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Texas v. Johnson: A Rhetorical Analysis

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ABSTRACT

In 1989, the Supreme Court of the United States heard the landmark case, *Texas v. Johnson*. The case centered around the constitutionality of flag burning as an act of protest. The issue arose after Gregory Lee Johnson was arrested outside the Republican National Convention for burning an American flag in protest of the nomination of Ronald Reagan. Johnson was arrested and charged under a Texas statute that prohibited the desecration of a venerated object. In this highly emotional and nuanced case, the Court considered whether flag burning is a form of expressive conduct protected under the First Amendment, whether the likelihood of inciting violence outweighed the value of free expression, and whether the American flag's history and symbolism afforded it special protection in the law and in society. In a 5-4 vote, the Court found that flag burning is a form of expressive conduct protected under the First Amendment. Justifying the majority's decision, Justice William Brennan asserted, "[i]f there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." This thesis analyzes the rhetoric of the case's oral arguments and opinions, as well as the effect of the Court's decision in American culture.

First, I discuss the background of the case and of the study of rhetoric within the context of law. Then, I analyze the oral arguments made by each side and three of the four written opinions. Finally, I discuss the broader effects on society and the rhetorical legacy of the decision.

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Chapter 1

Introduction

When James Madison penned the First Amendment to the US Constitution, he did so with the conviction that the right to free speech—the ability to criticize one's government, to pray, to speak freely on political and social matters—was a natural right. Natural rights were made famous by English philosopher John Locke in part because they are distinct from natural law. While natural law emphasized duties, Locke's perception of a natural right was less demanding, emphasizing the "perfect freedom" into which humans were born and their entitlement of certain, inalienable rights.[1] These rights, Locke argued, included life, liberty, and property. The first and third components of Locke's definition are relatively straightforward: everyone, as a function of their humanity, is entitled to live and to own what they have earned or bought. The second component of Locke's definition is more complex. In response to this definition, one would be forced to ask, what it means to be *entitled* to liberty, who should be tasked with determining the limits of liberty, and what the definition of liberty actually is.[2]

To answer these questions, Jud Campbell, an Associate Professor of Law at the University of Richmond School of Law, explains that the framers based their beliefs concerning the limitations of liberty on what they referred to as a "social contract." To construct a political

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[1] Campbell, Jud. "What Did the First Amendment Originally Mean?" *Richmond Law Magazine - University of Richmond*, https://lawmagazine.richmond.edu/features/article/-/15500/what-did-the-first-amendment-originally-mean.html.

[2] Hicks, Ted. "A State of Perfect Freedom." *John Locke Foundation*, https://www.johnlocke.org/landing-page/a-state-of-perfect-freedom/.

society through the social-contract theory first required that the founders envision a society in which there was no government. Only then would they consider which freedoms they would voluntarily sacrifice and powers they would transfer to a government to which they would grant authority.[3] They ultimately decided there were two circumstances under which a government could and should restrict natural rights: the first is when the people themselves consent to the restriction and the second is when doing so "promoted the public good — that is, the aggregate happiness and welfare of the entire political society."[4]

The vague nature of liberty eventually required a judicial body to determine where a people's liberty had traveled too far, where it had begun to encroach upon and diminish the public good. The United States Supreme Court, established in 1789, assumed the role of interpreting liberty's scope, delivering consequential decisions that determined the power of the government to limit liberty, including the freedom of speech, for reasons pertaining to the public good. It is noteworthy that despite the First Amendment's language that "Congress shall make no law… abridging the freedom of speech," the amendment has been and continues to be interpreted to prohibit all government agencies and officials from banning free speech, except in extraordinary circumstances.[5] The Amendment does not pertain solely to Congress.

The Supreme Court's role regarding the interpretation of the First Amendment was increased in the 20th century; they asserted that the freedom of speech could be limited during wartime in *Schenck v. United States*, that the government could not force citizens to confess or

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[3] *Ibid*

[4] Campbell, Jud. "What Did the First Amendment Originally Mean?" *Richmond Law Magazine - University of Richmond*, https://lawmagazine.richmond.edu/features/article/-/15500/what-did-the-first-amendment-originally-mean.html.

[5] First Amendment." *Legal Information Institute*, Legal Information Institute, https://www.law.cornell.edu/wex/first_amendment#:~:text=The%20Supreme%20Court%20interprets%20the,only%20expressly%20applicable%20to%20Congress.

act their faith in matters of opinion in *West Virginia v. Barnette*, and that the First Amendment protected the rights of students to peacefully protest the Vietnam War through the use of armbands in *Tinker v. Des Moines.*

They would soon be presented with a new challenge in the 1980's over whether the burning of a sacred American symbol, the American flag, was protected under the First Amendment. The question arose after the state of Texas arrested Gregory Lee Johnson for publicly burning an American flag outside of the 1984 Republican National Convention to protest the nomination of Ronald Reagan. Johnson was subsequently convicted for the "desecration of a venerated object" under Texas Penal Code. His conviction was overturned by the Fifth Court of Appeals of Texas, which ruled that the burning of the American flag was protected under the First Amendment. This ruling by the Fifth Court of Appeals was predicated on precedent, specifically from *Spence v. Washington*, another First Amendment case. The standard set by the court in *Spence* was two-pronged; to receive First Amendment protection, speech must (1) intend to convey a particular message and (2) there is great reasonable likelihood that the message will be understood. In response to this decision by the Fifth Court of Appeals, the state of Texas asked the Supreme Court of the United States to hear the case and finally determine whether the desecration of the American flag was constitutionally protected by the First Amendment.

In this thesis, I conduct a rhetorical analysis of the oral arguments, as well as the majority, concurring, and dissenting opinions in *Texas v. Johnson*. The purpose of the analysis is to understand how and why the parties involved argued for their interpretation of the First Amendment and to understand how their arguments shaped the country and our understanding of freedom of expression. In addition to analyzing the arguments made, I will also consider how the

arguments and decision in *Texas v. Johnson* were received and how they continue to affect society today.

It would be impossible to discuss the intersection of law and rhetoric without mentioning James Boyd White and his interpretation of the role and power of law in society. White, a legal professor at the University of Michigan, argues that law has been historically studied under two traditions: the older—characterized by a historical authority—and the newer, characterized by institutional sociology.[6] Dating back to the Christian and Judaic times, the older tradition understands and respects laws because of both their antiquity and congruence with the laws of nature and God. By contrast, the newer tradition dispels the emphasis on morality placed on law by the older tradition, instead favoring a "value-free" social science that aims to understand social institutions. This newer tradition—which Boyd suggests is dominant in the West—sees the law as objective and practical; the law is understood as rules and principles that are meant to be analyzed and defined.

In contrast to the newer tradition's view of law as objective, Boyd suggests an alternative perspective, arguing that law can be better understood as a rhetoric, that is, a "comprehensively organized method of argument."[7] This interpretation denies the presupposition of law's objective nature posited by the newer tradition; instead, it is fluid, subject to change by a powerful tool: rhetoric. Under this lens, which places a strong emphasis on the law's subjectivity, the law can be seen as both a social activity, in the sense that the persuasion and interpretation it requires is collaborative and confrontational, as well as cultural, given the fact that the law is an integral

[6] White, James Boyd, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*,52, University of Chicago Law Review. 684 (1985).
[7] *Ibid*

part of shaping—and being shaped by—culture. White's conception of the law gives it tremendous power: the power to create a shared identity among a culture.

Thus, creating that shared identity is the responsibility of both those making the arguments, lawyers, as well as the community the law affects. Lawyers create this identity by taking objective materials—the facts of a case—and employing persuasion to propose a new meaning for those materials under their own interpretation. Lawyers create a narrative which they use to argue their case. This reinterpretation of an objective, external reality is conducted through argument, i.e., adding and dropping distinctions, the inclusion of outside opinions, and the use of authority.[8] However, lawyers do not make their arguments in a vacuum; the very language they use to argue, the law they are attempting to interpret, and the facts over which they quarrel have been provided by the culture they are attempting to influence.

However, it is not just an identity that the rhetoric of law influences — it is also meaning. Rhetoric considers how the components that go into answering a legal question, namely arguments and their subsequent analysis, change the very meaning of law, how they alter the perception of it within a culture.[9] It is under Boyd's theory—that law is not static and is, by contrast, shaped and reshaped by rhetoric—that I will conduct my analysis of *Texas v. Johnson.*

Methods

To analyze the rhetoric in the opinions of this case, I rely on a book written by Wilson Huhn, *The Five Types of Legal Argumen*t. In the book, Huhn, a Professor of Law at Duquesne

[8] *Ibid*
[9] Berger, Linda L., "Studying and Teaching "Law as Rhetoric": A Place to Stand" (2010). Scholarly Works. 664.

University School of Law, argues that there are five types of legal reasoning: text, intent, precedent tradition, and policy. He likens persuasive legal arguments to a cable woven together by many materials; a legal argument that cites "text, intent, precedent, tradition, and policy…is far more persuasive than one that utilizes a single type of argument," he writes. In addition to suggesting that attorneys and judges should include multiple types of arguments, Huhn also argues that the order in which the arguments are presented is important. Text is the most objective; by employing a textual argument, the advocate is simply stating what the current law states. Policy arguments—arguments that claim that a certain interpretation will bring about a certain consequence—are the least objective. Huhn suggests that legal briefs and opinions should start with the most objective forms of argumentation and work their way to the more subjective forms.

