July 2015

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by
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ACTIONS SPEAK LOUDER THAN WORDS

During the summer of 1989, the U.S. Supreme Court handed down its decisions in two seemingly unrelated cases. In *Texas v. Johnson*,[1] it overturned the conviction of an individual charged with having desecrated the American flag. In *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*,[2] it held that the erection of a private nativity creche in a county courthouse violated the Establishment Clause but that a display of a Menorah along side of a Christmas tree did not. Both cases generated substantial public controversy and media attention.[3] The source of the controversy and attention is not simply that these were close cases involving weighty matters. Most of the cases reviewed by the Supreme Court raise difficult issues, the resolution of which will not readily be accepted by all, yet few generate the kind of public discussion that has followed these two cases.

The source of the controversy can be found in the common element between the two cases. At first blush, that element is not apparent: one involved the burning of the flag and the right to free speech; the other involved the display of religious symbols and the limitations on governmental endorsement of those symbols. A broader view of these cases reveals that both are about the regulation of ideas communicated through symbols. *Johnson* concerned the extent to which government may limit an individual's symbolic speech, while *Allegheny County* involved the extent to which the government itself may speak through symbols. The source of the controversy is in the symbols: the American flag, the creche, the Menorah, and the Christmas tree. The communicative force of these symbols is felt strongly by almost everyone, whether the messages of the symbols are viewed positively, negatively, or neutrally. These symbols raise the cases to a level of public interest and importance which, in the overall scope of the world's problems, they would not

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

[2] 109 S. Ct. 3086 (1989).

[3] On *Johnson*, see, e.g., Greenhouse, *Justices, 5-4, Back Protesters' Right to Burn the Flag*, N.Y. Times, June 22, 1989, at 1, col. 6; Toner, *Bush and Many in Congress Denounce Flag Ruling*, N.Y. Times, June 23, 1989, at 8, col. 3. On *Allegheny County*, see, *e.g.*, Greenhouse, *Religious Displays*, N.Y. Times, July 4, 1989, at 1, col. 2; Goldman, *Religious Groups Are Split Over Decisions on Symbols*, N.Y. Times, July 4, 1989, at 14, col. 1.

otherwise reach.

The aim of this article will be to explore the nature of symbolic speech, both individual and governmental. Using *Johnson and Allegheny County* as a backdrop, four themes will emerge from the article. First, both individuals and government speak and speak powerfully through symbols and symbolic conduct. Second, medium-based regulation of individual speech should receive careful judicial scrutiny. Third, unlike individual symbolic expression, governmental symbolic speech is subject to substantial content-based restrictions. Finally, careful distinctions must be drawn between government-initiated symbolic speech and governmental endorsement of individual symbolic speech.

I. Flag-burning And Holiday Displays

A starting point to this inquiry is to examine the *Johnson* and *Allegheny County* decisions themselves. If nothing else, the unusually high number of opinions produced by the justices in these two cases -- nine in total -- reflects the powerfulness of the symbols involved. Moreover, the opinions reveal the justices' underlying conceptions of the nature and importance, from a constitutional perspective, of the communication of ideas through symbols.

A. *Texas v. Johnson*

While the Republican National Convention in Dallas was proceeding to renominate President Ronald Reagan in 1984, Gregory Lee Johnson was participating in political demonstrations criticizing the Reagan administration and various Dallas corporations. At some point during the demonstrations, a fellow protester gave Johnson an American flag that had been taken down from a flag pole of one of the corporations being protested. In front of Dallas City Hall, Johnson poured kerosene on the flag and set it to fire. As the flag burned, the demonstrators chanted "America, the red, white, and blue, we spit on you."[4]

There was no violence, physical injury, or other disturbance resulting from the flag-burning.[5] However, several person who observed the incident found the flag-burning seriously offensive.[6] One witness to the event, in a gesture that was itself poignantly symbolic, gathered up the flag's remains and buried them in his backyard.[7]

Johnson was arrested and charged under Texas law with desecration of a

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[4] 109 S. Ct. at 2536.
[5] *Id.* at 2537, 2541.
[6] *Id.* at 2537.
[7] *Id.* at 2536.

venerated object.[8] He was convicted of the charge after a trial, and was sentenced to one year of imprisonment and a $2,000 fine.[9]

Johnson and his act of flag-burning received little national notoriety until the Supreme Court ruling that upheld the reversal of his conviction. The majority of the Court held that Johnson's conviction violated the First Amendment. Justice Brennan, writing for the majority of five,[10] commenced the First Amendment analysis of the Texas desecration statute as applied to Johnson's conduct[11] by concluding that his burning of the flag was expressive conduct deserving of constitutional protection. The Court determined that "[t]he expressive, overtly political nature of this conduct was both intentional and overwhelmingly apparent,"[12] as evidenced by Johnson's own testimony at trial, in which he stated that the flag burning was purposely juxtaposed against the renomination of President Reagan.[13]

Having concluded that the flag-burning was expressive conduct, the Court next examined the governmental interests asserted by Texas as justifying Johnson's conviction. The first asserted governmental interest -- preventing breaches of the peace -- was disposed of by the Court in short order. Because Johnson's conduct had not resulted in a breach of the peace or any actual or threatened physical violence or injury, the Court concluded that this interest amounted to little more than prohibiting speech when observers might be seriously offended by the flag-burning and therefore likely to breach the peace.[14] The suppression of speech that merely offends -- as opposed to expression that "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action"[15] or that is "likely to provoke the average person to retaliation, and thereby cause a breach of the peace"[16] -- is not justified by an interest in maintaining order and public safety.[17]

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[8] The Texas statute under which he was charged provides:

> Desecration of a Venerated Object
> (a) A person commits an offense if he intentionally or knowingly desecrates:
> (1) a public monument;
> (2) a place or worship or burial; or
> (3) a state or national flag.
> (b) For purposes of this section, "desecrate" means 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.

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

[9] 109 S. Ct. at 2537.

[10] *Justices Marshall, Blackmun, Scalia, and Kennedy joined the majority opinion.* 109 S. Ct. at 2536.

[11] The court declined to address the facial attack to the statute, limiting itself to the constitutional challenge of the statute as it was applied to Johnson's flag-burning. *Id.* at 2538 n.3.

[12] *Id.* at 2540.

[13] *Id.*

[14] *Id.* at 2541.

[15] *Id.* at 2542 (quoting Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)).

[16] *Id.* (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 574 (1942)).

[17] *Id.* at 2541-42.

The second governmental interest offered by Texas presents the crux of the constitutional question in *Johnson*. Texas maintained that it had a legitimate interest in preserving the integrity of the American flag as a special and unique symbol of the nation. Because this interest is implicated only when the desecration of the flag causes serious offense, the enforcement of the statute, as in Johnson's prosecution, is a content-based restriction on expressive conduct which is subject to "the most exacting scrutiny."[18]

The majority rejected the interest in preserving the special symbolic value of the flag as a basis for restricting expressive conduct such as Johnson's flag-burning. To permit such restrictions, the Court held, would allow the Government to confine the use of the flag as a communicative symbol to certain prescribed orthodox messages. Thus, one person could burn the flag because it is dirty or worn as an expressive or symbolic act of honor to the flag, while another could be criminally sanctioned for burning the flag to express her political rejection of the flag and the nation that it represents. The imposition of such content-based restrictions, according to the majority, could not be tolerated under the First Amendment.

The majority also refused to create a "special juridical category" for the American flag. Although the Court acknowledged the special role of the flag as a symbol of the nation, it stressed that "[t]he way to preserve the flag's special role is not to punish those who feel differently about [what the flag represents]."[19] Moreover, the Court ventured to say that "[o]ur decision is a reaffirmation of the principles of freedom and inclusiveness that the flag best reflects, and of the conviction that our toleration of criticism such as Johnson's is a sign and source of our strength."[20] In fact, the prosecution of the flag-burner would not further the asserted interest in ensuring the flag's integrity but rather would "dilute the freedom that this cherished emblem represents."[21]

Justice Kennedy, in a brief but eloquent concurring opinion, reemphasized these last points. Noting that this was "one of those rare cases" that it was appropriate to express distaste for the result even though it was the right result, Justice Kennedy stated simply but forcefully that "[i]t is poignant but fundamental that the flag protects those who hold it in contempt."[22]

Chief Justice Rehnquist authored a harsh dissent.[23] His dissent commenced with a long discourse on the important role of the flag in American history.[24] He suggested that "[t]he flag is not simply another 'idea' or 'point of view' competing

[18] *Id.* at 2543 (quoting Boos v. Barry, 485 U.S. 312, 321 (1988)).
[19] *Id.* at 2547.
[20] *Id.*
[21] *Id.* at 2548.
[22] *Id.* at 2548 (Kennedy, J., concurring).
[23] Justices White and O'Connor joined the Chief Justice's dissent. *Id.* at 2548.
[24] *Id.* at 2549-51 (Rehnquist, C.J., dissenting).

for recognition in the marketplace of ideas;'' rather, ''[m]illions and millions of Americans regard it with an almost mystical reverence regardless of what sort of social, political, or philosophical beliefs they may have.''[25] More important, the Chief Justice contended that Johnson's symbolic speech was ''no essential part of the exposition of ideas'' and had so little social value as to be greatly outweighed by the governmental interest in avoiding a probable breach of the peace resulting from ''so inherently inflammatory'' conduct.[26] Not only was the content of the speech of limited import, in the Chief Justice's view, but the medium through which he expressed his message -- the burning of the flag -- was a poor choice for which there were other more effective and unrestricted alternatives including verbal speech. Johnson's chosen medium amounted to little more than an ''inarticulate grunt or roar that, it seems fair to say, is most likely to be indulged in not to express any particular idea, but to antagonize others.''[27] Finally, the Chief Justice concluded by lamenting that the government can compel men to fight and die for the flag but cannot prohibit its desecration.[28]

Justice Stevens also filed a dissenting opinion. He focused primarily on the value of the flag as a unique symbol not just of the nation but of freedom, equality, religious tolerance, and goodwill, and of ''the courage, the determination, and the gifts of nature that transformed 13 fledgling Colonies into a world power.''[29] He described the limitation on free speech resulting from anti-desecration statutes as ''trivial,'' and maintained that permitting flag-burning to go unpunished would actually ''tarnish [the flag's] value -- both for those who cherish the ideas for which it waves *and* for those who desire to don the robes of martyrdom by burning it.''[30] The flag, in Justice Stevens' view, was a national asset, little different from the Lincoln Memorial, that was deserving of protection and that constitutionally could be protected from desecration.[31]

In the aftermath of *Johnson* came a maelstrom of political controversy. Johnson received more publicity and attention than he would have ever received had the Texas authorities left him alone in front of Dallas City Hall. Politicians of both major parties used the issue as a basis for demagoguery and chicanery.[32] President Bush proposed a constitutional amendment,[33] and Congress passed a new federal

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[25] *Id.* at 2552 (Rehnquist, C.J., dissenting).
[26] *Id.* at 2553 (Rehnquist, C.J., dissenting).
[27] *Id.* (Rehnquist, C.J., dissenting).
[28] *Id.* at 2555 (Rehnquist, C.J., dissenting).
[29] *Id.* at 2556 (Stevens, J., dissenting).
[30] *Id.* (Stevens, J., dissenting) (emphasis added).
[31] *Id.* (Stevens, J., dissenting).
[32] *See* Weinraub, *White House*, N.Y. Times, July 7, 1989, at B4, col. 5; *Legislators Supporting Flag Move*, N.Y. Times, July 4, 1989, at 6, col. 1; Weinraub, *Bush Seeking Way to Circumvent Court's Decision on Flag Burning*, N.Y. Times, June 27, 1989, at 1, col. 1; *Wrapped Up in the Flag*, N.Y. Times, June 27, 1989, at 22, col. 1; Toner, *Senate Attempts to Reinstate Law on Desecration of Flags*, N.Y. Times, June 24, 1989, at 8, col. 2.
[33] *See* Toner, *President to Seek Amendment to Bar Burning the Flag*, N.Y. Times, June 28, 1989, at 1, col. 6.

anti-desecration statute.[34] Within minutes after the new statute went into effect, demonstrators, including a Vietnam veterans group, burned flags in protest.[35]

B. *County of Allegheny v. American Civil Liberties Union*

At two government buildings in downtown Pittsburgh, two different holiday season displays were maintained. The first was a nativity creche owned by the Holy Name Society, a Roman Catholic group, displayed in the "Grand Staircase" area of the Allegheny County Courthouse during the Christmas season.[36] The creche display was comprised of a wooden manger in which were figures of the infant Jesus, Mary, Joseph, various farm animals, along with shepards and wise men. At the manger's crest was an angel with a banner bearing the message "Gloria in Excelsis Deo!"[37] The display also had a plaque stating that the display was donated by the Holy Name Society and was surrounded by poinsettias and flanked by two small evergreen trees.[38]

The second display was located at an entranceway to the City-County Building in Pittsburgh and included a forty-five-foot Christmas tree decorated with lights and ornaments and an eighteen-foot Chanukah Menorah.[39] Although the Menorah was owned by Chabad, a private Jewish group, it was erected, removed, and stored by the city.[40] Before the tree was a sign with the title "Salute to Liberty" and this message: "During this holiday season, the City of Pittsburgh salutes liberty. Let these festive lights remind us that we are the keepers of the flame of liberty and our legacy of freedom."[41]

The Court's resolution of the validity under the Establishment Clause of these

[34] The new statute provides in relevant part:

> Whoever knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States shall be fined under this title or imprisoned from not more than one year, or both.

Flag Protection Act of 1989, Pub. L. No. 101-131, § 2(a)(1), 103 Stat. 777 (Oct. 28, 1989). The statute exempts, "any conduct consisting of the disposal of a flag when it has become worn or soiled." *Id.* § 2(a)(2). It also provides for expedited appeal to the Supreme Court from any interlocutory or final order of judgment ruling on the constitutionality of the statute. *Id.* § 3.

Two federal district courts have held that the new statute is unconstitutional. *See* United States v. Eichman, 731 F.Supp. 1123 (O.O.C. 1990), *prob. jurisd. noted*, 110 S.Ct. 1779 (1990); United States v. Haggerty, 731 F.Supp. 415 (W.D. Wash. 1990), *prob. jurisd, noted*, 110 S.Ct. 1779 (1990). At the time of this writing, the Supreme Court had not decided the appeals from those rulings.

