

Barnette and Johnson: A Tale of Two Opinions

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*I don't believe in the long opinions which have been almost the rule here.
I think that to state the case shortly and the ground of decision as concisely
and delicately as you can is the real way.*

Oliver Wendell Holmes¹

Among other things, the final two years of the 1980s could well be remembered as a period of patriotic symbols, especially in the area of American constitutional law. During the summer of 1988, debate in the presidential campaign turned to the Pledge of Allegiance to the flag. George Bush criticized Michael Dukakis for vetoing a Massachusetts bill that would have required public school teachers to lead their students in reciting the Pledge of Allegiance.² Dukakis defended his action by citing an advisory opinion he had requested from the Supreme Court of Massachusetts which concluded that the bill violated the first amendment.³ Although Dukakis's position may have been constitutionally correct, there is no question that Bush's position was more appealing to the voting public.⁴

The controversy over the Pledge of Allegiance seemed relatively tame compared to the storm of outrage that greeted the Supreme Court's decision in *Johnson v. Texas*⁵ the following year. In *Johnson*, the Court invalidated a criminal conviction under a Texas statute that prohibited the "intentional[] . . . desecrat[ion of a] . . . national flag . . . in a way that the actor knows will seriously offend one or more persons likely to observe . . . his actions."⁶ By a five to four vote, the Court held that the conviction violated Johnson's first amendment freedom of expression.⁷ Public reaction was swift and vigorous.⁸ The debate quickly focused on whether the

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1. Letter from Oliver Wendell Holmes to Nina Gray (Mar. 2, 1903), excerpted in S. Novick, *Honorable Justice: The Life of Oliver Wendell Holmes* 256 (1989). Arguably, Holmes revolutionized the way Supreme Court opinions were written. During his tenure on the Court, his style was "an art form peculiar to [himself]." *Id.* As a principal spokesman for the Court for 20 years, however, his technique undoubtedly influenced the writing styles of subsequent Justices.

2. See Toner, *Dukakis Invokes Patriotic Theme*, N.Y. Times, Sept. 4, 1988, § 1, at 30, col. 1; Greenhouse, *Patriotism and the Pledge*, N.Y. Times, Aug. 27, 1988, § 1, at 1, col. 4; Rosenthal, *Bush Weak on Law, Dukakis Asserts*, N.Y. Times, Aug. 24, 1988, at A1, col. 1.

3. *Opinions of the Justices to the Governor*, 372 Mass. 874, 879-80, 363 N.E.2d 251, 255 (1977).

4. See *Waving the Bloody Shirt*, Newsweek, Nov. 21, 1988, at 116-17 (noting that flag issue, as centerpiece of campaign, was instrumental in propelling Bush to presidency).

5. 109 S. Ct. 2533 (1989).

6. Tex. Penal Code Ann. § 42.09 (Vernon 1989).

7. *Johnson*, 109 S. Ct. at 2548.

8. See Toner, *Bush and Many in Congress Denounce Flag Ruling*, N.Y. Times, June 23,

decision could be overruled by statute or whether a constitutional amendment would be necessary.⁹ Shortly after the decision, President Bush proposed a constitutional amendment that would provide Congress and the states with the power to prohibit desecration of the American flag.¹⁰ Congress instead chose to pass a statute entitled the Flag Protection Act of 1989,¹¹ which it concluded was constitutionally consistent with the *Johnson*

1989, at A8, col. 3.

9. See *id.*; Toner, *Constitutional Change to Prohibit Flag Burning Introduced in House*, N.Y. Times, June 30, 1989, at A12, col. 1; Toner, *President to Seek Amendment to Bar Burning the Flag*, N.Y. Times, June 28, 1989, at A1, col. 6; Weinraub, *Bush Seeking Way to Circumvent Court's Decision on Flag Burning*, N.Y. Times, June 27, 1989, at A1, col. 1; see also Tribe, *Protect it—and Ideas*, N.Y. Times, July 3, 1989, § 1, at 19, col. 1 (supporting change of federal statute outlawing flag desecration rather than amendment to Constitution). For testimony by Professor Walter Dellinger, opposing a constitutional amendment, and Judge Robert H. Bork, supporting a constitutional amendment, provided to the House of Representatives during consideration of the flag-burning act, see *Statutory and Constitutional Responses to the Supreme Court Decision in Texas v. Johnson: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 55-63, 203-11 (1989) (statements of Dellinger, Duke University Law School, and Bork, former judge on the U.S. Court of Appeals for the District of Columbia Circuit), excerpted in *Legal Times*, July 24, 1989, at 17.

10. See Toner, *Constitutional Change to Prohibit Flag Burning Introduced in House*, N.Y. Times, June 30, 1989, at A12, col. 1. The proposed amendment favored by the President read: "The Congress and the States shall have power to prohibit the physical desecration of the flag of the United States." S.J. Res. 180, 101st Cong., 1st Sess., 135 Cong. Rec. S8097 (daily ed. July 18, 1989). The proposal, by a vote of 51 to 48, failed to achieve the necessary two-thirds majority in the Senate. 135 Cong. Rec. S13,733 (daily ed. Oct. 19, 1989); see also Toner, *Senate Rejects Amendment Outlawing Flag Desecration*, N.Y. Times, Oct. 20, 1989, at A1, col. 1.

11. The text of the Act reads in its entirety:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Flag Protection Act of 1989".

SEC. 2. CRIMINAL PENALTIES WITH RESPECT TO THE PHYSICAL INTEGRITY OF THE UNITED STATES FLAG.

(a) In General.—Subsection (a) of section 700 of title 18, United States Code, is amended to read as follows:

"(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) Definition.—Section 700(b) of title 18, United States Code, is amended to read as follows:

"(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."