I use this information primarily in the chapters analyzing the written opinions from Justices Brennan, Kennedy, and Rehnquist. I consider the functions of their arguments and also use Huhn's book as a lens through which I categorize and scrutinize the efficacy of the justices' arguments.

Chapter 2

Oral Arguments

Background of Oral Arguments

Oral arguments have long been a staple of Supreme Court cases, dating back to the very origin of the court. They are a venue in which attorneys and justices can converse; the justices often interrupt attorneys and ask questions to clarify potential confusion and highlight a point the attorney potentially overlooked. For the attorney, oral arguments are an opportunity to persuade. They employ rhetoric to highlight precedent, principles, and statutes to bolster their case.

In its earliest days, oral arguments were the justices' first encounter with the arguments from each side of the case as they did not read any written briefs beforehand.[10] Attorneys took advantage of the situation, spending days making their arguments in what became a spectacle in the nation's capital. Arguments in the second half of the 19th century would attract society women who would dress up to see attorneys state their case in colorful ways, making reference to the Bible, to Roman law, and even Shakespeare.[11] Daniel Webster, a 19th century attorney, was creative in this aspect; his arguments would reference the Federalist papers, make emotional appeals, use fiery rhetoric, all in addition to the use of more common rhetorical tactics in the Court, such as conducting a textual analysis of the Constitution.[12]

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[10] Cushman, Clare. "Looking back at a year of Supreme Court cases tried over the phone." Interview by John Yang and Alex D'Elia. PBS, May 4, 2021, https://www.pbs.org/newshour/show/looking-back-at-a-year-of-supreme-court-cases-tried-over-the-phone#transcript.

[11] *Ibid*

[12] Shapiro, Stephen M. "Oral Arguments In The Supreme Court: The Felt Necessities of the Time." Supreme Court Historical Society, District of Columbia.

Because of an increased caseload and fatigue from hearing such long orations, the Court made a change in 1849. It decided that it would be best to streamline arguments, asking for a written brief before arguments commenced and limiting arguments—except in cases in which they granted special permission—to two hours. They would later further limit the allotted time to either one hour per side or thirty minutes, depending on the case, before reaching today's standard of thirty minutes per side.[13] Stephen M. Shapiro, an attorney with experience arguing before the Supreme Court claims that the changes to the format of oral arguments are a product of the relative abundance of information justices possess, the increasing importance of written briefs to articulate arguments concerning complex legal issues, and the decrease of oratory education in law schools.[14]

In addition to the time limitation of the arguments, the Court also significantly changed oral arguments after the Civil War by beginning to ask attorneys questions. Describing the importance of asking questions, Chief Justice Hughes remarked that "judges are not there to listen to speeches but to decide the case." Questioning affords justices the opportunity to essentially cut through the clutter and focus on the most important, and perhaps most confusing parts of a case—it is an opportunity to "focus light where it is most needed," Shapiro argues.[15]

This decrease in allotted time and the addition of questions did not necessarily lessen the impact of arguments, Shapiro argues. By contrast, this new argumentation style highlights the concept of "less is more." It is not only Shapiro who argues this; the very people to whom he presented have maintained that oral arguments aid them. Justice William Brennan has noted that

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[13] *Ibid*
[14] *Ibid*
[15] *Ibid*

his judgment has "turned" based on oral arguments and Justice Byron White referred to them as "important" in the decision-making process.[16]

One important function of oral arguments is their ability to directly address the concerns of the justices; although a written brief can provide a level of depth that an oral argument—due to strict time limitations—cannot, a written brief lacks the ability to tailor specific messages to satiate the curiosity of justices. In addition to providing an opportunity for a formal conversation between attorneys and justices, oral arguments are also functional because they are a venue for conversation between the justices themselves—and the very first conversation regarding the substance of the arguments. It is the first opportunity for the justices to "persuade each other on the merits of a dispute."[17]

Research has sought to determine the extent to which the quality of an oral argument affects justices' final votes. One finding by Timothy Johnson et al. is that "oral argument grades as determined by justices correlate highly with a justice's final vote on the merits."[18] This correlation holds true even in the case in which a justice's ideology differs from that of the attorney; justices have an "increased probability" of voting for the side of the case with a better oral argument.

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[16] *Ibid*
[17] Biskupic, Joan. "Why it matters that Supreme Court justices can look each other in the eye again." *CNN Politics.* October 8, 2021.
[18] Johnson, Timothy R., et al. "Supreme Court Oral Advocacy: Does it affect the Justices' Decisions?" *Washington University Law Review.* 2007.

Oral Arguments: Texas

The Supreme Court heard oral arguments for *Texas v. Johnson* on March 21, 1989, almost four and a half years after Johnson was arrested outside the 1984 Republican National Convention in Dallas. At the time, the court consisted of seven justices nominated by Republican presidents and only two justices—Byron White and Thurgood Marshall—nominated by Democratic presidents. William Rehnquist led the court as Chief Justice, assuming the position less than three years before *Texas v. Johnson* was argued.

Kathi Alice Drew, an Assistant District Attorney for Dallas County, represented the state of Texas for oral arguments. In her speech, she quickly previews her intention for the next 30 minutes: to argue that Texas has a compelling interest in regulating the type of protest in which Johnson took part. She has no interest in challenging the *Spence* test, which outlines types of speech that are constitutionally protected. Because of this, Texas concedes that Johnson's actions are, in fact, speech. Rather than argue that Johnson's form of protest was not speech, Drew explains what Texas' compelling interests are in maintaining their flag-burning statute: (1) preserving the flag as a symbol of national unity and (2) a prevention of a breach of the peace.

Justice Scalia is quick to establish the frame through which Drew must make her argument; he asks why it is that flag burning metaphorically destroys the symbolism of the American flag. This question is important because it is essentially arguing that there exists a dichotomy between "prevention" and destruction; Scalia understands that Texas wants to preserve this symbol, but if they want to preserve it, he questions if the lack of a law regulating this behavior will *necessarily* lead to destruction—why a lack of a law will make the American flag any less of a symbol. Drew responds by arguing that if a symbol is continually abused, it can

lose its symbolic effect. The symbolic effect she refers to is that of national unity. Here, Drew is primarily making a policy argument by asking the court to consider the *consequence* of the court's ruling. In his book, "The Five Types of Legal Argument," Wilson Huhn explains that policy arguments proceed in two steps: predicting multiple consequences of a ruling and evaluating which of the consequences is most consistent with the values of the law and society.[19] Drew previews one consequence of legalizing flag-burning: the destruction of the American flag's symbolic value; she argues that this consequence violates the historical tradition of veneration for the flag and the role of the flag in society, and then argues that this will affect society negatively by introduction disunity and animosity. Policy arguments are, by their very nature, subjective, however. It is very difficult to predict how a ruling will affect society and the law in the future. This difficulty is demonstrated by the continued interaction between Drew and Scalia, whose textualist approach to interpreting the constitution led him to discount the value of policy arguments. Scalia wanted rulings that were "guided by the text and not by intentions or ideals external to it, and by the original meaning of the text, not by its evolving meaning over time."[20]

As a result of their philosophical differences, Scalia and Drew continue to debate the point that the symbolic value of the flag would be eradicated. Scalia asserts that Texas is not actually arguing that Johnson's actions *destroy* the symbolic character of the flag, more so that Johnson's actions *disrespect* the flag. "They desecrate the flag indeed, but do they make it…do

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[19] Huhn, Wilson Ray. *The Five Types of Legal Argument*. Carolina Academic Press, LLC, 2022.

[20] Rossum, Ralph A. "The textualist jurisprudence of Justice Scalia." *Perspectives on Political Science* 28.1 (1999): 5-10.

they destroy the symbol? Do they make it any less symbolic of the country?" Scalia asks. Drew never quite clarifies this dichotomy, instead, she makes an argument from intent to respond to another statement Scalia later makes concerning respect for the flag. An argument from intent considers "the intent of the people who wrote the text," according to Huhn. In this case, that is the Texas state legislature. She argues that while the writers of the text understand that they cannot ask citizens to respect what the flag stands for, they believe they can ask for respect for the physical integrity of the flag for the purpose of national unity. This argument, of course, carries with it the implicit assumption that a state *can* ask for respect, in at least one form (physically), for the flag. This argument from intent aids Drew's argument by limiting the scope of the law; a law that asks citizens to respect what a symbol stands for is unequivocally compelling speech, but a law that merely asks for physical respect demands a more nuanced interpretation.

The arguments later turn to the question of *how do we determine what to protect and what not to*? If the American flag is deemed protected from certain forms of protest because of its symbolic nature, the justices would then like to understand whether other symbols of national unity would also then be protected, for instance, state flags and the constitution. They are considering the policy consequences of permitting the flag to receive increased protection. Scalia takes this further and argues that there is no precedent for America to declare an item a national symbol with the expectation that it could not be dishonored. This is both an argument from tradition and precedent. If in the two hundred years that the United States has existed, we have not yet deemed that the flag deserves special status, Scalia wonders why they should now start. This is an effective argument from Scalia because it demonstrates just how groundbreaking such a move would be. In a country that cares so much about fundamental rights being rooted in

"tradition and conscience," as Justice Benjamin Cardozo once said, this would be unorthodox, as demonstrated by Scalia. This also demonstrates how law is very culture specific; in drawing on American history, Scalia demonstrates how establishing and arguing for the meaning of something, a symbol in this case, requires understanding its place within existing culture.

