

University of Colorado Law School

Colorado Law Scholarly Commons

Publications

Colorado Law Faculty Scholarship

1992

Unfocused Governmental Interests

Robert F. Nagel

University of Colorado Law School

Follow this and additional works at: <https://scholar.law.colorado.edu/faculty-articles>



Part of the [Constitutional Law Commons](#), [Law and Society Commons](#), and the [Supreme Court of the United States Commons](#)

Citation Information

Robert F. Nagel, *Unfocused Governmental Interests*, 55 ALB. L. REV. 573 (1992), available at <https://scholar.law.colorado.edu/faculty-articles/869>.

Copyright Statement

Copyright protected. Use of materials from this collection beyond the exceptions provided for in the Fair Use and Educational Use clauses of the U.S. Copyright Law may violate federal law. Permission to publish or reproduce is required.

This Article is brought to you for free and open access by the Colorado Law Faculty Scholarship at Colorado Law Scholarly Commons. It has been accepted for inclusion in Publications by an authorized administrator of Colorado Law Scholarly Commons. For more information, please contact rebecca.ciota@colorado.edu.

HEINONLINE

Citation: 55 Alb. L. Rev. 573 1991-1992

Provided by:

William A. Wise Law Library



Content downloaded/printed from [HeinOnline](#)

Tue Aug 8 12:33:36 2017

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[Copyright Information](#)

UNFOCUSED GOVERNMENTAL INTERESTS†

Robert F. Nagel*

My subject is “unfocused governmental interests,” or what might be loosely thought of as diffuse or general moral objectives. Most of my paper is a discussion of two opinions with which you are all probably familiar. One is Justice William Brennan’s dissenting opinion in *Paris Adult Theatre v. Slaton*.¹ The other is the Court’s opinion in *Texas v. Johnson*,² the flag burning case. I plan to just summarize my observations about those two opinions and then try to quickly put those observations in a more general perspective.

I chose those opinions because they were written by the foremost modern practitioner of doctrinal analysis. Justice Brennan’s recent retirement from the bench, I think, makes this an opportune time to think further about the rhetorical functions of doctrinal analysis. Such an effort might help develop some perspective on the Court’s impending changes of direction. Ironically, Justice Brennan’s disapproval of unfocused governmental interests, upon analysis, turns out to be a somewhat reassuring prospect from which to view the ending of an era of judicial power that he did so much to shape.

One of the main consequences of doctrinalism in constitutional law, in my judgment anyway, is to mask or submerge the significant considerations at work in judicial decisions. Doctrinalism makes animating visions, hopes and fears hard to see; it hints at these considerations while making them seem routine or ordinary, analytic and definite. There are many reasons to expect the Court to choose a form of expression that masks the important considerations underlying its judgments. The particular reason that I am going to address is this: the important interests that are at work in judicial decisions, at least some of the time, are indistinguishable from the sorts of interests that the federal courts often find to be suspicious when asserted by

† © 1992 by Robert F. Nagel. These remarks were based on a paper prepared for the Conference on Compelling Government Interests at Albany Law School, September 26-28, 1991. The full paper, on which these remarks were based, is scheduled to appear in a volume tentatively entitled *Compelling Government Interests: The Mystery of Constitutional Analysis* (Stephen E. Gottlieb ed.) to be published by the University of Michigan Press.

* Rothgerber Professor of Constitutional Law, University of Colorado School of Law.

¹ 413 U.S. 49, 73 (1973) (Brennan, J., dissenting).

² 491 U.S. 397 (1989).

the other branches and layers of government. Since the Court's indictment of other decisionmakers applies to its own decisions, it is only natural for opinions to be written in language that obscures significant objectives and concerns.