SEC. 3. EXPEDITED REVIEW OF CONSTITUTIONAL ISSUES.

Section 700 of title 18, United States Code, is amended by adding at the end the following:

"(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).

decision.¹² President Bush did not veto the bill, however, he chose not to sign it based on his opinion that a constitutional amendment was required to circumvent *Johnson*.¹³ As this article went to press, the United States Supreme Court invalidated the 1989 Act in consolidated appeals from two recent challenges to it styled *United States v. Eichman*.¹⁴

These two controversies were linked together by more than political debate over manifestations of patriotism. Both, of course, implicated the first amendment and in the process called upon the Supreme Court's landmark decision in *West Virginia State Board of Education v. Barnette*.¹⁵ There, the Court held that the first amendment prohibited a state board of education from requiring public school children to salute the flag while reciting the Pledge of Allegiance.¹⁶ Both the Massachusetts Supreme Court in its advisory opinion to Governor Dukakis¹⁷ and the United States Supreme Court in its opinion in *Johnson* relied on *Barnette*.¹⁸ This is not surprising. Not only was the *Barnette* holding pertinent to both issues, but the classic nature of the opinion all but demands that it be invoked in any controversy involving patriotic symbols and the first amendment.

Like *Johnson*, *Barnette* was a controversial case. It was litigated by Jehovah's Witnesses, an unpopular religious minority group.¹⁹ It was decided while the nation was fighting World War II in both the Pacific and Europe.²⁰ It overruled a contrary decision handed down only three years

"(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."

Pub. L. No. 101-131, 103 Stat. 777 (1989).

12. A Senate Report accompanied the Act arguing that based on the testimony of several witnesses who appeared before the Committee on the Judiciary, the Act was constitutional because it was both content-neutral and designed to protect the physical integrity of the flag rather than punish communication of ideas. S. Rep. No. 152, 101st Cong., 1st Sess. 1-15, reprinted in 1989 U.S. Code Cong. & Admin. News 610, 618-24.

13. See Dowd, *President Hints at a Compromise Over Federal Funds for Abortion*, N.Y. Times, Oct. 14, 1989, § 1, at 1, col. 1.

14. 58 U.S.L.W. 4744 (June 11, 1990). Federal district courts in the Western District of Washington and the District of Columbia had held that Act unconstitutional in the course of criminal prosecutions arising out of flag burning incidents. *United States v. Haggerty*, 731 F. Supp. 415 (W.D. Wash. 1990); *United States v. Eichman*, 731 F. Supp. 1123 (D.D.C. 1990). The Supreme Court held that the Act violated the first amendment because it was not content neutral; rather it punished acts of flag desecration which disparaged the flag as a national symbol, but protected respectful burning of a worn flag which promoted the flag's traditional symbolic role. 58 U.S.L.W. at 4745-46.

Not surprisingly, the movement for a constitutional amendment was revived. Holmes, *House Flag Burning Amendment Advances on Subcommittee Vote*, N.Y. Times, June 14, 1990, A13, col. 1.

15. 319 U.S. 624 (1943). The proposed amendment failed to gain enough votes in the House, and now appears to be dead. Holmes, *Amendment to Bar Flag Desecration Fails in the House*, N.Y. Times, June 22, 1990, A1, col. 3.

16. *Id.* at 642.

17. See 372 Mass. 874, 878-79, 363 N.E.2d 251, 254 (1977).

18. See *Johnson*, 109 S. Ct. at 2537, 2539, 2545, 2547.

19. *Barnette*, 319 U.S. at 628.

20. The nature of the required salute was changed after several groups protested that it was too similar to the Nazi Sieg Heil salute. *Id.* at 627-28. The decision was handed down a few months after the battles of Guadalcanal in the Pacific and Kaserine Pass in North Africa. See J. Garraty, *The American Nation: A History of the United States* 769-72 (1975).

earlier.²¹ Most importantly, it concluded that the first amendment restricted the state's power to coerce respect for national symbols.²² Despite some of the similarities, the opinion of the Court in *Barnette* is very different from the opinion in *Johnson*. The nature of those differences suggests ways in which the Court's rhetoric and perhaps its own perception of its role have shifted over the past forty years. These changes have not necessarily been for the better.

Barnette is widely regarded as one of the Supreme Court's most impressive first amendment decisions. This is not because of the facts of the case, which are dealt with rather summarily near the beginning of the opinion.²³ Nor is it necessarily because of the nationwide impact of the decision. Although *Barnette* removed the element of legal coercion from the schools, it is likely that many children who did not share the Jehovah's Witnesses' objection continued to pledge allegiance to the flag, implicitly influenced at least by peer group pressure and unaware that the ritual was not mandatory.²⁴ *Barnette* is regarded as a great case in large part because of the broad principle of freedom of conscience that the Court expounded. It, however, also is considered a landmark case because of its rhetoric.

The Court in *Barnette* focused on the state's attempt to foster national unity in light of first amendment protection for freedom of belief. All four of the Justices who wrote in *Barnette* seemed to recognize that they were talking to the American people about matters for which they cared very deeply. For Supreme Court opinions, they are largely devoid of legalisms. They are written in a straightforward, easily comprehensible, and frequently moving style.