Justice O'Connor later seeks to determine whether it is legal for a statute to take into account motivation, even after considering the precedent set by *Street v. New York* and *Grayned v. City of Rockford*. The relevant aspect of the precedent set by those cases is that of the Strict Scrutiny test. Under this test, the government must show that there is a "compelling… interest in the law, and that the law is either very narrowly tailored or is the least speech restrictive means available to the government."[21] To answer Justice O'Connor's question, Drew focuses on the "narrowly tailored" aspect of the Strict Scrutiny Test, arguing that the law is narrow because it only takes into consideration *how* the flag burning was done—whether it was done with the intention to offend—and not the result of the flag burning, which is whether anyone was actually offended. Drew draws an important distinction there in her attempt to show how the Texas statute is sufficiently narrow. She builds on this with an example: if someone covertly burned a flag in the middle of the night, it would "probably" not violate the statute because there would be no intention to offend. Here, Drew effectively illustrates the narrowness of the statute by claiming that it does not consider the actual result of flag burning and only the intention. However, she leaves unanswered the question of whether there are other means to promote the state's compelling interest, which is maintaining the flag as a symbol of national unity.

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[21] Hudson, David L. "Strict Scrutiny." *Strict Scrutiny*, https://mtsu.edu/first-amendment/article/1966/strict-scrutiny.

Therefore, she does not demonstrate that this statute is the *most* narrow means that the state can use to achieve its goal.

After answering questions from justices inquiring about which types of flags would receive legal protection under the current Texas statute, Drew moves on to her second argument for why the statute serves a compelling state interest: it prevents a breach of the peace. Drew quickly makes an argument based on precedent, noting that the Texas Court of Criminal Appeals recognized that preventing a breach of the peace is a "legitimate state interest."

The Supreme Court has a long history with breach of peace laws. Notably, in 1942, the Court heard arguments for a case in which a Jehovah's Witness, Walter Chaplinsky, railed against a city marshal, calling him "a God-damned racketeer" and "a damned Fascist." The Court ruled against Chaplinsky, arguing that certain words are exempt from protections offered by the First Amendment.[22] Justice Francis W. Murphy wrote that "fighting words," due to their inflammatory nature, would likely cause an immediate breach of the peace. Speech, he argued, would need to possess some "social value" to garner the support of the First Amendment; if it does not possess said social value and could lead to a breach of the peace, the state would be within its right to limit it. Despite their *Chaplinsky* ruling, however, the court has subsequently been wary of expanding limitations on the First Amendment, denying that a jacket with anti-draft profanity could be considered fighting words in *Cohen v. California* and ruling that an ordinance classifying as "hate speech words that insult, or provoke violence, 'on the basis of race, color, creed, religion, or gender'" was unconstitutional in *R.A.V. v. St. Paul*.[23]

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[22] "First Amendment." *Legal Information Institute*, Legal Information Institute, https://www.law.cornell.edu/wex/first_amendment#:~:text=The%20Supreme%20Court%20interprets%20the,only%20expressly%20applicable%20to%20Congress.

[23] *Ibid*

Given that the court had been reluctant in recent decades to broaden the scope of what would be considered fighting words, Drew's challenge was to argue why flag desecration would possess little social value and why it could lead to immediate violence. She alludes to the intent of the Texas legislature by asserting that they "made a judgment" that public desecration has the potential to lead to violence. A problem with this argument is that in the very case in which she is arguing, there was no immediate breach of the peace; Johnson was not attacked by any onlookers after burning the flag, nor did other anti-Reagan protesters see the flag desecration as a call-to-arms against anyone else. Violence was non-existent, which Drew notes: "Individuals who were seriously offended by this conduct were not moved to violence. If they were, they exercised restraint," she says. However, according to Texas, just because violence did not occur in this specific scenario does not mean that it is still not within the state's interest to attempt to prevent a breach of the peace. Drew makes the argument that luck was a factor in the lack of violence and that they could not rely on such luck in future similar demonstrations. The facts of this case, specifically that there was no resulting violence from the flag burning, undoubtedly hurt Drew's argument. Her argument relies on the premise that flag burning is such a provocative act that it almost always causes a breach of the peace. The fact that there was not such a breach of the peace in this instance makes the justices question that premise and question whether preventing flag burning is furthering any material state interest.

Scalia then inquires about why the burning of other items—books and religious symbols—would not also incite violence and thus deserve protection. This question goes to the heart of the breach of peace argument Drew is making; essentially, it asks why the flag deserves special protection in this case — why it would have a unique ability to incite a crowd to violence if it saw it burned. Drew responds that other items, including public monuments and places of

burial and worship, *are* in fact protected under this statute, presumably for reasons of preventing a breach of the peace. In response to this, Justice Kennedy points out that those items that she named—public monuments and places of burial and worship—are public property. This logically leads to his argument that if one does not consider the American flag public property, then it cannot, under the current interpretation of the statute, also receive protection. Drew, at this point, is left with two options: (1) concede the point that the flag is not public property or (2) prove why it is. She elects for the second option, arguing that even the American Civil Liberties Union (ACLU), which submitted an amicus brief on behalf of Johnson, conceded that there is no First Amendment interest in protecting desecrations of the items she listed because they are "someone else's cherished property." However, her quoting the ACLU's concession does not necessarily imply that the flag *is* national property—just because it is "someone else's cherished property" does not necessarily make it public property. She addresses this by asserting "I think the flag is this nation's [, including the people's,] cherished property," adding that previous justices of the Supreme Court agree with that position. She then elects to save her remaining time for rebuttal.

Oral Arguments: Johnson

William M. Kunstler, renowned civil rights attorney known also for defending the Chicago Seven and the Black Panther Party, represented Johnson in oral arguments. To begin his oral argument, Kunstler references the merit brief submitted by the state which he interprets as a concession by Texas that Johnson's actions were, in fact, speech. If this is the case—that Texas

agrees that burning a flag can be considered speech—Kunstler's job is to then make a compelling argument as to why this *type* of speech deserves First Amendment protection.

To make this point, Kunstler points to Scalia's own opinion in *Community for Creative Non-Violence v. Watt*, a case in which Scalia wrote a dissenting opinion as a District of Columbia Circuit Court Judge. "A law directed at the communicative nature of conduct must, like a law directed at speech itself, be justified by the substantial showing of need that the First Amendment requires," Scalia's opinion reads. Writing for the University of California, Davis Law Review, Jane R. Bambauer explains that the constitutionality of "expressive conduct" bans depends on whether the purpose and effects of the ban target the *expressive* consequences (i.e. the messages being communicated) or the *non-expressive* consequences (i.e. the results of the speech).[24] In his *Community* opinion, Scalia argues that the law must treat the two equally with respect to regulation—that it must consider a "substantial showing of need" to regulate both types of speech.[25] In fact, Scalia argues that the "only reason" that the Supreme Court could have had for banning certain forms of expression (the flying of a red flag in *Stromberg*; the "breach of peace" statute in *Brown*; the proscription of armbands in *Tinker*) was because of the *effect* those types of speech could have. The court was, in Scalia's view, not regulating those forms of expression because of their content *per se*, but rather because of what that content could do: create a breach of the peace, invoke revolutionary sentiment, affect onlookers. By referencing Scalia's opinion, Kunstler is pointing to court precedent that shows, time after time, when judges have restricted conduct, it was done because of the conduct's effect; relating this to Johnson, if

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[24] Bambauer, Jane R. "The relationships between speech and conduct." *UCDL Rev.* 49 (2015): 1941.

[25] *Community for Creative Non-Violence v. Watt*, 703 F.2d 586 (D.C. Cir. 1983).

Kunstler can show that speech is usually not regulated based on content and only is regulated based on effect, then Texas would be forced to prove that the *effect* of the conduct warrants regulation of speech *per se*. In the case of Johnson, the effect of the expressive conduct was not significantly dangerous; it did not lead to a breach of the peace. If the court was to consider only the effect of the speech, they would likely be unpersuaded by Texas' breach of the peace argument.

In response to Texas' argument concerning national unity, Kunstler makes reference to *West Virginia v. Barnette* to argue that court precedent is that officials do not have the ability to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion…"[26] The opinion also warns against compulsory respect for national symbols, arguing "those bent on its accomplishment [the accomplishment of unity] must resort to an ever-increasing severity." The case is a helpful one for Kunstler, showing that the court has rejected giving the power to individuals to determine what shall be considered normal in certain aspects. The parallel he is apparently trying to draw is: if the court has held that officials cannot determine what is "orthodox," then is asking people to *not* do something also considered "orthodox?" Kunstler believes it is — he argues that there *is* a connection between not allowing people *not* to salute the flag and not allowing people to burn the flag. This use of precedent is especially persuasive because it uses precedent well. In his book, Huhn explains that to use precedent, rhetors must demonstrate similarity. They can do so in two ways: alluding to values and facts. In *West Virginia v. Barnette*, both the facts—government compelling speech or

[26] *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943)

conduct—and the values—promoting national unity—are the very similar. By using such a similar case, Kunstler does well to show what the Court has already decided on this issue.

