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Flag Burning Yes, Loud Music No: What's the Catch?

Alicia Otazo Sorondo

COMMENTS

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I. INTRODUCTION

The first amendment's rich tradition[1] reflects an unresolved state of tension, inherent in all societies, between individual freedom and collective goals.[2] Although worded in unconditional terms,[3] the first amendment does not guarantee absolute freedom of speech.[4] Often,

1. For an enlightening survey of this tradition, see H. KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA (J. Kalven ed. 1988).

2. Alternatively, individual freedom might be characterized as a collective goal in the sense that all members of a society may want individuals to be free. This objective meets no resistance as long as an individual's exercise of his freedoms does not collide with the society's other commonly held values. It is precisely those instances of conflict, however, that make up the rich case history of the first amendment.

3. The first amendment reads in part: "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. CONST. amend. I.

4. A. COX, FREEDOM OF EXPRESSION 4 (1981). Even Justice Hugo Black, widely regarded as the champion of an absolute interpretation of the first amendment, acknowledged some level of limitation by distinguishing speech and conduct:

> The First Amendment, I think, protects speech, writings, and expression of views in any manner in which they can be legitimately and validly communicated. But I have never believed that it gives any person or group of persons the constitutional right to go wherever they want, whenever they please, without regard to the rights of private or public property or to state law.

Brown v. Louisiana, 383 U.S. 131, 166 (1966) (Black, J., dissenting). For additional insight into Justice Black's views on the first amendment, see JUSTICE HUGO BLACK AND THE FIRST

society's desire to preserve commonly held values[5] delimits an individual's exercise of his first amendment rights. Because of these ingrained restrictions, the United States Supreme Court must engage in repeated line drawing between the individual's and society's competing values. In articulating the bases of its judgments, the Court has devised numerous tests.[6] Over the years, the Court has increas-

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AMENDMENT (E. Dennis, D. Gillmor & D. Grey eds. 1978). Professor Alexander Meiklejohn qualified the absolute scope of the first amendment along a different dimension. According to Professor Meiklejohn, the first amendment "protects the freedom of those activities of thought and communication by which we 'govern.'" Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255. After enumerating the activities required for self-government—understanding the issues facing the nation, passing judgment on how the government handles those issues, and devising methods for improving upon the government's handling of the issues—he stated: "Now it is these activities, in all their diversity, whose freedom fills up 'the scope of the First Amendment.' These are the activities to whose freedom it gives its unqualified protection." *Id.*

5. Paramount among these values is the preservation of public order. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (upholding the conviction of a Jehovah's Witness who called the City Marshal a "God damned racketeer" and "a damned Fascist"); *see also infra* notes 53-55 and accompanying text. Protection of children is another value that consistently takes precedence over first amendment claims. FCC v. Pacifica Found., 438 U.S. 726 (1978) (sustaining an FCC order granting a father's complaint against a radio station based on his and his young son's hearing of George Carlin's "Filthy Words" monologue); *see also* H. KALVEN, JR., *supra* note 1, at 54-59. The United States Supreme Court has also shown heightened concern when, in the Justices' perception, free speech claims threaten the integrity of the nation, particularly in times of war. The line of cases utilizing the clear and present danger test exemplify this preoccupation. *See infra* note 6.

6. Indeed, four early first amendment cases set the stage for this approach with the development of the clear and present danger test. Abrams v. United States, 250 U.S. 616 (1919); Debs v. United States, 249 U.S. 211 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Schenck v. United States, 249 U.S. 47 (1919). Each of these World War I cases presented an appeal of a political speech conviction under the Espionage Act of 1917. Even though the Court upheld all four convictions, these cases played a crucial role in the formative stages of first amendment jurisprudence. In the majority opinion in *Schenck*, Justice Holmes first articulated the test: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." *Schenck*, 249 U.S. at 52. Writing for the majority in *Frohwerk*, Justice Holmes again asserted: "[W]e have decided in *Schenck v. United States*, that a person may be convicted of a conspiracy to obstruct recruiting by words of persuasion." *Frohwerk*, 249 U.S. at 206. In *Debs*, Justice Holmes further discussed how a bad effect precluded speech protection:

> [T]he opposition was so expressed that its natural and intended effect would be to obstruct recruiting. If that was intended and if, in all the circumstances, that would be its probable effect, it would not be protected by reason of its being part of a general program and expressions of a general and conscientious belief.

