North Carolina Central Law Review

Volume 19
Number 2 *Volume 19, Number 2*

Article 3

4-1-1991

The Political Economy of Congressional Social Policymaking: United States v. Eichman and Texas v. Johnson

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THE POLITICAL ECONOMY OF CONGRESSIONAL SOCIAL POLICYMAKING: *UNITED STATES v. EICHMAN* AND *TEXAS v. JOHNSON*

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I. INTRODUCTION

The Supreme Court's opinion in *United States v Eichman*[1], announced on June 11, 1990,[2] rekindled a firestorm of controversy which had been smoldering since the 1989 Supreme Court opinion in *Texas v. Johnson*.[3] That precedent had found unconstitutional as contrary to the first amendment[4] a political protester's conviction for burning the American flag in violation of the Texas statute prohibiting desecration of a venerated object.[5] Congress had responded by passing at once the Flag Protection Act of 1989,[6] which pointedly provided for speedy Supreme Court review of any Constitutional challenges to it.[7] In *Eichman*, the Supreme Court produced essentially the same decision as it had in *John-*

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1. 110 S. Ct. 2404 (1990).

2. But the main event of June 11, 1990, was Texas Ranger great Nolan Ryan's sixth no hitter (5-0), walking two and striking out fourteen. Supreme Court recognition of Ryanesque heroes is found in *Flood v. Kuhn*, 407 U.S. 258, 260-64 (1972), and in B. WOODWARD AND S. ARMSTRONG, THE BRETHREN 189-92 (1979). A lawyer might rhapsodize that baseball most appropriately is America's national pastime, being a federalist balance of teamwork and individualism:

> The distinctiveness of its component actions - pitching, hitting, fielding, and base-running - makes them available to separate attention, measurement, analysis, and judgment. Every player's contribution to every play is recorded and given value. The statistics are rarely misleading. If you want to know who the American League's best second baseman of the Thirties was, well, as Casey Stengel used to say, "[y]ou could look it up." Try that with defensive linemen.

Sobran, *The Republic of Baseball*, NAT'L REV., June 11, 1990, at 36, 38. Baseball places every player of the hour within a conservative history: "[t]he statistical discreetness of individual performance, set against the game's stable history, gives achievement in baseball a permanence and stature other sports can seldom confer." *Id.* at 39.

3. 491 U.S. 397 (1989).

4. U.S. CONST. amend. I.

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

6. 18 U.S.C. § 700 (Supp. 1990).

7. 18 U.S.C. § 700(d)(1)-(2) (Supp. 1990).

son.[8] An immediate congressional effort to insert an anti-flagburning amendment[9] into the Constitution failed for lack of the necessary two-thirds majority in both Houses.[10] However, no move was ever seriously made to reform the Supreme Court's appellate jurisdiction under the Article III, section two, exceptions clause.[11]

The following discussion reviews this history with an eye to the political economy dynamics informing these respective performances of the Supreme Court and Congress. It will be shown that the Supreme Court and Congress have divided national policymaking to their mutual advantage. Not only was the *Eichman* opinion foreseeable, but so was the failure of Congress to reverse *Eichman* by democratic means.

II. THE *TEXAS V. JOHNSON* MAJORITY OPINION

During the 1984 Republican National Convention in Dallas, Texas, Gregory Lee Johnson participated in a political demonstration, the "Republican War Chest Tour."[12] The participants protested the policies of President Ronald Reagan and of certain corporations based in Dallas. Chanting political slogans and stopping at several corporate sites to stage "die-ins" to dramatize the consequences of nuclear war, the demonstrators marched through the streets of Dallas.[13] In front of the Dallas City Hall, "Johnson unfurled [an] American flag, doused it with kerosene, and set it [a]fire."[14] As the flag burned, the protestors chanted, "America, the red, white, and blue, we spit on you."[15]

Johnson was charged with the Texas criminal offense[16] of desecration of a venerated object.[17] Johnson was convicted, and his conviction was affirmed by the Texas Fifth Circuit Court of Appeals for Dallas.[18] The Texas Court of Criminal Appeals, however, reversed.[19] The court held that Johnson could not, consistent with the first amendment, be punished for burning the flag under the statute as applied to him.[20] In 1988 the Supreme Court granted a writ of certiorari.[21]

The question before the Supreme Court was whether Johnson's convic-

8. *Eichman*, 110 S. Ct. 2404 (1990).
9. Biskupic, *Congress Snaps to Attention Over New Flag Proposal*, CONG. Q., June 16, 1990, at 1877.
10. U.S. CONST. art. V.
11. U.S. CONST. art. III, § 2, cl. 2.
12. Texas v. Johnson, 491 U.S. 397, 399 (1989).
13. *Id.*
14. *Id.*
15. *Id.*
16. TEXAS PENAL CODE ANN. § 42.09(a)(3) (Vernon 1989).
17. *Johnson*, 491 U.S. at 400.
18. Johnson v. State, 706 S.W.2d 120 (Tex. App. 1986).
19. Johnson v. State, 755 S.W.2d 92 (Tex. Crim. App. 1988).
20. *Id.*
21. Texas v. Johnson, 488 U.S. 907 (1988).

tion comported with the first amendment;[22] therefore, the Court initially had to ascertain whether his flag burning constituted expressive conduct permitting Johnson to invoke the first amendment.[23] For the purpose of oral argument, the State of Texas conceded that Johnson's conduct was expressive conduct, a concession the Supreme Court accepted as prudent.[24] The Supreme Court also noticed that the Texas Court of Criminal Appeals had found the overtly political nature of his conduct was both intentional and overwhelmingly apparent, which did implicate the first amendment.[25]

