dead lying unburied on the field at Shiloh, one body half-shrouded by tattered remnants of the Stars and Bars, all that useless heroism caught in the pitiless gaze of Matthew Brady's camera.

To assert that the judicial choice between honoring the dictates of conscience and affirming civic unity is an easy one is a sure sign of an impoverished imagination. To proclaim that in America today such questions of constitutional meaning are amenable to the formal methods of conventional legal argument is to misunderstand both the limits of legality and the nature of moral choice. And to confuse advocacy with scholarship only ensures that one will, in the end, fail at both.

"The intellect of man is forced to choose" said Yeats,

Perfection of the life, or of the work,

And if it take the second must refuse
A heavenly mansion, raging in the dark.[155]

The facile certainties that fill the pages of modern constitutional doctrine deny this dichotomy and replace it with an unreal world of easy cases, self-evident truth, and empty exhortation. Their authors are writing the words to sermons that no one will hear.

155. W.B. YEATS, *The Choice, in* 1 THE COLLECTED WORKS OF W.B. YEATS: THE POEMS 246 (Richard J. Finneran ed., 1989).