Justice Rehnquist does not follow that logic, arguing that one could "quite easily say" that it *is* acceptable to allow a state to order people not to do something (not burn the flag), while allowing people to do another (not salute the flag). Rehnquist is attempting to take apart the connection that Kunstler argued for earlier, that *Barnette* and *Johnson* are related with respect to what a state could order people to do.

To draw another parallel to Supreme Court precedent, Kunstler elects to reference *Street v. New York*, a case which involved flag-burning. Sidney Street, a black World War II veteran and New York City Transit Authority employee, burned a flag after hearing of the assassination of civil rights activist, James Meredith. A police officer alleges that Street told others in the crowd, "If they did that to Meredith, we don't need an American flag." New York law at the time forbade casting contempt upon and unlawfully defiling the American flag either in words or in action. The Supreme Court, in ruling on this case, sidestepped the question of flag burning; rather, they were concerned with whether Street's words could have been an independent cause for arrest and whether a conviction for uttering "we don't need an American flag" would be unconstitutional.[27] The court ruled for Street. Justice Harlan II, writing for the majority, argued that convictions relying on speech protected by the First Amendment were unconstitutional. More importantly to Johnson, the court found that there was no governmental interest in prohibiting the actions of Street—it set forth the notion that the state did not have a compelling interest in justifying a conviction which relied upon constitutionally protected speech.

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[27] McInnis, Tom. *Street v. New York*, https://mtsu.edu/first-amendment/article/304/street-v-new-york.

Attempting to draw the parallel, Kunstler asks the court, “Can you say you can't force them to salute the flag or pledge allegiance to the flag [a reference to *West Virginia v. Barnette*], but can you then say we can force them not to show other means of disrespect for the flag, other means of protest over the flag by saying you can't burn the flag?” He later adds, “I think they’re the same.” This is again, another attempt at showing similarity. *Barnette* is key precedent for Kunstler’s argument; the more he can show similarity between the cases, the more pressure there is on the court to adhere to their previous rulings, due to a concept known as stare decisis, or “to stand by things decided,” in Latin.

Kunstler jokingly tells Chief Justice Rehnquist, “I don’t know if I’ve convinced you,” who then replies “--well, you may have convinced others.” Rehnquist then asks how a 1977 case, *Wooley v. Maynard*, relates to the current case. *Wooley* considers whether it is constitutional for the state of New Hampshire to “require citizens to display the state motto [“Live Free or Die”] upon their vehicle license plates.”[28] The Court ruled that it was unconstitutional for New Hampshire to require citizens to display that motto, arguing that the state did not have an interest that outweighed the free speech principles in the First Amendment. Rehnquist asserts that although New Hampshire was not constitutionally allowed to compel people to display a specific motto, they could—on the other hand—prohibit people from using certain mottos, such as foul language. Kunstler agrees with this to an extent, conceding that the state would likely be allowed to prohibit the use of certain language. But he also points out that painting over the “Live Free or Die” motto, which was found to be constitutional, is essentially the same as burning the flag. Both of those actions are a form of protest against some statement or symbol. There is a

[28] *Wooley v. Maynard*, 430 U.S. 705 (1977)

difference, he argues, between the state compelling people to make a statement, such as using foul language, for example, and protesting against symbols or not displaying certain language. Kunstler argues this point effectively because he draws a convincing parallel between *Texas v. Johnson* and *Wooley*. Ostensibly, *Wooley* could be seen as support for Texas because it allows the state to prohibit certain types of speech. However, Kunstler explains there is a clear similarity between painting over the state motto and burning a flag: both are, in different ways, disfiguring a symbol in protest of a message. One is seen as constitutional; he argues that the other should be, too. Precedent is undergirded by similarity, and Kunstler is very effective here in demonstrating that similarity.

Kunstler then moves on to Texas' argument regarding their compelling state interest in upholding the statute prohibiting flag burning. He points out that the statute does not apply only to the American flag, it also applies to the presidential flag and to the various departments in the federal government. By bringing this fact to light, Kunstler is attempting to ask whether there is also a compelling state interest in prohibiting the burning of those flags as well, implying that they do not serve as a symbol of national unity nor would the burning of such flags necessarily lead to a breach of the peace. If one accepts Kunstler's arguments, then it necessarily raises the question as to why Texas' statute would include national flags which, if burned, would likely not cause the very damage—in terms of harming a national symbol and causing a breach of the peace—that argued would occur. This argument implies that the statute is too broad when its goals are considered. This is both a textual and a policy argument. It is textual insofar as it reminds the court of the wide scope of the statute. It is a policy argument because it asks the Court to consider the effects of burning the other flags mentioned in the statute and contrast it with the state's explicit rationale for having the law: preventing a breach of the peace. It is this

contrast that leads the court to consider whether Texas' interest in preventing a breach of the peace is likely to actually be a factor in reality.

To further bolster his position that there was no clear and present danger, Kunstler asserts that he does not believe that there has been a case before the US Supreme Court regarding a breach of the peace caused by a flag burning. The closest candidate, he notes, is in *Monroe v. State Court of Fulton County*, a case decided in the U.S. Court of Appeals; in the case, a woman was arrested for burning an American flag while protesting the country's involvement in Iranian affairs.

In his opinion in *Monroe*, Judge Elbert P. Tuttle considered a few factors, beginning with whether this was a form of constitutionally protected symbolic speech.[29] He cites *Spence v. Washington*, in which the court asserted the nature of the activity must be considered, as well as the factual context and environment in which said activity occurred. In addition to those factors, the courts must also consider whether there is "an intent to convey a particularized message" and the likelihood that message would be understood by those who viewed it. Tuttle determined that Monroe, when burning the American flag to protest America's policies regarding Iran, (1) conveyed a particularized message and (2) the likelihood of the message being understood was high, given that it was part of a larger protest. Therefore, Tuttle found that her actions were symbolic speech protected by the First Amendment.

But *Spence* is useful for more than just those reasons; Tuttle uses *Spence* to consider the two exact claims that Texas' made to support their anti-flag-burning statute. Tuttle determined that, in this case, Georgia's state interest is not "sufficiently substantial as to justify infringement

[29] *Monroe v. State Court of Fulton County*, 739 F.2d 568 (11th Cir. 1984)

of Monroe's constitutional rights." Citing Judge Browning in *United States v. Crosson*, Tuttle argues that there is no difference between compelling expression of respect and preventing expression of disrespect—a point that supports Kunstler's interpretation of the New Hampshire "Live Free or Die" case. It is also interesting that Tuttle argues that government regulation of nonverbal expression should be "subject to the same limitations under the first amendment as direct regulation of verbal expression." Because the Supreme Court ruled for Street in *Street v. United States*, asserting that there was not a compelling state interest in the prevention of "casting contempt [upon the flag] by words" then Kunstler hopes to make the connection that there would not be a compelling state interest in preventing flag burning (a nonverbal action) in *Texas v. Johnson*.

In *Monroe*, Tuttle also disregards the argument that there was a likelihood of a breach of the peace that was so high, that it demanded the state to intervene. He concedes that there is a risk of a breach of the peace but that it does not outweigh other factors, such as the right to constitutionally protected symbolic expression. It did not fall into the category of "fighting words" as outlined in *Chaplinsky* and *Terminiello*, the latter of which prohibits speech that would "produce a clear and present danger." These arguments set forth by Judge Tuttle provide strong support for Kunstler, as they refute the two main arguments for Texas. They do this most convincingly by showing that even if there was a breach to the peace, it still had to overcome the hurdle of outweighing constitutionally protected rights in importance.

Kunstler's next tactic is to employ another textual argument to attack the language of the statute, which reads "the actor could reasonably believe that someone might be seriously offended by it." The argument made on behalf of Johnson is that this language is not only that the language is vague—what does it mean to "seriously" offend someone?; which actions

constitute the "physical mistreatment" it also mentions?—but also that offense does not necessarily lead to an immediate breach of the peace. After all, Kunstler points to the fact that a bystander *was*, in fact, seriously offended by the flag burning, so much so that he took the burnt flag and buried it in his backyard. However, this person did not attack Johnson, nor did he encourage anyone else to do so. Again, this argument exemplifies that the statute was, in Kunstler's view, too broad, and that it did not have the policy implications that Texas suggested.

The conclusion of Kunstler's oral argument centers around the principles supporting the First Amendment. He begins with a quote from Justice Jackson in *Barnette*: "Those who begin coercive elimination of dissent soon find themselves eliminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard. The First Amendment was designed to avoid these ends by avoiding these beginnings." The use of this quote is interesting in that it speaks to unity, a concept consistently spoken about throughout the duration of the oral arguments. It implies that it is impossible—in the pursuit of unity—to coerce *any* opinion without disastrous consequences. This weakens the argument that unity is, in itself, an ideal worth pursuing through the use of the law. It is also an argument that alludes to tradition and precedent given it explores how the Court has historically viewed the principles on which the First Amendment lies.