The next issue was whether Texas's regulation "related to the suppression of free expression."[26] The government has a freer hand, generally, in curtailing expressive conduct than in restricting the spoken or written word.[27] Nevertheless, the government may not restrict specific conduct *because* it entails expressive elements.[28] The Justices were to determine whether Texas had asserted an interest in support of Johnson's conviction which was unrelated to suppressing expression.[29]

Texas claimed that its interest in forestalling breaches of the peace justified Johnson's flag desecration conviction.[30] But the law countenances no presumption that an audience taking grave offense at particular expression is necessarily likely to so disturb the peace that the expression may be proscribed on that ground.[31] "Nor [did] Johnson's expressive conduct fall within [the] small class of 'fighting words' "[32] likely to trigger breach of the peace by provoking the average person to reprisal.[33] Consequently, Texas's interest in the maintenance of order was not implicated on the *Johnson* facts.[34]

Texas also advanced the interest in preserving the flag as a symbol of national unity. But this interest related to expression in Johnson's case.[35] The state's asserted interest, therefore, was subjected to the most rigorous scrutiny.[36]

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22. Texas v. Johnson, 491 U.S. at 403 (1989).
23. *Id.* at 404.
24. *Id.* at 405-406.
25. *Id.* at 406 (citing Spence v. Washington, 418 U.S. 405, 409 (1974)).
26. *Id.* at 407.
27. *Id.* at 406 (citing United States v. O'Brien, 391 U.S. 367, 376-77 (1968)).
28. *Id.* (citing Community for Creative Non-Violence v. Watt, 703 F.2d 586, 622-23 (D.C. Cir. 1983) (Scalia, J., dissenting), *rev'd sub. nom*, Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984)).
29. *Id.* at 407.
30. *Id.*
31. *Id.* at 409.
32. *Id.* (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 574 (1942)).
33. *Id.*
34. *Id.* at 410.
35. *Id.*
36. *Id.* at 410-411 (citing Boos v. Barry, 485 U.S. 312, 321 (1988)).

A bedrock principle of the first amendment is that government may not proscribe the expression of an idea simply because society finds it offensive;[37] involvement of the flag engenders no exception.[38] "A state may [not] foster its own view of the flag by prohibiting expressive conduct relating" to it.[39] The Court noted that to conclude that government may confine designated symbols to signal only a limited range of messages would risk entering territory without defensible or discernable boundaries.[40] Texas's interest in preserving the flag as a national unity symbol did not justify Johnson's conviction for engaging in political expression.[41]

As Justice Brennan added:

> [w]e are tempted to say, in fact, that the flag's deservedly cherished place in our community will be strengthened, not weakened, by our holding today. Our 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. Indeed, one of the proudest images of our flag, the one immortalized in our own national anthem, is of the bombardment it survived at Fort McHenry. It is the Nation's resilience, not its rigidity, that Texas sees reflected in the flag — and it is that resilience that we reassert today.[42]

Justice Kennedy briefly concurred, without reservation, in Brennan's opinion, and without citing any authorities. Kennedy's concurrence is of interest by demonstrating the personal dimensions of the case, which he found "exacts its personal toll."[43] He submitted that "[t]he hard fact is that sometimes we must make decisions we do not like."[44] He further stated, "we do not pause to express distaste for the result, perhaps for fear of undermining a valued principle that dictates the decision."[45]

Justice Kennedy continued by noting that among those "dismayed" by the majority holding would be those who defended the flag in battle.[46] Kennedy found the *Johnson* judgment painful to announce, noting "[i]t is poignant but fundamental that the flag protects those who hold it in contempt."[47]

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37. *Id.* at 414.
38. *Id.*
39. *Id.* at 415.
40. *Id.* at 416.
41. *Id.* at 420.
42. *Id.* at 419.
43. *Id.* at 420 (Kennedy, J., concurring).
44. *Id.*
45. *Id.* at 421.
46. *Id.*
47. *Id.*

III. THE *TEXAS V. JOHNSON* DISSENTS

The dissent of Chief Justice Rehnquist, which was joined by Justices White and O'Connor, was remarkable. It acidly condemns the conclusion of the Brennan opinion as:

> a regrettably patronizing civics lecture, presumably addressed to the Members of both Houses of Congress, the members of the 48 state legislatures that enacted prohibitions against flag burning, and the troops fighting under that flag in Vietnam who objected to its being burned. . . . The Court's role as the final expositor of the Constitution is well established, but its role as a platonic guardian admonishing those responsible to public opinion as if they were truant school children has no similar place in our system of government.[48]

Approximately the initial third of this dissent is a historical collage including the following: the opening lines of Ralph Waldo Emerson's poem *Concord Hymn*,[49] the 1812 British burning of Washington and attack on Fort McHenry and the first stanza of *The Star Spangled Banner*,[50] the 1861 lowering of the flag at Fort Sumter, the Confederacy's Stars and Bars,[51] and the entirety of John Greenleaf Whittier's poem *Barbara Frietchie*,[52] and then goes on to mentions of Iwo Jima's Mount Suribachi,[53] President Franklin D. Roosevelt, and the Korean War amphibious landing at Inchon.[54] The legend of Betsy Ross was omitted.

