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Texas v. Johnson

Henry Mark Holzer

TEXAS v. JOHNSON

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Editor's Note: This is an opinion written by a "Justice" who is not currently on the United States Supreme Court. The author of this article, Professor Henry Mark Holzer, likes to imagine himself to be a United States Supreme Court Justice in his spare time. This article is the unpublished "Supreme Court" opinion of a would-be Justice in response to the recent case of Texas v. Johnson.[1]

I. MR. "JUSTICE" HOLZER, [DISSENTING].

Unfortunately, too often constitutional analysis and decision-making is informed not by text, intention, and precedent but rather by emotion, desire, and anecdote. When that happens, as it has in this case, we do more than simply make bad constitutional law; we step beyond our role as judges and tread upon political prerogatives. In addition, when we do so in a case such as this one which involves the social policy of a constituent state of these United States, we undermine a structural pillar of American constitutionalism: Federalism. It is indeed ironic that the majority does so here in the name of a constitutional value—free speech—which is best protected not by federal judicial intrusion into state political prerogatives, but rather by the first principles of

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1. 109 S. Ct. 2533 (1989).

separation of powers and federalism.

II. THE STATE OF TEXAS AND GREGORY LEE JOHNSON

The events which started this case on its way to this Court are succinctly described in the majority opinion:

> While the Republican National Convention was taking place in Dallas in 1984, respondent Johnson participated in a political demonstration dubbed the "Republican War Chest Tour." As explained in literature distributed by the demonstrators and in speeches made by them, the purpose of this event was to protest the policies of the Reagan administration and of certain Dallas-based corporations. The demonstrators marched through the Dallas streets, chanting political slogans and stopping at several corporate locations to stage "die-ins" intended to dramatize the consequences of nuclear war. On several occasions they spray-painted the walls of buildings and overturned potted plants, but Johnson himself took no part in such activities. He did, however, accept an American flag handed to him by a fellow protestor who had taken it from a flagpole outside one of the targeted buildings.
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> The demonstration ended in front of Dallas City Hall, where Johnson unfurled the American flag, doused it with kerosene, and set it on fire. While the flag burned, the protestors chanted, "America, the red, white, and blue, we spit on you." After the demonstrators dispersed, a witness to the flag-burning collected the flag's remains and buried them in his backyard. No one was physically injured or threatened with injury, though several witnesses testified that they had been seriously offended by the flag-burning.
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> Of the approximately one hundred demonstrators, Johnson alone was charged with a crime. The only criminal offense with which he was charged was the desecration of a venerated object in violation of Tex. Penal Code Ann. § 42.09(a)(3)(1989) [citation omitted].[2]

The Texas Penal Code section provides, in pertinent part, that "[a] person commits an offense if he intentionally or knowingly desecrates: . . . (3) a state or national flag."[3]

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2. *Id.* at 2536-37.

3. TEX. PENAL CODE ANN. § 42.09(a)(3) (Vernon 1989).

The term "desecrate" is defined by the statute to mean to "deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action."[4]

Based on the largely uncontested facts,[5] Johnson was convicted in the Dallas County Criminal Court and sentenced to one year in the Dallas County Jail and a $2,000 fine. The Dallas Court of Appeals affirmed.[6] Johnson then sought discretionary review[7] in the Court of Criminal Appeals of Texas.[8] Principally, two related questions[9] were put before that court and in them one can find the genesis of what has become a fatal trap for this Court, one which, I fear, has ensnared my colleagues of both the majority and dissenting opinions. According to the Texas Court of Criminal appeals, it "granted . . . review to determine (1) whether V.T.C.A. Penal Code, § 42.09(a)(3) violates Art. I, sec. 8 of the Texas Constitution or the First Amendment to the United States Constitution . . . ."[10] However, despite Johnson's and the court's recognition that the validity of Johnson's conviction had to be measured by the free speech guarantee of the Texas Constitution, the Court of Criminal Appeals declined to utilize state grounds in deciding the case. Because that declination is the root from which this Court's ill-advised decision grew, what happened in the Texas courts needs to be closely examined.

As noted in the Texas Court of Criminal Appeals, Johnson raised eight separate free speech arguments, half based on state law and half based on federal law.[11] The following

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4. *Id.*

5. There was apparently some question concerning whether the flag which Johnson burned belonged to him or had been stolen from its rightful owner (*Johnson*, 109 S. Ct. at 2553), but that point seems not to have been important at his trial.

6. Johnson v. State, 706 S.W.2d 120 (Tex. Ct. App. 1986).

7. *See* TEX. R. APP. P. 200(c) (2 & 3) (Vernon 1990).

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

9. An additional question was "whether the prosecutor's closing argument during the punishment phase of the trial denied appellant a fair trial." (*Johnson* 755 S.W.2d at 93). That question, however, was not decided by the Texas Court of Criminal Appeals and played no further role in this case.

10. *Id.* TEX. CONST. art. 1 § 8 provides in pertinent part that "[e]very person shall be at liberty to speak, write or publish his opinions on any subject . . . and no law shall ever be passed curtailing the liberty of speech . . . ."

11. *Johnson*, 755 S.W.2d at 94 n.6, *aff'd*, 706 S.W.2d at 122.

summarizes what the Texas Court of Criminal Appeals had to say on that point.[12]

> [In *Spence, supra*] the Supreme Court adopted a two-part analysis for flag desecration cases: the appellate court must determine, first, whether the conduct is protected under the first amendment, and second, whether, upon the record of the given case, the interests advanced by the state are so substantial as to justify infringement of appellant's constitutional rights. *Monroe v. State Court of Fulton County*, 739 F.2d 568 (11th Cir. 1984).
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> Thus, we must first determine whether Johnson's act of burning the flag is constitutionally-protected free speech. On appeal, *the State does not dispute this*. Nonverbal expression may be a form of free speech entitled to first amendment protection. *See Spence v. Washington*, 418 U.S. 405, 94 S. Ct. 2727, 41 L.Ed. 2d 842 (1974) (attaching peace sign to a flag is a form of free speech); *Tinker v. Des Moines Community School District*, 393 U.S. 503, 89 S. Ct. 733, 21 L.Ed.2d 731 (1969) (wearing black armbands in school is akin to pure speech).
>
> To determine whether Johnson's conduct is entitled to first amendment protection, we must consider "the nature of appellant's activity combined with the factual context and environment in which it was undertaken." *Spence*, 418 U.S. at 409-10, 94 S.Ct. at 2730, 41 L.Ed.2d 842 (1974). If appellant shows "[a]n intent to convey a particularized message . . . and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it," *Id.*, at 410-11, 94 S. Ct. at 2730, then the activity is protected speech under the first and fourteenth amendments. *Monroe v. State Court of Fulton County*, 739 F.2d 568, 571 (11th Cir. 1984).
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> Here, Johnson was convicted of burning the United States flag during a public demonstration protesting the policies of President Ronald Reagan and the Republican Party during the 1984 Republican National Convention. The record reflects that Johnson and his fellow protesters participated in anti-Reagan chants and "die-ins," as well as burning the flag in front of Dallas City Hall. This suggests that Johnson intended to convey a particularized

12. *Id.* at 94. Editor's note: This portion is offset for emphasis. It is not intended to be a direct quote.