Kunstler then mentions that the First Amendment is meant to protect speech that people do not like; it would be unnecessary for speech that people *do* like. He supports this by mentioning the "marketplace of ideas" The concept of a "marketplace of ideas" is ubiquitous in Supreme Court opinions; it has been mentioned hundreds, if not thousands of times, to oppose

government censorship in various forms.[30] Professor David Schultz has even asserted it underpins much of First Amendment jurisprudence, acting as one of the most convincing reasons cited to oppose government regulation of speech.[31]

[30] Schultz, David. "Marketplace of Ideas." *Marketplace of Ideas*, https://www.mtsu.edu/first-amendment/article/999/marketplace-of-ideas.

[31] *Ibid*

Chapter 3

Opinions

Majority Opinion

On June 21st, 1989, the Supreme Court decided in a 5-4 vote that flag burning was constitutionally protected under the First Amendment. The majority consisted of Justices Brennan, Marshall, Blackmun, Scalia, and Kennedy. Justice Brennan was tasked with writing the majority opinion, in which he attempted to accomplish two goals: (1) to explain the majority's reasoning in determining whether Johnson's burning of the flag constituted expressive conduct protected by the First Amendment and (2) to explain their reasoning regarding whether Texas' regulation was related to the suppression of free expression.[32]

To accomplish his first goal, Brennan relies heavily on precedent, especially *Spence v. Washington*. He first explains that the Court has taken a broader understanding of "speech" than just speech within the context of written or spoken words. To do this, he quotes the Court's per curiam opinion from *Spence v. Washington*, in which the Court concluded that conduct must be "sufficiently imbued with elements of communication to fall within the scope of the First [Amendment]."[33] The next challenge for Brennan is proving that Johnson's actions did have the aforementioned "elements of communication." He quotes *Spence* again in his effort to prove the element of communication; Spence requires that to be considered speech, conduct must be both

[32] Texas v. Johnson, 491 U.S. 397 (1989)

[33] Spence v. Washington, 418 U.S. 405 (1974)

intended to convey a "particularized message" and have a high likelihood of being understood by onlookers. Brennan points out that the Court has recognized conduct such as black armbands in schools, sit-ins in protest of segregation, wearing of American military uniforms, and picketing as speech. The cases that he cites aid his argument that Johnson's actions were speech by showing similar actions that contained little-to-no spoken or written words were recognized by the court because they, too, met the criteria of intention and the likelihood of being understood by those who perceived them.

To further prove his point, Brennan looks at cases that would be "especially pertinent" to Johnson's. He cites cases in which the Court has considered conduct related to the flag as speech. The Court accepted as speech when people and/or organizations attached a peace sign to the American flag (*Spence*), refused to salute the flag (*Barnette*), and displayed a red flag to show solidarity with the Communist Party (*Stromberg*). These cases effectively prove Brennan's argument that Johnson's conduct should be considered speech under the Spence test; it—similar to the aforementioned cases—both had a particularized message, a protest of American policies under President Reagan, as well as a high likelihood of it being understood by onlookers, given that the flag burning took place at a political protest. The Court's recognition of conduct related to flags is not surprising, Brennan argues because—quoting Chief Justice Rehnquist, who would write a dissenting opinion in this case—the very purpose of flags is to symbolize "system[s], idea[s], institution[s], or personalit[ies]." Rehnquist even equates the ability of the flag to symbolize the nation as well as the word "America" does. Brennan's use of Rehnquist's own prior reasoning is powerful. It goes to show that even a justice who voted against the majority and was sufficiently impassioned to write a dissenting opinion would agree on the power of the flag to represent larger ideas, to essentially communicate.

To further prove the latter point, Brennan quotes Johnson himself: “the American Flag was burned as Ronald Regan was being renominated…a more powerful statement of symbolic speech…couldn’t have been made at that time.” The decision to quote Johnson is interesting and impactful—it gives the audience insight into Johnson’s reasoning for burning the flag, which was to make a powerful political statement. Because of these arguments, backed by precedent from Spence, Barnette, Stromberg, and others, Brennan was able to effectively prove that this conduct did have “elements of communication” and could therefore eligible to receive First Amendment protection.

Justice Brennan’s next goal is discussing his reasoning pertaining to whether Texas “asserted an interest in support of Johnson’s conviction that is unrelated to the suppression of expression.” Texas, arguing that their goals are unrelated to suppressing expression, cited the interest of maintaining the flag as a symbol of national unity and preventing breaches of the peace. Brennan examines each claim separately.

Brennan strongly disagrees with the state’s claim that the law is constitutional because it has an interest in preventing a breach of the peace. To explain why, he uses the state’s own words: “it [the state] admits that ‘no actual breach of the peace occurred at the time of the flagburning or in response to the flagburning.’” By using that quote, Brennan shows that there was not, in this case, a provocation caused by the flag burning, making the underlying assumption by the state, that there is a direct cause-effect relationship between flag-burning and breaches of the peace, seem hollow. To further attack this assumption by the state, Brennan relies on precedent to explain the function of free speech; in citing *Terminiello*, he explains that the purpose of free speech is to create conditions of unrest due to disagreement. According to Brennan then, if one accepts the reasoning concerning the function of free speech in *Terminiello*,

there would be a contradiction between that and the reasoning used by Texas. Thus, accepting Texas' explanation would force them to essentially change how the court views free speech in society. Brennan strongly rejects this request in the opinion. Brennan, in attempting to demonstrate another problem with accepting Texas' reasoning, cites *Brandenburg*, which explains that context matters; it asks whether the expression being suppressed would be directing or inciting "imminent lawless action." But the statute in question does not take into consideration only "imminent lawless action," it is broader—it allows for the suppression of conduct that demonstrates "the potential for a breach of the peace." By citing *Brandenburg*, Brennan shows yet another major change that would occur if they accepted Texas' reasoning: they would be forced to broaden what is and what is not considered constitutional based on the effect that the speech would have on others. Brennan also demonstrates a clear difference between the *Brandenburg*, the current view of the court, and the Texas statute: *Brandenburg* is clear; it requires that expression produce, direct, or incite "*imminent* lawless action," which is relatively easier to determine than whether expression has the *potential* to produce a breach of the peace. If they accepted Texas' reasoning, Brennan implies that there will be increased subjectivity in what is considered constitutional.

Brennan then moves on to addressing the claim from Texas that the statute is necessary because the flag serves as a symbol of nationhood and national unity. By destroying the flag, Texas argues, they, in effect, are conveying to others that the concepts of nationhood and national unity do not exist. Brennan argues that if the aforementioned reasoning by Texas concerning the purpose of the flag is true, then they cannot use the *Spence* test. This is because the *O'Brien* test asserts that government interest in regulating free expression must not be related to the "suppression of free expression." By quoting a requirement in *O'Brien*, Brennan

effectively shows that one cannot assume both that flag-burning has a message (that there is no national unity) and also that it deserves protection under *O'Brien* because it does not relate to "free expression."

In part IV of his opinion, Justice Brennan addresses Texas' claim concerning the relationship of their statute to preventing breaches of the peace. He is tasked with denying that there is a direct cause-and-effect relationship between burning the flag with an intent to cause offense and violence occurring. To begin, he speaks to the deeper meaning of the First Amendment: to allow for dissent, and more specifically, dissent against the government. Because Johnson was arrested for protesting against the actions of the US government, he was, as a result, arrested for the content of his protest. If Johnson was, as Brennan argues, arrested for the content of his protest, then that triggers a test created by *Boos v. Barry*. The test is one of subjecting the state's interest to "the most exacting scrutiny." By using this reasoning, Brennan is demonstrating the high bar that Texas' law would have had to reach according to precedent. To reach this high bar, Texas argues that by burning the flag, protestors create a harmful idea: that there is no national unity. Texas' use of the word "harmful" is of particular interest to Brennan who writes that—according to the dozen cases he cites—the First Amendment is essentially impartial to whether or not something is "harmful." By citing these cases, and arguing that the First Amendment disregards the idea of non-physical harm as being sufficient to prohibit speech, Brennan weakens one of the two main pillars of Texas' argument for their statute.

Brennan continues supporting the notion that the First Amendment disregards the idea that serious non-physical harm trumps free expression by also citing precedent relating to controversial treatment of flags. By citing cases similar to Johnson's, Brennan is able to show that the Court has long allowed for controversial treatments of the flag because they have seen it

as constitutionally protected conduct. For example, despite New York's argument in *Street v. New York* that they are legally permitted to demand "respect for our national symbol," the Court reiterated that freedom of expression includes protection for speech which is contrary or divisive. Additionally, according to Brennan, it would be contradictory for the Supreme Court to maintain the idea of freedom of speech proscribed in the Bill of Rights and also allow "public authorities" to compel people to utter what they do not believe. While defending this, Brennan cites Justice Jackson's words from his opinion in *West Virginia v. Barnette*: "If there is any fixed star in our constitutional constellation, it is that no official…can prescribe what shall be orthodox in…matters of opinion or force citizens to confess by word or act their faith therein." By quoting Jackson, Brennan is able to show that there is precedent for his reasoning regarding compelled speech and also tie that precedent to a central tenet of the Constitution, that public officials have a limited role regarding compelling speech.