Justice Jackson wrote the classic opinion of the Court. After briefly describing the regulation and its application to the student plaintiffs, he explained that the flag was a symbol and that the state was attempting to require the individual to affirm a belief in the ideas that the flag symbolized.²⁵ It was the question of whether the state possessed any such

21. *Minersville School Dist. v. Gobitis*, 310 U.S. 586, 599-600 (1940) (holding that religious beliefs could not excuse individuals from reciting Pledge of Allegiance). *Gobitis* was criticized harshly in the law reviews and by some of the press. D. Manwaring, *Render Unto Caesar: The Flag-Salute Controversy* 158-60 (1962). A significant wave of persecution of Jehovah's Witnesses broke out between the decisions in *Gobitis* and *Barnette*. *Id.* at 163-86.

22. *Barnette*, 319 U.S. at 634.

23. *Id.* at 625-30. The West Virginia State Board of Education had adopted a regulation requiring all teachers and students to recite the Pledge of Allegiance while saluting the flag in response to a state statute mandating that local school boards adopt courses of instruction "for the purpose of teaching, fostering and perpetuating the ideals, principles and spirit of Americanism, and increasing the knowledge of the organization and machinery of the government." *Id.* at 625 (quoting W. Va. Code § 1734 (Supp. 1941)).

24. As a student in a public elementary school during the fifties, I said the Pledge of Allegiance with my class every morning. No one ever suggested that I had a right to abstain and it certainly never occurred to me that I did or that there existed a Supreme Court case named *West Virginia State Board of Education v. Barnette*.

25. *Barnette*, 319 U.S. at 632. Justice Jackson stated:

There is no doubt that, in connection with the pledges, the flag salute is a form of utterance. 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

power that Justice Jackson considered crucial to the proper resolution of the case.²⁶ Noting that the Court's prior decision in *Minersville School District v. Gobitis*²⁷ assumed the existence of such power, he turned to an analysis of that case.²⁸ In relatively short order, Justice Jackson rejected Justice Frankfurter's arguments in *Gobitis* that invalidation of the regulation would unduly weaken the government, transform the Court into a national school board, and extend it well beyond its competence.²⁹ At that point, Justice Jackson recognized that "the very heart of the *Gobitis* opinion," and of course the heart of his *Barnette* opinion as well, was concerned with whether the state has the power to use methods such as a compulsory flag salute to foster national unity in furtherance of national security.³⁰ He then wrote nine paragraphs that essentially decided the case and gave the opinion its deservedly exalted status. In this closing section of the opinion he cited only one case, in a footnote at that, for a proposition that did not particularly need any authority.³¹

Justice Jackson relied on several historical examples to illustrate that official efforts to coerce national unity inevitably have proved futile and divisive.³² As he summarized it, "Compulsory unification of opinion achieves only the unanimity of the graveyard. It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings."³³ Nazi Germany obviously was fresh in mind. Justice Jackson continued with a reminder that under our system public opinion controls authority and not the reverse. Recognizing the inevitability of and indeed the need for diversity of opinion and belief under the first amendment, Justice Jackson concluded that:

freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be

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, the Crucifix, the altar and shrine, and clerical raiment. Symbols of 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.

Id. at 632-33.

26. Id. at 634-36.

27. 310 U.S. 586 (1940).

28. *Barnette*, 319 U.S. at 635-36.

29. Id. at 636-40.

30. Id. at 640.

31. Id. at 642 n.19. Justice Jackson cited the Selective Draft Law Cases, 245 U.S. 366 (1918), for the proposition that the government has the right to draft persons into the military.

32. *Barnette*, 319 U.S. at 641. Justice Jackson referred to Roman persecution of the Christians, the Inquisition, and Siberian exile from Russia.

33. Id.

orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.³⁴

These are unquestionably among the most powerful and most often quoted paragraphs ever written by a United States Supreme Court Justice.

Justices Black and Douglas wrote a short concurring opinion explaining why they were voting to overrule the *Gobitis* decision that they had joined in two years earlier.³⁵ Their opinion was straightforward and simple, citing only one other case.³⁶ They explained that “[w]ords uttered under coercion are proof of loyalty to nothing but self interest. Love of country must spring from willing hearts and free minds, inspired by a fair administration of wise laws enacted by the people’s elected representatives within the bounds of express constitutional prohibitions.”³⁷

Justice Murphy also wrote a short concurring opinion. He quoted from Thomas Jefferson, but did not cite any cases.³⁸ He emphasized the extent to which the West Virginia requirement was inconsistent with freedom of religious belief and freedom of conscience.³⁹

Justice Frankfurter wrote an impassioned dissent defending his opinion for the Court in *Gobitis* by beginning with the now famous sentence, “One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution.”⁴⁰ He devoted much of his lengthy dissent to an exposition of his belief in the wisdom of judicial restraint, especially with respect to an issue on which the Court already had spoken.⁴¹ Although Justice Frankfurter called on Marshall, Jefferson, Lincoln, Holmes, Thayer, and others for support, his argument ultimately was more one of policy than of authority.⁴² Closer to the merits, Justice Frankfurter argued that “[t]he constitutional protection of religious freedom terminated disabilities, it did not create new privileges. It gave religious equality, not civil immunity. Its essence is freedom from conformity to religious dogma, not freedom from conformity to law because of religious dogma.”⁴³ Justice Frankfurter relied on traditional case analysis to a much greater degree than the other Justices who wrote in *Barnette*, although perhaps not as much as he ordinarily did.⁴⁴

34. *Id.* at 642.

35. *Id.* at 643-44 (Black, J., & Douglas, J., concurring).

36. *Id.* at 643 (Black, J., & Douglas, J., concurring) (citing *Jones v. Opelika*, 316 U.S. 584, 623 (1942)).

37. *Id.* at 644 (Black, J., & Douglas, J., concurring).

38. *Id.* at 644-46 (Murphy, J., concurring).

39. *Id.* at 645 (Murphy, J., concurring).