Rehnquist proceeds to remind the Justices of the two flags in their courtroom, and of the flags decorating graves on Memorial Day.[55] He refers to Flag Day, to John Philip Sousa's *The Stars and Stripes Forever*, and to the Pledge of Allegiance to the flag.[56] The Chief Justice denies that the flag simply represents an idea or viewpoint jostling to be recognized in the "marketplace of ideas."[57]

Rehnquist argued that Johnson's public burning of the American flag tended to incite a breach of the peace:[58] as it is with fighting words, so it is with flagburning, for first amendment purposes.[59] Rehnquist found

48. *Id.* at 428 (Rehnquist, J., dissenting).
49. *Id.* at 422.
50. *Id.*
51. *Id.*
52. *Id.* at 424. This was not the first but the second time that poem in its entirety has visited itself upon topmost national councils. On May 15, 1943, British Prime Minister Winston S. Churchill spontaneously recited the poem from memory, without having read it for thirty years, for President Franklin D. Roosevelt, Eleanor Roosevelt, and Harry Hopkins. W. CHURCHILL, THE HINGE OF FATE 795-96 (1950); R. PILPEL, CHURCHILL IN AMERICA: 1895-1961, 182-83 (1976).
53. Texas v. Johnson, 491 U.S. at 426 (1989) (Rehnquist, J., dissenting).
54. *Id.*
55. *Id.*
56. *Id.* at 427.
57. *Id.* at 429.
58. *Id.* at 430.
59. *Id.* at 431.

flagburning to be no essential part of the "exposition of ideas," and to be of a social benefit so trivial as to be clearly outweighed by the public stake in avoiding a probable breach of the peace.[60]

"It was Johnson's use of this particular symbol, and not the idea that he sought to convey" via the symbol, that is sanctioned.[61] Besides, flagburning is so noncommunicative it is likely to be indulged in by participants not to convey any particular thought, but to antagonize others.[62]

Prior cases dealing with flag desecration statutes had left open the *Johnson* issue.[63] But Chief Justice Rehnquist cites[64] past dissents by Chief Justice Earl Warren,[65] and by Justices Hugo Black,[66] Abe Fortas,[67] and Harry A. Blackmun.[68] He likewise draws upon a concurrence by Justice Byron White.[69]

Justice Stevens's separate dissent, as if anticipating *Eichman*, identified the problem as whether either Texas "or indeed the federal government"[70] can prohibit public desecration of the flag:[71]

> The question is unique. In my judgment rules that apply to a host of other symbols, such as state flags, armbands, or various privately promoted emblems of political or commercial identity, are not necessarily controlling. Even if flag burning could be considered just another species of symbolic speech under the logical application of the rules that the Court has developed in its interpretation of the First Amendment in other contexts, this case has an intangible dimension that makes those rules inapplicable.[72]

Stevens went on to argue that the statutory proscription of flag desecration does not prescribe orthodoxy in politics or other matters of opinion, nor does it force citizens to confess by word or deed their belief therein.[73] Stevens believed the *Johnson* case had naught to do with disagreeable ideas, but hinged upon disagreeable conduct diminishing the value of an important national asset.[74] As such, Stevens concluded that the flag could not be undeserving of protection from desecration.[75]

60. *Id.* (citations omitted).
61. *Id.* at 432.
62. *Id.*
63. *Id.*
64. *Id.*
65. Street v. New York, 394 U.S. 576, 605 (1969) (Warren, C.J., dissenting).
66. *Id.* at 610 (Black, J., dissenting).
67. *Id.* at 615-17 (Fortas, J., dissenting).
68. Smith v. Goguen, 415 U.S. 566, 590 (1974) (Blackmun, J., dissenting).
69. *Id.* at 583 (White, J., concurring in judgment).
70. Texas v. Johnson, 491 U.S. at 436 (1989) (Stevens, J., dissenting).
71. *Id.*
72. *Id.*
73. *Id.* at 437.
74. *Id.* at 438.
75. *Id.* at 439.

IV. *UNITED STATES V. EICHMAN*

A. Johnson *Redux*

Following the *Johnson* decision Congress passed the Flag Protection Act of 1989:

> (a)(1) 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 for not more than one year, or both.
> (2) This subsection does not prohibit any conduct consisting of the disposal of a flag when it has become worn or soiled.
> (b) As used in this section, the term "flag of the United States" means any flag of the United States, or any part thereof, made of any substance, of any size, in a form that is commonly displayed.
> (c) Nothing in this section shall be construed as indicating an intent on the part of Congress to deprive any State, territory, possession, or the Commonwealth of Puerto Rico of jurisdiction over any offense over which it would have jurisdiction in the absence of this section.
> (d)(1) An appeal may be taken directly to the Supreme Court of the United States from any interlocutory or final judgment, decree, or order issued by a United States district court ruling upon the constitutionality of subsection (a).
> (2) The Supreme Court shall, if it has not previously ruled on the question, accept jurisdiction over the appeal and advance on the docket and expedite to the greatest extent possible.[76]

Thereafter, the United States prosecuted certain protestors for violating the Act by setting the flag afire.[77] These cases were decided in the Supreme Court's 1990 opinion in *United States v. Eichman*.[78]

The government, the appellant in *Eichman*, conceded that the appellees' flagburning constituted expressive conduct. However, it asked the Supreme Court to reconsider its decision in *Johnson*, and find that flagburning, while a means of expression, should be treated like fighting words or obscenity, and should not enjoy full first amendment protection. But the Supreme Court, split along lines identical to those in *Johnson*, in a majority opinion by Justice Brennan, declined the government's invitation to so decide.[79]

The sole remaining query for the Court was whether the Flag Protection Act was sufficiently distinct from the Texas statute that it could be constitutionally applied to proscribe the appellees' expressive conduct.[80] The government argued that the Flag Protection Act, unlike the statute

76. 18 U.S.C. § 700 (1989).
77. United States v. Eichman, 110 S.Ct. 2404 (1990).
78. *Id.* at 2405.
79. *Id.*
80. *Id.* at 2408.

in *Johnson*, did not target expressive conduct on the basis of message content and was, therefore, constitutional. The government posited an interest in protecting the physical integrity of the flag, to safeguard it as unalloyed symbol of the nation. The Act, the Court found, proscribed conduct damaging a flag, regardless of a defendant's motive or message, or of the likely effect of the defendant's conduct on onlookers. The Texas statute had barred only desecration which a defendant knew would seriously offend onlookers.[81]