> message, his dissatisfaction with the Reagan Administration's policies, and that this message was very likely to be understood by those who viewed it. *See Monroe v. State Court of Fulton County*, 739 F.2d 568, 572 (11th Cir. 1984). Johnson's act was not one of "mindless nihilism." *Spence*, 418 U.S. at 410, 94 S. Ct. at 2730. Therefore, we conclude that Johnson's act of burning the flag constituted symbolic speech requiring first amendment scrutiny.
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> Next, we must determine, given the record before us, whether the interests advanced by the State are so substantial as to justify infringement of Johnson's constitutional rights. The State advances two interests: preventing breaches of the peace and protection of the flag as a symbol of national unity.

Finding that the State of Texas had "a legitimate and substantial interest in protecting the flag as a symbol of national unity," the Dallas Court of Appeals held "that § 42.09 is constitutional" and "Johnson's grounds of error one through eight [were] overruled."[13]

This decision by the Dallas Court of Appeals is significant in at least three respects. First, Texas did not dispute that Johnson's act of burning the flag "[was] constitutionally protected free speech."[14] Second, the "two-part analysis for flag desecration cases,"[15] which this Court supposedly adopted in *Spence*, *supra*, was a figment of the Dallas Court of Appeals' imagination for the simple reason (which will be seen *infra*) that *Spence was not a flag-desecration case.* Third, the only other case of this Court cited by the Dallas Court of Appeals, *Tinker*, *supra*, was also not a flag desecration case.

When the *Johnson* appeal reached the Texas Court of Criminal Appeals, that court concluded that the lower appellate court's decision had "grouped [Johnson's] eight [free speech] points together and *purportedly* decided them on both state and federal grounds. Their analysis, however, depended completely on cases which applied *only* the *federal* constitution. Despite that court's *claim* to have disposed of the *State* law issues, those questions are *yet to be decided.*"[16]

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13. *Johnson*, 706 S.W.2d at 124.
14. *Id.* at 123.
15. *Id.*
16. *Johnson*, 755 S.W.2d at 94 n.6 (emphasis added).

Whether or not the Texas Court of Criminal Appeals was correct in its evaluation of what the Dallas Court of Appeals had actually decided, and on what grounds, the former tribunal, apparently in a misguided understanding of the Supremacy Clause of the federal Constitution, invoked a Texas procedure allowing that court to ignore the constitution of its own state in deciding Johnson's appeal:

> When a Court of Appeals is presented with both state and federal bases for a proposition of constitutional law and fails to address the state law aspects of the question, this Court's procedure is to review the correctness of the Court of Appeal's application of federal law and then remand, if necessary, for determination of the state law issues. *McCambridge v. State*, 712 S.W.2d 499, 501-02 n.9 (Tex. Crim. App. 1986). We will not, therefore, address article I, sec. 8 of the Texas Constitution in this opinion.[17]

In other words, in a negation of basic principles of federalism and contrary to the laudable trend noticeable today in state courts—of using state constitutional provisions to decide state constitutional questions—the Texas Court of Criminal Appeals chose to turn its back on the state's own free speech guarantee, ignore Johnson's invocation of that right, and instead to approach the decision in *Johnson* from a purely *federal* constitutional perspective.

Unfortunately, in doing so, the Texas court wrote on a slate already cluttered with three closely related categories of cases from this Court: the boiler-plate "first/fourteenth amendment incorporation" cases, our earlier, pre-*Johnson*, flag cases, and the "symbolic speech" cases. This is neither the time nor the place to refight the "incorporation" battle.[18] I mention the "incorporation" phenomenon here only because of its extreme relevance to what my colleagues stretch to decide today, and to what the Texas Court of Criminal Appeals failed to decide yesterday.

Despite many words from this Court and other courts, and from assorted lawyers, academics and commentators, to the effect that the Due Process Clause of the fourteenth amendment "incorporates" against the states most if not all

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17. *Id.* at 94 n.6.
18. *See* R. BERGER, GOVERNMENT BY JUDICIARY (1977).

the provisions of the federal Bill of Rights while also allowing this Court and other courts to pass on the "reasonableness" of state legislation, few really believe any longer (let alone try to prove) that there is legitimate constitutional authority for the existence or exercise of such unbridled power. Indeed, as Professor Wallace Mendelson has cogently observed:[19]

> . . . there is no way—as a matter of grammar, syntax, or rhetoric—that a single sentence in Amendment Fourteen[20] can be read to divide the period of human gestation into trimesters, and to prescribe in some detail differing abortion rights in each of them.[21] Nor, except perhaps in Wonderland, can that sentence be read to permit racial segregation, yet also to forbid it;[22] to incorporate, and not incorporate, laissez faire;[23] to permit, and not permit, poll taxes;[24] to impose, and not impose, the fair value doctrine:[25] to incorporate, yet not incorporate, most of the Bill of Rights:[26] to permit, and to outlaw, gender discrimination;[27] to accept and to forbid, compulsory flag salutes;[28] to protect trial by jury, though not by the traditional jury of twelve (six will do, but not five).[29] Moreover, the new version of jury tri-

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19. Mendelson, *Raoul Berger on The Fourteenth Amendment Corno Copia*, 3 BENCHMARK NOS. 4 & 5, 205 (1987). Professor Mendelson's footnotes have been renumbered and "incorporated" into footnotes 20-32 in this opinion.

20. U.S. CONST. amend. XIV states:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States: nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

21. Roe v. Wade, 410 U.S. 113 (1973).

22. *Ex parte* Virginia, 100 U.S. 399 (1879); Plessy v. Ferguson, 163 U.S. 537 (1896); Brown v. Board of Educ., 347 U.S. 483 (1954).

23. Lochner v. New York, 198 U.S. 45 (1905); Ferguson v. Skrupa, 72 U.S. 726 (1963).

24. Breedlove v. Suttles, 302 U.S. 277 (1937); Harper v. Virginia Bd. of Electors, 383 U.S. 663 (1966).

25. Smyth v. Ames, 169 U.S. 466 (1898); FPC v. Natural Gas Pipeline Co., 315 U.S. 575 (1942).

26. Duncan v. Louisiana, 391 U.S. 145 (1968); Wolf v. Colorado, 338 U.S. 25 (1949).

27. Groesaert v. Cleary, 335 U.S. 464 (1948); Craig v. Boren, 429 U.S. 190 (1976).

28. Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940); Board of Educ. v. Barnette, 319 U.S. 624 (1943).