40. *Id.* at 646 (Frankfurter, J., dissenting).

41. *Id.* at 648-53, 665-71 (Frankfurter, J., dissenting).

42. *Id.* at 649, 653, 667-70 (Frankfurter, J., dissenting).

43. *Id.* at 653 (Frankfurter, J., dissenting).

44. Compare *id.* at 646-71 (Frankfurter, J., dissenting) with *Baker v. Carr*, 369 U.S. 186, 266-330 (1962) (Frankfurter, J., dissenting) and *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 593-628 (1952) (Frankfurter, J., concurring) and *Dennis v. United States*, 341 U.S. 494, 517-61 (1951) (Frankfurter, J., concurring) and *Wolf v. Colorado*, 338 U.S. 25, 25-39 (1949). As a general rule, Justice Frankfurter did not write for the layperson. See generally H. Thomas, Felix Frankfurter: Scholar on the Bench 343-50 (1960) (discussing Frankfurter’s

Barnette is a remarkable case. Perhaps it comes as close to law-as-literature as we can expect from the Supreme Court.⁴⁵ Intuitively, the result in *Barnette* may not have been popular with large segments of the American public. The opinions were written, however, in language apparently aimed at explaining, as well as persuading the public at large and not simply constitutional lawyers, that the Court had reached the right decision under the first amendment.⁴⁶

From a technical legal standpoint, the style of the *Barnette* opinion can cause problems. Justice Jackson recognized and relied on a rather sweeping first amendment based "freedom of conscience"⁴⁷ that carries great rhetorical force but has yet to be clearly defined forty-five years later. As Justice Frankfurter illustrated, it was hardly an example of restrained and cautious judging.⁴⁸

As a matter of judicial style, *Texas v. Johnson*⁴⁹ is a very different kind of case from *Barnette*. The subject matter, flag burning, unquestionably provokes a more intense reaction than a mandatory flag salute. *Johnson* involved a situation somewhat the reverse of *Barnette*. In *Barnette* the question was whether the state could require a specific act of respect toward a national symbol. In *Johnson* the issue was whether the state could prohibit a specific act of disrespect.

Justice Brennan wrote for the majority of a narrowly divided Court. The opinion was low key and tightly structured. After stating the facts, he considered whether Johnson's act of burning the flag was expressive in nature and concluded that it was.⁵⁰ Justice Brennan set forth the Court's analytical approach to the issue in the quotation below, which explicates the Court's earlier decision in *United States v. O'Brien*⁵¹ and provides a representative example of the rhetorical style of the opinion. He stated:

Thus, although we have recognized that where " 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating

writing style, work habits, and courtroom presence).

45. For recent discussions of the *Barnette* case from a literary perspective, see Ferguson, *The Judicial Opinion as Literary Genre*, 2 *Yale J.L. & Humanities* 201 (1990); Resnik, *Constructing the Canon*, 2 *Yale J.L. & Humanities* 221 (1990).

46. See generally Prentice, *Supreme Court Rhetoric*, 25 *Ariz. L. Rev.* 85 (1983) (noting persuasive strategies employed by Supreme Court Justices when writing opinions in controversial cases). Professor Prentice argues that the Supreme Court consciously needs to adopt rhetorical strategies to persuade its various audiences, including the public, that its decisions are correct. He points out that the Court often must speak to several different audiences at once, including members of the Court itself, the litigants, government officials charged with enforcement and obedience, other persons affected by the decision, the lower courts, the press, and the public. *Id.* at 95-98. This obviously complicates the Court's task.

47. *Barnette*, 319 U.S. at 642.

48. *Id.* at 648 (Frankfurter, J., dissenting).

49. 109 S. Ct. 2533 (1989).

50. *Id.* at 2548. Justice Brennan also wrote the majority opinion in the recent case of *United States v. Eichman*, in which he relied on his *Johnson* opinion to strike down the federal Flag Protection Act of 1989. If anything the *Eichman* opinion was even tighter and more measured than *Johnson*. 58 U.S.L.W. 4744 (June 11, 1990) The Court refused to reconsider *Johnson*. *Id.* at 4746.

51. 391 U.S. 367 (1968).

the nonspeech element can justify incidental limitations on First Amendment freedoms," *O'Brien, supra*, at 376 . . . we have limited the applicability of *O'Brien's* relatively lenient standard to those cases in which "the governmental interest is unrelated to the suppression of free expression." *Id.*, at 377 . . . *see also Spence*, 418 U.S., at 414, n.8. . . . In stating, moreover, that *O'Brien's* test "in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions," *Clark, supra*, at 298 . . . we have highlighted the requirement that the governmental interest in question be unconnected to expression in order to come under *O'Brien's* less demanding rule.⁵²

Justice Brennan then analyzed the asserted state interests. He concluded that the state interest in preventing breaches of the peace was not implicated by the facts in the record.⁵³ Most of the Court's analysis was devoted to the other asserted state interest, *i.e.*, "preserving the flag as a symbol of nationhood and national unity."⁵⁴ Because intent to offend the public was an element of the offense, the Court concluded that the restriction was related to the defendant's message and consequently, the strict standard of review applied.⁵⁵

Quoting Justice Jackson's famous "fixed star" language from *Barnette*, the Court stated that there was no special first amendment exception for the American flag nor any way to distinguish it from other national symbols such as the presidential seal or the Constitution.⁵⁶ Consequently, Texas' legitimate interest in preserving the flag as a symbol of national unity could not override the first amendment policy against content-based restrictions on expression.⁵⁷ Up to that point, the Court's opinion had been measured and lawyerly with frequent citation and analysis of the precedents; quotations from the briefs, record, and transcript of oral argument; and discussion and application of the Court's pertinent analytical tests.⁵⁸ Justice Brennan closed the opinion, however, by explaining:

We are tempted to say, in fact, that the flag's deservedly cherished place in our community will be strengthened, not weakened, by our holding today. 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

52. *Johnson*, 109 S. Ct. at 2540-41. This short passage, with its multitudinous citations and quotations, is a microcosm of Brennan's opinion as a whole.