The Court found that while the Flag Protection Act included no express, content-linked restriction on the compass of prohibited conduct, the government's underlying interest is itself tied to suppressing free expression.[82] The Court found that mere disfigurement of a physical symbol, such as by destroying a flag secretly, would not diminish the symbol. Therefore, the government's announced interest would be implicated only if a defendant's treatment of the banner actually communicates to others a message inconsistent with those ideals the flag reflects.[83]

Also, the Court looked to the very verbs of the Act, such as "mutilates, defaces, defiles,"[84] which targeted disrespect on a defendant's part in the act of flagburning.[85] An explicit exemption for disposal of worn or soiled flags[86] protects acts traditionally associated with patriotic reverence for the flag.[87] The Act suppressed expression only in light of its communicative impact.[88] Since the Act's restriction on expression could be justified only with regard to the content of the communication, hence the focus on the governmental interest behind the statute, the Act was strictly scrutinized.[89] The Court found that the government's interest could not justify its infringement upon a first amendment right;[90] the Court held that the Act could not constitutionally be applied to the appellees.[91]

B. *The* Eichman *Dissent*

Justice Stevens explained for the dissenters that the majority essentially did no more than reconfirm what it already had decided.[92] Con-

81. *Id.*
82. *Id.* at 2408 (citing Brief for United States at 28, 29, United States v. Eichman, 110 S. Ct. 2404).
83. *Id.* at 2409.
84. 18 U.S.C. § 700(a)(1) (1989).
85. *Eichman*, 110 S. Ct. at 2409.
86. 18 U.S.C. § 700(a)(2) (1989).
87. *Eichman*, 110 S. Ct. 2405.
88. *Id.*
89. *Id.* at 2407
90. *Id.*
91. *Id.*
92. *Id.* at 2412 (Stevens, J., dissenting).

trary to the position asserted by the *Johnson* flagburners, Stevens noted that it was admitted in *Eichman* that the federal government has a legitimate interest in protecting the national flag's symbolic value.[93] The initial issue for the Court was whether the interest in safeguarding the worth of the symbol was unrelated to suppressing ideas the flagbuners attempt to share.[94] Stevens argued the government's legitimate interest in preserving the flag's symbolic value is basically the same, no matter what ideas may have triggered a specific flagburning.[95] Stevens argued the government may, and should, shield the symbolic value of the flag, whatever the specific content of the flagburners' speech.[96]

For Stevens, the controversy boiled down to a judgment question of whether "the admittedly important interest in allowing every speaker to choose the method of expressing his or her ideas that he or she deems most effective and appropriate outweigh[s] the societal interest in preserving the symbolic value of the flag?"[97] The dissenters answered this question in the negative.[98]

V. THE POLITICAL ECONOMY OF *EICHMAN*

The key to *Eichman* resides neither in its text nor that of the *Johnson* opinion, a precedent so close to *Eichman* that its dissenters speculated that "it might be appropriate to defer to the judgment of the majority and merely apply the doctrine of stare decisis to the case at hand."[99] The real substance of *Eichman* is tucked away in the footnotes.

The *Eichman* majority noted, "[w]e deal here with concededly political speech and have no occasion to pass on the validity of laws regulating commercial exploitation of the image of the United States flag."[100] The note cites the 1907 Supreme Court opinion in *Halter v. Nebraska*.[101] The *Johnson* majority noted that the *Halter* case had addressed the validity of a state law proscribing certain commercial exploitation of the flag.[102] The *Halter* case had transpired years before the Supreme Court had first applied the first amendment to states.[103] "More important, as we continually emphasized in *Halter* itself, that case involved purely

93. *Id.* at 2410.
94. *Id.*
95. *Id.* at 2411.
96. *Id.*
97. *Id.*
98. *Id.* at 2412.
99. *Id.*
100. *Id.* at 2408 n.4.
101. 205 U.S. 34 (1907).
102. Texas v. Johnson, 109 S. Ct. 2533, 2545 n.10 (1989).
103. Gitlow v. New York, 268 U.S. 652 (1925); Fiske v. Kansas, 274 U.S. 380 (1927); Near v. Minnesota, 283 U.S. 697 (1931).

commercial rather than political speech."[104]

As the first Justice Harlan stated for the Supreme Court in *Halter*:

> It is familiar law that even the privileges of citizenship and the rights inhering in personal liberty are subject, in their enjoyment, to such reasonable restraints as may be required for the general good. Nor can we hold that anyone has a right of property which is violated by such an enactment as the one in question. If it be said that there is a right of property in the tangible thing upon which a representation of the flag has been placed, the answer is that such representation — which, in itself, cannot belong, as property, to an individual — has been placed on such thing in violation of law, and subject to the power of government to prohibit its use for purposes of advertisement.[105]

The key to *Eichman*, and even to *Halter*, is that democratically-elected politicians make popular economic policy, not divisive social policy, unchecked by the federal judiciary. Hence the *Eichman* references to acceptable "laws regulating commercial exploitation,"[106] and *Halter's* approving reference to the power of the government to prohibit the flag's use "for purposes of advertisement" resulted.[107]

Dissenting in *Johnson*, Chief Justice Rehnquist sputtered that only two terms previously the Supreme Court had held in *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*,[108] that Congress could grant exclusive use of the word "Olympic" to the U.S. Olympic Committee (U.S.O.C.).[109] The Supreme Court had stated therein that if a word acquires value as a result of the organization and the expenditure of labor, skill, and money of an entity, that entity may, constitutionally, obtain a limited property right in the symbol.[110] "Surely Congress or the States may recognize a similar interest in the flag."[111]

In *United States Olympic Committee*,[112] the Amateur Sports Act[113] had indeed granted the U.S.O.C. the right to prohibit certain commercial and promotional uses of the word "Olympic" and various Olympic symbols. As Justice Powell's opinion for the majority declared, once again in a footnote, "[t]here is no basis in the record to believe that the Act will be interpreted or applied to infringe significantly on noncommercial speech rights."[114]