Brennan then moves on to focusing on the weaknesses that the majority perceived in Texas' argument. His main argument is that Supreme Court precedent has historically protected expressive conduct, regardless of content. To demonstrate this, he explains how the enforcement of the statute might unfold by using a hypothetical: Texas could, under this statute, arrest someone for burning a flag for protesting its "symbolic role," yet could not and would not arrest someone for burning a flag because it is dirty or in otherwise bad shape. Brennan argues this is contrary to precedent, it discriminates based on content—Texas could arrest people for actions based on one view of the flag as it relates to its symbolic role. To further support this point, Brennan cites *Schacht v. United States*, which ruled that unauthorized wearing of military uniforms at outdoor performances are a form of expressive conduct. This case has a clear parallel with Johnson's; the state cannot show preference for content in only one direction—permitting

only actions that respect the flag or permitting only "praising" the Army—while forbidding content to the contrary with the flag or uniforms. This example aids Brennan in explaining the rationale behind the majority's view concerning the First Amendment and its relationship to offensive content.

Assuming that it was possible for governments to constitutionally permit statutes designating specific symbols as only to be interacted with in "one direction," either the praising or disrespecting of them, Brennan then asserts that a problem would necessarily arise: the subjectivity of choosing those symbols. To drive this point, he asks rhetorical questions: "Could the government, on this theory, prohibit the burning of state flags? Of copies of the Presidential seal? Of the Constitution?" Asking these questions forces the reader to engage with the difficulty that such subjectivity relating to government power that these statutes would necessarily entail. He then explains the result of increased subjectivity: consultation of political preferences, which would mean judges inevitably imposing their politics on the citizenry. The implication here is powerful. It is that justices do not currently consult their own political preferences. This is a view that many would disagree with, but is also a separate matter than what this thesis is about altogether.

Understanding that this ruling may cause confusion for states on how to deal with flag burning, Brennan begins an argument that attempts to demonstrate that the fears laid out by Texas, while understandable, are overblown and contrary to the country's principles. Texas argued that the nation's confidence in the idea and the existence of national unity would be diminished by flag burning in specific contexts; Brennan disagrees with that notion. Instead, citing Justice Oliver Wendell Holmes Jr., he argues that one person— "an unknown," as he refers to him—cannot have such an effect on the nation. He then moves on to speaking about the

role of the flag as a symbol moving forward. He makes the argument for the flag as a symbol of tolerance and strength—tolerance for the sorts of actions which cause "serious offense" and strength to deal with physical harm. Interestingly, to make an argument for the physical and symbolic strength of the flag, he cites the bombardment of Fort McHenry. There, following a victorious naval battle against the British, flew a damaged American flag, one that inspired Francis Scott-Key to write a poem that would eventually become the country's national anthem. It is *this* resilience Brennan sees as the strength of the flag. His mentioning of the flag and its historical value strengthen his point that the flag is about tolerance as opposed to rigidity. The flag, according to history, can withstand attacks, and yet still survive and inspire.

Before ending the majority opinion, Brennan makes one more reference to the marketplace of ideas to continue explaining how to deal with the prohibition against statues prohibiting flag burning. He explains that the marketplace of ideas presents a unique opportunity to show that people who burn the flag are wrong. He explains that people can wave their own flags or make arguments to the people burning it. What they cannot do is "dilute the freedom that this cherished emblem represents."

Kennedy's Concurring Opinion

Justice Anthony Kennedy wrote a concurring opinion. He states the purpose of his concurring opinion early on: to describe the difficulty of the decision. It seems that Kennedy approached the vote with a keen understanding of the weight of the moment. He understood what

the vote meant to people who served America in uniform, he understood what the flag meant to so many Americans. It was thus this understanding that compelled him to explain his actions.

Kennedy makes it clear from the very start of his opinion that he does not disagree with the reasoning of Justice Brennan and the majority; he goes so far as to note that the words in the majority opinion are chosen "so well." He does, however, feel the need to explain a few difficulties specific to this case, among them why the Supreme Court had to make this decision and could not pass it on to another branch of the government. He explains that this was a clear case of a "clear and simple statute" to be judged against a "pure command of the Constitution." The purpose of choosing these words— "clear," "simple," and "pure" —justify his reasoning well. By employing these words, Kennedy demonstrates that the burden must fall to the Court— the case presents too clear-cut of a legal problem not to. Because of this, he is able to set up his argument that he—and the Court—had no choice but to act in this case, despite that they may not have wanted to since some ultimately did not particularly like the result.

Kennedy mentions the notion that he does not like the result later in the opinion as well, claiming the judgment is "painful to announce." This technique of explaining to displeased readers of the opinion could be seen as a sign of weakness. One may ask, "why does he feel the need to explain how he feels about the case?" However, this rhetoric can also be seen as a technique to strengthen the legitimacy of the Court. According to Legal Professor Richard H. Fallon, there are three types of legitimacy on which a Court depends: sociological, moral, and legal.[34] In this case, the most pertinent type is legal legitimacy, which asks whether the justices use interpretive methods that are generally accepted within the legal culture. By explaining that

[34] Grove, Tara Leigh. "The Supreme Court's Legitimacy Dilemma." (2019): 2240-2277.

he, himself, does not like the conclusion to which the Court came, Kennedy improved the legal legitimacy of the court; he demonstrated that his interpretive methods trumped his policy and personal preferences.

Kennedy then enters into the debate regarding the meaning of the flag, writing that the flag "protects those who hold it in contempt." This argument adds to the majority opinion, as Brennan also wrote about how the flag was strong not because of its ability to silence dissent, but to withstand and even welcome it.

Rehnquist's Dissenting Opinion

There were two dissenting opinions, one written by Chief Justice Rehnquist and joined by Justices White and O'Connor and the other written by Justice Stevens. In its opening statement, Rehnquist's dissent makes clear how it will begin to attack the reasoning of the majority: by contextualizing the flag's importance throughout American history. These appeals to the historical importance are not inherently legal arguments, nor are they meant to be. They are meant to give credence to Texas' argument that the flag has a unique symbolic value and should therefore be protected. Each of Rehnquist's' historical examples attempt to validate that claim by demonstrating why the flag is important to America and her citizens. Furthermore, his historical examples attempt to lay the groundwork for the claim that if flag burning was permitted, the flag would no longer serve the same purpose of unification for Americans that it once did.

To contextualize this, Rehnquist relies on literature, a unique argumentative strategy for Supreme Court opinions. His first use of literature is that of Ralph Waldo Emerson's poem,

"Concord Hymn." "Concord Hymn" was written to commemorate the Battle of Concord; Rehnquist quotes its first stanza in an attempt to demonstrate how the flag was flown at the battle and stood, unfurled by the wind, as a unifying symbol. He then moves on to explain why America needed a symbol; without a flag, Britain could harass American vessels, treating their sailors as pirates and hanging them. However, when American vessels were captured by the British after the adoption of the stars and stripes, the British would be forced to treat American sailors as prisoners of war. Thus, an American flag quite literally protected Americans, a powerful example of the flag's importance.

Rehnquist continues employing literature, explaining the context behind Francis Scott Key's poem, "Defence of Fort M'Henry," (which America's national anthem would be based on) and John Greenleaf Whittier's poem, "Barbara Frietchie." These are both appeals to emotion: Key wrote his poem after being "intensely moved" by witnessing the American flag prevailing after a battle with the British in the War of 1812 and "Barbara Frietchie" tells the story of an older woman who told a confederate officer to shoot her but to spare the American flag. One can imagine the pride one would feel in their country—and flag—after fending off a superpower such as Britain to hold an important fort or to stand up to a general by telling them to preserve the American flag. These appeals to emotion are strong examples of how woven the importance of the American flag is within its history and how why some view it with a distinct reverence.

He even goes to show the consequences of permitting flag burning: decreased troop morale. Telling the story of Vietnam War soldiers, Rehnquist explains that the burning of American flags during the war caused servicemen to write to members of congress in disgust and confusion. This is a good use of an appeal to emotion because it shows direct and material consequences of flag burning beyond just preservation of peace arguments.

Rehnquist also directly attacks Brennan's argument regarding the marketplace of ideas. Whereas Brennan argued that Americans should use logic and reason to persuade flag-burners that their actions are wrong, Rehnquist rejects that the treatment of the American flag should be up for discussion. "The flag is not simply another 'idea' or 'point of view' competing for recognition in the marketplace of ideas." He goes even further to rebuke the marketplace of ideas, claiming that burning a flag is not a way to express an idea. Instead, he claims it is more of an "inarticulate grunt or roar." This line illuminates how Rehnquist's and Brennan's interpretation of the value of flag burning differ within the context of communication. Rehnquist views it as a lazy, and offensive, way to communicate while Brennan understands that the inflammatory nature of flag burning is part of its appeal.

Rehnquist later appeals to emotion and public opinion, citing the fact that millions of Americans regard the flag with "an almost mystical reverence." This is an argument that appeals to tradition. Tradition, according to Wilson Huhn, is defined as "the customs of the people and traditions of the community" and has been employed as a principal test for determining our fundamental rights. Wilson goes on to explain that tradition often establishes "baselines," which favor the status quo and place a burden of proof on those who wish to deviate from current norms. In the context of Rehnquist's argument, he appeals to the American tradition regarding the flag. The status quo has been that we have, throughout our history, viewed the flag with a certain respect. Therefore, using this traditional framework, Rehnquist places burden of proof on Johnson's side to explain why the existing order must be changed.