53. *Id.* at 2541-42.

54. *Id.* at 2542-48.

55. *Id.* at 2543. Again in *Eichman*, the Court concluded that the lack of content neutrality was the undoing of the statute. The Court noted that the Act's prohibition of conduct that "knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag" is aimed at "disrespectful treatment." Similarly the exception for ceremonious burning of a worn flag protects respectful treatment. This indicated a concern with the viewpoint of the symbolic expression rather than a neutral attempt at preserving the physical integrity of the flag. 58 U.S.L.W. at 4745.

56. *Johnson* at 2545-46.

57. *Id.* at 2546.

58. *Id.* at 2536-46.

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.

The way to preserve the flag's special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong.⁵⁹

Following a quotation from Justice Brandeis's famous concurring opinion in *Whitney v. California*,⁶⁰ the Court closed by noting:

And, precisely because it is our flag that is involved, one's response to the flag-burner may exploit the uniquely persuasive power of the flag itself. We can imagine no more appropriate response to burning a flag than waving one's own, no better way to counter a flag-burner's message than by saluting the flag that burns, no surer means of preserving the dignity even of the flag burned than by—as one witness here did—according it remains a respectful burial. We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents.⁶¹

Justice Kennedy added a short concurring opinion in which he did not really address the first amendment issue. Rather, he simply explained that while he found the decision to be very painful, he believed that it was correct and that the Court could not avoid such hard cases.⁶²

Chief Justice Rehnquist wrote the primary dissent. He devoted the first portion of his opinion to several lyrical quotations pertaining to the flag including the *Star Spangled Banner*, *Emerson's Concord Hymn*, and all of Whittier's poem *Barbara Frietchie*.⁶³ The Chief Justice continued by quoting from federal law and precedent to illustrate the reverence with which the American flag is held.⁶⁴ Turning to the legal issues, Chief Justice Rehnquist argued that, as with fighting words, burning the flag, even though

59. *Id.* at 2547.

60. 274 U.S. 357, 377 (1927).

61. *Johnson*, 109 S. Ct. at 2547-48. Justice Brennan closed his opinion in *United States v. Eichman* by making a similar point, but far more succinctly and with greater moderation than in *Johnson*. Essentially he wrote:

We are aware that desecration of the flag is deeply offensive to many. But the same might be said, for example, of virulent ethnic and religious epithets . . . , vulgar repudiations of the draft . . . and scurrilous caricatures. . . . "If there is a bedrock principle underlying the First Amendment, it is that Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." [quoting *Johnson*] Punishing desecration of the flag dilutes the very freedom that makes this emblem so revered, and worth revering.

58 U.S.L.W. 4744, 4746 (June 11, 1990) (citations omitted).

62. *Id.* at 2548 (Kennedy, J., concurring).

63. *Id.* at 2549-50 (Rehnquist, C.J., dissenting). See Massey, *The Jurisprudence of Poetic License*, 1989 Duke L.J. 1047, 1048-50 (1989), for the observation that the *Barbara Frietchie* story was a creation of Whittier's imagination and that Chief Justice Rehnquist should not have treated it as historical fact.

64. *Johnson*, 109 S. Ct. at 2550-51 (Rehnquist, C.J., dissenting).

expressive in nature, is " 'no essential part of any exposition of ideas. . . .'"⁶⁵ He argued that criminal punishment of flag burning should not run afoul of the first amendment since there are so many other ways in which the speaker can convey his message, including the burning of every other national symbol.⁶⁶ Finally, Chief Justice Rehnquist argued that the prohibition was not aimed at the message at all, but rather, the mode in which it was conveyed.⁶⁷

Justice Stevens also wrote a dissenting opinion.⁶⁸ Like Chief Justice Rehnquist, he attempted to capture the special significance that the American flag bears to citizens and noncitizens as well. He wrote:

It is more than a proud symbol of the courage, the determination, and the gifts of nature that transformed 13 fledgling Colonies into a world power. It is a symbol of freedom, of equal opportunity, of religious tolerance, and of goodwill for other peoples who share our aspirations. The symbol carries its message to dissidents both at home and abroad who may have no interest at all in our national unity or survival.⁶⁹

Like Chief Justice Rehnquist, Justice Stevens argued that criminal prohibition was aimed at the manner of communication rather than the content of the message and as such was not as troubling under the first amendment.⁷⁰

Despite the controversy that it produced, the Court's opinion in *Johnson* probably reached the correct result as a matter of first amendment doctrine.⁷¹ Punishing a person specifically because her expression offends others runs directly counter to one of the central tenets of freedom of speech.⁷² The dissent was not wholly correct in characterizing the prohibition as simply one of manner rather than content. The message is not simply "I disagree with what the flag represents"; it is also inevitably "I have no respect for the flag." As such, there is probably not any other equally effective manner of conveying the message. Moreover, the state does not have unlimited authority to prohibit one method of expression simply

65. *Id.* at 2553 (Rehnquist, C.J., dissenting) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942)).

66. *Id.* (Rehnquist, C.J., dissenting). See Tushnet, *The Flag-Burning Edisode: An Essay on the Constitution*, 61 *Colo. L. Rev.* 39, 44-46 (1990), for the argument that Chief Justice Rehnquist may have failed to build a majority in *Johnson* by making the rhetorical error of suggesting that the Court should modify general first amendment principles instead of simply making an exception for flag burning.