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104. *Johnson*, 109 S. Ct. at 2545 n.10 (citing Halter v. Nebraska, 205 U.S. 34 (1907)).
105. *Halter*, 205 U.S. at 42-43.
106. United States v. Eichman, 110 S. Ct. 2405, 2445 (1990).
107. *Halter*, 205 U.S. at 43.
108. 483 U.S. 522 (1987).
109. *Johnson*, 109 S. Ct. at 2552 (Rehnquist, C.J., dissenting) (citing San Francisco Arts & Athletics, Inc., v. United States Olympic Comm., 483 U.S. 522, 532 (1987)).
110. *San Francisco Arts & Athletics, Inc.*, 483 U.S. at 536 n.15.
111. *Johnson*, 109 S. Ct. at 2552 (Rehnquist, C.J., dissenting).
112. 483 U.S. 522 (1987).
113. 36 U.S.C. § 380 (1988).
114. *San Francisco Arts & Athletics, Inc.*, 483 U.S. at 536 n.15.

The key to *Johnson* and to *United States Olympic Committee* is, again, that democratically-elected politicians, especially those in Congress, make economic policy decisions, which are unchecked by the federal judiciary. The federal judiciary, especially the Supreme Court, is the body which makes national social policy, such as policy over flagburning; hence, Powell's *United States Olympic Committee* footnote distinguishing "noncommercial speech rights,"[115] and Brennan's *Eichman* footnote invoking the *Halter* contrast of "purely commercial rather than political speech."[116]

VI. THE POLITICAL ECONOMY OF CONGRESSIONAL SOCIAL POLICYMAKING

A. *The 1990 Offensive to Amend the Constitution*

Within an hour of the *Eichman* decision, President George Bush announced that he would press for a constitutional amendment against flagburning.[117] The proposed amendment provided that "Congress and the states shall have the power to prohibit the physical desecration of the flag of the United States."[118]

In June, the House Judiciary Committee sent the proposed amendment to the House floor without a recommendation.[119] After a five hour debate,[120] the House, on June 21, voted 254 in favor of the amendment, while 177 opposed.[121] The proposal fell 34 votes short of the two-thirds[122] required in each house[123] for congressional proposal of a constitutional amendment.[124]

Speaker of the House Thomas S. Foley took the unusual action of casting a vote against the proposed amendment.[125] Traditionally, the Speaker rarely votes except to break ties.[126] Speaker Foley, as widely reported, boasted, in opposing the amendment, that while every nation

115. *See id.* and accompanying text.

116. *See supra* note 98-102 and accompanying text.

117. Nelson, *Flag Burning Perfect Non-Issue in an Election Year*, LIBERAL OPINION WEEK, June 25, 1990, at 15, col. 1.

118. Biskupic, *Congress Snaps to Attention Over New Flag Proposal*, CONG. Q., June 16, 1990, at 1877.

119. Ferguson, *House Vote of 254-177 Kills Amendment Prohibiting Desecration of U.S. Flag*, WALL ST. J., June 22, 1990, at A10, col. 1.

120. Holmes, N.Y. TIMES, June 22, 1990, at 1, col. 3.

121. *Id.*

122. Wolf, *House Ends Flap Over Flag*, USA TODAY, June 22-24, 1990, at 1, col. 5.

123. U.S. CONST. art. V.

124. Holmes, *supra* note 112.

125. *Id.* at A14, col. 1.

126. *Id.*

has a flag, the United States alone has a Bill of Rights.[127] The negative votes reached the 145 necessary to defeat the measure in just ten minutes, although fifteen minutes are allocated for voting.[128] When a vote fails or passes well before the allotted time, undecided members reap a political windfall in that the guaranteed outcome allows them to choose the safer political alternative.[129]

The measure failed in the Senate, nine Senators shy of the required two-thirds majority.[130] The two days of debate preceding the vote were largely perfunctory;[131] following the failure of the amendment in the House, the Senate's action was primarily symbolic.[132] These June efforts in the Congress highlight the political economy of the Supreme Court-Congress division of labor.

The proper difficulty of amending the Constitution in the wake of a Supreme Court opinion emerged anew in the 1990 failure of the Flag Protection Amendment, despite its popularity with the public. Congressional proponents of the amendment, and even the President himself, made a bid for public support as social policymakers attempting to make policy by the most dramatic and fundamental means known to the law — amending the Constitution — despite the heavy procedural obstacles presented to any amendment. But assessment of these June 1990 events in the long range perspective of the Supreme Court-Congress division of labor raises the question of whether, or how far, Congress dares to make social policy.

B. *The Supreme Court-Congress Division of Labor*

i. The Exceptions Clause

For the two democratic branches of the federal government to regularly respond to controversial Supreme Court constitutional decisions with fresh constitutional amendments would be ill-advised. An overly

127. Rasky, *Foley Vindicated by Vote on Flag*, N.Y. TIMES, June 22, 1990, at A14, col. 6; *Congress: The Flag Boosters Get Burned*, NEWSWEEK, July 2, 1990, at 24.

This signalled that while the Speaker, the son of a judge, Ferguson, *supra* note 119 at A10, col. 2., may know a good deal about flags, he could brush up on bills of rights. *See, e.g.*, Swan, *Article III, Section 2, Exceptions Clause Canadian Constitutional Parallels: Canada Teaches the United States an American History Lesson*, 13 CALIF. W. INT'L L.J. 37 (1983) (concerning Canada's 1982 Charter of Rights and Freedoms).

In all fairness to speaker Foley, a more reliable source reported that: "[e]very country has a flag. We are one of the few countries that has a Bill of Rights." Biskupic, *supra* note 118.