[35] Johnson himself was arrested under the new statute for burning a flag on the steps of Congress. *See* Sherman, *The Debate Is Rekindled*, Nat'l L.J., Nov. 13, 1989, at 3, col. 1.

[36] County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter, 109 S. Ct. at 3093.

[37] *Id.* at 3093-94.

[38] *Id.*

[39] *Id.* at 3094-95, 3097.

[40] *Id.* at 3097.

[41] *Id.* at 3095.

two displays was so fractured that a score card would be useful. The remarkable splits among the nine justices occurred on two levels: disagreement over doctrine, and disagreement over how that doctrine should be applied to these particular facts.

Justice Blackmun delivered the judgment of the Court. However, he garnered a majority only on certain portions of his opinion. With regard to the question of the appropriate doctrinal analysis, Blackmun took the position that a governmental practice is unconstitutional if it has the purpose or effect of endorsing religion.[42] Specifically, Blackmun stated that "the government's use of religious symbolism is unconstitutional if it has the effect of endorsing religious beliefs, and the effect of the government's use of religious symbolism depends upon its context."[43]

Justice O'Connor penned a concurring opinion in *Allegheny County*, premised largely on and in defense of her concurrence in *Lynch*,[44] the first occasion in which she espoused her "endorsement" analysis.[45] Offered in *Lynch* as a "clarification" of the Court's Establishment Clause doctrine,[46] O'Connor's inquiry was premised on the notion that the Establishment Clause "prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community."[47] In her view, "[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[48] She has stressed that "'[e]very government practice must be judged in its *unique circumstances* to determine whether it constitutes an endorsement or disapproval of religion.'"[49] Moreover, unlike Justice Blackmun, she has especially emphasized that certain practices, such as the use of legislative chaplains and the motto "In God We Trust," do not convey a message of government endorsement of religion because of their unique "history and ubiquity."[50] A practice's history and ubiquity, according to Justice O'Connor, can be a factor eliminating a message of endorsement because it is "part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion."[51]

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[42] *Id.* at 3100-01.
[43] *Id.* at 3103.
[44] Lynch v. Donnelly, 465 U.S. 668 (1984).
[45] Justices Brennan and Stevens concurred in Justice O'Connor's concurrence.
[46] *Lynch*, 465 U.S. at 3118 (O'Connor, J., concurring).
[47] *Id.* at 687 (O'Connor, J., concurring).
[48] *Id.* at 688 (O'Connor, J., concurring).
[49] County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter, 109 S. Ct. at 3118 (O'Connor, J., concurring) (quoting *Lynch*, 465 U.S. at 694 (O'Connor, J., concurring).
[50] *Id.* (O'Connor, J., concurring); *Lynch*, 465 U.S. at 693 (O'Connor, J., concurring).
[51] *Allegheny County*, 109 S. Ct. at 3121 (O'Connor, J., concurring). For a review of Justice O'Connor's contribution to the debate surrounding the Establishment Clause, see Beschle, *The Conservative as Liberal: The Religion Clauses, Liberal Neutrality, and the Approach of Justice O'Connor*, 62 NOTRE DAME L. REV. 151 (1987); Marshall, *"We Know It When We See It": The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495 (1986); Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266 (1987).

In his separate opinion, Justice Brennan remarked that "the display of an object that 'retains a specifically Christian [or other] religious meaning' ... is incompatible with the separation of church and state demanded by our Constitution."[52] Similarly, Justice Stevens wrote separately to suggest that "the Establishment Clause should be construed to create a strong presumption against the display of religious symbols on public property. There is always a risk that such symbols will offend nonmembers of the faith being advertised as well as adherents who consider the particular advertisement disrespectful."[53]

Justice Kennedy also wrote a separate opinion, but unlike the other various opinions, harshly attacked the endorsement analysis embraced by the other justices.[54] He considered this approach to reflect "an unjustified hostility toward religion, a hostility inconsistent with our precedents."[55] In its place, Kennedy recommended an analysis that he maintained would be more sensitive to the "latitude in recognizing and accommodating the central role religion plays in our society" permitted by the Establishment Clause.[56] In his view, the Establishment Clause would restrict only those government practices that included an element of coercive proselytization. "Absent coercion, the risk of infringement of religious liberty by passive or symbolic accommodation is minimal."[57] The endorsement test, by contrast, is "flawed in its fundamentals and unworkable in practice,"[58] according to Kennedy. It is flawed because, if applied with consistency, it would invalidate a slew of practices that have been commonly acknowledged as permitted accommodations of religion. According to Kennedy, government practices with longstanding traditions, such as the national motto, legislative chaplains, and Thanksgiving proclamations, would be invalid endorsements of religion unless the endorsement test includes an arbitrary exception for historical acceptance. To Kennedy, this is exactly what Justice O'Connor has created by emphasizing a practice's "history or ubiquity" as an element of the practice's context.[59] For Kennedy, the endorsement analysis also is unworkable because it results in a "jurisprudence of minutiae,"[60] requiring the Court to examine every small factual detail of a display that includes a religious symbol and relegating constitutional adjudication to measurements of the distance between various components of a display.[61] As a parting shot to the majority, Justice Kennedy decried the secularizing effect of the Court's judgment and, as if to scold the majority, remarked that "This Court is ill-equipped to sit as a national theology board, and I question both the wisdom and the constitutionality

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[52] *Allegheny County*, 109 S. Ct. at 3124 (Brennan, J., concurring in part, dissenting in part) (citation omitted).
[53] *Id.* at 3131 (Stevens, J., concurring in part, dissenting in part) (footnote omitted).
[54] Justice Kennedy was joined by Chief Justice Rehnquist and Justices White and Scalia.
[55] *Allegheny County*, 109 S. Ct. at 3134 (Kennedy, J., concurring part, dissenting in part).
[56] *Id.* at 3135 (Kennedy, J., concurring in part, dissenting in part).
[57] *Id.* at 3137 (Kennedy, J., concurring in part, dissenting in part).
[58] *Id.* at 3141 (Kennedy, J., concurring in part, dissenting in part).
[59] *Id.* at 3142-43 (Kennedy, J., concurring in part, dissenting in part).
[60] *Id.* at 3144 (Kennedy, J., concurring in part, dissenting in part).
[61] *Id.* at 3144-45 (Kennedy, J., concurring in part, dissenting in part).

of its doing so.''[62]

If the Court's conflict over the proper doctrinal principles is somewhat confusing, the application of their various analyses is even more so. Writing for a majority of five,[63] Justice Blackmun held that the creche in the County Courthouse imparted a message of government endorsement. He notes that the creche display communicates a religious message -- to wit, a celebration of the birth of Jesus.[64] Reviewing the setting of the creche, the Court found that it was entirely sectarian, and that it contained nothing that neutralized the religious content of the display's message. Moreover, because the creche was displayed in a central and prominent location within the courthouse that is not normally a place at which anyone could place displays, the overwhelming message was that the county supported the religious message of the creche.[65] Justice Blackmun concluded that ''[t]he government may acknowledge Christmas as a cultural phenomenon, but under the First Amendment it may not observe it as a Christian holy day by suggesting that people praise God for the birth of Jesus.''[66]

With regard to the Christmas tree-Menorah display, however, Blackmun wrote only for himself. He found that the Menorah was a predominantly religious symbol of the Jewish holiday of Chanukah.[67] By contrast, the Christmas tree, in Blackmun's view, was primarily a secular symbol of the Christmas holiday season.[68] Combining the secular symbol of the Christmas Tree and the religious symbol of the Menorah, which are accompanied by the City's sign proclaiming a ''Salute to Liberty,'' results, in Blackmun's opinion, not in an endorsement of either or both Christian or Jewish religious beliefs, but rather communicates a message of the ''recognition of cultural diversity.''[69] According to Blackmun, the Menorah, in effect, is drained of its predominant religious meaning in the display, and the display is meant to acknowledge the secular celebration of Christmas and Chanukah as important holidays in American culture.[70]

Justice O'Connor, writing separately, agreed that the tree-Menorah display was permissible, but for slightly different reasons. She disagreed with Blackmun that the display had to be viewed as celebration of two secular holidays or the winter holiday season generally. Instead, the inclusion of the religious symbol of the Menorah with what she viewed as the entirely secular symbol of the Christmas tree imparted a message of pluralism and freedom of belief and not endorsement of the

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[62] *Id.* at 3146 (Kennedy, J., concurring in part, dissenting in part).

[63] Again, in this portion of his opinion, Justice Blackmun was joined by Justices Brennan, Marshall, Stevens, and O'Connor.

[64] *Allegheny County*, 109 S. Ct. at 3103.

[65] *Id.* at 3104.

[66] *Id.* at 3105.

[67] *Id.* at 3112.

[68] *Id.* at 3113.

[69] *Id.* at 3115.

[70] *Id.* at 3112, 3114-15.

Jewish faith.[71] Thus, unlike the creche display, the tree-Menorah display was not unconstitutional.

Justice Brennan dissented from the Court's judgment regarding the tree-Menorah display. First, he questioned the initial premise that the Christmas tree can so easily be disposed of as a secular symbol of Christmas. Rather than finding that the Christmas tree's secularism diminishing the Menorah's religiousness, Brennan asserted the reverse: The display could convey a message of pluralism only if the religious symbol of the Menorah is placed along side a second religious symbol. Thus, in the context of this display, the Christmas tree in fact represents the Christian, rather than the secular, holiday of Christmas.[72] More fundamentally, Brennan criticizes Blackmun and O'Connor's acceptance of the notion that the display represents a tribute to pluralism. The constitutional infirmities of a display of a single religious object does not "vaporize," in Brennan's view, simply because a second symbol from another religion is added to the display.[73] Furthermore, Brennan contended that the inclusion of the Menorah in the display "works a distortion of the Jewish religious calendar.[74] The city had obviously chosen to include a recognition of Chanukah in its "Salute to Liberty" because of its temporal proximity to Christmas, even though Chanukah is far less significant a holiday than Rosh Hashanah and Yom Kippur in the Jewish faith. Other religions lacking a holiday around Christmas are effectively precluded from acknowledgement in the message of "pluralism." Thus, Brennan concludes that the message is not one of diversity or pluralism at all.[75]

Justice Stevens also dissented over the tree-Menorah display on similar grounds as Justice Brennan. Stevens wrote that "displays of this kind inevitably have a greater tendency to emphasize sincere and deeply felt differences among individuals than to achieve an ecumenical goal."[76] Placing the tree next to the Menorah gives the tree religious significance, according to Stevens, and "[t]he overall display thus manifests governmental approval of the Jewish and Christian religions."[77] The purported message of pluralism was not sufficiently clear to overcome Stevens's strong presumption against government displays of religious symbols.[78]

Justice Kennedy, joined by three other members of the Court,[79] found nothing constitutionally improper with either display. He asserted that neither the creche in

[71] *Id.* at 3123 (O'Connor, J., concurring).

[72] *Id.* at 3126-27 (Brennan, J., concurring in part, dissenting in part). For example, Justice Brennan suggests, "[c]onsider a poster bearing a star of David, a statue of Bhudda, a Christmas tree, a mosque, and a drawing of Khrishna. There can be no doubt that, when found in such company, the tree serves as an unabashedly religious symbol." *Id.* at 3126 (Brennan, J., concurring in part, dissenting in part).

[73] *Id.* at 3128 (Brennan, J., concurring in part, dissenting in part).

[74] *Id.* (Brennan, J., concurring in part, dissenting in part).

[75] *Id.* at 3128-29 (Brennan, J., concurring in part, dissenting in part).

[76] *Id.* at 3132 (Stevens, J., concurring in part, dissenting in part).

[77] *Id.* at 3133 (Stevens, J., concurring in part, dissenting in part).

[78] *Id.* at 3133-34 (Stevens, J., concurring in part, dissenting in part).

[79] Chief Justice Rehnquist and Justices White and Scalia.

the County Courthouse nor the Christmas tree and the Menorah before the City-County building posed a serious threat of proselytizing. The symbols were entirely passive acknowledgements of religious holidays "that over time have acquired a secular component."[80] The displays were in no way coercive, and "[p]asserbys who disagree with the message conveyed by these displays are free to ignore them, or even to turn their backs, just as they are free to do when they disagree with any other form of government speech."[81] The Establishment Clause, in Kennedy's view, does not prevent government from recognizing and indeed joining in the celebration of holidays having both religious and secular aspects; more important, the recognition of and participation in the celebration need not be limited to the secular aspects of those holidays alone.[82]

The outcome and aftermath of *Allegheny County* is, simply stated, confusion. The bottom line of the case is that the display of the creche was unconstitutional while the display of the Christmas tree beside the Menorah was not. The Supreme Court made no substantial step towards resolving the confused state of Establishment Clause law, except to illustrate the extreme split among the justices about the proper analysis of church-state relations.[83]

C. *The Unifying Theme*

What does flag-burning have to do with nativity creches? At first glance, *Johnson* and *Allegheny County* appear to have little, if anything, to do with each other except that they both produced some publicity and rather caustic dissents. This similarity is itself rather unnoteworthy; Supreme Court cases often generate publicity and dissents. But in these two cases, this similarity points to the connection. The publicity and the dissents were as substantial and harsh as they respectively were because the two cases involved symbols. Moreover, they involved symbols of widespread recognition, and for most people, symbols that have special, deeply felt meanings. On the one hand, *Johnson* involved individual symbolic speech, and on the other, *Allegheny County* involved governmental symbolic speech. In both cases, nevertheless, the symbolic speech had a powerful force, and the difficulty for constitutional adjudication that such symbolic speech can pose was reflected in the Court's opinions.

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[80] *Allegheny County*, 109 S. Ct. at 3139 (Kennedy, J., concurring in part, dissenting in part).

[81] *Id.* at 3139 (Kennedy, J., concurring in part, dissenting in part).

[82] *Id.* at 3138 (Kennedy, J., concurring in part, dissenting in part).

[83] In the wake of *Allegheny County*, the County and the City determined not to display the creche or the menorah. The Holy Name Society, the Sponsor of the creche objected to displaying the creche with secular symbols of the holiday season, and the City had agreed not to display the menorah if the County did not display the creche. A private Jewish group, however, brought suit to require the City to permit the display of its menorah in a public forum. *See Pennsylvania County Rejects Displaying of Nativity Scene*, N.Y. Times, Nov. 26, 1989, at 36, col. 1. On December 22, 1989, Justice Brennan vacated a stay entered by the Third Circuit of a preliminary injunction ordered by the district court requiring the City of Pittsburgh to permit the display of the menorah by the Jewish group. Chabad v. City of Pittsburgh, 110 S. Ct. 708 (1989).