29. *Duncan*, 391 U.S. 145 (1948); Williams v. Florida, 399 U.S. 78 (1970);

al—repudiating an ancient tradition—permits non-unanimous convictions in State (though that is not permissible in federal) cases.[30] Perhaps strangest of all, some claims deemed so "fundamental" as to be protected by the Fourteenth Amendment are nevertheless not basic enough to merit "retrospective" application.[31] The result is that People similarly situated are treated unequally.

Obviously, uninhibited by the Constitution's language and history, constitutional law has become a fairy tale. The classic example is the Douglas effort in *Griswold*.[32] There a "privacy" right to copulate with contraceptives was found in "penumbras formed by emanations" from our eighteenth century Bill of Rights—made binding upon the States by a fair-trial-provision in a Civil War amendment. Some of us may be excused for believing Justice Douglas was far too astute, far too clear minded, to believe his own *Griswold* figment. Surely his purpose was to obscure for lesser minds a raw exercise in judicial fiat. Why did he and the Court not say simply that an anti-contraception law reflects bad social policy for such and such reasons and is therefore not enforceable? Plato gave the answer long ago when he recognized that even the true philosopher-king could not stay in power on his own merits. He would need the support of a "noble fiction"[33] the pretense, for example, that his decrees spring not from his own will but from some "higher law" (or from the "plain words" of those who gave us the great charter and its amendments). The fiction, of course, is calculated to hide the implacable moral difference between obedience to law and subservience to mere fellow men. The ultimate collapse of the "nine old men" may be another facet of history's hint that no fiction, however noble, can forever cloak the philosopher-king with moral respectability. Soon[er] or late[r], it seems, his nakedness appears; and then we must begin again the unending struggle for Law—for government by something more respectable than the will of those who for the moment hold high office.[34]

Ballew v. Georgia, 435 U.S. 223 (1978).

30. Apodaca v. Oregon, 406 U.S. 404 (1972).
31. Linkletter v. Walker, 381 U.S. 618 (1965).
32. Griswold v. Connecticut, 381 U.S. 479 (1965).
33. PLATO, THE REPUBLIC, Book 3, at 415B-D.
34. Mendelson, *supra* note 19.

As we shall see *infra*, "incorporation," together with the creation of new rights via this Court's exercise of the artificially created substantive due process power, lies at the core of the Texas courts' rather perverse use of federalism in this case.

But first it is necessary to canvass the second category of our cases—dealing with the flag—which the Texas Court of Criminal Appeals confronted when it decided *Johnson*.

In *Halter v. Nebraska*[35]— against fourteenth amendment due process, privileges and immunities, and equal protection defenses — we affirmed a criminal conviction for violation of a state statute prohibiting advertising uses of representations of an American flag. Our decision is steeped in the foundation principle of federalism:[36]

> . . . more than half of the states of the union have enacted statutes[37] substantially similar, in their general scope, to the Nebraska statute. The fact is one of such significance as to require us to pause before reaching the conclusion that a majority of the states have, in their legislation, violated the Constitution of the United States.
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> In our consideration of the questions presented we must not overlook certain principles of constitutional construction, long ago established and steadily adhered to, which preclude a judicial tribunal from holding a legislative enactment, Federal or state, unconstitutional and void, unless it be manifestly so. Another vital principle is that, except as restrained by its own fundamental law, or by the Supreme Law of the Land, a State possesses all legislative power consistent with a republican form of government; therefore each State, when not thus restrained and so far as this court is concerned, may, by legislation, provide not only for the health, morals, and safety of its people, but for the common good, as involved in the well-being, peace, happiness, and prosperity of the people.[38]

In sum, we held in *Halter* that nothing in the fourteenth amendment, including due process, allowed *this Court* to provide a *federal* remedy against a *state*'s exercise of

35. 205 U.S. 34 (1907).
36. *Id.* at 39-40.
37. Court's citations omitted.
38. *Id.*

flag-protective *police power.*

Halter was followed a quarter-century later by *Stromberg v. California.*[39] There, Yetta Stromberg had been convicted *not* for desecration of an American flag, but of violating a state law "making it an offense publicly to display a *red* flag,"[40] intending it to be "a sign, symbol or emblem of opposition to organized government."[41] Her defense was fourteenth amendment "due process"—but which kind: procedural or substantive? Because the Court took pains to point out that "[i]t has been determined that the conception of liberty under the due process clause of the Fourteenth Amendment embraces the right of free speech,"[42] it might have appeared that the tribunal was preparing to substitute its own judgment for that of California's concerning what substantive legislation affecting certain acts alleged to be communicative the state would be allowed to enact. However, the Court's opinion later abandons that approach in favor of a strictly *procedural due process* analysis: "[a] statute which upon its face, and as authoritatively construed [by the California court], is so *vague* and *indefinite* . . . it is repugnant to the guaranty of liberty contained in the Fourteenth Amendment. The first clause of the statute [is] invalid on its face."[43] Thus, *Halter* instructs that the structural constitutional principle of federalism does allow a state to prohibit misuse of the American flag even in a communicative context (albeit advertising), and *Stromberg* tells us nothing to the contrary. Let alone does *Stromberg* stand for the proposition that a state's punishment of flag burning violates free speech.

That brings us to *Street v. New York*[44]—notwithstanding *Halter*, the first actual American flag desecration case in this Court—where Justice Harlan, writing for the majority, made it clear beyond question that this "Court ruled that since

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39. 283 U.S. 359 (1931). Neither Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940) nor West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) are considered here because although they involved the flag, neither case involved a prohibition on its use, as did *Halter*, and as does the instant case.

40. Street v. New York, 394 U.S. 576, 585 (1969) (emphasis added).

41. *Stromberg*, 283 U.S. at 361.

42. *Id.* at 368 (citing Gitlow v. New York, 268 U.S. 652, 666 (1925); Whitney v. California, 274 U.S. 357, 362, 371, 373 (1927), Fiske v. Kansas, 274 U.S. 380, 382 (1927)).

43. *Stromberg*, 283 U.S. at 369-70 (emphasis added).

44. 394 U.S. 576 (1969).