Debs, 249 U.S. at 215. Finally, speaking for the dissent in *Abrams*, Justice Holmes restated the test:

> I do not doubt for a moment that by the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent.

ingly relied on the application of these tests as a technique for deciding first amendment cases.[7] This form of adjudication, however, presents treacherous pitfalls. At the test formulation stage, the method involves the Court's acceptance of various fictions regarding societal interests. For example, in devising the clear and present danger test,[8] the Court implicitly assumed that society's view coincided with the Court's own notion of which "substantive evils"[9] permit the state to silence the speaker. Similarly, in the area of obscenity, the Court has attempted,[10] and failed,[11] to develop a test in a way that

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Abrams, 249 U.S. at 627 (Holmes, J., dissenting). In 1951, the Court adopted Chief Judge Learned Hand's reformulation of the test: " 'In each case [courts] must ask whether the gravity of the "evil," discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.' " Dennis v. United States, 341 U.S. 494, 510 (1951) (quoting United States v. Dennis, 183 F.2d 201, 212 (1950) (affirming convictions of Communist Party members for violations of the conspiracy provisions of the Smith Act, ch. 439, 54 Stat. 670 (1940) (current version at 18 U.S.C. § 2385 (1988)))).

Obscenity is another first amendment area where the Court has articulated tests. In 1957, Justice Brennan announced the test for obscenity as: "[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." Roth v. United States, 354 U.S. 476, 489 (1957). Justice Brennan, joined by Chief Justice Warren and Justice Fortas, later restated the *Roth* test as follows:

> [I]t must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.

Memoirs v. Massachusetts, 383 U.S. 413, 418 (1966) (Brennan, J., announcing the judgment of the Court). In 1973, Chief Justice Burger reworked the *Roth-Memoirs* obscenity standard into the following three-part test:

> The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Miller v. California, 413 U.S. 15, 24 (1973) (citations omitted).

Two additional tests that are central to the thesis of this Comment, the *O'Brien* test and the *Clark* test, are discussed in Section II of this Comment.

7. Indeed, the Court premised its adjudication of the two cases that are the subject of this Comment on tests. The use of tests in first amendment cases goes hand in hand with the "categorizing" and "balancing" techniques of adjudication. The former involves definitional line drawing, while the latter requires weighing the individual's and the state's interests. *See* Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975) (discussing the *O'Brien* test in connection with these techniques).

8. For a discussion of the clear and present danger test, see *supra* note 6.

9. *Abrams*, 249 U.S. at 627 (Holmes, J., dissenting); *Schenck*, 249 U.S. at 52.

10. *Miller*, 413 U.S. at 24; *Memoirs*, 383 U.S. at 418; *Roth*, 354 U.S. at 489.

11. *See* Paris Adult Theater I v. Slaton, 413 U.S. 49, 73-74 (1973) (Brennan, J., dissenting) (acknowledging the futility of any attempt to devise a workable obscenity test).

reflects both the moral concerns and the free speech interests of society.

Having made various assumptions at the test formulation stage, the Court must then indulge in the additional fiction of fitting the particular circumstances of a specific case within the parameters of the previously chosen test. In this conforming process, the Court may disregard significant indicia, peculiar to the speaker, which are essential for sensitive first amendment adjudication. As a consequence, the Court runs the risk of obtaining contradictory results when adjudicating substantively comparable free speech claims.

Nowhere is this danger more apparent than in the cases that are the subject of this Comment: *Texas v. Johnson*,[12] which upheld flag burning as speech guaranteed by the first amendment; and *Ward v. Rock Against Racism*,[13] which rejected a rock band's claim that the imposition of a city's sound amplification system and technician during musical performances abridged speech guaranteed by the first amendment. The Court decided both cases within a day of each other at the end of the 1988-89 Term.[14] Although the Court reached contrary results, in many important ways the cases presented analogous facts and implicated similar freedom of speech issues.[15] Each case involved outrageous, attention-grabbing conduct by the speaker: burning the American flag; playing disturbingly loud music. In each case, the conduct occurred in a public setting: flag burning in front of Dallas City Hall; a rock concert at the Naumberg Bandshell in New York's Central Park. The messages that the speakers sought to convey implicated political protest speech: the flag burner's message was anti-Reagan; the rock band's message was anti-racist. Finally, each case presented a first amendment challenge to the validity of local laws: Texas' flag desecration statute; New York City's bandshell use ordinance. Moreover, just as Texas' statute interfered with the flag burner's symbolic speech by prohibiting flag desecration to convey a political message, New York's ordinance interfered with the rock band's musical expression by imposing on its performance an extraneous sound amplification system and technician. Thus, each case called for first amendment protection of speakers who were similarly situated in terms of their unconventional positions, their utilization of outrageous public conduct to convey political messages, and their suf-

12. 109 S. Ct. 2533, 2536 (1989).