II. INDIVIDUAL SYMBOLIC SPEECH

The First Amendment provides, in part, that "Congress shall make no law . . . abridging the freedom of speech."[84] The broadly stated protection of the First Amendment extends not just to so-called "pure speech" -- written or oral expression through language -- but also to expressive conduct -- communication through the medium of non-language symbols or symbolic acts.[85] This general proposition is not particularly troublesome. However, a closer view of the implications of this principle will reveal that it can present some mettlesome problems.

A. *Discerning Between Expressive and Non-Expressive Conduct*

Not all expression is verbal, that is, written or oral language-based. By the same token, not all conduct is expressive. In fact, only a relatively small portion of all conduct is predominantly expressive. Nevertheless, people communicate everyday through their conduct. No one would mistake the meaning of a slammed door or telephone on an obnoxious salesperson, a delivery of a bouquet of roses to a lover, or the applause at the end of a play. Each of these examples involves no "pure speech"; yet, the conduct contains a strong message that is readily communicated to others. Similarly, some types of acts or conduct become so closely tied to the meaning they express that they become symbols of their meaning. An observer readily understands the difference between Churchill's two-fingered "V" for victory sign and the extension of the middle finger alone, symbolizing a profanity. In addition, there are certain objects -- such as crosses, stylized eagles, sickles and hammers, and five- and six-pointed stars -- that have specific meanings attached to them.

Ideally, expression can best be understood on a continuum ranging from fully expressive (i.e., "pure speech") to nonexpressive (i.e., "pure conduct").[86] At one end of the spectrum is a person giving a speech criticizing Congress in front of the Capitol building. This is pure expression. Add gestures to the speech, including a wave of the hand indicating the futility of dealing with Congress, and the speech now has an element of expressive conduct. Eliminate the speech, leaving only the derogatory wave of the hand towards the Capitol building, and what is left is expressive, albeit somewhat inarticulate, conduct. Move the speaker to an unre-

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[84] U.S. CONST. amend. I.

[85] United States v. Grace, 461 U.S. 171, 176-77 (1983); Spence v. Washington, 418 U.S. 405, 410 (1974); Tinker v. Des Moines Community School Dist., 393 U.S. 503, 505 (1969); Brown v. Louisiana, 383 U.S. 131, 141-42 (1966); Cox v. Louisiana, 379 U.S. 559, 563-64 (1965); Stromberg v. California, 283 U.S. 359, 369 (1931).

[86] *See* Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 U.C.L.A. L. REV. 29, 33 (1973) ("[I]n one sense all speech is symbolic. At this moment the reader is observing black markings on paper which curl and point in various directions. We call such markings letters, and in groups they are referred to as words. What is being said in this sentence is meaningful only because the reader recognizes these markings as symbols for particular ideas. The same is true of oral speech which is simply the use of symbolic sounds.").

markable street corner, and the wave of the hand into empty air communicates nothing. This is the other end of the spectrum.

Constitutional adjudication, however, tends to be better suited to categories rather than continua. Consequently, it is more convenient to slice up the continuum into categories of "pure speech," "expressive conduct," and "nonexpressive conduct." Drawing the line between expressive and nonexpressive conduct is not always an easy task. When, for example, does the derogatory waive of the hand become nothing more than a spasmodic jerk into the air?

Conduct is considered expressive for purposes of the First Amendment, and therefore is protected speech, if the purported speaker intended a particularized message to be conveyed through his conduct and if there is a substantial likelihood that those observing the conduct will understand that a message is being communicated by the conduct.[87] Take for instance again our speaker at the Capitol building. An observer sees our speaker gesture in what appears to the observer in a disgusted and derogatory fashion towards the Capitol building. The observer takes the gesture to mean the speaker is unhappy with Congress. In fact, our speaker was merely waiving angrily at a buzzing insect. No message was intended by the speaker, and his gesture was not expressive conduct within the meaning of the First Amendment.[88] A few minutes later, our speaker, now infuriated with the number of bugs on the Capitol grounds and Congress's ineffectiveness in promoting insect control, walks defiantly away from the Capitol grounds, attempting to express his discontent. The observer is not quite sure what to make of this ambiguous gesture. Thus, even though our speaker has in fact intended to "speak," the nature of his conduct is so unclear and imprecise that a reasonable observer would not understand that our speaker is attempting to communicate.

Courts have on numerous occasions been faced with the question of whether a particular type or course of conduct is expressive. Examples of the types of conduct that they have found to be expressive include: peaceful picketing and marching,[89] economic boycotts,[90] peaceful sit-ins and other similar demonstrations,[91] displaying

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[87] Texas v. Johnson, 109 S. Ct. at 2539; *Spence*, 418 U.S. at 409-10. Professor Emerson suggests that whether expressive conduct is entitled to First Amendment protection depends upon which element -- expression or conduct -- is the predominant one. T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 80 (1970). This type of categorization invites arbitrary distinctions between what is deemed the "predominant" element and the secondary element of conduct. *See* Nimmer, *supra* note 86, at 32-33. Moreover, it distracts from the central concerns of whether the conduct is intended and can be understood as communicating a message.

[88] *See, e.g.*, Redgrave v. Boston Symphony Orchestra, Inc., 855 F.2d 888, 895 (1st Cir. 1988) (en banc), *cert. denied*, 109 S. Ct. 869 (1989).

[89] *E.g.*, *Grace*, 461 U.S. at 176; Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 313-14 (1968); Cox, 379 U.S. at 563-64; Collin v. Smith, 578 F.2d 1197, 1201 (7th Cir. 1978), *cert. denied*, 439 U.S. 916 (1978).

[90] *E.g.*, NAACP v. Clairborne Hardware Co., 458 U.S. 886, 907-11 (1982).

[91] *E.g.*, Brown v. Louisiana, 383 U.S. 131 (1966); Garner v. Louisiana, 368 U.S. 157 (1961).

a flag or banner,[92] burning or mutilating the American flag,[93] affixing a peace symbol to the American flag,[94] wearing the American flag as part of one's clothing,[95] removing an American flag patch by police officers from their own uniforms,[96] wearing an arm band or pin,[97] wearing a military uniform by one unauthorized to do so,[98] the erection of "shanties,"[99] contributing money to political campaigns,[100] nude dancing,[101] and artwork.[102] Examples of the sort of conduct courts have found to not to be symbolic or expressive for purposes of the First Amendment include nude sunbathing,[103] wearing long hair,[104] and not wearing a necktie.[105]

Whether particular conduct is expressive depends to a great extent on the factual context in which the conduct takes place. For instance, a person who purposefully throws down an American flag into a mud puddle as part of a protest of U.S. foreign policy is engaging in expressive and symbolic conduct. By contrast, a second person moments later absent-mindedly drags her American flag through the same mud puddle. Although her flag becomes just as dirty as the protester's, she has

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[92] *E.g.*, *Stromberg*, 283 U.S. at 369.

[93] *E.g.*, *Johnson*, 109 S. Ct. at 2540; Monroe v. State Court of Fulton County, 739 F.2d 568, 572 (11th Cir. 1984); United States v. Crosson, 462 F.2d 96, 108-09 (9th Cir. 1972) (Browning, J., dissenting), *cert. denied*, 409 U.S. 1064 (1972); Joyce v. United States, 454 F.2d 971, 987-88 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 969 (1972).

[94] *E.g.*, *Spence*, 418 U.S. at 409-11; Cline v. Rockingham County Superior Court, 502 F.2d 789, 790-91 (1st Cir. 1974); Long Island Vietnam Moratorium Committee v. Cahn, 437 F.2d 344, 349-50 (2d Cir. 1970), *aff'd mem.*, 418 U.S. 906 (1974).

[95] *E.g.*, Smith v. Goguen, 415 U.S. 566, 573-74 (1974); Royal v. Superior Court of New Hampshire, 531 F.2d 1084, 1084-85 (1st Cir. 1976), *cert. denied*, 429 U.S. 867 (1976); Hoffman v. United States, 445 F.2d 226, 228-29 (D.C. Cir. 1971). *See also* Melton v. Young, 465 F.2d 1332, 1333-34 (6th Cir. 1972), *cert. denied*, 411 U.S. 951 (1973) (student wearing Confederate flag patch on jacket sleeve).

[96] Leonard v. City of Columbus, 705 F.2d 1299, 1304-05 (11th Cir. 1983), *cert. denied*, 468 U.S. 1204 (1984).

[97] *E.g.*, *Tinker*, 393 U.S. at 508; *Collin*, 578 F.2d at 1201; Smith v. United States, 502 F.2d 512, 514 (5th Cir. 1974); James v. Board of Educ. of Central Dist. No. 1 of Towns of Addison, 461 F.2d 566, 572 (2d Cir. 1972), *cert. denied*, 409 U.S. 1042 (1972).

[98] Schacht v. United States, 398 U.S. 58, 63-64 (1970).

[99] University of Utah Students Against Apartheid v. Peterson, 649 F. Supp. 1200, 1204-05 (D. Utah 1986). *Cf.*, Clark v. Community for Creative Non-violence, 468 U.S. 288, 293 (1984) (overnight sleeping in park). *See also* Davis v. Norman, 555 F.2d 189, 190 (8th Cir. 1977) (placing wrecked car in front yard to protest police abuse of authority in high speed chase).

[100] Buckley v. Valeo, 424 U.S. 1, 16-17 (1976).

[101] *E.g.*, Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 66 (1981); Miller v. Civil City of South Bend, 887 F.2d 826, 828-30 (7th Cir. 1989); International Food & Beverage Systems v. City of Fort Lauderdale, 794 F.2d 1520, 1525 (11th Cir. 1986); Salem Inn, Inc. v. Frank, 522 F.2d 1045, 1047-48 (2d Cir. 1975).

[102] *E.g.*, Piarowski v. Illinois Community College, 759 F.2d 625, 628 (7th Cir. 1985), *cert. denied*, 474 U.S. 1007 (1985). *But see* Yurkew v. Sinclair, 495 F. Supp. 1248, 1253-54 (D. Minn. 1980) (tatooing not communicative conduct), *aff'd mem.*, 657 F.2d 274 (8th Cir. 1981).

[103] *E.g.*, South Florida Free Beaches, Inc. v. City of Miami, 734 F.2d 608, 609-10 (11th Cir. 1984). *See also* Roth v. United States, 354 U.S. 476, 512 (1957) (Douglas, J., dissenting) ("No one would suggest that the First Amendment permits nudity in public places.").

[104] *E.g.*, Karr v. Schmidt, 460 F.2d 609, 613-14 (5th Cir.) (en banc), *cert. denied*, 409 U.S. 989 (1972); Freeman v. Flake, 448 F.2d 258, 260-61 (10th Cir. 1971), *cert. denied*, 405 U.S. 1032 (1972). *See also Tinker*, 393 U.S. at 507-08.

[105] East Hartford Educ. Ass'n v. Board of Educ., 562 F.2d 838, 858 (2d Cir. 1977) (en banc).

not engaged in any expressive conduct.[106] Similarly, a young man may decide to wear his hair long, as was popular twenty years ago, or with some design carved into it, as is rather popular today, because he likes the way it looks. No particularized message is intended to be communicated.[107] A person who wears his hair in a particular way in accordance with his religious beliefs,[108] however, is expressing a message through his appearance.

The distinctions courts have attempted to draw between nude dancing and nude sunbathing are instructive. Nudity is not in and of itself expressive, any more than the wearing of clothing or a blank canvas are per se communicative. Nudity is, like a blank canvas, a medium through which a message can be communicated. Its transformation from an empty medium to a form of protected expression depends upon how it is used and the context in which it is placed. A man and woman lying naked on a beach hoping to obtain the ultimate tan are communicating nothing. The same man and woman lying naked on the stage of a theater can be communicating many things. And a person dancing nude, whether in a ballet or at a topless bar,[109] is communicating to the audience a message, whether the message is one of refined drama or bawdy entertainment.

The difference lies in whether the purported speaker is intending to communicate and whether the purported audience can discern that a message is intended to be communicated. The nude dancer intends to convey a message, and the audience takes what entertainment value the dancer has the talent to offer. The nude sunbather may not intend to communicate any message; he or she may simply wish to enjoy the sun unfettered by any clothing. As unoffensive as such conduct may be, it simply is not speech.

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[106] *See* Texas v. Johnson, 109 S. Ct. at 2538-39 n.3.

[107] Many young people, both today and yesterday, would contend that the way in which they wore their hair was indeed intended to express a message. (Take, for example, the play and subsequent movie entitled "Hair.") If the way in which the person wore his hair was intended to express, for example, a protest against conventional norms, as opposed to a person's grooming preferences, then hair style could be symbolic expression. *But see Karr*, 460 F.2d at 613-14.

[108] *See* Fromer v. Skully, 874 F.2d 69, 71 (2d Cir. 1989) (Orthodox Jew wearing beard); Reed v. Faulkner, 842 F.2d 960, 961-62 (7th Cir. 1988) (Rastafarian wearing "dreadlocks"); Hill v. Blackwell, 774 F.2d 338, 339 (8th Cir. 1985) (Muslim wearing beard); Cole v. Flick, 758 F.2d 124, 125 (3d Cir.) (American Indian wearing long hair), *cert. denied*, 474 U.S. 921 (1985); Teterud v. Burns, 522 F.2d 357, 359 (8th Cir. 1975) (American Indian wearing long braided hair). *See generally* Note, *Soul Rebels: The Rastafarians and the Free Exercise Clause*, 72 GEO. L.J. 1605 (1984). *But see* New Rider v. Board of Educ., 480 F.2d 693, 698 (10th Cir.), *cert. denied*, 414 U.S. 1097 (1973) (American Indian wearing long braided hair).

[109] As Judge Oakes aptly remarked:

> [W]hile the entertainment afforded by a nude ballet at Lincoln Center to those who can pay the price may vastly differ in content (as viewed by judges) or in quality (as viewed by critics), it may not differ in substance from the dance viewed by the person who, having worked overtime for the necessary wherewithal, wants some "entertainment" with his beer or shot of rye.

Salem Inn, Inc. v. Frank, 501 F.2d 18, 21 n.3 (2d Cir. 1974), *aff'd in part, rev'd in part on other grounds*, 422 U.S. 922 (1975).