[Street] might have been convicted solely on the basis of his words, the conviction could not stand," but it expressly reserved the question of whether a defendant could constitutionally be convicted for burning the flag.[45]

That open question was not resolved in the last of our cases with which the Texas Court of Criminal Appeals was faced as it decided *Johnson*: *Spence v. Washington*.[46] It was not resolved because, like *Halter*, *Stromberg*, *Street* and *Smith*, but unlike the instant case of Mr. Johnson, *Spence* did *not* involve a prosecution and conviction for *desecration of an American flag by physical act*. Indeed, our *per curiam* opinion in *Spence* carefully underscored the narrowness of our holding: "[T]his was a privately owned flag . . . . [A]ppellant displayed his flag on private property. He engaged in no . . . disorderly conduct . . . . [T]he record is devoid of proof of any risk of breach of the peace. It was not appellant's purpose to . . . even stimulate a public demonstration. There is no evidence that any crowd gathered or that appellant made any effort to attract attention."[47] Even more important than the narrowness of our holding was our express recognition that Mr. Spence "was not charged under Washington's flag desecration statute."[48]

What the foregoing brief review of this Court's flag cases means, then, is that at the threshold of its decision in *Johnson* the Texas Court of Criminal Appeals had not only turned its back on any state constitutional grounds which may have been dispositive, such as article I, section 8, but even given the "incorporation" of the first amendment through the fourteenth, that court was confronted by no

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45. Texas v. Johnson, 109 S. Ct. 2533, 2554 (1989) (Rehnquist, C.J., dissenting) (citing *Street*, 394 U.S. at 581). One *Street* dissenter was Chief Justice Warren, who strongly asserted that both the state and federal governments did possess the power to punish desecration of the American flag. (*See Street*, 394 U.S. at 605). Justices Black and Fortas shared the Chief Justice's view and similarly dissented.

46. 418 U.S. 405 (1974). Smith v. Goguen, 415 U.S. 566 (1974); is irrelevant to our present inquiry because it was decided on the procedural due process grounds of broadness and vagueness. Indeed, as Chief Justice Rehnquist notes in his dissenting opinion here, the Court in *Smith* observed that "[c]ertainly nothing prevents a legislature from defining with substantial specificity what constitutes forbidden treatment of United States flags." *id.* at 581. *See also* Justice White, *id.* at 587, and Justice Blackmun, *id.* at 591.

47. Spence v. Washington, 418 U.S. at 408 (1974).

48. *Id.* at 406.

decision of ours which predetermined the outcome of Texas' flag desecration case.

The same is true of our so-called "symbolic speech" cases. Even accepting, *arguendo*, the claim of Justice Brennan's majority opinion here that we have held that the constitutional concept of speech embraces students wearing black armbands to a public school, *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 89 S. Ct. 733 (1969), blacks sitting-in in a "white only" public building, *Brown v. Louisiana*, 383 U.S. 131, 86 S. Ct. 719 (1966), activists cavorting in American military uniforms, *Schact v. United States*, 398 U.S. 58, 90 S. Ct. 1555 (1970), union members picketing, *Food Employees v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 88 S. Ct. 1601 (1968), disgruntled citizens leafleting, *United States v. Grace*, 461 U.S. 171, 103 S. Ct. 1702 (1983), protesters attaching a peace sign to the American flag, *Spence*, *supra*, students saluting the flag, *Barnette*, *supra*, and anarchists displaying a red flag, *Stromberg*, *supra*,[49] still, not one of these decisions, nor any other decision that I have been able to find, has even arguably held that the physical act of setting fire to something is "communicative"—let alone that starting an incendiary reaction is "speech" as contemplated by the Constitution. Thus, just as with our flag cases, nothing in our prior cases on the subject of speech, symbolic or otherwise, bound the Texas Court of Criminal Appeals as it decided the fate of Mr. Johnson.

What, then, does that court's *en banc* decision rest on?[50] Two conclusions: (1) "The *act* for which appellant was convicted [setting fire to someone else's American flag in a public place] was *clearly* 'speech' contemplated by the First Amendment, and (2) neither of the state-advanced justifications for its statute—i.e., preventing breaches of the peace and preserving the flag as a symbol of national unity—outweighed" the law's burden on that speech.[51]

The Texas Court of Criminal Appeals "symbolic speech" conclusion was reached by means of liberally borrowing from

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49. *Johnson*, 109 S. Ct. at 2539. Editor's note: This portion is offset for emphasis. It is not intended to be a direct quote.

50. The court expressly declined to rule on a vagueness challenge to the statute facially, or on other assorted attacks against it. Johnson v. State, 755 S.W.2d 92, 97 (Tex. Crim. App. 1988).

51. *Id.* at 95 (emphasis added).

the opinion of the Dallas Court of Appeals:

> . . . the *Spence* non-flag-desecration case "tests," *Tinker*'s armbands, *Monroe* from the Eleventh Circuit. All that was new were *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 63 S. Ct. 1178, 1182-83, 87 L.Ed. 1628, (1943), which involved not *action* (incendiary or otherwise) but rather *refusal* to salute the flag, and a "c.f." citation of *United States v. O'Brien*, 391 U.S. 367, 88 S. Ct. 1673 (1968), where this Court declined to decide whether setting fire to a draft card was protected speech.[52]

There were no cases cited, in this Court or in any other, as authority for the proposition that the *act* of starting a fire, albeit one accompanied by words, was protected speech. In addition, "incorporation" having literally occurred, according to the Texas Court of Criminal Appeals, Mr. Johnson's "symbolic speech" was protected not by the Due Process Clause of the fourteenth amendment but rather by the first amendment itself.

The Texas Court of Criminal Appeals' conclusion concerning the first state-proffered justification for its statute—preventing breaches of the peace which might be caused by flag desecration—rested on the court's view that the law's "serious offense" requirement could not be equated with "incitement to breach the peace."[53] Thus, the statute suffered from overbreadth, especially in light of Texas Penal Code section 42.01 which, "addresse[d] the same basic interest in a less restrictive manner."[54] (Section 42.01 dealt with language, gestures or displays tending "to incite an immediate breach of the peace.")

The state's second justification—the flag as a symbol—failed because, although the court seemed to concede that such symbolism might be a legitimate government interest, it was not sufficiently "compelling" to survive a balancing analysis.

Accordingly, the Texas Court of Criminal Appeals held "that section 42.09(a)(3) may not be used to punish acts of

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52. *Id.* at 95. Editor's note: This portion is offset for emphasis. It is not intended to be a direct quote.

53. *Id.* at 96.