13. 109 S. Ct. 2746, 2760 (1989).

14. The decisions were announced on June 21 and June 22, respectively.

15. The factual details and issues presented in the two cases appear in Section III of this Comment. An analysis of the opinions appears in Section IV.

fering from state impingement on those messages as a result of state attempts to regulate outrageous conduct.

Given these similarities, a consistent approach to the first amendment would require the Court to afford the same level of protection to the speakers in both cases. The Court, however, achieved opposite results in these cases—shielding the flag burner, but forsaking the rock band. Why? This Comment argues that the Court's uneven performance stems from its reliance on tests to determine first amendment issues. By selecting two different tests to adjudicate these cases,[16] the Court followed diverging doctrinal paths, which led to different results.[17] To elucidate how the use of tests without sensitivity to the speaker threatens the integrity of the first amendment, this Comment examines the rationale of each opinion and questions the Court's selection and application of tests in the two cases.

Section II of this Comment provides both a background overview of flag desecration and a survey of the two tests respectively employed by the Court in *Texas v. Johnson* and *Ward v. Rock Against Racism*. Section III presents the factual settings and issues of the two subject cases, as well as the substantive similarities between the two cases. Section IV examines the Court's opinions and addresses the contrary outcomes of the cases in terms of the Court's use of first amendment tests. As a result of this analysis, this Comment concludes that the United States Supreme Court decided the flag burning case correctly, but the park concert case incorrectly, underscoring the proposition that mechanical application of tests is an undesirable technique in first amendment adjudication.

II. PERSPECTIVE

A. *Background on Flag Desecration*

United States Supreme Court adjudication of flag cases dates back to the beginning of this century. As early as 1907, the United States Supreme Court confronted its first flag desecration case, *Halter v. Nebraska*.[18] The controversy arose from the use of the American

16. In *Texas v. Johnson*, the Court applied the test formulated in United States v. O'Brien, 391 U.S. 367, 377 (1968). In *Ward v. Rock Against Racism*, the Court applied the test announced in Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984). These tests are discussed in Section II of this Comment, and the Court's present application of these tests is discussed in Section IV.

17. The Court's choice of tests may be characterized either as accidental—based on superficially different factual patterns—or conditioned by precedent, or, more skeptically, as deliberate and outcome determinative. For a discussion of these concerns, see *infra* text accompanying notes 260-65.

18. 205 U.S. 34 (1907).

flag as an advertisement on a bottle of beer, in violation of a 1903 Nebraska flag desecration statute.[19] The Court found the Nebraska statute constitutional as it pertained to the narrow purpose of forbid-

19. *Id.* at 38. Flag desecration statutes have played a major role in the adjudication of flag cases. In 1907, when *Halter v. Nebraska* was decided, 31 states had enacted flag desecration statutes. *Id.* at 39 n.1. In 1989, when *Texas v. Johnson* was decided, the number of states with flag desecration statutes had risen to 48. Texas v. Johnson, 109 S. Ct. 2533, 2551 n.1 (1989) (Rehnquist, C.J., dissenting). A number of states modeled their flag laws after the Uniform Flag Act, approved in 1917 by the National Conference of Commissioners on Uniform State Laws. *See* Rosenblatt, *Flag Desecration Statues: History and Analysis*, 1972 WASH. U.L.Q. 193, 196-97. The Uniform Flag Act reads as follows:

AN ACT

TO PREVENT AND PUNISH THE DESECRATION, MUTILATION OR IMPROPER USE OF THE FLAG OF THE UNITED STATES OF AMERICA, AND OF THIS STATE, AND OF ANY FLAG, STANDARD, COLOR, ENSIGN OR SHIELD AUTHORIZED BY LAW.

Section 1. [Definition.] The words flag, standard, color, ensign or shield, as used in this act, shall include any flag, standard, color, ensign or shield, or copy, picture or representation thereof, made of any substance or represented or produced thereon, and of any size, evidently purporting to be such flag, standard, color, ensign or shield of the United States or of this state, or a copy, picture or representation thereof.