67. *Johnson* at 2554 (Rehnquist, C.J., dissenting).

68. *Id.* at 2555-57 (Stevens, J., dissenting).

69. *Id.* at 2556 (Stevens, J., dissenting). Justice Stevens wrote the sole dissent in *United States v. Eichman*, 58 U.S.L.W. 4744, 4746 (June 11, 1990), writing for Chief Justice Rehnquist, and Justices O'Connor and White, the *Johnson* dissenters.

70. *Johnson* at 2557 (Stevens, J., dissenting). Justice Stevens reiterated this theme in his dissent in *Eichman*, 58 U.S.L.W. at 4746-47.

71. See Stone, *Flag Burning and the Constitution*, 75 *Iowa L. Rev.* 111, 114 (1989) (concluding that Supreme Court's analysis in *Johnson* was correct). The same is true of Justice Brennan's majority opinion in *Eichman*, 58 U.S.L.W. at 4744-46.

72. *Johnson*, 109 S. Ct. at 2544. Justice Brennan cited 13 Supreme Court precedents for this proposition. Justice Harlan made the point particularly well for the Court in *Cohen v. California*, 403 U.S. 15, 24 (1971).

because another is available, especially when the prohibition may affect the nature of the message conveyed.⁷³ The dissent is surely correct in noting that the flag is unique and more special than any other national symbol. Even so, there is little in existing first amendment doctrine to suggest that even the flag may be placed off limits to offensive and destructive symbolic expression.⁷⁴

From a purely doctrinal standpoint, Justice Brennan did a creditable job of explaining why the conviction could not be sustained. In other respects, however, the opinion is disappointing. Unlike the concurring opinion of Justice Kennedy or the dissenting opinions of Chief Justice Rehnquist and Justice Stevens, Justice Brennan's opinion for the Court only dimly acknowledges how painful and wrenching the burning of the American flag is for most Americans.

Because of the sensitive nature of the public issue involved, *Johnson* is the type of case in which the Court should consider itself under an obligation to speak directly to the people and attempt to explain in nontechnical language why it believes it must reach the result that it has. The *Barnette* opinion certainly can be read as one in which the Court recognized and discharged that obligation in a powerful and effective manner.⁷⁵ In making his primary constitutional argument in that case, Justice Jackson wrote eloquently but in the language of the layperson rather than the lawyer. The core of his opinion is wholly uncluttered with citations or jargon.⁷⁶

In contrast, most of Justice Brennan's opinion in *Johnson*, especially the core explanation of why the conviction was unconstitutional, is relatively technical and packed with citations to and quotations from legal authority.⁷⁷ Like most Supreme Court opinions, it clearly is addressed to an audience of lawyers and scholars as opposed to the public at large. This is quite unfortunate. Much of the strength and legitimacy of the Constitution

73. See *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 541 n.10 (1980) (rejecting suggestion that content-based regulation justified by showing alternative means of speech); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council Inc.*, 425 U.S. 748, 757 n.15 (1976) (same); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556 (1975) (same); *Spence v. Washington*, 418 U.S. 405, 411 n.4 (1974) (same).

74. To a large extent, this is the gist of Justice Jackson's opinion for the Court in *Barnette*. See *supra* notes 25-26 and accompanying text; see also M. Nimmer, *Nimmer on Freedom of Speech* § 3.06[E][1] (1984) (noting that flag desecration statutes probably violate first amendment); Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482, 1502-08 (1975) (same).

75. See Mengler, *Public Relations in the Supreme Court: Justice Tom Clark's Opinion in the School Prayer Case*, 6 Const. Commentary 331 (1989), for the argument that Justice Tom Clark made a very deliberate attempt to deflect adverse reaction by writing an opinion addressed directly to the American people in the Court's second school prayer case, *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963).

76. *Barnette*, 319 U.S. at 640-42.

77. *Johnson*, 109 S. Ct. at 2542-48. But see Greenwalt, *O'er the Land of the Free: Flag Burning as Speech*, 37 U.C.L.A. L.Rev. 925, 943 (1990) (noting that none of the Justices in *Johnson*, including Justice Brennan, cited a single law review article perhaps to avoid detracting "from the majestic simplicity of the flag and the majestic simplicity of freedom of speech"). Justice Brennan's opinion for the majority in *United States v. Eichman*, 58 U.S.L.W. 4744, is still legalistic, but is perhaps somewhat more accessible and considerably shorter than his opinion in *Johnson*.

itself is derived from the fact that it was ratified by the people and that the people continue to accept its legal and moral authority.⁷⁸ Most of the time, the vast majority of the people would probably just as well remain ignorant of how the Court is interpreting the Constitution. But sometimes they want to understand. And when they do, the Court has an obligation to explain in a comprehensible manner, especially when its decision almost certainly runs against common intuition. In a case like *Johnson*, the Court truly should feel a responsibility to act as a "teacher[] in a vital national seminar," to use Professor Rostow's memorable phrase.⁷⁹

Arguably, Justice Brennan attempted to explain the decision in layperson's terms in the final few paragraphs of his opinion.⁸⁰ Unfortunately, that portion of the opinion seems hollow and preachy. Rather than explaining why the first amendment mandates the result reached by the Court, Justice Brennan basically told those who favor the punishment of flag burning that their response is inconsistent with true American values. As Chief Justice Rehnquist noted in dissent:

The Court concludes its opinion with 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.⁸¹

Chief Justice Rehnquist's characterization of the tone of Justice Brennan's remarks rings true. And he is certainly correct that the Court would be ill advised to resort to scolding those who disagree in good faith. That does not mean, however, that the Court should avoid any attempt to explain its more controversial decisions to the public at large. If that is what Justice Brennan was trying to do, then he simply did a poor job of it.