When Justice Brennan employed the adjective "unfocused" in his dissent in *Paris Adult Theatre*, he was describing the governmental interest asserted to justify a prohibition against adults viewing obscene films in commercial theaters.³ Having just acknowledged that states have the authority to regulate not only health and safety, but also "the morality of the community,"⁴ Brennan quickly distinguished the moral objectives behind suppressing obscenity as "ill defined" and "speculative."⁵ The state's interest in regulating morality is, he argued, lawful, but inadequate to justify the suppression of obscenity.⁶ In contrast, what he called "strong and legitimate interests"—perhaps the welfare of children or the privacy of adults—might justify controls over the method of distribution of obscene material.⁷

The distinction between "unfocused" interests and "strong" interests, then, was a tentative effort to establish a hierarchy of public purposes. The word "unfocused" was part of a justification for the relatively low legal weight that Justice Brennan would assign to the state interests behind at least certain "moral" regulations. Brennan's discussion emphasizes the intangible and uncertain kinds of consequences that can be traced to exposure to obscenity. There is "'little empirical basis,'" he said, for a causal connection between obscenity and sexual deviance or crimes.⁸ It is only "speculative" that repressing obscenity would build a moral community and, in any event, the idea of a moral community is "ill defined."⁹ These aspects of Brennan's opinion assume that the state's important moral interests involved "real" consequences and specific behavior.

Despite what Justice Brennan says or assumes, I cannot see why unfocused moral interests are unimportant. You can immediately think of important moral interests, such as enhancing individual self-respect, training vigorous and responsible citizens, and creating beautiful cities, that are intangible or uncertain or vague. Moreover, you

³ *Paris Adult Theatre I*, 413 U.S. at 109 (Brennan, J., dissenting).

⁴ *Id.* at 108-09.

⁵ *Id.* at 109.

⁶ *Id.* at 109-10.

⁷ *Id.* at 112-13.

⁸ *Id.* at 107-08 (quoting *Stanley v. Georgia*, 394 U.S. 557, 566 (1968)).

⁹ *Id.* at 109.

can think of unimportant moral purposes, such as mending pot holes—although some people, I suppose, would probably think that mending pot holes is as important as anything else—that are tangible, specific and certain. These counter examples exist for obvious and intrinsic reasons. Social consequences can be morally important by virtue of their diffuseness. Think of the countless acts of kindness and usefulness that flow from the inculcation, in a single individual, of character traits like tolerance, responsibility, or pride. Moreover, it can be because a social consequence is morally important that the uncertainty of its realization may not matter decisively. I think that everyone knows this who has supported controversial programs to eradicate poverty or to achieve racial equality, or to make any major change in society. Further, profound moral issues, such as when one human life begins or whether the death penalty is ever justified, tend to involve great controversy partly as a result of their moral significance.

Although Justice Brennan used the term “unfocused” as a way of grading the importance of state interests, the term only makes sense, I think, if it is understood in quite a different way. Justice Brennan could have fully acknowledged that the interests credited by the majority opinion in *Paris Adult Theatre* were morally important. If he had done so he still could have taken the following position: Both the suppression of obscenity and obscenity itself entail profoundly bad consequences. However, when the justifications for suppressing obscenity are “unfocused,” the side effects of suppression threaten to become widespread and to engulf us as a society. This is because the kinds of state interests asserted for suppressing obscenity can always or almost always be asserted. The advantage of “focused” interests is simply that, by definition, they can be convincingly asserted only sometimes. Not every obscenity regulation, for instance, is designed to protect children, but every suppression of obscenity (indeed, every suppression of any offensive communication) can be justified on the basis of the “moral character of the community.”

It is this familiar argument against boundless justifications that gives force to Justice Brennan’s use of the word “unfocused.” It is possible to extrapolate from Brennan’s bleak depiction of the side effects created by prosecutions under the *Roth* obscenity standard¹⁰ to a nightmare image of widespread timidity and arbitrary prosecutions, where valuable ideas and information about sexuality never see the light of day. If, on the other hand, obscenity regulation is permit-

¹⁰ See *Roth v. United States*, 354 U.S. 476 (1957).

ted only when interests in privacy or child welfare are demonstrable, pervasive suppression, along with its nightmarish consequences, becomes less likely. The advantage of focused justifications, then, is not their moral superiority, but their infrequency. The side effects of obscenity regulation are more unacceptable than the effects of obscenity, not because these side effects in themselves are worse morally, but because they are likely to expand to unacceptable proportions.

As congenial and common as such a prediction or such a fear might be, it seems to me that it is important to ask what it could be based on. It is possible that, as a psychological matter, the inclination to suppress is strong and can always be expected to expand to the limits defined by the courts. Or, perhaps, there are specific political and institutional characteristics of our time that make widening suppressions likely. Possibly, a perceptive eye can see, in our society, indications that suppression is already unexpectedly common. Even if suppression is still acceptably contained, a clairvoyant insight might reveal that soon society will undergo a sharp change of direction toward general suppression.