But what about the nude sunbather who in fact intends to communicate through the act of lying naked on the beach? For example, a woman might wish to express her opposition to society's unequal treatment of women by sunbathing topless as men as men do.[110] The question then becomes whether an observer would be likely to understand that a message is being conveyed by her appearing topless on the beach or whether she would be mistaken for a carefree spirit or the seeker of the ultimate tan. Without some additional indicia of the content of her protest, the topless woman on the beach is something like a blank canvas. It is quite possible for an artist to hang a blank canvas on the wall of a gallery as part of an art exhibit. The blank canvas, because it is presented in the context of an exhibit, is understood to convey a message -- albeit, in the eye of some viewers, a rather insubstantial one. However, if the same blank canvas was lying on top of a pile of canvases, even if it were the artist's final product, a passerby would not understand that a message was to be communicated by that canvas. So it is with the topless sunbather. Without some other indication that the "blank canvas" of her nudity is meant to communicate a message of protest of the subordination of women, the observer sees only the nudity without taking in the message. Therefore, despite her intent to communicate, her conduct is not expressive.

Although an observer must be able to understand that a message is being communicated, it need not be the particular message that the speaker intended to express. Moreover, the message, at least as heard or observed by the audience, need not be entirely coherent or unambiguous.[111] Abstract art and music are obvious examples of expression in which the intended message may not be understood by an observer who nevertheless understands that a message of some sort is being conveyed.[112] Similarly, the more unconventional or involved the message, the more difficult it will be for the observer to grasp readily the message conveyed through conduct.[113] That is not, however, a reason to deny First Amendment protection to symbolic conduct so long as the observer understands that *some* message is conveyed, whether the inability to understand the intended message is because of the speaker's unartfulness or because of the sophistication or complexity of the message.

B. *Content-Based Regulation of Individual Symbolic Conduct*

Government regulation may impinge on expression in a variety of ways, only some of which are prohibited by the First Amendment. One that is most antithetical to First Amendment values, however, is regulation based on the content of the expression regulated. Content-based regulation is subjected to "the most exacting scrutiny,"[114] and is justified only when necessary to serve a compelling governmen-

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[110] *See , e.g.*, Craft v. Hodel, 683 F. Supp. 289, 291-92 (D. Mass. 1988).

[111] *See* Note, *First Amendment Protection of Ambiguous Conduct*, 84 COLUM. L. REV. 467, 486-87 (1984) [hereinafter Note, *Ambiguous Conduct*].

[112] Nimmer, *supra* note 86, at 35.

[113] Note, *Ambiguous Conduct*, *supra* note 111, at 486.

[114] Boos v. Barry, 485 U.S. at 321.

tal interest and when it is narrowly tailored to serve that end.[115]

A regulation of expression is content-based when it cannot be justified without reference to the content of the regulated speech.[116] For example, a municipal ordinance that prohibits the posting of signs on public monuments is content-neutral; it restricts all speech, without regard to its content, from certain places.[117] However, if the ordinance prohibited only the posting of signs depicting neo-Nazi or racist slogans on public monuments, it obviously no longer retains its content neutrality.[118] While the first ordinance is justified by the governmental interest in protecting the appearance of public monuments, the second ordinance cannot claim such a justification because it would permit non-Nazi or racist signs to clutter public monuments. Its only justification is in preventing neo-Nazi or racist groups from trying to associate themselves with the symbols displayed in the public monuments.

A regulation need not restrict only one viewpoint to be content-based.[119] In the public monument ordinance example, an ordinance that restricted the posting of signs of all political groups, rather than just those of the Neo-Nazi party, is not content-neutral; it discriminates between political speech on the one hand and non-political speech on the other. Its justification again lies not in preserving the appearance of the monuments but in depriving all political groups from using the monuments in their causes.

Similarly, a regulation is not necessarily content-neutral simply because the governmental interest that provides its justification lies in the impact of the expression on its audience rather than on the effect of the restriction on the speaker. For example, regulations that restrict picketing in front of embassies because of the affront to the dignity such expression can have to diplomats or that restrict adult movie houses because of the psychological or sociological impact of such movies on their viewers are both content-based.[120] It is the content of the expression with results in the "evil" that the regulation seeks to eliminate. By contrast, regulations that restrict picketing in front of embassies if the picketing threatens the security of the embassy or obstructs access to the embassy or that prohibit adult movie theaters from residential neighborhoods are content-neutral.[121] These regulations may be justified by governmental interests unrelated to the content of the expression, to wit, ensuring the security of and access to embassies, and the protection of property values and the

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[115] *Id.*; Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 473 U.S. 788, 800 (1985); *Grace*, 461 U.S. at 177.

[116] *Boos*, 108 S. Ct. at 1163; Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976).

[117] *See* Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 804-05 (1984).

[118] *See Collin*, 578 F.2d at 1202.

[119] *Boos*, 485 U.S. at 319; Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530, 537 (1980).

[120] *Boos*, 485 U.S. at 320-21.

[121] *Id.*; Renton v. Playtime Theaters, Inc., 475 U.S. 41, 47-48 (1986). *See also* Young v. American Mini Theaters, Inc., 427 U.S. 50 (1976).

quality of residential neighborhoods.[122]

Long-accepted constitutional doctrine holds that certain specific categories of expression are excluded from First Amendment protection altogether because of the nature of their content. The most significant forms of such unprotected speech are so-called "fighting words" and obscenity. The perceived complete lack of value in their content deprives them of any consideration for First Amendment protection.[123]

"Fighting words" are abusive epithets or insults, designed "to provoke the average person to retaliation, and thereby cause a breach of the peace."[124] Speech is not excluded from the protection of the First Amendment merely because it is provocative and invites dispute or simply because it is vulgar.[125] Instead, the words used must be "a direct personal insult or an invitation to fisticuffs,"[126] or it must be "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[127] The same standards should apply equally to conduct that is directed at inciting a brawl or riot.

The courts have had more difficulty in defining obscenity. It does not include all sexually explicit conduct or indecent expression.[128] In *Miller v. California*,[129] the Supreme Court settled upon a somewhat cumbersome "test": "The basic guidelines for the trier of fact must be: (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest . . .; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."[130] In addition, child pornography, even if merely indecent, is entirely denied First Amendment protection.[131]

Rather than creating a separate juridical category for such expression because of the perceived limited value of the *content* of the speech, a more appropriate view of fighting words and obscene language, and analogous expressive conduct such as

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[122] *See Renton*, 475 U.S. at 46-49.

[123] Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) ("It has been well observed that such utterances [-- obscene, profane, libelous, and fighting words --] are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.").

[124] *Id.* at 574.

[125] Cohen v. California, 403 U.S. 15, 25-26 (1971); Terminiello v. Chicago, 337 U.S. 1, 4 (1949).

[126] Texas v. Johnson, 109 S. Ct. at 2542.

[127] Brandenburg v. Ohio, 395 U.S. at 447.

[128] *See, e.g.*, Sable Communications v. FCC, 109 S. Ct. 2829, 2836 (1989).

[129] 413 U.S. 15 (1973).

[130] *Id.* at 24 (quoting Roth v. United States, 354 U.S. 476, 489 (1957)). The Court also offered "a few plain examples" of obscene expression: "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated. (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." *Id.* at 25.

[131] New York v. Ferber, 458 U.S. 747 (1982).

political terrorism and obscene sexual acts, would be to conclude that the governmental interests in suppressing the content of the speech entirely outweigh the individual's interest in expressing the message conveyed by such speech. Thus, rather than creating a special exception from First Amendment doctrine for these categories of unprotected speech, their lack of constitutional protection is easily explained under the accepted analysis of content-based regulation. For example, the governmental interest in preventing breaches of the peace and riots justify prohibiting fighting words on the basis of their content. Similarly, governmental interests in protecting children and maintaining certain levels of decency would justify the suppression of obscenity, both in the form of conduct or verbal expression.

C. *Medium-Based Regulation of Individual Symbolic Speech*

The First Amendment does not ensure that a speaker shall have access to every method or means of communicating his message at all times and places.[132] Expression, including symbolic conduct, can be subjected to reasonable time, place, and manner restrictions.[133] As the name suggests, time, place, and manner restrictions focus not on the content of the expression, but rather on its medium or context. They regulate not whether a person may criticize the government's foreign policy but whether she may do so at 1:30 a.m., in the backyard of the Secretary of State's private home, with a loudspeaker.[134]

A time, place, or manner restriction is valid if it can be justified without reference to the content of the regulated expression, if it is narrowly tailored to serve a significant governmental interest, and if it leaves open ample alternative channels for expression.[135] A regulation of protected expression does not qualify as a time, place, and manner restriction if it regulates the content of the expression. The evil that is the target of the regulation must not be the message of the expression or its direct effect on the recipients of the message.[136] Moreover, the regulation must "target[] and eliminate[] no more than the exact source of the 'evil' it seeks to remedy."[137] Regulation of protected expression that goes beyond that which the government has a significant interest in regulating, even if the entire regulation is content-neutral, is not a reasonable time, place, or manner restriction. Finally, the regulation cannot close off all other methods of expressing the message. Alternative channels of expression must remain.[138]

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[132] Members of City Council v. Taxpayers for Vincent, 466 U.S. at 812.

[133] Clark v. Community for Creative Non-violence, 468 U.S. at 293.

[134] *See, e.g.*, Ward v. Rock Against Racism, 109 S. Ct. 2746, 2753-54 (1989); Frisby v. Schultz, 108 S. Ct. 2495, 2502 (1988); Kovacs v. Cooper, 336 U.S. 77, 86-87 (1949).

[135] *Id.*; United States v. Grace, 461 U.S. at 177; Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 647-48 (1981).

[136] Boos v. Barry, 108 S. Ct. at 1163-64.

[137] *Frisby*, 108 S. Ct. at 2502 (citing Members of City Council v. Taxpayers for Vincent, 466 U.S. at 808-10).

[138] *Id.* at 2501 (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).

Government thus may restrict nude dancing to indoors, away from the eyes of children as well as adults not interested in viewing the dancing.[139] Similarly, it can restrict the picketing of abortion clinics that obstructs access to the clinic or physically harasses those entering the clinic while permitting nonobstructive, nonharassing expressive conduct.[140] And government could prohibit a bonfire of American flags in a place that would constitute a fire hazard. In none of these examples is the symbolic conduct regulated on the basis of its content. Moreover, the regulations would permit the symbolic conduct to be engaged in a different place or manner.

The Supreme Court has suggested on several occasions that "[g]overnment has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word."[141] The distinction the Court has drawn between "pure speech" and "speech plus conduct" has resulted in what the Court has characterized as a particularized version of the time, place, or manner doctrine for expressive conduct.[142] Unlike written or spoken speech, expressive or symbolic conduct may be regulated if the regulation furthers an important governmental interest, if the governmental interest is unrelated to the suppression of expression, and "if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[143]

This standard unique to expressive conduct was first announced in *United States v. O'Brien*,[144] which involved the conviction of a person for burning his Selective Service registration certificate.[145] The cause for creating this separate test for expressive conduct appears to lie in the Court's concern about an expansive view of conduct constituting protected expression. The Court indicated that "[w]e cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."[146] Avoiding the need to directly answer this question, the Court determined that government may regulate the "conduct" element so long as the regulation served a substantial governmental interest that is unrelated to the content of the expression and so long as the regulation is merely "incidental" to the expression.[147]

The governmental interest in ensuring the efficient functioning of the Selec-

[139] *See* International Food & Beverage Systems v. City of Fort Lauderdale, 794 F.2d at 1525.

[140] New York State Nat'l Org. for Women v. Terry, 886 F.2d 1339, 1362-64 (2d Cir. 1989).

[141] Texas v. Johnson, 109 S. Ct. at 2540; *see also* City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 495 (1986); United States v. O'Brien, 391 U.S. 367, 376 (1968).

[142] *See Johnson*, 109 S. Ct. at 2540-41; Clark v. Community for Creative Non-violence, 468 U.S. at 298.

[143] *O'Brien*, 391 U.S. at 377.

[144] 391 U.S. 367 (1968).

[145] *Id.* at 369.

[146] *Id.* at 376. *See also* Cox v. Louisiana, 379 U.S. 536, 555 (1965) ("We emphatically reject the notion... that the First and Fourteenth Amendment afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways as these amendments afford to those who communicate by *pure speech*." (emphasis added)).

[147] *Id.* at 376-77; *see also* Texas v. Johnson, 109 S. Ct. at 2541.

tive Service System was deemed amply sufficient to deny draft-card burning as a means of communicating.[148] The statute under which the draft-card burner was convicted, prohibited the mutilation and destruction by burning of draft cards. Its aim, the Court held, was not at eliminating the content of the draft card burner's speech -- opposition to the Vietnam War -- but rather the destruction of draft cards.[149] The regulation was therefore content-neutral and merely incidental to speech.[150]

More recently, in *Clark v. Community for Creative Non-Violence*,[151] the Court concluded that regulations prohibiting overnight sleeping in certain national parks justified denying permission to sleep in symbolic tents in Lafayette Park in the heart of Washington, D.C. as a protest of the plight of the homeless.[152] The regulation was unrelated to the message of the demonstrators; instead, it was designed to protect the park.[153] The restriction of the symbolic speech was narrowly tailored to that conduct that could damage the park -- overnight sleeping.[154] Any incidental limitation of the demonstrator's symbolic speech therefore did not violate the First Amendment.

The Court's unease about expressive conduct is easy to understand. Many forms of conduct that can be expressive would, if government were prohibited from regulating the conduct, cause tremendous disruption and instability in society. Murder can be a medium for communicating political dissent. Theft can be a means of economic protest. Any gain to the marketplace of ideas, however, is outweighed by the damage to the integrity of society resulting from such expression. Put another way, government has a compelling interest in regulating such conduct as a medium for expression.

The proper response in terms of constitutional doctrine, nonetheless, is not to deny that such conduct can be expressive. Nor is it to make it relatively easy for government to shut off an entire category of conduct as a communicative medium. Just as some expression can be suppressed entirely on the basis of its content, so too can some expression be suppressed because of its medium. Obscene conduct obviously is no more protected than pictures depicting the conduct.[155] An analog to "fighting words"[156] is tortious conduct. Murder, kidnapping, and physical assaults, even when committed with an intent to convey a message and when done in a context

[148] *O'Brien*, 391 U.S. at 382.

[149] *Id.* Although there was significant evidence that Congress had amended the law to eliminate specifically draft card burning as a form of anti-war protest, see L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-6, at 596-97 (1978), the Court held that legislative purpose was irrelevant to the First Amendment analysis. *O'Brien*, 391 U.S. at 383-84.