It would seem that each of the other Justices who wrote in *Johnson* made some attempt to speak to an audience beyond the immediate professional consumers of the Court's product. In a sense, Justice Kennedy simply apologized. In essence, he said, "I realize that what I have done will hurt you, I'm sorry, but I really had to do it." The thought was nice. It was better than nothing. But perhaps he should have tried to explain in simple terms why the first amendment requires that result.

78. See, e.g., A. Bickel, *The Morality of Consent* 15-16 (1975) (noting that consent of public depends on keeping public informed on issues); C. Black, *The People and the Court: Judicial Review in a Democracy* 209-15 (1960) (stating conviction in the "necessity and the duty of ultimate deference to the people, in the exercise of all political power"); Rostow, *The Democratic Character of Judicial Review*, 66 *Harv. L. Rev.* 193, 210 (1952) (describing Court's duty as one of preserving "democratic legitimacy of political decisions").

79. Rostow, *supra* note 78, at 208.

80. *Johnson*, 109 S. Ct. at 2547-48; see also *supra* notes 59-61 and accompanying text.

81. *Johnson*, 109 S. Ct. at 2555 (Rehnquist, C.J., dissenting). As noted above, Justice Brennan largely avoided this tack in *Eichman*. See *supra* note 61.

Chief Justice Rehnquist attempted to evoke the spirit of reverence that Americans feel toward the flag by calling upon both literature and the law. He was able to drive home the point that the flag is indeed perceived differently than any other national symbol. His analysis of the first amendment issue, however, was as technical and citation-laden as Justice Brennan's analysis.⁸² Justice Stevens' short dissent, more than any of the other opinions in the case, attempted to explain in ordinary language the special significance of the flag and the reasons why the state should be able to prohibit its desecration.⁸³

Perhaps Justice Brennan was attempting to explain the decision in a more popular idiom near the end of his decision and simply did so inartfully. If so, it would be unfair to criticize him for lacking the eloquence of a Justice Jackson. *Johnson* is scarcely the only recent Supreme Court opinion involving a significant constitutional issue that seems more technical than evocative.⁸⁴ Virtually all of the Court's opinions seem bland and plodding these days. Perhaps the present Justices, despite their competence and intelligence, simply do not have the literary talents that contributed to the greatness of the likes of Holmes, Brandeis, Stone, Jackson, Douglas, Black, Frankfurter, and both Harlans, just to name a few. In that regard, perhaps we have been particularly fortunate in the past.

There is, however, probably more to the contrast between *Barnette* and *Johnson* than the stylistic strengths of different generations of Justices. It is, rather, a classic example of what Professor Robert Nagel has characterized as the "formulaic constitution."⁸⁵ In his extraordinarily perceptive article of a few years back, Professor Nagel argued that the Supreme Court has adopted a highly formalistic style of opinion writing over the past thirty

82. *Johnson* at 2552-55 (Rehnquist, C.J., dissenting).

83. *Id.* at 2555-57 (Stevens, J., dissenting); see also *supra* notes 68-70 and accompanying text. Once again, Justice Stevens' dissent in *Eichman* was written in a style far more accessible to the layperson than was Justice Brennan's opinion for the majority. Indeed, it contains no footnotes and only one formal legal citation—to *Texas v. Johnson*. The analysis is engaging and at times quite eloquent despite the fact Justice Brennan's position on the merits is far stronger.

From a rhetorical standpoint, Justice Stevens' dissent in *Eichman* comes close to achieving what Justice Brennan's majority opinion in *Johnson* so sorely lacked. For instance, he writes:

The symbolic value of the American flag is not the same today as it was yesterday. Events during the last three decades have altered the country's image in the eyes of numerous Americans, and some now have difficulty understanding the message that the flag conveyed to their parents and grandparents—whether born abroad and naturalized or native born. Moreover, the integrity of the symbol has been compromised by those leaders who seem to advocate compulsory worship of the flag even by individuals whom it offends, or who seem to manipulate the symbol of national purpose into a pretext for partisan disputes about meaner ends. And, as I have suggested, the residual value of the symbol after this court's decision in *Texas v. Johnson* is surely not the same as it was a year ago.

58 U.S.L.W. at 4747.

84. See generally Nagel, *The Formulaic Constitution*, 84 Mich. L. Rev. 165 (1985) (discussing how Supreme Court's modern constitutional jurisprudence is distancing itself from the public and the Constitution).

85. *Id.* at 165.

years.⁸⁶ As he explained:

This style emphasizes formalized doctrine expressed in elaborately layered sets of "tests" or "prongs" or "requirements" or "standards" or "hurdles." The judicial opinions in which these "analytical devices" appear tend to be characterized by tireless, detailed debate among the Justices. The apparently definitive formulations, standing amidst a welter of separate opinions and contentious footnotes, seem forlorn testaments to the ideals of clarity and consensus.⁸⁷

. . . .
 . . . The style is an amalgam of the bureaucratic and the academic.⁸⁸

. . . .
 . . . The Court . . . has adopted the formulaic style in part because its primary audience is not the general public. It is addressing itself, its clerks, and the lower courts.