128. Ferguson, *supra* note 119, at A10, col. 2.

129. *Id.*

130. On June 26, the vote against the proposed amendment was 58 Senators in favor, 42 opposed. Phillips, *Flag Amendment Fails to Pass Senate Test*, USA TODAY, June 27, 1990, at A4, col. 2.

131. *What's News—: World-Wide*, WALL ST. J., June 27, 1990, at 1, col. 3.

132. *Senate Rejects New Move to Outlaw Flag Burning*, N.Y. TIMES, June 27, 1990, at A11, col. 4.

mutable constitution would too little protect citizens from the tyranny of passionate but perhaps ephemeral majorities. On the other hand, a constitution virtually impossible to amend, such as in retort to five to four vote social policy decisions by the Supreme Court, would too seriously frustrate democratic self-determination. There ought to be some compromise. There is.

The Article III, section 2, exceptions clause provides that "[t]he Supreme Court shall have appellate Jurisdiction, as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."[133] During the Maryland Convention on ratifying the Constitution, A. Contee Hanson argued that under Article III, Congress enjoys plenary power over the Supreme Court's appellate jurisdiction.[134]

On June 18, 1788, at the Virginia Convention, young delegate John Marshall similarly offered that, "Congress is empowered to make exceptions to the appellate jurisdiction, as to law and fact, of the Supreme Court — These exceptions certainly go as far as the Legislature may think proper, for the interest and liberty of the people."[135] He referred to "the wisdom and integrity of the Legislature, because we call them to rectify defects."[136]

The 1989 Congressional majority need not have replied to the Supreme Court's *Johnson* opinion with the federal Flag Protection Act of 1989, which was struck down in *Eichman*. Congress, in 1989, could have instead, by simple majority vote in each house, framed a narrowly-drawn flagburning jurisdictional exception for the federal appellate courts.

This would not have invited the mere rerun of the *Johnson* appraisal of the first amendment dimensions of flagburning as obtained in *Eichman*,[137] and would have precluded the disquieting prospect of amending the federal Bill of Rights during 1990. This course would have left the Supreme Court of each state as the final interpreter of the still-controlling national Constitution, within the confines of its own state. This would not have deputized Congress as arbiter of the Constitution, but would only have fulfilled the congressional function of choosing whether, or how far, the state or the federal judiciaries would be the ultimate arbiter of the Constitution belonging to Americans throughout these United States, by its control of the federal appellate jurisdiction.

Indeed, in June 1990, the House of Representatives and Senate simple

133. U.S. CONST. art. III, § 2, cl. 2.

134. E. KEYNES, THE COURT VS. CONGRESS: PRAYER, BUSING, AND ABORTION 79 (1989).

135. 1 J. MARSHALL, THE PAPERS OF JOHN MARSHALL 283 (H. Johnson ed. 1974).

136. *Id.*

137. "[A]nd Justice Brennan's decision striking down the federal flag desecration law was based almost entirely on the ruling a year ago invalidating the Texas flag law." Wermiel, *Liberal Justices Are Losing Their Voice As Influence on Pivotal Decisions Fades*, WALL ST. J., June 28, 1990, at B1, B3, col. 3.

majorities voted 254 and 58 respectively, purportedly endorsing the protection of the flag from burning.[138] Yet, Congressional exercise of its exceptions clause muscle received widespread consideration at no time.

ii. Congressional Disuse of the Exceptions Clause

Since approximately the time of the Supreme Court's 1936 opinion in *United States v. Curtiss-Wright Corp.*,[139] there has evolved an effectively plenary presidential power in foreign policymaking: witness the late 1990 blockade of Iraq. Since approximately the time of the Supreme Court's 1937 opinion in *NLRB v. Jones & Laughlin Steel Co.*,[140] there has evolved an effectively plenary congressional power in economic policymaking. And, since approximately the time of the Supreme Court's 1938 opinion in *United States v. Carolene Products Co.*,[141] there has evolved an effectively plenary Supreme Court power in social policymaking.

This last point explains why the 1989 congressional majority passing the Flag Protection Act of 1989, and the two-house congressional simple majorities voting in favor of a constitutional amendment in 1990, fail to translate into an exceptions clause jurisdictional regulation statute. Congress covets the popular role of economic policymaker; no republican nation has ever repealed its welfare state.[142] Congress, however, simultaneously fears the seething lavas of social policymaking.

Congress, composed of politicians, prefers to let the Supreme Court take the social policy heat, at the expense of the states over whose peoples social policy tends to be made.[143] Daniel Elazar, the well-known expert on federalism,[144] recently observed that since World War II the states increasingly have been denied by Supreme Court decisions their historic constitutional powers to underpin one or another particular moral order.[145] The powers of state governments have been frustrated in matters relating to transcendent moral issues, such as the church-state relationship, pornography, the right to life, and weekly days of rest.[146]

138. The wary term "purportedly" is requisite, to be sure, given the political windfall mentioned in Section VIA above. Such windfalls allow legislators the luxury of voting the more popular way — because the outcome is a foregone conclusion — notwithstanding their own personal preferences.

139. 299 U.S. 304 (1936).

140. 301 U.S. 1 (1937).

141. 304 U.S. 144 (1938).

142. "[A]nother deeply rooted aspect of contemporary politics - the welfare state, whose benefits no majority in any democratic country has yet foresworn." Kirkpatrick, *Why the New Right Lost*, COMMENTARY, February 1977, 34, 39.

143. E.g., the people of Texas in *Johnson*.

144. Daniel J. Elazar is author or editor of the following: D. ELAZAR, AMERICAN FEDERALISM: A VIEW FROM THE STATES (3d ed. 1984); D. ELAZAR, EXPLORING FEDERALISM (1987); FEDERALISM AND POLITICAL INTEGRATION (D. Elazar ed. 1984).