[150] For a critique of *O'Brien*, see Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975); Henkin, *The Supreme Court, 1987 Term -- Forward On Drawing Lines*, 82 HARV. L. REV. 63, 76-82 (1968); Nimmer, *supra* note 86, at 39-44.

[151] 468 U.S. 288 (1984).

[152] Clark v. Community for Creative Non-violence, 468 U.S. at 298-99.

[153] *Id.* at 296.

[154] *Id.* at 296-97.

[155] *See supra* notes 128-31 and accompanying text.

[156] *See supra* notes 123-27 accompanying text.

that makes clear to the observer what the message is, are not protected by the First Amendment.[157] An assassination can express opposition to a political system. It nevertheless is not shielded by the Constitution. Similarly, the destruction or theft of another's property cannot be the medium for protected expression.[158] Picketing an abortion clinic is protected speech; destroying the clinic is not.[159] The governmental interest in preventing and punishing murder and theft overwhelmingly outweighs the First Amendment interest in using murder or theft as media for expression.

Justifying governmental regulation of a medium of communication as merely "incidental" to expression directs attention from important concerns. The medium through which one chooses to communicate can have a serious impact on both the way in which the message that is intended to be communicated is understood and on the very content of the message. Different media, whether the medium is spoken words or some kind of conduct, have a stronger or weaker force in different contexts for different messages.[160] A group protesting against the use of nuclear energy could write an eloquent letter to the editor of a major newspaper and pass out leaflets. Their anti-nuclear message might be more effectively communicated by a silent protest outside a nuclear power plant. If the protesters were denied the latter medium, they would retain the alternative channel of the leaflets and the letter to the editor. Nevertheless, their ability to communicate is substantially implicated by the restriction.[161] The *O'Brien* standard's emphasis on the incidental effect of a regulation does not adequately take into account this aspect of medium-based regulation of expression.

More important, some media give a unique meaning to a message that simply cannot be replicated through other channels of communication. Some types of conduct have an intangible quality and force that transform the message.[162] Flag-burning is an example of such conduct. The American flag, like many national flags, is a symbol with exceptionally strong meaning. To express political discontent through the desecration of the flag has a power that not only propels the meaning of the protester but gives the message additional meaning that could not be conveyed

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[157] *E.g.*, United States v. Marcano-Garcia, 622 F.2d 12, 16 (1st Cir. 1980). *See generally* Tinker v. Des Moines Community School District, 393 U.S. at 513 (suggesting that disruptive conduct by student would not be protected expression).

[158] *See, e.g.*, United States v. Allen, 760 F.2d 447, 448-49 (2d Cir. 1985). In *Johnson*, the flag that was burned was stolen. However, Johnson was not prosecuted for having stolen the flag, only for having desecrated it. 109 S. Ct. at 2544 n.8. The act of stealing the flag, even if intended to be expressive conduct, would not have been protected expression.

[159] *See* Northeast Women's Center, Inc. v. McMonagle, 868 F.2d 1342, 1348-49 (3d Cir. 1989), *cert. denied*, 110 S. Ct. 261 (1989).

[160] *See* Members of City Council v. Taxpayers for Vincent, 466 U.S. at 819-20 (Brennan, J., dissenting).

[161] *See Leading Cases of the 1983 Term*, 98 HARV. L. REV. 87, 224-25 (1984) ("The choice of a medium is in itself the choice of an expressive message. Thus, to the extent that the manner of expressive conduct is directly regulated by even content-neutral regulation, both the medium and the message of expressive conduct are lost.").

[162] *See* Note, *Symbolic Conduct*, 68 COLUM. L. REV. 1091, 1108 (1968) [hereinafter Note, *Symbolic Conduct*].

by mere words railing against the United States. Similarly, nude dancing, whether in the ballet or in a bar, would obviously lose much of its unique meaning if the medium of nudity were removed.

Symbolic conduct provides a medium for communication for a great many for whom the medium of "pure speech" is either largely unavailable or ineffective. The use of verbal expression requires a certain level of skill and sophistication. Blocking symbolic speech denies a medium of effective communication for those that lack the ability to articulate verbally.[163] Moreover, access to verbal media can be costly. As Professor Kalven has suggested, symbolic speech is "the poor man's printing press."[164]

The *O'Brien* test is not just a particularized form of the time, place, and manner doctrine, as the Court has on occasion suggested.[165] Medium-based regulation of expression can eliminate a unique aspect of the content of expression that is obtained only through the medium that is regulated. Medium-based regulations should be scrutinized with these considerations in mind. A regulation is medium-based only if it cuts off entirely an expressive medium.[166] For example, the statute prohibiting the destruction of Selective Service registration cards in *O'Brien* is medium-based. A person could not burn his draft card as a means of communicating without violating the statute. By contrast, the regulation proscribing overnight camping in Lafayette Park in *Community for Creative Non-violence* is not medium-based. A person is not completely denied the medium of overnight camping as a means of communicating. Rather, she cannot use the medium in Lafayette Park. Medium-based regulation must be carefully distinguished from reasonable time, place, and manner restrictions. The ban on overnight camping in Lafayette Park is a reasonable place restriction. Conducting a protest against homelessness by overnight camping would probably be far more effective in Lafayette Park, located across from the White House, than some campground outside of Washington entirely. The proper concern, nevertheless, is whether an entire medium is closed off to expressive use, rather than whether the medium is available in its most effective context.

If a regulation is medium-based -- that is, it eliminates entirely the use of a particular medium for expressive purposes -- it should be subjected to heightened judicial scrutiny.[167] Thus, medium-based regulations should be deemed constitutionally acceptable only if justified by a substantial governmental interest and there

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[163] *See* Note, *Ambiguous Conduct*, *supra* note 111, at 471; Note, *Symbolic Conduct*, *supra* note 162, at 1106-07.

[164] Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 Sup. Ct. Rev. 1, 30.

[165] *See supra* note 142 and accompanying text.

[166] *See* Schneider v. New Jersey, 308 U.S. 147 (1939) (complete ban on distributing handbills); *cf.*, Members of City Council v. Taxpayers for Vincent, 466 U.S. at 812 ("While the First Amendment does not guarantee the right to employ every conceivable method of communication at all times and in all places, a restriction on expressive activity may be invalid if the remaining modes of communication are inadequate." (citations omitted)).

[167] *See Taxpayers for Vincent*, 466 U.S. at 820 (Brennan, J., dissenting).

are no less restrictive alternatives for achieving that interest than the complete ban on the use of the medium for expression.[168]

Take for example a tax protester who expresses his opposition to the federal income tax by withholding payment of his taxes. The government's interest in requiring the tax protester to pay his income tax is certainly a substantial, if not a compelling one with constitutional support.[169] Furthermore, the interest in the efficient collection of taxes cannot be achieved by any less restrictive alternative that permits taxpayer to engage in his expressive conduct -- the withholding of his taxes.[170] By contrast, the interest in promoting patriotism and honoring national symbols can be achieved through means less restrictive than criminally sanctioning the desecration of the flag.

This proposal for heightened scrutiny of medium-based regulation of expression would constitute a dramatic departure from present constitutional doctrine. The relatively lax *O'Brien* standard would be scuttled, and the holding in *O'Brien* itself would be susceptible to attack. The heightened standard would nevertheless give a more complete meaning and scope to the protection of free expression guaranteed by the First Amendment.

III. GOVERNMENTAL SYMBOLIC SPEECH

At least in terms of constitutional law, government is not ordinarily thought of as a "speaker." Nevertheless, government "speaks" on a wide variety of issues and topics everyday.[171] Moreover, it quite often uses symbols and symbolic conduct for expressive purposes. The symbols through which government speaks can be found all around us. Public monuments, flags, seals, ceremonies, and even government buildings all are imbued with meaning that the government intends to communicate through the symbol. The Lincoln Memorial, for instance, is not merely a good likeness of Lincoln. Rather, it is intended to communicate a resounding tribute to the 16th president and the principles that he exemplified. A twenty-one gun salute is not just the discharge of rifles into the air; it is conduct expressing respect and honor. And the Supreme Court, in order to do its business, does not necessarily have to have an impressive building to occupy; the building, nevertheless, expresses the importance and solemnity of the business of the Court.

Government speech, however, is not treated the same way as individual speech by the Constitution. Whereas individual speech is affirmatively protected by

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[168] *Id.* at 824 (Brennan, J., dissenting).

[169] *See* U.S. CONST. art. I, §8; amend. XVI.

[170] *See e.g.*, United States v. Malinowski, 472 F.2d 850, 852 (3d Cir.), *cert. denied*, 411 U.S. 970 (1973) (false information on withholding exemption form to protest Vietnam War).

[171] For excellent discussions of the notion of governmental speech, see M. YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA (1983); Shiffrin, *Government Speech*, 27 U.C.L.A. L. REV. 565 (1980).

the First Amendment, government speech is not. Moreover, while the restriction of individual speech on the basis of its content is severely limited by the First Amendment, the Constitution, in some circumstances, actually requires the suppression of some government speech on the basis of its content.

A. *Governmental Symbolic Speech and the First Amendment*

Government speech does not claim the same special protection under the First Amendment that individual speech does. The First Amendment protects individual expression from government regulation. It offers no similar protection to expression by the government.[172] As Professor Yudof has aptly noted, governmental entities are "not fledgling communicators in need of protection from the community's excesses."[173] On the flip side of the coin, the First Amendment also does not preclude the government from controlling its own expression in ways that it could not control individual expression.[174]

Thus, government can regulate its own speech on the basis of its content, for example. It can preclude its own expression on a particular viewpoint or on an entire topic. Take the example of a radio or television station owned and operated by the government. Government, as editor, is permitted in these circumstances to decide what to put on the air and what not to. These editorial decisions do not necessarily offend the First Amendment.[175]

Although government speech is not protected by the First Amendment, government nevertheless can enter the marketplace of ideas. Indeed, while government can restrict its own expression on a particular viewpoint without violating the First Amendment, it can also take a certain viewpoint to the exclusion of others.[176] In other words, government speech need not be neutral; it can take sides. Obvious examples are patriotic celebrations of the Fourth of July and the bicentennial of the Constitution. Government qua government is permitted to extol the virtues of American democracy through words or symbolic conduct. Even though the decision to express such a viewpoint and suppress the opposing viewpoint -- at least in its own expression -- are content-based determinations, the First Amendment is not impli-

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[172] *See* Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94, 139 (1973) (Stewart, J., concurring) ("The First Amendment protects the press *from* governmental interference; it confers no analogous protection on the Government.").

[173] Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 TEX. L. REV. 863, 867 (1979).

[174] *Id.* at 139 n.7 (Stewart, J., concurring); Serra v. United States Gen. Serv. Admin., 847 F.2d 1045, 1048 (2d Cir. 1988); *see generally* EMERSON, *supra* note 87, at 700 ("The purpose of the First Amendment is to protect private expression and nothing in the guarantee precludes the government from controlling its own expression or that of its agents.").

[175] *See* Muir v. Alabama Educational Television Comm'n, 688 F.2d 1033, 1038, 1043-44 (5th Cir. 1982) (en banc), *cert. denied*, 460 U.S. 1023 (1983).

[176] Professor Kamenshine suggests that there are limits to government's advocacy of political viewpoints. *See* Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CAL. L. REV. 1104, 1110-15 (1979).

cated.

This is not to say that government speech is entirely unrestricted. The Constitution does provide certain content-neutral restrictions on government speech. Government, through its own expression, may not "drown out" individual speech.[177] This would in effect be doing through expression what it cannot do through regulation. Also, government may be more limited when it has a captive or youthful audience than when it does not.[178] Furthermore, government may not compel individuals to be its message bearers. Thus, although government may communicate a specific viewpoint of a political or ideological nature, it cannot force individuals to be the conduit for communicating the viewpoint. New Hampshire, for instance, can take as its state motto "Live Free or Die," but it cannot compel an individual to display that motto on his private property.[179] In the oft-quoted language of Justice Jackson in *West Virginia Board of Education v. Barnette*:[180]

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.[181]

B. *Content-Based Restrictions on Government Symbolic Speech*

In addition to the content-neutral restrictions on government speech that prevent it from drowning out individual speech or from using individuals as conduits for its speech, the Constitution imposes certain content-based restrictions on government speech. The Equal Protection Clause, for example, would be implicated by government speech promoting racial discrimination. Even though government is not generally restricted from expressing viewpoints on political and social questions, government's use of symbols connoting a racist message would violate the principles of equal protection.[182] By far, the most significant content-based restriction on government symbolic speech, nevertheless, is found in the Establish-

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[177] *See* Shiffrin, *supra* note 171, at 595-601; Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).

[178] See Yudof, supra note 173, at 874-91; *compare* Engel v. Vitale, 370 U.S. 421 (1962) (school prayer) *with* Marsh v. Chambers, 463 U.S. 783 (1983) (legislative prayer).

[179] Wooley v. Maynard, 430 U.S. 705, 715 (1977). *See also* Serra v. United States Gen. Serv. Admin., 847 F.2d at 1048; Kamenshine, *supra* note 176, at 1126-28; Yudof, *supra* note 173, at 891-94.

[180] 319 U.S. 624 (1943).

[181] *Id.* at 642.

[182] In the context of school desegregation cases, federal courts have enjoined the use of the Confederate flag and other Confederate symbols in desegregated public schools on the grounds that they symbolize racial animus. *E.g.*, Augustus v. School Bd. of Escambia Cty., 507 F.2d 152, 157-58 (5th Cir. 1975); Smith v. Tammany Parish School Bd., 316 F. Supp. 1174, 1176 (E.D.La. 1970) ("The Confederate battle flag. has become a symbol of resistance to school integration and, to some, a symbol of white racism in general."), *aff'd*, 448 F.2d 414 (5th Cir. 1971); *see also* Crosby by Crosby v. Holsinger, 852 F.2d 801, 802 (4th Cir. 1988); Melton v. Young, 465 F.2d 1332, 1333-34 (6th Cir. 1972), *cert. denied*, 411 U.S. 951 (1973); *but see* NAACP v. Hunt, 891 F. 2d 1555, 1564-66 (11th Cir. 1990) (holding that Flying of Confederate flag over the dome of Alabama State Capital does not constitute impermissible governmental expression); Banks v. Muncie Community Schools, 433 F.2d 292, 297, 299 (7th Cir. 1970) (although school's use of flag

ment Clause.