54. *Id.*

flag desecration when such conduct [as Mr. Johnson's] falls within the protections of the first amendment."[55]

In sum, according to the Texas Court of Criminal Appeals, Mr. Johnson's setting fire to someone else's American flag in a public place while he uttered political words was "speech" protected by the first amendment. Although a statute could constitutionally prohibit such "speech," the particular Texas law before the court could not because its breach-of-the-peace justification was overbroad in light of an existing, less restrictive alternative, and its flag-as-symbol reason was not "compelling" enough. Despite the lack of direct case authority in this Court to support the foregoing propositions, a pastiche of our cases—*Spence*, *Tinker*, *Barnette*, *O'Brien*—could be mixed together to yield the desired result.[56]

The State of Texas petitioned for a writ of certiorari, which was granted.[57]

III. ANALYSIS OF JUSTICE BRENNAN'S MAJORITY OPINION, JUSTICE KENNEDY'S CONCURRING OPINION, AND CHIEF JUSTICE REHNQUIST'S AND JUSTICE STEVEN'S DISSENTING OPINIONS

Given the Texas court's reliance on this Court's "incorporation," flag, and "symbolic speech" decisions, and given the conceptual disarray of the Texas courts' opinions, I am not surprised that in ruling on Mr. Johnson's conviction this Court has produced five separate opinions.[58]

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55. *Id.* at 97. The court added, cryptically, that it "express[ed] no view as to whether the State may prosecute acts of flag desecration which do not constitute speech under the First Amendment." *Id.*

56. There were four dissenters. One wrote briefly to express the view that the state's flag-as-symbol rationale was indeed compelling enough to overcome "whatever first amendment rights this appellant sought to assert." *Id.* at 98.

57. 109 S. Ct. 257 (1988).

58. It is, however, more than a little surprising to note that Justices Brennan and Marshall have been joined in the up-to-then plurality opinion by Justice Scalia, that Justice Kennedy provided the crucial fifth vote for affirmance, and that in addition to a dissent by Chief Justice Rehnquist and Justices White and O'Connor, also urging reversal (and thus reinstatement of Mr. Johnson's conviction, at least pending further state proceedings), a dissent has been penned by Justice Stevens. I note with interest that today's plurality opinion includes my colleague Justice Blackmun, who has on an earlier occasion cast his vote to uphold the conviction of a man for misusing an American flag. The case is Smith v. Goguen, 415 U.S. 566 (1974), where the defendant had been convicted of violating Massachusetts' flag-abuse statute by wearing pants whose seat had been embellished with a small

After conceding that "Johnson was convicted of flag desecration for burning the flag rather than for uttering insulting words,"[59] and thus recognizing that Mr. Johnson could not escape punishment by Texas under our decision in *Street*, *supra*, the plurality opinion reflects a typical "balancing" analysis.[60] The opinion begins by taking unnecessary pains to establish by means of our "symbolic speech" and flag cases—*Tinker*, *Brown*, *Schacht*, *Logan Valley*, *Grace*, *Spence*, *Barnette*, *Stromberg* and *Smith*, all *supra*—that Johnson's pyrotechnics "constituted expressive conduct." The effort is unnecessary because all along the appellate line "Texas [had] conceded . . . that Johnson's conduct was expressive conduct." Having crossed that bridge, all that is left for the plurality here to "decide [is] whether Texas has asserted an interest in support of Johnson's conviction that is *unrelated* to the suppression of expression."[61] The plurality answers in the negative. "The State offers two separate interests to justify this conviction: preventing breaches of the peace, and preserving the flag as a symbol of nationhood and national unity. We hold that the first interest is not implicated on this record and that the second is related to the suppression of expression."[62]

As a result, and with the concurrence of Justice Kennedy, which I shall address *infra*, the decision of the Texas Court of Criminal Appeals is affirmed. Mr. Johnson goes free. The state's flag desecration statute becomes a nullity, and this Court creates yet another new constitutional right: setting fire to an American flag in a public place.

With all due respect to the views of my colleagues, there is much wrong with this result, methodologically and substan-

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American flag. My colleague's dissent relied on the ruling of Massachusetts' highest court that there was no possibility that "communicative elements" were in any way the predicate for Goguen's conviction. Thus, Justice Blackmun concluded, "Goguen's punishment was constitutionally permissible for harming the physical integrity of the flag . . . ." *Id.* at 591. Doubtless, Justice Blackmun is comfortable with today's plurality view that Johnson *was* convicted for the communicative impact of his *conduct*.

59. Texas v. Johnson, 109 S. Ct. 2533, 2538 (1989).

60. The opinion gives short shrift to Johnson's facial challenge to the Texas statute, opting instead to decide this case on "as applied" grounds. *Id.* at 2538 n.3.

61. *Id.* at 2538.

62. *Id.* at 2541. For another expression of the same point, see *id.* at 2548.

tively.

First, although for reasons which will appear *infra* I disagree with what would be the result of the other dissenters' views (i.e., reversal of the Texas Court of Appeals, and probable reinstatement of Mr. Johnson's conviction), there is much in the Chief Justice's dissenting words with which the plurality opinion fails to deal. To begin with, for better or worse, this Court has repeatedly held that there is no absolute right of even "pure" speech.[63] That being so, it is necessary to deal with the Chief Justice's *Chaplinsky* analogy by doing more than simply dismissing it out of hand as the plurality opinion does, in its subjective conclusion concerning what "no reasonable onlooker would have regarded."[64] The same is true of the plurality's cavalier dismissal of *Halter v. Nebraska* and *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, as "commercial" rather than "political" speech.[65] Indeed, not only is *Halter* our only direct precedent on flag burning, and thus worthy of being more adequately distinguished (if at all) but if no form of speech is absolutely protected, any distinction between the varieties known as "commercial" and "political" must be better explained and defended. Lastly, the Chief Justice's dissent correctly demonstrates that neither our few earlier flag cases, nor any other of our decisions, have resolved the question decided today.[66] The Chief Justice further notes that the states have nearly unanimously prohibited flag burning.[67] Those related points epitomize the two core problems of the plurality opinion.

In this state-based police power case, the plurality

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63. *See, e.g.*, Schenck v. United States, 249 U.S. 47 (1919); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); *see also* Justice Brennan's plurality opinion Memoirs v. Massachusetts, 383 U.S. 975 (1966).

64. *Johnson*, 109 S.Ct. 2533, 2542 (1989). Indeed, *Chaplinsky*'s summary reading out of existence of certain entire categories of speech—"the lewd and obscene, the profane, the libelous, and the insulting or 'fighting words'-those which by their very utterance inflict injury or tend to incite an immediate breach of the peace," 315 U.S. at 571, (footnotes omitted)—has not only never been repudiated, but Justice Murphy's broad-stroked dictum has been repeated and relied on countless times by this Court.

65. *Johnson*, 109 U.S. at 2545 n.10 (citing, *Halter*, 205 U.S. 34 (1907) and *San Francisco Arts & Athletics*, 483 U.S. 522 (1987)).

66. *Johnson*, 109 U.S. at 2554.