Under the dry word "unfocused," then, we can barely make out an intimidatingly large form, a fearful image of an arbitrary and sterile society. Many people besides Justice Brennan see such a society taking shape around us, and for such people Brennan's dissent in *Paris Adult Theatre* will seem compelling. The power in his argument depends, however, not on the words or the doctrines but on an animating vision that is only suggested. Given the terms of Brennan's argument, this vision had to be kept obscure for the simple reason that it amounts to the assertion of an unfocused interest. Just as there is no conclusive proof of a causal connection between obscenity and sex crimes, there is no firm proof that the *Roth* standard resulted in any significant blockage of the flow of sexual information to the public, much less that loosening the *Roth* standard would unleash any frightful wave of obscenity prosecutions. Potential publishers' presumed timidity is intangible in the same sense that the effects of obscenity on family relationships and individuals' self-respect are intangible. The precise contours of any predicted general repression are necessarily undefined for the same reasons that the damage done by obscenity to the moral character of the community is, as Justice Brennan argued, only vaguely defined. Indeed, the grim society that he sought to avert by limiting the states' authority to regulate obscenity might as well be described as a different version of a society without moral character, listless as opposed to prurient, cautious rather than reckless, repressed instead of libertine. Put affirmatively,

Brennan's position was fashioned to improve the moral character of the community by building a vigorous, experimental, individualistic ethos among its people.

As morally attractive as this purpose is, it is boundless. A society that is permitted to suppress obscenity only for the sake of adult privacy and children's welfare could be engulfed by prurient materials. A person fearful of this possibility might imagine obscenity appearing not only in downtown commercial theaters but in outdoor drive-in theaters, on bumper stickers, in municipal parks, in public libraries, on late-night television, in popular recorded music; that is, virtually everywhere that unpleasant speech might be anticipated or from which the eye could be averted. What might underlie such a fear or prediction? As a psychological matter, it might be supposed that sexuality is an enormously powerful force that can be expected to generate a limitless market. There may be cultural and institutional weaknesses specific to our time that make commercial exploitation of obscenity especially lucrative. A perceptive eye might already see in our society indications that obscenity, or something like obscenity, is disturbingly prevalent. Even if our present culture is largely free of obscenity, some prophetic insight might accurately predict a sudden and pervasive change.

In summary then, the operative effect of using the word "unfocused" in Brennan's dissent in *Paris Adult Theatre*, was, paradoxically, to hint at the diffuse visions that animated and gave force to Brennan's position, while simultaneously discrediting the unfocused objectives underlying the state's position. If Brennan's language had been more powerfully expressive, it would have been clear that what was at stake was two competing sets of hopes and fears: differing images of potential calamities and virtuous communities.

When we examine Brennan's opinion for the Court in the flag burning case, we see much the same dynamic at work.¹¹ Most of this opinion is devoted to convincing the reader that invalidation of the Texas flag desecration statute was required by the prosaic application of legal doctrine rather than by any grand social vision. The key to the opinion, however, is the Court's treatment of the governmental interest asserted by Texas. That interest or purpose was to "preserv[e] the flag as a symbol of nationhood and national unity."¹² Now, it would be easy to misunderstand the Court's decision as holding that this purpose is an illegitimate effort to suppress speech that

¹¹ See *Texas v. Johnson*, 491 U.S. 397 (1989).

¹² *Id.* at 407.

is disrespectful of our nationhood. The opinion does describe the state's purpose as "content-based" and repeatedly invokes the principle that government "may not prohibit expression simply because it disagrees with its message."¹³ Nevertheless, none of this is used to establish that Texas's objective was improper. Rather, the Court concludes only that the asserted interest must be subject to something it calls "the most exacting scrutiny"¹⁴ and that it must involve some consideration other than "simply" protecting society from offensive or disagreeable ideas.¹⁵ The promotion of nationhood, obviously, is an objective that goes far beyond protecting the public's sensibilities from distasteful or dissenting views, and the Court itself flatly describes this objective as legitimate.¹⁶ Why, then, was the Texas law not constitutional?