The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion."[183] The meaning of this somewhat vaguely phrased provision has been the basis for continued, and sometimes vitriolic debate among the members of the Supreme Court[184] and commentators.[185] Although a popular metaphor, the Establishment Clause, as interpreted by the Court's occasionally incongruent decisions, does not "build[] a wall of separation between church and State."'[186] Instead, the wall is frequently breached by constitutionally permissible government recognition and accommodation of religion. Thus, rather than a strict separation of church and state, the Establishment Clause has come to be interpreted to impose a hazy, oft-times indiscernible demarcation between permissible and impermissible government involvement in religious matters.

The Supreme Court's cases have not resulted in a single, easily applied test or rule for the Establishment Clause. In attempting to give content to the language of the Establishment Clause, Justice Black stated:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state or the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will

resembling Confederate banner and of names "Southern Aires" for glee club and "Southern Belle" for homecoming queen were offensive to black students, there was no evidence that black students had been denied access to school facilities or activities because of the symbols, and their selection, through a student election, was not unconstitutional). Interestingly, two states -- Georgia and Mississippi -- have incorporated the Confederate flag in their state flags.

[183] U.S. CONST. Amend. I.

[184] *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 111 (1985) (Rehnquist, J., dissenting); Wolman v. Walter, 433 U.S. 229, 262 (1977) (Powell, J., concurring in part, dissenting in part); Lemon v. Kurtzman, 403 U.S. 602, 671 (White, J., dissenting), (1971). As Justice White, with no small degree of understatement, summed up:

> Establishment Clause cases are not easy; they stir deep feelings; and we are divided among ourselves, perhaps reflecting the different views on this subject of the people of this country. What is certain is that our decisions have tended to avoid categorical imperatives and absolutist approaches at either end of the range of possible outcomes. This course sacrifices clarity and predictability for flexibility, but this promises to be the case until the continuing interaction between the courts and the States... produces a single, more encompassing construction of the Establishment Clause.

Committee for Pub. Educ. & Religious Liberty v. Reagan, 444 U.S. 646, 662 (1980).

[185] *See, e.g.*, R. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION (1982); L. PFEFFER, RELIGION, STATE, AND THE BURGER COURT (1984); Bradley, *Imagining the Past and Remembering the Future: The Supreme Court's History of the Establishment Clause*, 18 CONN. L. REV. 827 (1986); Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673 (1980); Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1 (1961); Tushnet, *The Constitution of Religion*, 18 CONN. L. REV. 701 (1986).

[186] Reynolds v. United States, 98 U.S. 145, 164 (1878) (quoting Thomas Jefferson's reply to an address by a committee of the Danbury Baptist Association (Jan. 1, 1802)).

> or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*.[187]

Later cases brought further, if not entirely satisfying, development of the analysis under the Establishment Clause. In *Lemon v. Kurtzman*,[188] the Court announced a three-part "test" derived from earlier precedents: "First, the [challenged practice] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the [challenged practice] must not foster 'an excessive government entanglement with religion.'"[189] Although much maligned,[190] the so-called *Lemon* test remains the accepted analytical device for Establishment Clause challenges.[191]

Modifications or alternatives to the *Lemon* test have been proposed on frequent occasions. The most successful refinement has been that of Justice O'Connor. She has maintained that the central thrust of the Establishment Clause is its prohibition against "government from making adherence to a religion relevant in any way to a person's standing in the political community."[192] This principle is violated if government "endorses" religion because "[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[193] The "endorsement" test initiated by Justice O'Connor has found its way into at least two majority opinions to date.[194]

Courts have had occasion to apply the *Lemon*/endorsement analysis to a variety of public displays of religious symbols. In *Lynch v. Donnelly*,[195] the Supreme Court upheld a municipality's Christmas display, which included a traditional nativity scene along with "a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cut-out figures representing such

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[187] Everson v. Board of Educ., 330 U.S. 1, 15-16, (1947).

[188] 403 U.S. 602 (1971).

[189] *Id.* at 612-13 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)) (citations omitted).

[190] *See supra* notes 184-85.

[191] *See, e.g.*, Bowen v. Kendrick, 108 S. Ct. 2562, 2570 (1988); Edwards v. Aguillard, 482 U.S. 578, 583 (1987).

[192] Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring).

[193] *Id.* at 688 (O'Connor, J., concurring).

[194] County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter, 109 S. Ct. at 3100-01; School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 389-92 (1985). *See also* Edwards v. Aguillard, 482 U.S. 578, 593 (1987); Wallace v. Jaffree, 472 U.S. 38, 60 (1985).

[195] 465 U.S. 668 (1984).

characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, [and] a large banner that read[] "SEASONS GREETINGS."[196] The Court concluded that the inclusion of the creche in the display, when viewed in the overall context of the whole display and the Christmas holiday season, was intended only as part of the celebration of the holiday season and to depict the origins of the holiday.[197] Any benefit to religion from the inclusion of the religious symbol of the creche was "indirect, remote, and incidental."[198]

Writing separately in a concurring opinion, Justice O'Connor elaborated. She determined that, after carefully considering the unique factual context of the challenged practice including its "history and ubiquity,"[199] an objective view of the holiday display would not convey a message of governmental endorsement of religion. Rather, including the creche in a display of other traditional, secular symbols of the Christmas season indicated that the city was promoting the celebration of the holiday season and not endorsing the religious content of the creche itself.[200]

Courts have been far less accepting of circumstances in which government has displayed a religious symbol, such as a creche, without accompanying secular symbols. For example, a city-owned creche located on the front lawn of city hall, standing alone, has been held unconstitutional because the "display called attention to a single aspect of the Christmas holiday -- its religious origin. A creche standing alone without any of the nonreligious symbols of Christmas affirms the most fundamental of Christian beliefs -- that the birth of Jesus was not just another historical event."[201] However, the exact same display on the city hall lawn, once combined with a Christmas tree, Santa Claus, carolers, snowmen, and other similar secular Christmas symbols, conveys support for the holiday season and not the religious element of the holiday, and is therefore constitutional.[202]

Courts have held unconstitutional the display of Latin crosses in Christmas holiday displays. Unlike a creche, a cross has no secular element to its message. A creche can be used as a reminder of the origins of the holiday without necessarily endorsing a religious message or belief. By contrast, "the only connection that a

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[196] *Id.* at 671.

[197] *Id.* at 679-81.

[198] *Id.* at 683. To a large extent, the majority based its conclusion that the inclusion of the creche constituted only an indirect or incidental benefit to religion by comparing it to other practices -- for example, legislative chaplains, Marsh v. Chambers, 463 U.S. 783 (1983) -- that have been previously upheld or assumed to be permissible. *Id.* at 676-77, 682-83. For a critique of this comparative analysis, see Dorsen & Sims, *The Nativity Scene Case: An Error in Judgment*, 1985 U. ILL. L. REV. 837; Van Allstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall -- A Commentary on Lynch v. Donnelly*, 1984 DUKE L.J. 770.

[199] *Id.* at 693 (O'Connor, J., concurring).

[200] *Id.* at 692-93 (O'Connor, J., concurring).

[201] American Civil Liberties Union v. City of Birmingham, 791 F.2d 1561, 1566 (6th Cir.), *cert. denied*, 479 U.S. 939 (1986).

[202] Mather v. Village of Mundelein, 864 F.2d 1291, 1292-93 (7th Cir. 1989) (per curiam).

cross has to Christmas is as a religious symbol."[203] Because of this especially strong religious symbolism of the cross, the inclusion of other secular symbols in a holiday display with a cross will not eliminate the religious message of the display, at least where the cross is prominent.[204]

Similarly, courts have not viewed with favor other non-holiday uses of crosses by government. For example, the inclusion in a county seal of a Latin cross with the motto "CON ESTAS VENCEMOS," meaning in Spanish "With This We Conquer," violated the Establishment Clause.[205] The seal, which was used on county documents and police cars, imparted a message of governmental endorsement of Christianity.[206] Similarly, a brightly lighted, sixty-five foot tall cross, erected as a war memorial, on a Marine Corps base conveyed a message of governmental endorsement of Christianity.[207]

The Establishment Clause thus provides a serious content-based restriction on government symbolic speech. Government may not employ religious symbols when the use of those symbols will convey a message of governmental sponsorship, support, or preference for religion.

C. *Mixed Expression: Governmental Endorsement of Individual Symbolic Speech*

Government speech does not always take the form of expression that government itself initiates. Government can also speak by endorsing or embracing the message of a private speaker. When the mayor's office permits a private organiza-

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[203] Libin v. Town of Greenwich, 625 F. Supp. 393, 398 (D. Conn. 1985); *accord* American Civil Liberties Union v. City of St. Charles, 794 F.2d 265, 271-73 (7th Cir.), *cert. denied*, 479 U.S. 961 (1986).

[204] *See City of St. Charles*, 794 F.2d at 267, 271 (prominent lighted cross atop fire department building); American Civil Liberties Union of Mississippi v. Mississippi State General Services Adm'n, 652 F. Supp. 380, 381-82, 384 (S.D. Miss. 1987) (lights in windows of public building turned on at night in shape of cross one one side, and in shapes of bells, Christmas tree, and "Joy" and "Peace" on others).

[205] Friedman v. Board of County Comm'rs of Bernalillo County, 781 F.2d 777, 779 (10th Cir. 1985) (en banc), *cert. denied*, 476 U.S. 1169 (1986).

[206] *Id.* at 782 ("[A] person approached by officers leaving a patrol car emblazoned with this seal could reasonably assume that the officers were Christian police, and that the organization they represented identified itself with the Christian God. A follower of any non-Christian religion might well question the officers' ability to provide even-handed treatment. A citizen with no strong religious conviction might conclude that secular benefit could be obtained by becoming a Christian."). *See also* Foremaster v. City of St. George, 882 F.2d 1485, 1491-92 (10th Cir. 1989) (city logo depicting St. George Temple of the Church of Latter Day Saints).

[207] Jewish War Veterans v. United States, 695 F. Supp. 3, 4, 14 (D.D.C. 1988). *See also* Stone v. Graham, 449 U.S. 39, 41-42 (1980) (posting of Ten Commandments in public schools); Gilfillian v. City of Philadelphia, 637 F.2d 924, 928, 930-31 (3d Cir. 1980), *cert. denied*, 451 U.S. 987 (1981) (city's erection of platform and cross for use as altar by Pope John Paul II during visit to Philadelphia); Greater Houston Chapter of the American Civil Liberties Union v. Eckels, 589 F. Supp. 222, 235 (S.D. Tex. 1984), *appeal dismissed*, 755 F.2d 426 (5th Cir.), *cert. denied*, 474 U.S. 980 (1985) (erection of three crosses and a Star of David as part of war memorial gave impression that government only honored Christian and Jewish war dead); *but cf.*, Hewitt v. Joyner, 705 F. Supp. 1443, 1444-45, 1448-50 (C.D. Cal. 1989) (county ownership and maintenance of park containing religious sculptures did not convey message of endorsement).

tion to display a banner announcing an anti-smoking campaign across the entrance of city hall -- a place that private banners would not ordinarily be permitted -- the message is not simply one of the private group encouraging smokers to quit, but that the local government supports the group's efforts. Although, like government-initiated speech, government is not proscribed as a general matter from endorsing the message of individual private speakers, its endorsement does have limits. In particular, the Establishment Clause once again provides a strict content-based restriction on government-endorsed speech.

The restriction of government-endorsed speech, however, has a dimension that restrictions on government-initiated speech has not: the limitations on government-endorsed speech may implicate the free expression of the individual speaker that is being endorsed by the government. The Establishment Clause does not limit individual religious expression;[208] rather, it limits government endorsement of it. Therefore, imposing content-based restrictions on government-endorsed speech requires a delicate balancing of the free speech rights of individuals against the constitutional mandate that government not endorse religion. This tension between the competing constitutional principles of free expression and nonestablishment is no more serious than when the individual expression that the government endorses takes place in a "public forum."

A public forum is a place that is held open for assembly and expression.[209] There are three categories of public fora: "traditional," "designated," and "limited."[210] Traditional public fora are those place such as streets, sidewalks, and parks that "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[211] In a traditional public forum, government may impose reasonable time, place, and manner restrictions on individual expression.[212] However, government may not ban all expressive activity in a traditional public forum,[213] and expression may be regulated on the basis of its content only if narrowly drawn to accomplish a compelling governmental interest.[214]

Aside from the streets, sidewalks, and parks that constitute traditional public fora, public property does not become a public forum merely because it is owned by government. Public property other than traditional public fora need not be held open for individual expression. Nevertheless, once government opens up public property for expressive purposes, its power to exclude some expression but not other on the

[208] Indeed, the Free Exercise Clause affirmatively protects it. *See* Cantwell v. Connecticut, 310 U.S. 296 (1940).

[209] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

[210] *See* Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 799-800 (1985).

[211] Hague v. Committee for Indust. Org., 307 U.S. 496, 515 (1939); *accord* Carey v. Brown, 447 U.S. 455, 460 (1980); Hudgens v. NLRB, 424 U.S. 507, 515 (1976); Cox v. New Hampshire, 312 U.S. 569, 574 (1941).

[212] United States v. Grace, 461 U.S. 171, 177 (1983); *see supra* notes 133-40 and accompanying text.

[213] *Perry*, 460 U.S. at 45.

[214] Boos v. Barry, 485 U.S. at 321; *Grace*, 461 U.S. at 177; *Perry*, 460 U.S. at 45.

basis of its content is limited.[215] For example, a local school board may permit private groups to use a school auditorium for a variety of expressive purposes. The local Rotary Club uses the auditorium on Monday night for a speaker on international affairs. On Tuesday night, a Boy Scout troop uses the auditorium for a meeting. On Wednesday night, a local orchestra performs a free concert. The school board is not required to open up the auditorium for use by these groups. In fact, it is not required to keep it open for such uses. However, once it has created a designated public forum in this fashion, its restriction on access to it is the same as that for traditional public forum.[216] It may impose reasonable time, place, and manner requirements on the use of the auditorium -- for example, it can require that the auditorium be used by private groups only when not used for school purposes -- but may not exclude its use for expressive activities by groups on the basis of the content of those expressive activities absent a compelling justification.[217]

Finally, just because government has opened up public property for some expressive conduct does not necessarily mean it has created a public forum for all purposes. A public forum can be created for a limited purpose. For example, a public forum can be created for use by certain groups, so long as the category of groups to which access is limited is not content-based. Thus, a school can create a limited public forum by making school space available to student groups.[218] The school may exclude non-student groups from using the rooms made available, but it cannot exclude some student groups from using the space on the basis of the content of the group's expressive activities unless the restriction is narrowly drawn and necessary to a compelling interest.[219] Similarly, a public forum may be limited to the discussion of a certain topic.[220] For instance, a local zoning board can open its meetings up to public debate on the question of a new retail shopping complex. Although it cannot exclude expression on the basis of a private speaker's position on this question, it does not open the meeting to speech on all topics.[221]

Because individual expression in a public forum is afforded the greatest protection under the First Amendment, the sites of the individual religious expression is a critical factor in considering whether government is endorsing the religious message of the expression in violation of the Establishment Clause. A public forum, simply because it is located on public property, "does not confer any imprimatur of state approval on religious sects or practices" any more than it would indicate governmental support for a political candidate shaking hands and greeting passers-by on a street corner or in a park.[222] On the other hand, individual religious

[215] *Perry*, 460 U.S. at 46-47.