67. *Id.* at 2551-52 n.1.

opinion's repeated reference to, and reliance on, the first amendment, while totally disregarding the fourteenth amendment, and the plurality finding precedential support for the "symbolic speech" of flag burning when none of our prior decisions have so held, constitutes yet another example of this Court's insensitivity to, indeed disdain for, the keystone principles of federalism and separation of powers. In other words, even though Texas exercised its tenth amendment reserved police powers to mildly criminalize the act of setting fire to a flag knowing that someone else will be seriously offended (as have forty-eight other states); even though the only federal constitutional provision even remotely applicable to the Texas law is the Due Process Clause of the fourteenth amendment; even though there were no allegations of procedural infirmities in that law and "substantive due process" is supposed to be dead;[68] even though in deciding this case we were writing on a clean precedential slate; and even though there was no policy reason to perform such major surgery, this Court has by a razor-thin margin wiped out of existence the anti-flag burning political determination of virtually every constituent state of these United States. No matter that forty-eight state legislatures enacted these statutes. No matter that forty-eight state governors approved them or were overridden in their opposition. No matter that these statutes have been upheld by state judiciaries. Despite these democratic, state political processes, *this* Court—and a *federal* court at that—has struck it all down, and then by a single vote out of nine.[69]

But the anti-democratic nature of the decision we announce today is rooted in more than merely the substantive result achieved: the creation of yet one more assembly-line "right," this time the right to burn a flag in a public place if one is constitutionally sophisticated enough to simultaneously incant the requisite political mantras. It is also found in the

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68. *See* Griswold v. Connecticut, 381 U.S. 479 (1965); Roe v. Wade, 410 U.S. 113 (1973).

69. While I appreciate and respect Justice Kennedy's agonizingly candid, albeit brief, concurring observation, I cannot help observing that his fidelity to what he characterizes as the "process" actually undermines what he seeks to protect (speech), because, notwithstanding the first and fourteenth amendments, the first-line defenses for freedom, including speech, are the correlative principles of federalism and separation of powers.

methodology utilized by the plurality to reach the desired result: "balancing."

Throughout that opinion Justice Brennan makes it clear that the plurality conceives "of constitutional law as a battle ground of competing interests."[70] For example: "A law directed at the communicative nature of conduct must, like a law directed at speech itself, be justified by the substantial showing of need that the first amendment requires": " . . . the government interest at stake . . . helps to determine whether a restriction on that expressions valid"; " . . . a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms";[71] "[t]he State offers two separate interests to justify this conviction";[72] "[t]he State's interest in maintaining order is not implicated on these facts";[73] "[w]e must therefore subject the State's asserted interest . . . to the most exacting scrutiny."[74]

No one has more compellingly identified and criticized the nature and consequences of "balancing" than Professor Alienikoff:[75]

> . . . balancing also implicates deeper questions about the role of the Court and the nature of judicial review. This section argue[s] . . . that balancing builds upon, and fosters, an inappropriate conception of constitutional law.
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> A. The Role of the Court
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> A common objection to balancing as a method of constitutional adjudication is that it appears to replicate the job that a democratic society demands of its legislature. The legislative aspect of balancing has become quite pronounced in a number of recent opinions that have openly explored the "costs" and "benefits" of constitutional rules and appealed to empirical evidence of the effect of constitutional doctrine on societal interests. [Footnote 242 omitted]. Such a methodology may be an appropriate model for common law adjudication. But

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70. *Johnson*, 109 S. Ct at 2540.
71. *Id.* at 2540.
72. *Id.* at 2541.
73. *Id.* at 2542.
74. *Id.*
75. Alienikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 963 (1987). Professor Alienikoff's footnotes have been renumbered; his original numbers appear in brackets.

balancing needs to be defended in constitutional interpretation where the decision of a court supplants a legislative decision.

What defense might be offered for an understanding of the role of the Court as replicating the legislative task? Some may view judicial balancing as a way to catch errors in the legislative calculations. Just as we do sums twice to check our addition, so we might want to rebalance interests through judicial review. But normally when our second sum is not the same as the first, we add again. Thus this defense must develop a theory that explains why we always accept the judiciary's calculation. Moreover, the structure established by the Constitution explicitly provides for an "addition-checker" in the form of bicameralism.

A better argument for the balancer is that the Court improves the balancing process by giving weight to interests that the legislature tends to ignore or undervalue. Under this view, the Court plays two important roles. First, it reinforces representation, ensuring that the interests of unpopular or underrepresented groups are counted and counted fairly. Second, it protects constitutional rights and interests that are sometimes forgotten in the hurly-burly of politics. [Footnote 244 omitted].

Both of these "thumb-on-the-scales" claims are plausible. Legislators may have difficulty crediting the interests of minority groups to which they do not belong. [Footnote 245 omitted]. We might also be justifiably suspicious of the legislature's evaluation of constitutional interests that conflict with popular governmental conduct. Thus the balancer may claim that her form of constitutional interpretation provides a procedural and a substantive justification for judicial review.

While these arguments may point to troubling flaws in the legislative process, they do not alone establish a justification for the judiciary's performance of the legislative task. The argument from undervalued interests might support a model of judicial review analogous to court review of administrative decisions: If a court determines that an agency has ignored or misevaluated relevant interests, it may order the agency to go through the decision-making process again. Similarly, a conclusion that the legislature has wrongfully ignored certain interests might justify judicial review in the form of a "sus-

pensive veto"[76] and a "remand."[77] But it does not warrant an evaluation and balancing of the interests by the court. Once the legislature has openly considered the values that the court tells it are at stake, what grounds are there for preferring a court's subsequent determination of the balance?

A balancer might respond that it is improper to portray judicial balancing as duplicating legislative balancing. According to this view, a balancing approach attempts not to maximize social welfare or represent voters. Its primary focus is the Constitution. It simply insists that the Constitution not be interpreted in a vacuum and that courts be aware of the social context and impact of constitutional doctrine. The Court that balances, the argument might run, is really searching for a reasonable understanding of the Constitution—one that harmonizes constitutional provisions and values with important governmental interests. The balancing court does not *replicate* the legislative function or *supplant* legislative judgments of good social policy. It *uses* the legislative act as a measure of social importance and thus as a basis for calculating the degree to which the constitutional interest should be "softened."[78]

I think that this is the balancer's best case, and it does indeed supply a role for the court distinct from those of the other branches of government. The judicial role might be described as: Protect and preserve all constitutional interests, taking into account the value that the other branches place on achieving other legitimate ends. But this description raises a deep, and generally unaddressed, problem. Even if the balancing court purports to accept the value that the legislature places on its own output, it cannot simply factor the legislature's determination into a constitutional calculus. It must first convert the constitutional value and the legislative value into a common currency. How does a court decide how "important" a legislative or administrative policy is? For example, why are a "city's aesthetic interests" sufficiently "sub-

76. *See* Sandalow, *Judicial Protection of Minorities,* 75 MICH. L. REV. 1162, 1183 (1977). [247].