Rehnquist then turns to the distinction between absolute and relative rights concerning the phrase "freedom of expression." He effectively makes his case by citing *Chaplinsky*. The majority opinion, written in 1942, made clear that the right to free speech is not absolute. There

are circumstances—lewd, obscene, profane, libelous, and insulting communicative action—in which punishment for certain forms of expression are consistent with the First Amendment. This is because, the opinion argues, those forms of expression have little substantive value while they threaten the "social interest in order and morality." He believes *Texas v. Johnson* is similar to *Chaplinsky* in that respect; according to the justice, the burning of the flag was not an essential part of Johnson's argument. He writes that there were other ways for Johnson to express his resentment for President Reagan without resorting to burning the flag; he cites chants shouted by Johnson, the fact that he led a march, and his previous "die-in" in protest of nuclear weapons. These arguments use precedent to illustrate how the prohibition of flag burning is not consistent with previous rulings but also lead to desirable consequences, such as order and morality. However, this argument does not rely solely on precedent; it is also a policy argument. A policy argument is "consequentialist in nature, … [arguing that] a certain interpretation of the law will bring a certain state of affairs." Rehnquist predicts the consequences—less social order and morality—of a broader interpretation of the First Amendment.

Rehnquist then makes an argument that centers on intent. He questions the meaning of the word "establish." The question he raises is: is the court outlawing flag-burning really establishing a certain feeling or respect for the flag?" His perspective is that it does not — tradition has done that. By allowing tradition to determine how we legislate actions relating to the flag, the government would not be establishing anything, and therefore would not be violating the intent of the First Amendment.

Chapter 4

Reaction and Legacy

News Publications

The 5-4 ruling in favor of Johnson elicited a strong response not only from the public but also from the justices themselves. A New York Times article, written by legal journalist Linda Greenhouse, published the day of the decision's announcement describes the scene in the courtroom as "spellbinding."[35] Two of the justices—Brennan and Stevens—elected to read their opinions out loud, a rare occurrence in the Court. Greenberg describes the case as revealing the "distinctive views held by the individual Justices on the Court's role in interpreting the Constitution." She even marvels at the four opinions, describing them as not only jurisprudence but also essays on political philosophy and American history. She cites the use of Justice Rehnquist's liberal use of literature to highlight the storied nature of the American flag, including his use of the poem "Barbara Frietchie." In the poem, the titular character displays an American flag outside her house while Confederate soldiers march through her town. After the Confederate soldiers shoot the flag off its staff, Frietchie catches it and says, "Shoot, if you must, this old gray head, but spare your country's flag."

Greenberg also captures some prominent reactions to the ruling from both sides of the political spectrum. She cites a member of a conservative research group, Free Congress Center for Law and Democracy, slamming the ruling as "an exercise in absurdity" and the National

[35] Greenhouse, Linda. "Justices, 5-4, Back Protesters' Right to Burn the Flag." *The New York Times*, The New York Times, 22 June 1989, https://www.nytimes.com/1989/06/22/us/justices-5-4-back-protesters-right-to-burn-the-flag.html.

Commander of the American Legion describing his reaction as "extreme sadness" before evoking the image of Gold Star mothers. The president of a liberal lobbying group, People for the American Way, saw the ruling as "a victory for freedom of speech" and claimed that the nation could not withstand "seeing the First Amendment cast aside out of a misguided sense of nationalism."

Legal/Political Research

Poll data about the *Texas v. Johnson* decision examined the effect of the ruling on the public's confidence in the Supreme Court. Professors Anke Grosskopf and Jeffrey J. Mondak evaluated survey data from three polls taken before and after the ruling.[36] The polls asked over one thousand people the question: "as far as the people in charge of running the Supreme Court are concerned, would you say you have a great deal of confidence, only some, or hardly any confidence at all in them?" The results show that the number of respondents with "a great deal of confidence" in the Court dropped from 30.3% before the decision to 18.1% just weeks after and down further to 17% nearly two months after; they found that there was an 9% increase in respondents who claimed to have "some confidence," as well as a 4% increase in respondents who claimed to have "hardly any confidence." Clearly, based on these results, *Texas v. Johnson*, had a negative effect on the public's perception of the Court, most notably on those who previously had the most confidence in it.

In addition to being used for a study of public perception of the Supreme Court, *Texas v. Johnson* was the subject of a law review article by Geoffrey R. Stone, the Dean of The

[36] Grosskopf, Anke, and Jeffery J. Mondak. "Do Attitudes toward Specific Supreme Court Decisions Matter? The Impact of Webster and Texas v. Johnson on Public Confidence in the Supreme Court." *Political Research Quarterly*, vol. 51, no. 3, 1998, pp. 633–54. *JSTOR*, https://doi.org/10.2307/3088042. Accessed 15 Mar. 2023.

University of Chicago Law School at the time of the writing.[37] Stone defends the Court's ruling, explaining that in his view, "the Court's analysis of *O'Brien* and of the Texas flag desecration statute was clearly correct and essentially uncontroversial as a matter of both precedent and principle." He goes on to refute arguments against the *Johnson* ruling. The most convincing opposing argument he entertains is that the Texas flag desecration statute only limits one particular means of protest but does not limit protest in general. Stone disagrees with this argument by explaining that the statute was content-based; this is evidenced by it only prohibiting burning the flag to convey ideas that were "offensive" to others, thus making it almost certainly unconstitutional. Content-based restrictions "limit expression because of the message conveyed," Stone explains, whereas content-neutral restrictions do not consider the content of the message they are restricting. He labels the former "presumptively invalid."

Stone's favorable interpretation of the Court's decision and Justice Brennan's opinion was echoed by others in the legal community. Writing in the Florida State University Law Review, Deborah T. Eversole argues that "only by ignoring precedent could the Supreme Court have ruled otherwise."[38] Her argument about the outcome of the decision strongly mirrors the words of Justice Brennan; "Permitting protesters to burn flags… enhances the flag's symbolic power… [and] underscores its commitment to freedom of thought," she wrote.

Eversole does note, however, that the Court's decision in *Johnson* is ambiguous in one key respect: it allows for the prosecution of flag-burning as long as it is content-neutral. She argues that a content-neutral law prohibiting flag-burning "may pass constitutional muster." This

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[37] Stone, Geoffrey R. "Flag Burning and the Constitution." *Iowa L. Rev.* 75 (1989): 111.

[38] Deborah T. Eversole, Texas v. Johnson, 109 S. Ct. 2533 (1989), 17 Fla. St. U. L. Rev. 869 (1990) . https://ir.law.fsu.edu/lr/vol17/iss4/6

argument is supported by former Deputy General Counsel to the Clerk of the U.S. House of Representatives, Charles Tiefer. Tiefer calls the distinction between content-neutral and content-based laws "potentially vital."[39] There is a good basis for this claim. In a dissent involving a case—*Smith v. Goguen*—in which a defendant wore an American flag on the "seat of his pants," Justice Blackmun argued that a Massachusetts statute prohibiting that act was valid because it was sufficiently limited in scope. Justice Blackmun was part of the majority in *Texas v. Johnson*. Justice Brennan even "paid homage" to the *Smith v. Goguen* decision in the Court's *Johnson* opinion, which Tiefer argues, "implicitly, as well as explicitly," opens the door to content-neutral statutes.

Eversole and Tiefer raise an interesting point about the rhetoric of Justice Brennan's opinion in *Johnson*. The scope of the opinion goes further than answering the main question in *Johnson* but stops at a significant point. It asserts that the state does not have a significant interest in preserving the flag as a "symbol of nationhood and national unity," however, it stops short of limiting a state's interest in the name of protecting the physical integrity of the flag.[40]

The aforementioned law review and research articles represent the reaction of the broader legal community to the *Johnson* decision. There was a consensus in the literature that the Court correctly followed established precedent from *O'Brien*, *Spence*, and *Barnette* when deciding this case. The nuance largely centered around the potential impact of the case. Professor of political science at Middlebury College, Murray Dry argued that the case had a significant effect on our

[39] Tiefer, Charles. "The Flag-Burning Controversy of 1989-1990: Congress' Valid Role in Constitutional Dialogue." Harvard Journal on Legislation, vol. 29, no. 2, Summer 1992, pp. 357-398. HeinOnline.

[40] *Ibid*

understanding of freedom and freedom of expression.[41] "The emphasis on content-neutrality reflects the notion that government has no business enforcing orthodoxy," Dry wrote. However, Columbia Law professor Kent Greenawalt, argued that *Texas v. Johnson* was trivial in comparison to cases such as *Roe v. Wade* and *Brown v. Board of Education*.[42] If the First Amendment did not protect flag-burning, "our country would not be much less free and democratic," Greenawalt argued.

Although Greenawalt correctly asserts that *Johnson* did not have the relative impact on American society and jurisprudence that other landmark cases, such as *Roe v. Wade* and *Brown v. Board of Education* did, a consequentialist framework is insufficient for understanding the effect of the case. The oral arguments and the justices' opinions employed rhetoric to answer vital questions about the meaning of the First Amendment, speech, freedom, and America as a whole. By engaging in these debates, the Court validated the importance of expressive conduct—a topic the court had considered since 1931 in *Stromberg*—and made a definitive statement about what they believe the flag represents.