[216] Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 555-56 (1975).

[217] *Perry*, 460 U.S. at 46.

[218] Widmar v. Vincent, 454 U.S. 263, 267 (1981).

[219] *Id.* at 268-70.

[220] City of Madison Joint School Dist. v. Wisconsin Employment Relations Comm'n, 429 U.S. 167, 175 & n.8 (1976).

[221] *Id.* at 175-76 *see also Perry*, 460 U.S. at 46 n.7.

[222] *Widmar*, 454 U.S. at 274; *see also* Smith v. County of Albermarle, 895 F.2d 953, 962 (4th Cir. 1990) (Blatt,

expression that is permitted on public property other than a public forum would be a strong indication of governmental approval of the religious message or the group making the message.[223]

The location of a display of a privately owned religious symbol is but one factor courts have considered in assessing whether the symbol is endorsed by government in violation of the Establishment Clause. The most significant factors examined in this inquiry, other than the nature of the forum in which the symbol is displayed, have been the extent of the indicia of governmental authority surrounding the symbol, the temporary or permanent nature of the symbol, and the presence of a disclaimer or sponsorship sign.

Courts have found that private religious symbols that are actually *inside* a government building will convey governmental endorsement of religion. For instance, placing a privately owned creche in the lobby of city hall "inevitably creates a clear and strong impression that the local government tacitly endorses Christianity" because "every display and activity in the building is implicitly marked with the stamp of government approval."[224] Similarly, courts have held unconstitutional private displays of creches and menorahs that were located just outside or in close proximity to a central government building, such as city hall, even if the display was located in a public forum.[225] By contrast, at least when the public forum is not located next to or associated closely with a central government building, courts have considered the fact that the religious display is located in a public forum as a substantial consideration negating governmental endorsement.[226]

A permanent lighted cross erected by a private group in a state park has been held to violate the Establishment Clause.[227] However, the religious symbol need not be permanent to convey government support of the symbol's religious message. Courts have found that "semi-permanent" displays -- that is, a display that is erected and left standing for a period of time before being dismantled -- carries with it a potentially strong connotation of government approval.[228]

J., dissenting); Kaplan v. City of Burlington, 891 F.2d 1024, 1029-30 (2d Cir. 1989) (Meskill, J., dissenting); American Jewish Congress v. City of Chicago, 827 F.2d 120, 132 (7th Cir. 1987) (Easterbrook, J., dissenting).

[223] *See* County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter, 109 S. Ct. at 3104 n.50.

[224] American Jewish Congress v. City of Chicago, 827 F.2d 120, 128 (7th Cir. 1987); *accord Allegheny County*, 109 S. Ct. at 3104.

[225] *Kaplan*, 891 F.2d at 1026-27 (display of privately sponsored menorah in "City Hall Park" -- a traditional public forum); Smith v. County of Albermarle, 895 F.2d 953 (privately sponsored creche display on front lawn of city hall -- a designated public forum).

[226] *See Kaplan*, 891 F.2d at 1031-32 (Meskill, J., dissenting); McCreary v. Stone, 739 F.2d 716, 728-29 (2d Cir. 1984), *aff'd by an equally divided Court sub nom.* Board of Trustees v. McCreary, 471 U.S. 83 (1985); Grutzmacher v. Public Building Comm'n, 700 F. Supp. 1497, 1502-03 (N.D. Ill. 1988).

[227] American Civil Liberties Union v. Rabun County Chamber of Commerce, Inc., 698 F.2d 1098, 1110-11 (11th Cir. 1983).

[228] *Kaplan*, 891 F.2d at 1030; *Smith*, 895 F.2d 953; *but see Kaplan*, 891 F.2d at 1032 (Meskill, J., dissenting) (suggesting that period during which menorah was displayed was relatively short).

In several cases, the governmental body involved had required that a sign identifying the sponsor of the display or disclaiming government sponsorship accompany the display. The courts reaction to this attempt at negating a message of government endorsement has depended to a large degree on the pervasiveness of the symbols of government near the display. Thus, courts have disregarded disclaimer or sponsorship signs when the indicia of governmental support are so pervasive that the signs are rendered ineffective or meaningless.[229] This does not mean that a sign cannot be effectively employed to limit any lingering suggestion of government endorsement, at least if the display is not overwhelmed by the symbols of government authority.[230]

Government symbolic speech is restricted on the basis of its content by the Establishment Clause if it endorses individual symbolic speech with a religious message. Generally speaking, the greater the presence of symbols of government authority surrounding the display, even if the display is located in a public forum, the greater the likelihood that the display will communicate a message of unconstitutional government endorsement.

D. *Endorsement as Symbolic Speech*

Judges have frequently complained about the nature of the prevailing endorsement analysis under the Establishment Clause. The fact-oriented endorsement analysis inappropriately elevates "the role of architectural judgment in constitutional law."[231] As the Seventh Circuit has lamented, "[d]etails that would be important to interior decorators do not spell the difference between constitutionality and unconstitutionality."[232] For example, the endorsement analysis has been criticized as placing too much emphasis on the distance between objects in a display.[233] Because of the significance placed on the presence of other secular holiday symbols, the endorsement test has been lampooned as the "St. Nicholas, too" test.[234] Judge Easterbrook has remarked that "[i]t would be appalling to conduct litigation under the Establishment Clause as if it were a trademark case, with experts testifying about whether one display is really like another, and witnesses testifying that they were offended -- but would have been less so were the creche five feet closer to the jumbo candy cane."[235]

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[229] County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter, 109 S. Ct. at 3105; *Kaplan*, 891 F.2d at 1029; American Jewish Congress v. City of Chicago, 827 F.2d at 128; *Smith*, 895 F.2d 953.

[230] *Allegheny County*, 109 S. Ct. at 3114-15; *Kaplan*, 891 F.2d at 1033-34 (Meskill, J., dissenting); *McCreary*, 739 F.2d at 728; American Civil Liberties Union v. Wilkinson, 701 F. Supp. 1296, 1312-13 (E.D. Ky. 1988), *aff'd*, 895 F.2d 1098 (6th Cir. 1990).

[231] Mather v. Village of Mundelein, 864 F.2d at 1293 (per curiam).

[232] *Id.*

[233] *Id.* at 1298 (Easterbrook, J., concurring) ("[T]here is no constitutional virtue in the ten-foot pole."); American Jewish Congress v. City of Chicago, 827 F.2d at 131 (Easterbrook, J., dissenting); *contra Mather*, 864 F.2d at 1299 (Flaum, J., dissenting).

[234] American Civil Liberties Union v. City of Birmingham, 791 F.2d at 1567 (Nelson, J., dissenting).

[235] *American Jewish Congress*, 827 F.2d at 130 (Easterbrook, J., dissenting).

Much of the unhappiness with the present approach can be attributed to the relative unpredictability of the Supreme Court's handling of cases involving the public display of religious symbols.[236] The multiplicity of opinions and alignments in *Allegheny County* did not help matters.[237] Some clarity or at least understanding for the need for a fact-specific analysis can be derived from comparing the Establishment Clause endorsement analysis with the inquiry necessary to identifying whether individual conduct is expressive for First Amendment purposes.

Individual conduct is deemed expressive under the First Amendment if it: (1) is intended by the speaker to communicate a message; and, (2) can be reasonably understood as communicating some message.[238] The endorsement analysis under the Establishment Clause is, in a sense, a particularized species of this two-pronged test. The aim of the endorsement analysis is, after all, to assess whether government has expressed, through conduct or otherwise, support, sponsorship, or preference for religion in violation of the Establishment Clause. It follows, therefore, that the same two factors that are essential to identifying expression generally are critical to identifying expression of a particular message -- to wit, the endorsement of religion. Indeed, Establishment Clause doctrine has developed along these two lines. Action by government that is intended to endorse religion has been held unconstitutional.[239] And action that can be reasonably understood to express endorsement of religion violates the principle of nonestablishment.

Just as the question of whether a person's conduct can be reasonably understood as communicating a message requires a careful consideration of the factual context in which the conduct takes place,[240] so does the issue of whether government's conduct can be reasonably understood as expressing endorsement of religion. The necessity for careful scrutiny of the different factual situations of holiday displays cannot easily be avoided, unless the level of government support for religion that we are willing to tolerate as a constitutional matter is substantially raised.[241] Otherwise, courts will continue to be faced with the task of considering, given a specific factual context, whether a reasonable observer would understand the challenged governmental practice as endorsing religion.

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[236] *See, e.g., Mather*, 864 F.2d at 1293 (per curiam).

[237] *See supra* notes 42-81 and accompanying text.

[238] *See supra* note 87 and accompanying text.

[239] Wallace v. Jaffree, 472 U.S. 38, 60 (1985) (moment-of-silence statute enacted for sole purpose of expressing state's endorsement of prayer). Understanding governmental endorsement of religion as symbolic expression by the government also explains why intent or purpose is relevant to the Establishment Clause but not, for example, to governmental regulation of expression. *See supra* note 149.

[240] *See supra* notes 109-13 and accompanying text.

[241] Indeed, that is the suggestion of those judges who criticize the factual-oriented endorsement inquiry. *See, e.g.*, County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter, 109 S. Ct. at 3141-45 (Kennedy, J., concurring in part, dissenting in part); American Jewish Congress v. City of Chicago, 827 F.2d at 131-33 (Easterbrook, J., dissenting); American Civil Liberties Union v. City of Birmingham, 791 F.2d at 1569-72 (Nelson, J., dissenting).

IV. UNDERSTANDING SYMBOLIC SPEECH

A. *The Power of Symbols*

Both individuals and government speak through symbols and symbolic conduct. The symbols and the symbolic conduct that they use to communicate may be powerful or weak, just as the message itself may be momentous or trivial. The protection they receive from the First Amendment, however, should not depend entirely on either the content of the expression or its medium.

Expression occurs in a wide variety of ways. At one end of the range of media is verbal language. Oral or written, it is what the courts have traditionally called "pure speech." One small step removed from verbal language are systems of non-verbal language, such as the sign language of the deaf or the hand signals a third-base coach sends to a batter. No one would suggest that any principled distinction can be made between the medium of vocalized words and that of words communicated through finger-gestures. A little further along the spectrum are signs and symbols: a peace sign, a traffic light, a flag, a Menorah. Finally, at the other end of the spectrum, there is conduct.

All of these different media can be expressive. Words spoken eloquently can be powerful, moving speech. But so can symbolic conduct. And in many cases, the use of a symbol or symbolic conduct rather than spoken or written words is more powerful. Government can express its favor for a particular religious faith by holding a press conference or passing a legislative resolution. It also can express that preference by affixing that faith's symbol on all government buildings. It is difficult to discern any principled basis for distinguishing between the spoken or written endorsement and the symbolic endorsement. Similarly, an individual can express his opposition to the Supreme Court's most recent abortion decision by displaying a banner on the sidewalk outside the Supreme Court building. In the alternative, he could silently tear up a copy of the opinion. Both convey his message, and both should be protected forms of expression.

As Justice Jackson wrote in *West Virginia State Board of Education v. Barnette*:[242]

> Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design. The State announces rank, function, and authority through crowns and maces, uniforms and black robes; the church speaks through the Cross,

[242] 319 U.S. 624 (1943).

> the Crucifix, the altar and shrine, and clerical raiment. Symbols of the State often convey political ideas just as religious symbols come to convey theological ones. Associated with many of these symbols are appropriate gestures of acceptance or respect; a salute, a bowed or bared head, a bended knee. A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn.[243]

The "short cut from mind to mind" is what gives symbols their special quality, a quality that is not always available through the spoken or written word, and a quality that invites and deserves protection from oppressive governmental interference.

The importance of expression as a matter of constitutional protection should not depend entirely upon what the medium for the message is, any more than what the message is determines the constitutional stature of the speech. To denigrate the constitutional status of symbols and symbolic conduct as expressive media does not merely preclude certain messages or viewpoints from effectively entering the marketplace of ideas. It would render the marketplace a sterile place, empty of color and vigor.

B. *Johnson and Allegheny County Revisited*

This inquiry ends where it began -- with an analysis of *Johnson* and *Allegheny County*. In *Johnson*, the Supreme Court recognized the protected status of an individual's symbolic act of burning the American flag. In *Allegheny County*, the Court found permissible governmental symbolic recognition of the holiday season in a display including a Christmas tree and a Menorah but found impermissible governmental symbolic recognition of Christmas in a display of a creche.

The American flag has tremendous emotion-ladden meaning for most Americans. And, as Chief Justice Rehnquist and Justice Stevens emphasized in their dissenting opinions in *Johnson*, it is not just any symbol.[244] Yet, it still is a symbol.

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[243] *Id.* at 632-33.

[244] Texas v. Johnson, 109 S. Ct. at 2549-52 (Rehnquist, C.J., dissenting); *Id.* at 2556 (Stevens, J., dissenting); *see also id.* at 2548 (Kennedy, J., concurring) ("[T]he flag holds a lonely place of honor in an age when absolutes are distrusted and simple truths are burdened by unneeded apologetics."); Smith v. Goguen, 415 U.S. 566, 603 (1974) (Rehnquist, J., dissenting) ("[The flag] is not merely cloth dyed red, white and blue, but also the one visible manifestation of two hundred years of nationhood -- a history compiled by generations of our forebears and contributed to by streams of immigrants from the four corners of the globe."); Street v. New York, 394 U.S. 576, 616 (1969) (Fortas, J., dissenting) ("[T]he flag is a special kind of personalty."); *Barnette*, 319 U.S. at 645 (Murphy, J., concurring) (referring to "the emotion aroused by the flag as a symbol for which we have fought and now are fighting"); Halter v. Nebraska, 205 U.S. 34, 43 (1907) ("[It] is known to all, that to every true American the flag is the symbol of the nation's power, -- the emblem of freedom in its truest, best sense. It is not extravagant to say that to all loves of the country if signifies government resting on the consent of the governed; liberty regulated by law; the protection of the weak against the strong; security against the exercise of arbitrary power; and absolute safety for free institutions against foreign aggression.").