145. D. ELAZAR, THE AMERICAN CONSTITUTIONAL TRADITION 175 (1988).

146. *Id.* at 175-76.

In such cases as school prayer and abortion, the Supreme Court imposed its own reading of the Constitution against the wishes of both the people and the states.[147] The people, however, have been sufficiently divided to prevent reassertion of state authority in any specific policy field wherein constituency of conscience issues predominate.[148] This leaves the stage set for the post-*Carolene Products* social policymaking role of the Supreme Court in the Supreme Court-Congressional division of labor.

Since the New Deal, the central government has undertaken to establish a new constitutional paradigm for the nation. The trend for the past half-century has been to constrict traditional individual liberties in connection with the right to property, and with freedom of association. This trend was facilitated by the Supreme Court.[149] This post-New Deal popular shuffling of property claims represents the economic policymaking role assigned to Congress in the Supreme Court-Congress division of labor. Hence, the court's attention rendered to the *Halter* precedent, and especially its attention to the *United States Olympic Committee* precedent, discussed in section V above.

This is, to reemphasize, why Congress would not invoke the exceptions clause over these past two years, preferring to hurriedly pass a 1989 statute, itself at the mercy of the five-Justice *Johnson* majority which was repeated in *Eichman*, and to ostentatiously attempt a 1990 constitutional amendment. To utilize the exceptions clause in so prominent a showdown would alert the electorate to the democratic third alternative of the exceptions clause. That would be an alternative first, to plenary judicial social policymaking and, second, to the virtually impossible amendment process. Congress recoils from so educating the populace. Senators and Representatives are exquisitely sensitive to the law of self-preservation, if not to constitutional law. They fear repeatedly voting on prospective jurisdictional reforms as to weekly days of rest, school prayer, obscenity, creation science, affirmative action, capital punishment, et cetera. Hence, the 1989 statute and the 1990 constitutional amendment endeavors, both ignoring the exceptions clause option, exemplified not explicit congressional opposition to, but implicit congressional acquiescence in, continuing Supreme Court social policymaking.

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147. *Id.* Professor Laurence Tribe of Harvard Law School recalls:

> So it seems a serious mistake to assume that the partial success of legislative reform movements in a few key states would have been replicated elsewhere if *Roe v. Wade* had not intervened. . . . Indeed, it is instructive in this regard that between 1971 and 1973 not one additional state moved to repeal its criminal prohibition on abortion early in pregnancy.
>
> [T]here is little evidence that the United States was on the verge of emerging, in the early 1970's, from the long shadow of shame that had branded women as blameworthy for extramarital sex and nonprocreative sex and that condemned them for choosing abortion even when the choice was a painful and profoundly reluctant one. L. TRIBE, ABORTION: THE CLASH OF ABSOLUTES (1990).

148. D. ELAZAR, *supra* note 145, at 176.

149. *Id.*

iii. The Lesson of *Eichman*

The author of the pro-First Amendment/pro-flagburners briefs informing the *Eichman* opinion was David Cole, who teaches constitutional law at the Georgetown University Law Center. He afterward found of *Eichman*, "[y]ou go through law school learning that all of law is politics. What this case shows is that courts matter, that they place internal constraints even on conservative judges."[150]

Actually, *Eichman* evidences the converse. *Eichman* simply illustrates the Supreme Court's post-*Carolene Products* unchecked social policymaking role in the Supreme Court-Congress division of labor. *Eichman* constitutes social policymaking by strategic methods, albeit perhaps not with the tactical result that Congress most desires. *Eichman*, to be precise, presents to the Congress a politics of hot potato social policymaking isolated from the pesky nuisance of democracy. The self-regarding Congress, by failing to exercise its plenary exceptions clause authority, which acts as a "check" to balance the federal judiciary, most timorously prefers it thus.

Compare Cole's own observation that past legislative initiatives in the post-*Curtiss-Wright* fields of war powers, international agreements, and trade relations could be construed to evidence that Congress cares in the abstract[151] about sharing foreign policymaking.

> But viewed alongside Congress' abysmal record in asserting its authority in specific instances, the evidence might also be read more cynically to suggest that Congress is interested only in a symbolic show of interest, to appease the public outcry that attends events like Vietnam and the Iran-Contra affair.[152]

Congress' dismissal of the exceptions clause alternative suggests that Congress correspondingly is interested in only a symbolic show of interest in social policymaking, merely seeking to appease the yearlong public outcry raised by *Johnson* and *Eichman*. Even so paltry is the whole of Congressional social policymaking.

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150. Margolick, *At the Bar*, N.Y. TIMES, June 22, 1990, at B5, col. 1.

151. Cole, *Book Review*, 99 YALE L.J. 2063, 2079 (1990). Congressman David Bonior accused his House colleagues of failure to go beyond abstract gestures in foreign policy-making:

> You people do not have the guts, you do not have the nerve to take responsibility for what the Constitution has given you. You have given it up. And you gave it up in the 1960's and you got us involved in Vietnam, and you caused a situation which this country regrets today, and that is what is involved here.

131 Cong. Rec. H5088 (daily ed. June 27, 1985).

152. "If Congress is seeking merely to look good while ducking the issue, however, there is no reason to tolerate such evasion. It's not Congress' choice; the Constitution allocates responsibilities as well as powers." Cole, *supra* note 151, at 2079-80.

VII. CONCLUSION

A. *The Facade of 1989 Congressional Social Policymaking*

The preceding discussion has observed that the national policymaking division of labor between the Supreme Court and Congress has evolved to their mutual advantage since approximately the 1937-1938 period. Grasping the political economy logic of their division of labor clarifies why the Supreme Court could with such self-confidence in 1990 decide that the 1989 federal Flag Protection Act had been applied in violation of the first amendment in *Eichman*.