Political Aftermath and Commentary

In a case comment published two years after *Johnson* was decided, then Lead Articles Editor of the New England School of Law, James R. Dyer, summarizes the aftermath of the decision. He explains that, in an attempt to overrule the *Johnson* decision, Congress amended an

[41] Dry, Murray. "Flag Burning and the Constitution." *The Supreme Court Review*, vol. 1990, 1990, pp. 69–103. *JSTOR*, http://www.jstor.org/stable/3109656. Accessed 23 Mar. 2023.
[42] Greenawalt, Kent. "O'er the Land of the Free: Flag Burning as Speech." UCLA Law Review, vol. 37, no. 5, June 1990, pp. 925-948. HeinOnline.

existing federal flag desecration statute.[43] The existing statute which outlawed "knowingly cast[ing] contempt on any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it…" was revised to remove the phrase "knowingly casts contempt" in an attempt not to interfere with constitutionally protected verbal or written communication. Dyer explains why this attempt fell short; because the Court recognized in *Spence* that actions toward the speech—whether conduct or more traditionally understood forms of speech—were considered constitutionally protected forms of symbolic speech.

Dyer also explains why even content-neutral statutes restricting should be found to be unconstitutional. There are two reasons: (1) any government justification for the statute "will invariably be tied to expression, meaning that the Court will always use the Strict Scrutiny test and not the *O'Brien* test, and (2) the Court has shown that they will prioritize the individual right to expression "over a state's interest in preserving the integrity of the flag." He then considers another option lawmakers considered in the aftermath of the ruling: a constitutional amendment. He argues against a constitutional amendment on the grounds that it would reduce the Court's legitimacy in the eyes of the public. The Supreme Court, an unelected branch of government, derives its power from the respect of other branches and the American population. Reversing such a monumental decision would hurt its credibility and was "wisely avoided" for that purpose, Dyer argues.

Between 1990-2006, Congress attempted to amend the Constitution seven times to include an exception to the First Amendment. CNN legal analyst, Jeffrey Toobin, called

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[43] James R. Dyer, "Texas v. Johnson: Symbolic Speech and Flag Desecration Under the First Amendment," New England Law Review 25 (1991): 895.

constitutional amendment attempts "extremely rare."[44] In 2006, the measure passed the House but failed to pass the Senate, receiving 66 of the 67 votes necessary to pass. Politicians voting against the amendment included then Senators Barack Obama, Joe Biden, and Hillary Clinton, as well as current Senate minority leader, Mitch McConnell. Even if the measure passed the Senate, it still would have needed ratification from 38 of the 50 states.

However, another measure was successfully passed: the Flag Protection Act of 1989. This law permitted Congress "the right to enact statutes criminalizing the burning or desecration of the flag in public protest."[45] In *United States v. Eichman*, this law was struck down one year later by the Supreme Court in a 5-4 ruling in which all justices voted in unison with their previous ruling in *Johnson*.

Influence of Decision in Modern Day

Texas v. Johnson, and its underlying principles, continues to be a matter of importance today. The case has been cited 29 times in subsequent Supreme Court cases, including a case that received national attention, *Masterpiece Cakeshop v. Colorado Civil Rights Commission*.[46] It remains a recurring issue in politics as well. In 2016, then President-elect Donald Trump tweeted, "Nobody should be allowed to burn the American flag - if they do, there must be

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[44] "Flag-Burning Amendment Fails by a Vote." *CNN*, Cable News Network, https://www.cnn.com/2006/POLITICS/06/27/flag.burning/.

[45] Ramos, Mitzi. "Flag Protection Acts of 1968 and 1989." *Flag Protection Acts of 1968 and 1989*, https://mtsu.edu/first-amendment/article/1079/flag-protection-acts-of-1968-and-1989.

[46] "Texas v. Johnson." *Global Freedom of Expression*, 12 Nov. 2019, https://globalfreedomofexpression.columbia.edu/cases/texas-v-johnson/.

consequences - perhaps loss of citizenship or year in jail!"[47] While in office, Trump took the anti-flag burning sentiment a step further. He told state governors in a call, "Flag burning is a disgrace. We have a different court. It's time to review that again."[48] While he was a senator, Joseph Biden was also in favor of preventing flag burning through means of law. He once said in a 1989 interview, "if it turns out we cannot [make flag burning illegal] by statute, then I believe it's important that we protect the flag, and I would vote for a constitutional amendment if that was necessary."[49] As president, however, Biden has not suggested support for a flag burning statute.

Former San Francisco 49ers' quarterback, Colin Kaepernick ignited a debate about the meaning of the flag in 2016 when he kneeled for America's national anthem and the US flag before games kicked off. "I am not going to stand up to show pride in a flag for a country that oppresses black people and people of color," Kaepernick said. His justification for kneeling was to highlight what the flag represented to him—an institutionally racist judicial system that disproportionately affected minority groups, especially Black people. In fact, he even said that he would not stand for the flag until it "represents what it's supposed to represent." His view of protesting the lack of equality and fairness strongly differed from those who saw the kneeling as an offensive act to the flag in itself. Those who disagreed with Kaepernick had an entirely

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[47] Hayden, Michael. "Trump Says Flag Burners Should Lose Citizenship or Spend a Year in Jail." *ABC News*, ABC News Network, https://abcnews.go.com/Politics/trump-flag-burners-lose-citizenship-spend-year-jail/story?id=43842355.

[48] Sommerfeldt, Chris. "Trump Slams Governors over George Floyd Protests: 'You Are Weak. You Have to Arrest People'." *New York Daily News*, 1 June 2020, https://www.nydailynews.com/news/politics/ny-trump-governors-protests-weak-20200601-narircadfjaoddl4cp26ecq6we-story.html.

[49] "Sen. Biden Proposes Law to Criminalize Burning the American Flag." *The Washington Post*, WP Company, https://www.washingtonpost.com/video/opinions/sen-biden-proposes-law-to-criminalize-burning-the-american-flag/2020/07/01/398fb044-7025-4c05-8356-37dbad2fee4a_video.html.

different conception of what the flag represented—common arguments centered around veterans and their sacrifice—and appropriate conduct toward the flag. This is an important example of people bringing their own meanings of what the flag represents to a debate. Moreover, it exemplifies how public debates can devolve due to two sides that cannot agree on definitions and meanings and, as a result, talk past each other.

Legacy

The most informative part of writing this thesis has been gaining a deeper understanding of the intersection of rhetoric and law. In *Heracles' Bow*, James Boyd White argues that law can be understood as a rhetorical process that is both "creative and educative."[50] Examining *Texas v. Johnson* through a rhetorical lens has helped me understand what it means to *do* law, how law shapes culture, and the fluid, dynamic nature of law. When Kathi Alice Drew and William Kunstler stood in front of the nine justices and answered their questions, they were not only telling the story of Gregory Lee Johnson's flag burning but also asserting a meaning for it. This translation of language from narrative into legal arguments is part of the process of law. Whether their arguments were inherently successful is beyond the point; simply by translating the narrative into legal rhetoric, they created new possibilities for what the First Amendment could be, the value of expressive conduct relative to maintaining peace, and what the American flag represents.

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[50] White, James Boyd. *Heracles' Bow*. University of Wisconsin Press, 1985.

White also argues that judicial opinions should be understood "as a statement by a… group of individual minds exercising their responsibility to decide a case as well as they can and to determine what it shall mean in the language of the culture."[51] The justices who wrote and signed opinions continued the perpetual debate about the meaning of the First Amendment. They also added their own interpretation of it. Justice Brennan notably constituted a meaning of the First Amendment as valuing expression of ideas more than the reaction to those ideas. In doing so, according to White's rhetorical lens, Brennan told us what the majority—and we, as Americans and America—could and should believe. The majority constituted a community and culture that respects and tolerates protest, even in its offensive forms. They create a community that reshapes our understanding of patriotism not as an allegiance to a symbol but an allegiance to certain principles. To love one's country is to rather see its flag burned than to see its ideals discarded.

Although their words did not become justification for law, the words of Justices Rehnquist and Stevens remain important. They creatively constituted a meaning for the American flag that provides it a special and esteemed distinction in society and to us; it is a role that is above protest and other symbols. They constitute a vision of America that understands the history of the American flag from the words of Francis Scott Key to the modern day and respects it to such an extent that it will not tolerate disrespect toward it.

In the process of articulating arguments about the value of free expression, those who shaped the law in *Texas v. Johnson* provided us with a model for productive dialogue. Although their values and interpretations of law differed, they engaged with each other in good faith. They

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[51] *Ibid*

asked difficult questions of each other and, judging from their emotionally charged opinions, from themselves. White explains that the "practice and teaching of rhetoric is by its nature self-reflective." Engaging in rhetoric, as we all do daily, provides us with the opportunity to shape the communities and cultures in which we find ourselves. We can ask whether our voices are represented, whether the law constitutes communities that we want it to, and whether the law is being created through productive rhetoric. The process of law invites us to be curious and inquisitive; by engaging in it, we consider and reconsider our assumptions all while challenging each other to be better citizens and our country to continue striving to its ideals.

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