The Chief Justice overstates his point by suggesting that "[t]he flag is not simply another 'idea' or 'point of view' competing for recognition in the marketplace of ideas."[245] Although many Americans indeed do have "an almost mystical reverence" for the flag "regardless of what sort of social, political, or philosophical beliefs they may have,"[246] for others, such as Mr. Johnson, the flag represents a political system and society that they just as strongly oppose. The flag is no less a symbol simply because what it symbolizes are, for the vast majority of Americans, the majestic principles of freedom and liberty as well as the remarkable history of the nation. In fact, it is the strong emotional elements and piercing meaning of the flag that give it its power and force as a medium for communication. For most Americans, observing someone desecrate the flag is a very disturbing, indeed offensive experience. The meaning of the symbolic act, nevertheless, is not easily lost upon the observer.

Flag-burning, thus, is not "the equivalent of an inarticulate grunt or roar."[247] A speaker need not in a neat and orderly fashion outline his objections to American foreign policy in order to be articulate in his message. A burning flag does not necessarily tell you whether the protester opposes the administration's Central American policy or its trade policy with China. But it does, in both a powerful and an articulate way, express a condemnation or rejection of what the flag stands for. If the protester wants to convey a message that he does not believe the United States is a free and just nation, burning the flag will express that message in a way that is sharply understood by those Americans who revere the flag.

Even though the flag is a unique symbol, this status alone does not justify a ban on its use as a medium for communication. It is not, as Justice Stevens suggests, like the Lincoln Memorial, the use of which as a medium government could presumably preclude.[248] The simple fact is that there is but one Lincoln Memorial and it is actually owned by the government; there are many American flags, most of which are privately owned.

Placing the question of flag desecration in a broader perspective, the proper question is how should society respond to the flag-burner's message: Should he be jailed for his symbolic act? Or should, like other expression, the response be made through speech?[249] Ironically, by permitting the flag-burner his act of desecration,

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[245] *Johnson*, 109 S. Ct. at 2552 (Rehnquist, C.J., dissenting).

[246] *Id.* (Rehnquist, C.J., dissenting).

[247] *Id.* at 2553 (Rehnquist, C.J., dissenting).

[248] *Id.* at 2557 (Stevens, J., dissenting); *accord* Smith v. Goguen, 415 U.S. at 587 (White, J., concurring in judgment).

[249] *See generally* Whitney v. California, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring) ("[The Framers] knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law

his very message is weakened. As Professor Bollinger has suggested, the tolerance of such expression reflects "the genuine nobility of a society that can count among its strengths a consciousness of its own weaknesses."[250] The American flag, and all it represents, are enhanced by the liberty to desecrate it. The nations whose flags have come to symbolize tyranny -- the swastika flag of Nazi Germany comes to mind -- would not have tolerated flag-burning. The nation whose flag symbolizes freedom and liberty, in stark contrast, does.

The majority in *Johnson* suggests that "[t]he way to preserve the flag's special role is not to punish those who feel differently about [what it represents; rather] it is to persuade them that they are wrong."[251] The Chief Justice scolds the majority for this "regrettably patronizing civics lecture."[252] Given the level of political demogogery that followed the decision,[253] the lesson appears to have been quite necessary.

Like *Johnson*, *Allegheny County* provides an excellent illustration of the powerful messages symbols can communicate. The government, just as readily as individuals, can employ a symbol to express ideas. The Establishment Clause imposes a limitation on the use of certain symbols in certain contexts. About the only thing made clear in *Allegheny County* is that where that limitation begins and ends is a very difficult determination.

Five of the justices, lead by Justices Blackmun and O'Connor, draw the line at the point at which government "endorses" religion.[254] The remaining four of the justices, lead by Justice Kennedy, draw the line at "proselytization."[255] Justice Kennedy attempts to articulate a principled basis in support of his proselytization test and for distinguishing it from the endorsement analysis. He argues that, absent coercion, governmental accommodation or recognition of religion through the use of passive religious symbols does not violate the Establishment Clause.[256]

The example he uses to illustrate his notion of coercion, however, belies the usefulness of the concept of coercion as a principle in constitutional adjudication. He

-- the argument of force in its worse form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed."); M. NIMMER, NIMMER ON FREEDOM OF SPEECH § 1.04 (1984) (stressing the importance of free speech as a societal "safety value").

[250] L. BOLLINGER, THE TOLERANT SOCIETY: FREE SPEECH AND EXTREMIST SPEECH IN AMERICA 248 (1986) (arguing that toleration of extremist speech will lead to greater recognition of society's own intolerance). See also F. SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 160 (1982) (noting that it is "paradoxical to allow freedom of speech to those who would use it to eliminate the very principle upon which they rely," but necessary for the preservation of that freedom).

[251] *Johnson*, 109 S. Ct. at 2547.

[252] *Id.* at 2555 (Rehnquist, C.J., dissenting).

[253] *See supra* notes 32-35 and accompanying text.

[254] *See* County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter, 109 S. Ct. at 3101 (Justice Blackman writing for majority including Justices Brennan, Marshall, Stevens, and O'Connor).

[255] *Id.* at 3137 (Kennedy, J., concurring in part, dissenting in part) (joined by Chief Justice Rehnquist and Justices White and Scalia).

[256] *Id.* (Kennedy, J., concurring in part, dissenting in part).

admits that the permanent erection of a Latin cross on the roof of city hall would be unconstitutional. He suggests that "such an obtrusive year-round religious display would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion."[257] But what if the cross were only displayed on the city hall roof during Christian holidays? Or just on Easter? It is difficult to see why such displays would no longer have a "proselytizing" effect. The real distinction between Justice Kennedy's proselytization test and the endorsement test is the degree of governmental support for religion that is tolerable.[258]

Justice Kennedy incorrectly suggests that "[p]assersby who disagree with the message conveyed by these displays are free to ignore them, or even to turn their backs, just as they are free to do when they disagree with any other form of government speech."[259] The point is that this is not just any other form of government speech. Government is affirmatively prohibited from engaging in practices "respecting an establishment of religion."[260] Certainly, it may speak, including through the media of symbols and symbolic conduct, on political, moral, and social issues. However, special scrutiny of governmental speech with a religious message is mandated by the Establishment Clause. Government may not use religious symbols as a form of expression if the message that is conveyed by the use of those symbols suggests governmental approval, support, or preference for religion or religious beliefs.

The effect of governmental symbolic speech that endorses religion is not remedied merely by turning one's back on the display. The constitutional fault in such speech is not that it is simply offensive to nonadherents (and to some adherents).[261] Rather, government symbolic speech that displays approval, support, or preference for religion begins the construction of barriers to political participation and social cohesion. The barriers may not appear especially high, particularly to members of the majority sect to whom many religious symbols connected with Christmas, for example, are so commonplace that their religious meaning is lost and their connection with the religious aspect of the holiday are dimmed.[262] Their effect

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[257] *Id.* (Kennedy, J., concurring in part, dissenting in part).

[258] *See id.* at 3109.

[259] *Id.* at 3139 (Kennedy, J., concurring in part, dissenting in part). Similarly, Judge Easterbrook has emphasized that holiday displays including religious symbols "do[] not require obedience. People may venerate, disdain, or curse the icons as they please, without reward for the first or reprisal for the last." American Jewish Congress v. City of Chicago, 827 F.2d at 129 (Easterbrook, J., dissenting). He contends that "the government may participate as a speaker in moral debates, including religious ones. Speech is not coercive; the listener may do as he likes." *Id.* at 132 (Eaterbrook, J., dissenting). Furthermore, "[s]ome government speech will offend in itself; other speech will mobilize to action and so be more offensive still; yet none is forbidden. The absence of coercion is why. The government may encourage what it may nor compel." *Id.* at 134 (Easterbrook, J., dissenting).

[260] U.S. CONST. amend. I.

[261] *See Allegheny County*, 109 S. Ct. at 3131 & n.8 (Stevens, J., concurring in part, dissenting in part).

[262] *See* Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 HARV. L. REV. 592, 611 (1985) ("When the government dons religious robes, those vestments are least visible to those who wear the same colors.").

is to create exclusiveness rather than inclusiveness and to promote religious favoritism rather than religious tolerance.

This effect is apparent in the manipulation and distortion of a minority religion to achieve equal recognition by the majority. Chanukah does not hold the position of significance in the Jewish faith that Christmas does in Christian religions. It is not surprising that Chanukah would obtain greater prominence in a predominantly Christian society. Government, however, should not fuel these distortive effects. This is precisely the outcome of permitting a holiday display acknowledging, and thereby necessarily equating, Christmas and Chanukah.[263]

The endorsement test does not, as Justice Kennedy charges, constitute "an unjustified hostility toward religion."[264] Instead, it is a constitutionally mandated hostility toward the government's use of religious symbols that has the effect of impairing the religious neutrality of government and the religious tolerance of society at large. The steadfast furtherance of these goals ultimately ensures the freedom of conscience and religious belief.

Justice Kennedy is correct in noting the artificial appearance of the treatment of long-standing government practices involving religion under the endorsement analysis, especially as it is applied by Justice O'Connor.[265] These practices include the national motto of "In God we trust," Thanksgiving proclamations, opening Court sessions with "God save the United States and this honorable Court," and the use of legislative chaplains. Justice O'Connor attempts to secularize these practices by suggesting, for instance, that legislative prayers and the national motto "serve the secular purposes of 'solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society.'"[266] Denying the overwhelming religious nature of these practices amounts to little more than sophistry.[267] A prayer said in a legislature or a call for divine protection for the Supreme Court are "solemnizing," if at all, only because they have a religious message.

Justice Blackmun attempts to salvage these historically accepted practices by relying on their nonsectarian quality, as opposed to the strictly sectarian message of a creche display.[268] Labelling them as nonsectarian ignores those whose religious beliefs do not include a single diety or for whom the government's calling upon God is religiously offensive. There was a time in our history when a member or the

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[263] *See Allegheny County*, 109 S. Ct. at 3128-29 (Brennan, J., concurring in part, dissenting in part).
[264] *Id.* at 3134 (Kennedy, J., concurring in part, dissenting in part).
[265] *See Allegheny County*, 109 S. Ct. at 3142-44 (Kennedy, J., concurring in part, dissenting in part).
[266] *Id.* at 3118 (O'Connor, J., concurring) (quoting Lynch v. Donnelly, 465 U.S. at 693 (O'Connor, J., concurring).
[267] The same could be said of Justice Blackmun's attempt to secularize the predominantly religious nature of Chanukah and the menorah. *See id.* at 3096-97.
[268] *Id.* at 3106.

Supreme Court could, without substantial objection state, that "this is a Christian nation."[269] As a matter of constitutional law, if not social reality, that statement was as wrong then as it is today. Although the Supreme Court is not likely to hold any of these longstanding practices unconstitutional,[270] the reluctance to do so is a reflection of the unwillingness to fulfill the demands of the principle of nonestablishment.[271] The constitutional demand that government not express sponsorship, support, or preference for religion would be best served by a rule that proscribes the use of religious symbols in any context, whether accompanied by Christmas trees and candy canes or simply standing alone.[272]

The Supreme Court has yet to face squarely the issues involved when individual symbolic speech and governmental symbolic speech come together. When individuals, rather than government, display a religious symbol in a public forum, the right to free speech clashes with the Establishment Clause. The difference in the location of the display should not be underestimated.[273] In a public forum, individuals have the specially protected right to expression, including speech that has a religious message. Moreover, the fact that the religious expression is taking place in a public forum, as opposed to other public property, diminishes any message of endorsement by the government, so long as an observer may reasonably ascertain who the private speaker is.[274] In such cases, the right to individual symbolic speech should not be undervalued.

V. CONCLUSION

Individuals and government both use symbols and symbolic speech to communicate. Individual expression cannot ordinarily be restricted on the basis of its content. Nor should it be easily restricted because of the medium through which it is conveyed. Expression through symbols and symbolic conduct can convey unique messages that can not always be replicated through the media of written or spoken words. Therefore, medium-based restrictions should be subject to careful judicial scrutiny just as are content-based restrictions.

Unlike individual expression, governmental speech is subject to content-based restrictions. The most significant of these emanates from the Establishment Clause. Government cannot employ religious symbols in a manner that conveys a

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[269] Church of the Holy Trinity v. United States, 143 U.S. 457, 471 (1892) (Brewer, J.).

[270] *See* Marsh v. Chambers, 463 U.S. 783 (1983) (legislative prayer).

[271] *See* Lupu, *Keeping the Faith: Religion, Equality and Speech in the U.S. Constitution*, 18 CONN. L. REV. 739, 746 n. 30 (1986); *but see* Note, *Civil Religion and the Establishment Clause*, 95 YALE L.J. 1237 (1986) (arguing that the government's use of religious symbols and references is permissible as part of the American "civil religion").

[272] *See Allegheny County*, 109 S. Ct. at 3131 (Stevens, J., concurring in part, dissenting in part); Lynch v. Donnelly, 465 U.S. at 706-17 (Brennan, J., dissenting).

[273] *See* Kaplan v. City of Burlington, 891 F.2d at 1032-33 (Meskill, J., dissenting); Smith v. County of Albermarle, 895 F.2d at 962 (Blatt, J., dissenting).

[274] *See Kaplan* at 1033 (Meskill, J., dissenting).

message of governmental endorsement of religion. To permit otherwise would result in greater social and political exclusivity and less religious tolerance and freedom.

The recent Supreme Court cases of *Johnson* and *Allegheny County* gained substantial notoriety because they involved expression through symbols that, for most Americans, strike deeply emotional chords. The force with which the messages expressed by the symbols of a burning flag and a creche or Menorah display are felt, reveals the unique and powerful medium that symbols and symbolic conduct can be.

To fulfill the constitutional principles of free expression and nonestablishment, however, difficult limits must be placed on government. On the one hand, to ensure the liberty for which the American flag stands, we must be willing to accept its desecration. On the other, to ensure the religious liberty that continues to attract thousands to our shores, we must be willing to place strict limits on the ways in which government can join in the celebration of religious holidays.