Sec. 2. [Desecration.] No person shall, in any manner, for exhibition or display:

(a) place or cause to be placed any word, figure, mark, picture, design, drawing or advertisement of any nature upon any flag, standard, color, ensign or shield of the United States or of this state, or authorized by any law of the United States or of this state; or

(b) expose to public view any such flag, standard, color, ensign or shield upon which shall have been printed, painted or otherwise produced, or to which shall have been attached, appended, affixed or annexed any such word, figure, mark, picture, design, drawing or advertisement; or

(c) expose to public view for sale, manufacture, or otherwise, or to sell, give or have in possession for sale, for gift or for use for any purpose, any substance, being an article of merchandise, or receptacle, or thing for holding or carrying merchandise, upon or to which shall have been produced or attached any such flag, standard, color, ensign or shield, in order to advertise, call attention to, decorate, mark or distinguish such article or substance.

Sec. 3. [Mutilation.] No person shall publicly mutilate, deface, defile, defy, trample upon, or by word or act cast contempt upon any such flag, standard, color, ensign or shield.

Sec. 4. [Exceptions.] This statute shall not apply to any act permitted by the statues of the United States (or of this state), or by the United States Army and Navy regulations, nor shall it apply to any printed or written document or production, stationery, ornament, picture or jewelry whereon shall be depicted said flag, standard, color, ensign or shield with no design or words thereon and disconnected with any advertisement.

Sec. 5. [Penalty.] Any violation of Section Two of this act shall be a misdemeanor and punishable by a fine of not more than . . . . . dollars. Any violation of Section Three of this act shall be punishable by a fine of not more

ding the use of "the flag for advertising articles of merchandise."[20] Additionally, Justice Harlan, writing for the majority, embarked on a discussion of more general purposes that the statute might serve. He expressed approval for state regulations reflecting "that to every true American the flag is the symbol of the Nation's power, the emblem of freedom in its truest, best sense."[21] Justice Harlan also favored state legislation generally aimed at "cultivat[ing] a feeling of patriotism among the people."[22] For almost a century, the Court has not disturbed the narrow *Halter* ruling that the state's interest in the flag surpasses an individual's lower interest in commercial speech.[23] How-

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than . . . . . dollars, or by imprisonment for not more than . . . . . days, or by both fine and imprisonment, in the discretion of the Court.

Sec. 6. [Inconsistent Acts Repealed.] All laws and parts of laws in conflict herewith are hereby repealed.

Sec. 7. [Interpretation.] This act shall be so construed as to effectuate its general purpose and to make uniform the laws of the states which enact it.

Sec. 8. [Name of the Act.] This act may be cited as the Uniform Flag Law.

Sec. 9. [Time of Taking Effect.] This act shall take effect . . . . . days after . . . . . .

NAT'L CONF. OF COMM'RS ON UNIF. STATE L., PROCEEDINGS OF THE TWENTY-SEVENTH ANNUAL MEETING, 323-24 (1917).

The Texas statute implicated in Texas v. Johnson, 109 S. Ct. at 2537 n.1, however, did not resemble the Uniform Flag Act. The Texas legislature had enacted Section 42.09 of Texas Penal Code in 1973 to replace a 1925 flag desecration statute. *See* TEX. PENAL CODE ANN. § 42.09 practice commentary - 1973 (Vernon 1989). The current Texas statute reads:

(a) A person commits an offense if he intentionally or knowingly desecrates:
(1) a public monument;
(2) a place of worship or burial; or
(3) a state or national flag.
(b) For purposes of this section, "desecrate" means deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action.
(c) An offense under this section is a Class A misdemeanor.

Id. § 42.09.

20. *Halter*, 205 U.S. at 45. The *Halter* decision preceded Gitlow v. New York, 268 U.S. 652 (1925), which applied the first amendment to the states through incorporation into the fourteenth amendment. *Id.* at 666. Arguably, in declaring the Nebraska statute constitutional, *Halter* did not address the flag desecration issue in light of the first amendment's applicability to state laws. Yet, *Halter* continues to be cited in cases involving state flag desecration statutes. *See, e.g.*, Texas v. Johnson, 109 S. Ct. 2533, 2552 (1989) (Rehnquist, C.J., dissenting); Spence v. Washington, 418 U.S. 405, 418 (1974) (Rehnquist, J., dissenting).