77. *See* CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 17 (1982); Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case,* 71 HARV. L. REV. 1, 14 (1957). [248].

78. *See* C. DUCAT, MODES OF CONSTITUTIONAL INTERPRETATION 133 (1978) (contrasting legislative and judicial balancing). [249].

stantial" to sustain a city ordinance prohibiting political posters on utility poles,[79] but "administrative convenience" not an adequate justification for requiring servicewomen (but not servicemen) to prove the dependency of their spouses to receive housing allowances?[80] At work here is some undisclosed scale of social value, one not obviously derived from the Constitution. Balancers must defend this inevitable aspect of balancing. They must suggest reasons why judgments assigning a social value to legislation are within the province and capacity of the courts.

B. The Conception of Constitutional Law

For the balancer, constitutional law is comprised of principles discovered by weighing interests relevant to resolution of a particular constitutional problem. These interests may be traceable to the Constitution itself (free speech, federal regulation of commerce) or discoverable elsewhere (clean streets, law enforcement). Some interests are accorded great weight because society generally recognizes their importance, others because they are located in the Constitution. Indeed, one may understand the Constitution, from the balancer's point of view, as a document intended to ensure that judges (among others) treat particular interests with respect. It is an honor roll of interests.

Although this conception of law may have brought realism to the common law, it threatens to do real damage to constitutional law. Early critics of balancing were largely concerned about the impact of the methodology on the protection of constitutional rights. [Footnote 252 omitted]. And, as Ronald Dworkin has tirelessly argued, viewing constitutional rights simply as "interests" that may be overcome by other non-constitutional interests does not accord with common understandings of the meaning of a "right."[81]

But the implications of balancing for constitutional law go far beyond strategic discussions about the best way to protect constitutional rights. (In fact, since the original critiques, balancing has proven to be a robust

79. Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984). [250].

80. Frontiero v. Richardson, 411 U.S. 677 (1973) (plurality opinion). [251].

81. *See* R. DWORKIN, TAKING RIGHTS SERIOUSLY 194, 269 (1977). [253]. [Portion of footnote omitted].

methodology for the creation and extension of rights). Balancing is undermining our usual understanding of constitutional law as an interpretive enterprise. In so doing, it is transforming constitutional discourse into a general discussion of the reasonableness of governmental conduct.

One can see this trend most clearly in opinions that define or describe a constitutional right and then weigh the right against competing state interests. Here, balancing appears as an extra step in constitutional interpretation. Once a court has done the hard work of explicating a constitutional provision through the usual methods of textual precedential and consequentialist reasoning, the result is subjected to another test — the weight of competing interests.

. . .

Not all balancing opinions add the balance at the end. Many view the underlying constitutional principle itself in balancing terms. Thus, in procedural due process cases, the constitutional requirement is determined by comparing the weights of three interests.[82] Here the problem is that balancing does not require the Court to develop and defend a theoretical understanding of a constitutional provision. Under a balancing approach, the Court searches the landscape for interests implicated by the case, identifies a few, and reaches a reasonable accommodation among them. In so doing, the Court largely ignores the usual stuff of constitutional interpretation—the investigation and manipulation of texts (such as constitutional language, prior cases, even perhaps, our "ethical tradition"). [Footnote 263 omitted]. Balancing at its bleakest, to use Justice Brennan's phrase, is "doctrinally destructive nihilism."[83]

This revolt against theory is most troubling in cases that balance constitutional and non-constitutional interests. In these cases, the Constitution is viewed as a broom closet in which constitutional interests are stored and taken out when appropriate to be considered with other social values. Because the weight of the constitutional interest is usually assumed to be substantial, most of the Court's attention is focused on the competing state interests: How strong are they? Can they be

82. Mathews v. Eldridge, 424 U.S. 319, 335 (1976). [262].
83. New Jersey v. T.L.O., 469 U.S. 325, 369 (1985). [264].

achieved with less of an impact on the constitutional interest? [Footnote 265 omitted]. In a curious way, constitutional law goes on *next to* the Constitution.

. . .

Does this transformation of constitutional law matter? Some might argue that balancing has made constitutional law more reasonable and accessible. But I believe that the transformation has important and troubling consequences. Constitutional law provides a set of peremptory norms—a checking power that is basic to the American notion of a government of limited powers. Equally important, although less frequently noted, is constitutional law's validating function. As Charles Black noted long ago, "one indispensable ingredient in the original and continuing legitimation of a government must be its possession and use of some means for bringing about a consensus on the legitimacy of important governmental measures."[84] Constitutional cases provide a forum for the affirmation of background principles and for ratification of changes in those principles—changes the amendment process could only sporadically produce.

Balancing undermines the checking and validating functions of constitutional law. This is most apparent in opinions that adopt legislative voice, openly weighing costs and benefits in order to maximize social welfare. If constitutional decisions and normal political decisions examine similar variables in similar ways, then constitutional answers ought not to "trump" non-constitutional answers; the constitutional process simply serves as an arithmetic "check" on the non-constitutional process. Nor can constitutional law perform its validation function if constitutional judgment is reached in the same manner as the legislative judgment. The Court's agreement might only show that the Court and the legislature used the same calculator. These concerns are not alleviated even under the best account of balancing offered above (that a court does not replicate the legislative task but simply accommodates constitutional values with other social interests). That account supplies no basis for the authority or ability of a court to assign a value to the legislative output.

Claims that an interpretive strategy threatens the legitimacy of constitutional review are easy to make but

84. C. BLACK, THE PEOPLE AND THE COURT 38 (1960). [271].

> hard to prove. More easily seen is the devastating impact that balancing has had on constitutional theory. Balancing opinions give one the eerie sense that constitutional law as a distinct form of discourse is slipping away. The balancing drum beats the rhythm of reasonableness, and we march to it because the cadence seems so familiar, so sensible. But our eyes are no longer focused on the Constitution. If each constitutional provision, every constitutional value, is understood simply as an invitation for a discussion of good social policy, it means little to talk of constitutional "theory."
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> Ultimately, the notion of constitutional supremacy hangs in the balance. For under a regime of balancing, a constitutional judgment no longer looks like a trump. It seems merely to be a card of a higher value in the same suit.[85]

I might add that not only does "the notion of constitutional supremacy [hang] in the balance," but so too do the building-blocks of federalism and separation of powers, as the instant case so clearly demonstrates.[86]

IV. DEALING WITH THE OFFENSIVE MR. JOHNSON

What then is to be done? The plurality affirms the Texas Court of Appeals' reversal of Mr. Johnson's conviction. He publicly burned an American flag with impunity, now that this Court has eviscerated the statute (and many more such laws) under which he was tried and convicted.