At this point in his analysis, Justice Brennan's dilemma is parallel to the dilemma he had faced years earlier on the obscenity issue. In both instances, he conceded that the conduct involved can be regulated by the government if some heightened level of scrutiny reveals a sufficiently important public interest, and in both he described the asserted state interest as legitimate. His route out in the flag burning case is over the same path that he had marked in *Paris Adult Theatre*. Although the word does not appear in the decision, notice that Texas was asserting an "unfocused" interest. Like the moral character of a community, nationhood is an abstraction, a self-perception, a pervasive sense. It does not consist of acts, but of the meaning attributed to acts; it is not a program, but an identity based on history, imagination, and sentiment. Nationhood, of course, does have tangible consequences, but they are diffuse, diverse, and uncertain. National unity, therefore, is a boundless justification. It could be promoted by protecting the flag, but, as Justice Brennan points out, it could also be promoted by sanctifying the presidential seal or copies of the Constitution. The image that looms at the end of this slide is ominous indeed; it is the image of totalitarian orthodoxy. If we can be forced to treat a flag with respect, we can be forced to express false agreement with public policies and false homage to governmental leaders.

Against this depressing image, the Court sets its own vision of self-assurance and tolerance. "The way to preserve the flag's special role is not to punish those who feel differently. . . . It is to persuade them

¹³ *Id.* at 416.

¹⁴ *Id.* at 412 (quoting *Boos v. Barry*, 485 U.S. 312, 321 (1988)).

¹⁵ *Id.* at 414.

¹⁶ *Id.* at 418.

that they are wrong."¹⁷ Justice Brennan's opinion says that the flag represents "the Nation's resilience, not its rigidity."¹⁸ It appeals to "'courageous, self-reliant men.'"¹⁹ The Court could imagine "no more appropriate response to burning a flag than waving one's own, no better way to counter a flag burner's message than by saluting the flag that burns."²⁰

This vision of a tolerant society is appealing, but like the image of a society brave enough or licentious enough to risk having obscenity nearly everywhere, this objective is unfocused. Its boundless possibilities are unwittingly evoked by the image of citizens saluting while their country symbolically burns in the street. The people are instructed to wave their flags back and forth as they watch the emblem of their common heritage being burned or, presumably, walked over or urinated on. Self-confidence, as much as unity, is an answer that can always be given; as unity at the extreme turns to totalitarian force, resilience at its extreme turns to entropy. It would seem, then, that again we have a choice of nightmares: a society without tolerance and variety, or a society without commonality and self-respect.

Just as in *Paris Adult Theatre*, however, Justice Brennan insists that the interests he prefers are focused. He writes, "We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents."²¹ This claim, however, is undercut by Justice Brennan's depiction of the Court's opinion itself; he plainly sees his opinion as a substitute for the symbolism of the flag. He writes, "Our decision is a reaffirmation of the principles of freedom and inclusiveness that the flag best reflects. . . . [A]nd it is that resilience [represented by the flag surviving the bombardment a Fort McHenry] that we reassert today."²² This is to say that national unity, correctly understood, is symbolized and protected by the Court's opinion in *Texas v. Johnson*.

In short, the Court presents its opinion as an alternative to flag desecration laws. For the visual symbolism, the emotional connotations, the historical associations of the flag, the Court would substitute its teachings, its discussion of precedent, its doctrinal analysis, and its claims about self-confidence and resilience. This means, among other things, that the interest of the State of Texas could not

¹⁷ *Id.* at 419.

¹⁸ *Id.*

¹⁹ *Id.* (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).

²⁰ *Id.* at 420.

²¹ *Id.*

²² *Id.* at 419.

have been inadequate or illegitimate because it was unfocused or symbolic. If the state's interest was insufficient on this ground, under the Court's view of the purpose of its own opinion, that opinion would also have to be unimportant or improper.

The distinction in *Texas v. Johnson* between substantive principles of freedom and the symbols that represent those freedoms is the same distinction that Justice Brennan made in *Paris Adult Theatre* when he contrasted legitimate state interests with unfocused moral objectives. In both cases, however, his opinions end up asserting a judicial version of an unfocused interest. Indeed, in the latter case, Brennan's opinion for the Court substitutes an intellectualized version of a national mythology for a visual one, and he thus audaciously pursues symbolic interests that are identical to those of the State of Texas.