21. *Halter*, 205 U.S. at 43.

22. *Id.*

23. Under generally accepted first amendment theory, commercial speech deserves less protection than political speech. *See* Board of Trustees v. Fox, 109 S. Ct. 3028 (1989) (upholding a State University of New York regulation prohibiting the holding of Tupperware parties in school dormitories); Valentine v. Chrestensen, 316 U.S. 52 (1942) (upholding a city regulation prohibiting the distribution of commercial and business advertising handbills). *But see* Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (affirming the Ohio Supreme Court's decision that a public transit system could ban political advertising from its buses

ever, the broader scope of the *Halter* dicta—that a state-sponsored message regarding the flag may supersede all speech interests—was definitely put to rest in *Texas v. Johnson*.[24] Nevertheless, the emotional appeal of Justice Harlan's sentiments concerning the flag issue has persisted. Indeed, in his *Johnson* dissent, Chief Justice Rehnquist cites the *Halter* opinion with approval.[25]

In 1943, while the country was engaged in World War II, the role of the national flag again came under the scrutiny of the United States Supreme Court. In *Board of Education v. Barnette*,[26] the Court chose substance over form by striking down a West Virginia statute requiring school children to salute the flag.[27] Justice Jackson squarely framed the issue presented by the case as whether "compulsory measures toward 'national unity' are constitutional."[28] Echoing Justice Harlan's patriotic fervor in *Halter*, but unwilling to be blinded by it, Justice Jackson acknowledged that "[t]he case is made difficult not because the principles of its decision are obscure but because the flag involved is our own."[29] The Court's decision against compulsion reflects the first amendment's repugnance for state-imposed orthodoxy in matters of opinion, even when the symbolic stakes are high.[30] At the same time, the Court left the door open for yet undiscovered circumstances that might permit an exception to this blanket condemnation.[31] By allowing the possibility of overriding governmental concerns, the Court foreshadowed the balancing approach utilized in the two cases that are the subject of this Comment.[32]

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while allowing commercial advertising). Justice Rehnquist pointed to the inconsistency between the *Lehman* holding and the Court's traditional approach to commercial speech in his dissent in Spence v. Washington, 418 U.S. 405, 419-20 (1973) (Rehnquist, J., dissenting), a case decided in the same term in which *Lehman* was decided. The Court's latest pronouncement on commercial speech, however, seems to preserve the lower level of protection for commercial speech that was originally advanced in *Chrestensen. Fox*, 109 S. Ct. at 3033.

24. 109 S. Ct. 2533, 2542-48 (1989).

25. *Johnson*, 109 S. Ct. at 2552 (Rehnquist, C.J., dissenting).

26. 319 U.S. 624 (1943).

27. *Id.* at 642.

28. *Id.* at 640 (quoting Minersville School Dist. v. Globitis, 310 U.S. 586, 595 (1940)).

29. *Id.* at 641.

30. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.* at 642.

31. "If there are any circumstances which permit an exception, they do not now occur to us." *Id.* In a footnote to this statement, however, Justice Jackson offered the example of military service as an instance where the government might compel duties abridging freedoms ordinarily claimed by civilians. *Id.* at 642 n.19.

32. Justice Brennan, writing for the majority, utilized such an approach in evaluating the state interests advanced by Texas to justify the flag burning conviction in *Johnson*. Similarly, Justice Kennedy's majority opinion in *Ward v. Rock Against Racism* evaluated the interests

Early challenges to flag desecration statutes centered on their prohibitions against using the flag for advertising.[33] Indeed, *Halter* is the paradigm of such cases. As the country became involved in increasingly controversial issues such as the Civil Rights Movement and the Vietnam War, however, flag desecration as a form of political protest became more popular.[34] During this period, three cases involving flag desecration statutes came before the United States Supreme Court: *Street v. New York*,[35] *Smith v. Goguen*,[36] and *Spence v. Washington*.[37] In each of these cases, the Court avoided the question of whether flag desecration is protected speech, reversing the convictions on other grounds.[38] These three decisions set the stage for

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asserted by the City of New York in imposing sound amplification guidelines on concert sponsors. These opinions are discussed in Section IV of this Comment.