Congress wants the Supreme Court available to absorb the blame for unpopular social policy, as surely as Congress wants the Federal Reserve Board available to shoulder the blame for periodic economic contractions during its business cycle, and wants a Commander in Chief available to accept responsibility for his periodic, undeclared foreign wars. Congress, therefore, lacks the stomach to forthrightly check Supreme Court social policymaking; to do so would mean Senators and Representatives actually facing responsibility themselves. And few such profiles in courage thrive on Capitol Hill.

This clarification constitutes the principal product of the *Eichman* opinion. Flagburning now being no longer a forbidden fruit, it might be even less attractive to protesters than it was before 1989. As even Chief Justice Rehnquist, author of the bitter dissent in *Johnson*, told the mid-1990 Fourth Circuit Conference shortly post-*Eichman*, "[t]here are not many people in this country who have burned flags, but now that it has finally been established as legal, there will be far fewer."[153]

B. *The Facade of 1990 Congressional Social Policymaking*

A fitting postscript to the 1989-1990 flagburning controversy was the October 24, 1990, climax to nearly 18 months of divisive debate over congressional support of the National Endowment for the Arts.[154] On that date, the Senate adopted a bipartisan compromise[155] reflecting the nearly unanimous recommendation of the Labor and Human Resources Committee, as well as the final position of the House of Representatives.[156] Amendment 3130 to the Department of the Interior and Related Agencies Appropriations Act, Fiscal Year 1991, approved by a vote of 73 to 24,[157] provided in relevant part:

153. Mauro, *Courtside*, MIAMI REV., August 8, 1990, at 9, 10, col. 2.

154. Myers, *Arts Backers are Pleased By Congress's 3-Year Reauthorization of NEA Without Restrictions*, CHRONICLE OF HIGHER EDUCATION, Nov. 7, 1990, at A19, col. 4.

155. Tolchin, *Senate Passes Compromise Bill on Arts Endowment*, N.Y. TIMES, Oct. 25, 1990, at B1, col. 1.

156. 136 Cong. Rec. S 17,987 (daily ed. Oct. 24, 1990) (statement of Senator Pell).

157. *Id.* at 17,995.

> The chairperson of the National Endowment for the Arts shall establish sanctions for groups or individuals who receive funds pursuant to the provisions of section 5 and use such funds to create, produce, or support a project or production that is found to be obscene under State criminal laws or is found to be a criminal violation of State child pornography laws in which the group or individual produced such a project or production in the state or States described in the grant award as the site or sites of the project or production, *as determined by the court decision*, after final appeals.[158]

This means that Congress abandons determinations concerning congressionally-funded obscenity to the judiciary.[159] Senator Pell explained to the Senate that "[i]nstead of requiring that the Endowment itself set standards on what may or may not be obscene, this amendment places that role in the courts where such a decision truly belongs."[160]

The Senators, most of whom are lawyers, well knew that their language allows virtually open-ended federal funding of pornography, if not of obscenity. The three-prong test for identifying obscenity controllable by the state demands that: (a) Applying contemporary community standards, the average person must determine the work overall appealing to the prurient interest; (b) The work must in a patently offensive fashion present sexual conduct defined specifically by the state law being applied; and (c) The work must as a whole lack serious literary, artistic, political, or scientific value.[161] The question is whether a reasonable person would find serious literary, artistic, political, or scientific value in the material overall, not whether the ordinary member of a given community would do so.[162] One reason for calling obscenity an issue of law in *Jenkins v. Georgia*[163] was to render the appellate judiciary ultimate arbiter of what is suppressible.[164]

Just as the Flag Protection Act of 1989 was an empty gesture toward congressional social policymaking, purportedly forestalling flagburning, so this 1990 provision constitutes another hollow gesture toward congressional social policymaking, purportedly forestalling taxpayer-subsidized obscenity. In both examples Congress sought credit for popular policymaking while deliberately delivering their real decisions into the hands of the federal judiciary. Larry Hart, a spokesperson for Representative Dana Rohrabacher, declared that the 1990 enactment merely offered "political cover for members of congress who needed to tell their

158. *Id.* at 17,975 (emphasis added).

159. Zuckman, *Congress Removes Restrictions on Federal Arts Funding*, CONG. Q., Oct. 27, 1990, at 3613.

160. 136 Cong. Rec. S 17,987 (daily ed. Oct 24, 1990) (statement of Senator Pell).

161. Miller v. California, 413 U.S. 15 (1973).

162. Pope v. Illinois, 481 U.S. 497 (1987).

163. 418 U.S. 153 (1974).

164. F. JAMES & G. HAZARD, CIVIL PROCEDURE § 7.10, 338 (3d ed. 1985).

constituents that they were voting for something other than unrestricted funding of the N.E.A.."[165]

Congress covets popularity purchased with appropriations for the arts, but wants the judiciary to bear the responsibility for the controversial art which Congress actually funds. Compare Congress's direction in the War Powers Act[166] that judges can not interpret appropriations as congressional authorization of military moves, absent express directions to that effect in legislation. Congress wants the President to bear the responsibility for the controversial, undeclared foreign wars which Congress actually funds. Such is the policymaking division of labor of the three branches of the wholly unchecked central government as America enters 1991.

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165. Myers, *supra* note 154, at A23, col.4.

166. Authority to introduce United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances shall not be inferred—

(1) from any provision of law (whether or not in effect before November 7, 1973), including any provision contained in any appropriation Act, unless the provision specifically authorizes the introduction of United States Armed Forces into hostilities or into such situations and states that it is intended to constitute specific statutory authorization within the meaning of this chapter; or

(2) from any treaty heretofore or hereafter ratified unless such treaty is implemented by legislation specifically authorizing the introduction of United States Armed Forces into hostilities or into such situations and stating that it is intended to constitute specific statutory authorization within the meaning of this chapter.

50 U.S.C. § 1547(a) (1973).