. . . .
 . . . It is also academic. The opinions look like law review articles. They have the same pattern of laborious footnoting and detailed argumentation.⁸⁹

. . . .
 . . . In this age of intellectual anxiety, when judicial power is extended but its bases are more problematic than ever, it is only natural that the Court should imitate its most skeptical and demanding audience.⁹⁰

. . . .
 . . . [T]he modern style is a superficial and unsatisfactory response to (admittedly) serious problems. It achieves organizational control and intellectual responsibility, to the extent it does so, by excluding the general public from the Court's audience and by impoverishing the Court's thought.⁹¹

Professor Nagel's analysis accurately captures the feel of modern Supreme Court opinions and explains why they rarely, if ever, are capable of rising to the heights of a *Barnette*. Arguably, the Court does not speak to the public persuasively, if at all, to a large degree because it has gotten out of the habit of engaging in ordinary discourse. As Professor Nagel put it, "the current Court [has] persistently . . . isolate[d] itself from the general culture, retaining ties of language and intellectual approach only to an

86. *Id.*; see also Kaye, *One Judge's View of Academic Law Review Writing*, 39 *J. Legal Educ.* 313, 315 (1989) ("Opinions that are shorn of adornments—the crisp, plain statements of an earlier day—do not seem 'scholarly' or 'reasoned' when written today. The principle appears to be that if an opinion is short, unanimous, and readable, it is unsophisticated or unimportant; if not, it is positively brilliant.").

87. Nagel, *supra* note 84, at 165 (footnotes omitted).

88. *Id.* at 177.

89. *Id.* at 178.

90. *Id.* at 180 (footnotes omitted).

91. *Id.* at 182.

academic elite."⁹² By so doing, it sacrifices the opportunity to exert any significant, direct influence on popular understanding of the Constitution. This in turn tends to weaken the bond between the people and the Court. Given that the legitimacy of constitutional judicial review is based largely on consent of the governed, such consent is undermined when the Court declines to speak to the people in their own language.

This is not to suggest that a straightforward and even eloquent opinion will change many minds on a controversial issue, at least in the short run. Most Americans will not read Supreme Court opinions or even newspaper excerpts of them no matter how they are written or to whom they are addressed.⁹³ There certainly must have been many who read Justice Jackson's opinion in *Barnette* and yet continued to believe that the first amendment should not be construed to prohibit the mandatory flag salute.⁹⁴ Many, perhaps even a majority, would still agree. Similarly, it is unlikely that the most persuasive and evocative opinion that the Supreme Court could have written would have convinced many of those who so vigorously disagreed that the criminal prohibition of flag burning in the circumstances of *Johnson* should be unconstitutional. But that is not necessarily the point. It is important, at least in cases such as *Johnson*, that the Court attempts to explain its decision to the people at large simply out of respect. If for no other reason than to reinforce its own legitimacy, the Court should say "we understand that many of you disagree but here is why we so hold." To a degree, Justice Kennedy attempted to make that effort. Justice Brennan also appeared to make such an effort but only as an afterthought and in a voice that seemed more patronizing than empathetic. Contrary to Chief Justice Rehnquist's suggestion, the unconvincing tone of

92. *Id.* at 212. Professor Mengler wrote that "[t]wenty-five years later, one is hard pressed to name any other Supreme Court opinion decided since *Schempp* that has attempted to address the concerns of the American people." Mengler, *supra* note 75, at 348. *See also* Schauer, *Opinions as Rules* (Book Review), 53 *U. Chi. L. Rev.* 682, 687-88 (1986) (observing that Supreme Court rarely writes opinions for its nonacademic audience, especially the ordinary citizen).

93. *See* Mengler, *supra* note 75, at 347. Mengler noted that reaction to the Supreme Court's first two school prayer cases, including the *Schempp* opinion which was arguably aimed directly at the public, occurred before the public had the time or opportunity to read the opinions. *Id.* at 346-47. Even if the "man on the street" does not read the opinions, the Court should at least write in language that allows gatekeepers to explain decisions to the public. Prentice, *supra* note 46, at 97. Much can be lost in translation, of course. David Manwaring notes that many writers in both the popular press and the law reviews misinterpreted the Jackson opinion in *Barnette* as a freedom of religion, rather than a freedom of conscience decision. D. Manwaring, *supra* note 21, at 236, 239.

94. In his study of *Gobitis* and *Barnette*, Manwaring concluded that the reaction of the press to *Barnette* was largely favorable, persecution of Jehovah's Witnesses subsided following the decision, and the public at large was too caught up in the war effort to engage in any significant negative reaction to the decision. D. Manwaring, *supra* note 21, at 236-40. There was a certain amount of state defiance of the *Barnette* decision, however, particularly in New Jersey and Colorado. *Id.* at 242.

In his study of the *Schempp* opinion, Professor Mengler concluded that the direct and simple nature of the opinion was not the reason why the public reaction to the decision was milder than to the previous school prayer decision. Rather, the public had grown accustomed to the Court's interference with school prayer. Mengler noted, however, that Judge Kaufman had previously reached the opposite conclusion. *See* Mengler, *supra* note 75, at 334, 346-49 (citing Kaufman, *The Supreme Court and its Critics*, *Atlantic Monthly*, Dec. 1963, at 50).

Justice Brennan's final remarks should not persuade future Courts to stick to their dry and technical formulaic analysis in cases like *Johnson*. Rather, it should push them to try even harder in the course of their analysis of difficult and publicly controversial constitutional cases to make a rhetorical connection with the people. Obviously that will not be easy. As Professor Nagel noted, "if [the Court's] roles require sensitive moral judgments and the capacity to educate and move the people who provide continuing consent to the authority of the Constitution, the Court must learn other ways of talking. It could learn something from reconsidering the idioms of past Courts."⁹⁵ *West Virginia State Board of Education v. Barnette* would be an excellent place to start.

95. Nagel, *supra* note 84, at 212.