33. Rosenblatt, *supra* note 19, at 197.

34. This trend prompted Congress to pass a federal flag desecration statute, Act of July 5, 1968, Pub. L. No. 90-381, 82 Stat. 291 (codified at 18 U.S.C. § 700 (1988)). The legislative history contains a report by the Senate Judiciary Committee stating: "The instant bill is occasioned by a number of recent public flag-burning incidents in various parts of the United States and in foreign countries by American citizens." S. REP. NO. 1287, 90th Cong., 2d Sess. 1669 (reference table), *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS 2507, 2508. The Senate Committee also remarked on the absence of federal legislation concerning flag desecration other than that applicable to the District of Columbia. *Id.* (commenting on 4 U.S.C. § 3 (1988)). In light of recent events, the Committee saw a need to remedy the omission in order to protect the flag both in the United States and abroad. *Id.* The text of 18 U.S.C. § 700, as enacted, entitled "Desecration of the flag of the United States; penalties" is as follows:

> (a) Whoever knowingly casts contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it shall be fined not more than $1,000 or imprisoned for not more than one year, or both.
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> (b) The term "flag of the United States" as used in this section, shall include any flag, standard colors, ensign, or any picture or representation of either, or of any part or parts of either, made of any substance or represented on any substance, of any size evidently purporting to be either of said flag, standard, color, or ensign of the United States of America, or a picture or a representation of either, upon which shall be shown the colors, the stars and the stripes, in any number of either thereof, or of any part or parts of either, by which the average person seeing the same without deliberation may believe the same to represent the flag, standards, colors, or ensign of the United States of America.
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> (c) Nothing in this section shall be construed as indicating an intent on the part of Congress to deprive any State, territory, possession, or the Commonwealth of Puerto Rico of jurisdiction over any offense over which it would have jurisdiction in the absence of this section.

18 U.S.C. § 700 (1988). *But see infra* note 167 (recent amendments to the statute).

35. 394 U.S. 576 (1969) (burning and speaking contemptuously about the flag).

36. 415 U.S. 566 (1974) (wearing trousers with a flag sewn to their seat).

37. 418 U.S. 405 (1974) (per curiam) (displaying a flag with a peace symbol affixed).

38. The avoidance of the issue may be justified in terms of judicial method. A dictate of judicial economy is that an issue should not be decided unless it is squarely presented and necessary to determine the outcome of the case. "The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it. It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the

the *Johnson* case: *Street* foreshadowed the balancing of interests approach used by the majority in overturning Johnson's conviction; the dissent in *Goguen* presaged the arguments brought out by the *Texas v. Johnson* dissent; and the per curiam opinion in *Spence*, while not strong in doctrinal value, presented a sensitive discussion of the flag issue.

In *Street v. New York*, the Court reversed Street's conviction under New York's flag desecration statute[39] for burning and speaking contemptuously about the flag of the United States.[40] On June 6, 1966, Sidney Street, a patriotic black man, left his apartment carrying the American flag which he displayed on national holidays, walked to a nearby intersection, and set the flag on fire.[41] Street's act was motivated by news of the shooting of civil rights leader James Meredith.[42] When interrogated by a New York police officer, Street answered: "Yes; that is my flag; I burned it. If they let that happen to Meredith we don't need an American flag."[43] The charge filed against Street accused him of both burning the flag and shouting his complaint about Meredith's fate.[44] The Court reversed Street's conviction on the possibility that it rested on his "publicly speaking defiant or contemptuous words about the flag."[45]

In evaluating whether Street could constitutionally be convicted for his words, the Court listed four governmental interests that the conviction might further: (1) preventing incitement of others to commit unlawful acts; (2) preventing the utterance of inflammatory words that would provoke others to retaliate and cause a breach of the peace; (3) protecting the sensibilities of passersby; and (4) assuring proper respect for the national emblem.[46] On the facts of the case, and in light of prior first amendment law, none of these interests could be sustained when balanced against Street's first amendment

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case.'" Ashwander v. TVA, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring) (citations omitted). Not until the *Johnson* case was the issue of flag desecration properly before the Court.

39. N.Y. GEN. BUS. LAW § 136(d) (McKinney 1988). The statute provides in part: "Any person who . . . [s]hall publicly mutilate, deface, defile, or defy, trample upon, or cast contempt upon either by words or act, . . . shall be guilty of a misdemeanor." This statute superseded the identical language of N.Y. PENAL LAW § 1425(16)(d) (1909) in 1967. Street had originally been convicted under the earlier statute. *Street*, 394 U.S. at 577-79, 578 n.1.

40. *Street*, 394 U.S. at 594.