I have joined the other two dissents because their effect would be to reverse the Texas Court of Criminal Appeals, to which Mr. Johnson's case would be returned, and where, at least for a while, his conviction would be reinstated as af-

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85. Alienikoff, *supra* note 75.

86. Lest it be thought that my references *supra* to the anti-plurality arguments of Chief Justice Rehnquist's dissenting opinion implied agreement with the conclusion reached therein, I hasten to reiterate that while I am in accord with much that he said there, I part company with him in two respects. The first I have already mentioned: a result which would cause reversal of the Texas Court of Criminal Appeals' decision and reinstatement of Mr. Johnson's conviction, without more. The second is that despite its legitimate, even moving, paean to the American flag and the patriotism which it so manifestly symbolizes, the dissent partakes of the same value balancing as does the plurality and thus suffers the same infirmities. So, too, does Justice Stevens' separate dissent. However, at least the other two dissents have the virtue of leaving the political judgment concerning flag burning where it belongs: with the people of Texas.

firmed by the Dallas Court of Appeals. I say "at least for a while" because, it will be remembered, the Texas courts utilized only federal grounds to decide Mr. Johnson's case, deliberately by-passing the available free speech guarantee found in article I, section 8, of the state's own constitution.[87]

This, then, is the solution to our conundrum. We should force this case back into the Texas courts, either by reversing the Texas Court of Criminal Appeals or by now dismissing the writ of certiorari for having been improvidently granted. That way, the proper forum will have an opportunity to make a decision based on the constitutional provision which rightly does apply here: Texas' own free speech guarantee. That way, we remain faithful to those principles – federalism and separation of powers – without which individual rights will not and cannot be adequately protected no matter how much is "incorporated" through the Due Process Clause, no matter how many acts we casually characterize as "speech," no matter how many assembly-line "rights" we crank out in the name of enlightened social policy.

I would add one further note of caution to those of my colleagues who made it possible for this case to reach us in

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87. I note with considerable bewilderment not only that in this case the State of Texas deliberately chose to ignore its own constitutional safeguards for speech, but that there are other seemingly contradictory events occurring in the first/fourteenth amendment area, especially in the liberal camp. For example, more than one institution of higher learning has recently sought to impose stringent restrictions on what can be said about certain subjects, such as sexual preference, race, religion, physical disability, gender, ethnicity, both on campus and at school-related events off-campus. David Gardner, President of the University of California, apparently drawing on *Chaplinsky*, characterized the now prohibited offensive speech as "those personally abusive epithets which, when directly addressed to any ordinary person are . . . likely to provoke a violent reaction whether or not they actually do so." It is well known that the sponsors of these kinds of anti-free speech proposals are on the left, where solicitude for its special constituencies have apparently made liberals forgetful about what has heretofore been their proper commitment to free speech–a commitment which doubtless causes them to rejoice at what this Court decides today. But as commentator William A. Rusher has noted, "What I would like some liberal to do is tell me why . . . [restriction on speech in academia] is permissible, and indeed desirable, while any nut on the street can burn an American flag in full view of hundreds of patriotic Americans and deserve the full protection of the Constitution." *See* RUSHER, *Fighting Words vs. Symbols*, 4 CONSERVATIVE CHRONICLE Oct. 1989). 26. *See* also Doe v. University of Mich., No. 89-71683, (E.D. Mich. S.Div. 1989); Brooklyn Law School Report of the Special Committee on Sexual Harassment (May 2, 1989).

the first place, doubtless in the now-realized hope that the theretofore limited decision of the Texas Court of Criminal Appeals could become national policy.

Common to all our opinions in this case is the undeniable fact that to Americans their flag symbolizes everything from the spiritual values of the Declaration of Independence to the blood-soaked sacrifices of generations of fighting men. We all agree that our flag is special, that to dishonor it is to dishonor oneself, and that those who do so are reprehensible.

It is well and good to speak in ringing phrases, as the plurality opinion does, about how giving Mr. Johnson licence to desecrate our national standard really does it honor, how allowing him to incinerate it proves America is serious about free speech, how standing by helplessly while he physically abuses what men have lived to glimpse and died to protect somehow makes us better people.

But there are countless citizens in our land who do not share that view, and who are bound to be incensed by what we do here today. And despite our repudiation of the laws of forty-eight states, those people, not yet having despaired of the political process, will turn to it for salvation from what they will consider, rightly or wrongly, betrayal of their trust in this Court and its task of principled judicial review. I fear that they will not stop at mere legislation,[88] but will instead seek to embody their patriotic fervor in a constitutional amendment. If their political leaders accommodate them, swept along on a tide of understandable frustration and bewilderment, we will witness not only trivialization of our constitutional amendment process,[89] but a gross, overreaction

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88. It is obvious to me that if legislation is enacted criminalizing flag burning, the incendiarist will not wait long before "symbolically" setting fire to American flags in high-profile places throughout this country, certainly here in Washington, D.C., probably on the steps of the capitol itself, and perhaps even at the front door of this very building. Doubtless, arrests will be made, and very likely this Court will once again be confronted with this divisive issue. If that day comes, I hope that we shall handle *Johnson II* better than we have handled *Johnson I*.

89. As commentator Don Feder has observed, other matters of far greater magnitude engage our attention and are much more properly the subjects of possible constitutional amendment: a balanced budget-tax limitation, capping the terms of Congressmen/women, prohibiting abortion. *See Forget the Flag and Save the Nation*, CONSERVATIVE CHRON., Vol. 4, No. 31, Aug. 2, 1989, at 28). One

to violation of federalism and separation of powers.[90] That is too high a price to pay for this Court indulging, in the name of constitutional right, the infantile incendiary tantrums of Mr. Kunstler's client. Whether the sovereign State of Texas wishes to so indulge him[91] should be no concern of ours.[92]

I dissent.

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might also add capital punishment, life-tenure for federal judges, and various criminal procedure issues.

90. As Professor William Van Alstyne points out, a proposed constitutional amendment would have several thorny problems to contend with: would it be designed specifically to cope with the result in *Johnson*, or more broadly address flag desecration; how would "flag" be defined; what would be embraced within the concept "desecration"? Van Alstyne, *Burn the Flag Amendment*, MANHATTAN LAW., 12 (Oct. 17-23, 1989).

91. Since the issue of who owned the flag Johnson burned in Dallas never seemed important to the Texas courts, and since the assumption seemed to be that however he had acquired the flag it belonged to him when he burned it, on remand the Texas courts might decide, without regard to state free speech guarantees, simply that he has the right to dispose of his property any way he sees fit, so long as he violates no one else's rights in the process.

92. *Cf.* Reynolds v. United States, 98 U.S. 145 (1878) where this Court held in the context of free exercise of religion that while one possessed a constitutional right to believe anything one wished, the right to act on those beliefs could be proscribed.