National unity built on a shining vision of tolerant, flag-waving people is both possible and attractive. But it is also possible that unity, including vigorous commitment to individual freedom, depends less on reason than on sentiment, less on doctrine than on history. If so, Brennan's vision at its end might convert a political ethos that is vigorous and proud into one that is feckless and empty.

I can now state in more general terms the propositions that are illustrated by the two opinions that I have been discussing. Viewing constitutional cases as struggles between competing social images, rather than merely arguments about principle and doctrine, can restore some sense of authenticity and significance. By emphasizing the extent to which the Court's decisions serve controversial aspirations and fears, this perspective forces attention to an important equivalence between judicial and other governmental interests. To the extent that both sets of interests are unfocused, both are boundless justifications. This means that both sets of interests entail potentially serious risks. Moreover, to the extent that the constitutional status of the judicial interests depends on the alleged insufficiency of the competing governmental interest, the boundlessness of the judicial interest undercuts any special claims it might have to legal authoritativeness.

As I have tried to demonstrate, Brennan's two opinions deny the equivalence between his preferred interests and those of the government. To the extent that the Court adopts this strategy when it declares a governmental interest to be vague and potentially boundless, the judiciary is vulnerable on the very charge that it directs at the political branches. Indeed, in some ways the judiciary is more vulnerable; not only are the Court's justifications, if they were fully ex-

pressed, patently boundless in theory, but judicial opinions almost necessarily betray a tendency to apply them to excess in practice.

To see why this might be, consider the consequences of the assertion that the Court's imagery in a particular case has authoritative status. Given our assumptions about the Constitution as supreme law, constitutional prescriptions must apply uniformly across the nation and must subordinate all other interests. To the extent that an objective has authoritative constitutional status, judges are required to realize that objective everywhere and at all costs. That is to say, as justifications, judicial objectives are boundless.

The boundless pursuit of a social vision requires a lot more than this, of course. It requires what you might call inspiration, what you might call fanaticism, at least dogmatism. There is no doubt that most federal judges, most of the time, are the opposite of fanatical; they are usually moderate, thoughtful, and tolerant. Does this mean that the unfocused interest pursued by the court should never be expected to present a realistic threat of boundless application? Most citizens, most of the time, are not fanatics; but the American body politic is not entirely immune from excessive zeal and pathological moods. There is no reason that I know of to think that jurists, especially when fired by the conviction that they are performing an inescapable duty, should be any different. Brennan's opinions, then, raise questions that should be assessed openly and carefully. Under what circumstances are federal judges, like others in power, capable of obduracy and even, in their own way, of fanaticism? Might they push, or have they pushed, their boundless justifications to end-points where pleasing images dissolve into painful excesses?

The society that Justice Brennan would create is thought by many not only to be morally attractive but also to be legally imperative. In that imagined society, virtually all acts expressing defiance are protected as speech. People hide from or are inured to the clamor of offensive communications and sexually explicit materials; church and state are separated by a high and mostly impregnable wall; gender differentiation has been eliminated; abortion is freely available; sexual freedoms have been extended to minors and to the unmarried; and the institution of marriage has withered into legal insignificance. For many judges and for many legal academics, this world, or something like it, marks the limit of imagination and tolerance. In this there is a dogmatism that doctrinalism dignifies and obscures.

Recognizing this should affect how we react during periods of retrenchment on the Court, such as the one we are now entering. The Court is now slowing or stopping what otherwise would have been its

own pursuit of boundless images. Given the reasons to expect rigidity and intolerance among our judges, it ought to be reassuring that the massive power exercised by the federal judiciary can, at least over the course of decades, be qualified and redirected through political checks:

On the other hand, perhaps, the new Court can be expected to deprecate progressive legislative or executive objectives as potentially boundless, while obscuring its own agenda of unfocused interests. This might occur under a number of circumstances, the most obvious being the cynical possibility that the asymmetrical evaluation of public purposes is simply a method of institutional or ideological aggrandizement. It could also occur on other assumptions: for example, that a politically conservative Court nonetheless will continue to be captive to the instrumentalist assumptions of modern individualism; or that the tradition of doctrinal justification will remain strong and will itself tend to suppress the articulation of animating visions; or that other, inherent aspects of the judicial function discourage candid communication. No matter what the cause, it would be both ironic and unfortunate if the newly constituted Court were to follow Justice Brennan's lead in ignoring the simple truth that all unfocused governmental interests should be identified and evaluated for what they are.