41. *Id.* at 578; People v. Street, 20 N.Y.2d 231, 229 N.E.2d 187, 282 N.Y.S.2d 491 (1967).

42. Street v. New York, 394 U.S. at 578.

43. *Id.* at 579.

44. *Id.*

45. *Id.* at 588, 594.

46. *Id.* at 590-91.

rights.[47]

The United States Supreme Court has long recognized the legitimacy of the first state interest analyzed in *Street*—preventing incitement.[48] To suppress a speaker under the guise of preventing incitement, the Court requires a strong showing of the speaker's advocacy of concrete and immediate lawless action.[49] Using this criterion, the *Street* Court found that Street's words did not rise to the necessary level required for suppression because he did not urge anyone to do anything unlawful.[50] Rather, the Court concluded that Street's expression fell into the category of "public advocacy of peaceful change in our institutions"[51]—the quintessential form of speech protected by the first amendment.[52]

The second interest considered by the Court in *Street* has its roots in the "fighting words" doctrine announced in *Chaplinsky v. New Hampshire*.[53] According to *Chaplinsky*, words "likely to provoke the average person to retaliation, and thereby cause a breach of the peace," fall outside the first amendment's protective circle.[54] The requirement of an impending breach of the peace, like present incitement, serves to narrow the category of unprotected speech to those expressions presenting a tangible and immediate threat to the social order.[55] Again, the Court found that Street's remarks were not sufficiently inflammatory to rise to the level of "fighting words."[56]

The Court addressed the third state interest—protecting passersby from shock—rather briefly. The Court noted that shock is a relative function of cultural values; therefore, a determination of what constitutes shock inherently requires an evaluation of the content of the speech.[57] Given this requirement, the Court summarily dismissed

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47. *Id.* at 594.

48. As used by the Court, the term "incitement" is synonymous with subversive advocacy. For a scholarly discussion tracing the Court's contouring of this issue up through the decision in Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam), see H. KALVEN, JR., *supra* note 1, at 77-236.

49. [T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

Brandenburg, 395 U.S. at 447.

50. *Street*, 394 U.S. at 591.

51. *Id.* (citations omitted).

52. *See* H. KALVEN, JR., *supra* note 1, at 240.

53. 315 U.S. 568 (1942); *see also* H. KALVEN, JR., *supra* note 1, at 78-80.

54. *Chaplinsky*, 315 U.S. at 574; *see also* H. KALVEN, JR., *supra* note 1, at 78-80.

55. *See* H. KALVEN, JR., *supra* note 1, at 80, 236.

56. Street v. New York, 394 U.S. 576, 592 (1969).

57. *Id.*

any interference with the expression of ideas "merely because the ideas are themselves offensive to some of their hearers."[58]

The final state interest scrutinized by the Court in *Street* goes to the heart of flag desecration controversies: May the state punish a citizen who fails to show respect for the flag as the national symbol?[59] In a totalitarian system of government, the state is free to compel the outward allegiance of its citizens by any means.[60] The totalitarian state is also free to punish any expression of dissent.[61] Indeed, totalitarian regimes legitimize their actions under laws that empower them to carry out human rights violations.[62] As Justice Jackson made clear in *Board of Education v. Barnette*, however, the ground rules are different under the first amendment.[63] Relying on the decision in *Barnette* that the state may not compel a flag salute,[64] the Court in *Street* determined that the state may not inhibit "the freedom to express publicly one's opinions about our flag, including those opinions which are defiant or contemptuous."[65] The Court, however, reserved the question addressed in *Texas v. Johnson*, commenting that it had "no occasion to pass upon the validity of this conviction insofar as it was sustained by the state courts on the basis that Street could be punished for his burning of the flag, even though the burning was an act of protest."[66]

Just as the majority's analysis in *Street* set the stage for the *Texas v. Johnson* opinion, the dissent in *Smith v. Goguen*[67] was a rehearsal for the *Johnson* dissent. Goguen was convicted under a Massachu-

58. *Id.* (citing Terminiello v. Chicago, 337 U.S. 1 (1949) (reversing the conviction of a speaker, who was virulently critical of various political and racial groups, under a breach of the peace statute)). Professor Harry Kalven, Jr. discussed *Terminiello* and a similar case, Kunz v. New York, 340 U.S. 290 (1951) (striking down a licensing scheme banning a Baptist speaker who had ridiculed and denounced other religious beliefs), under the rubric of "ideological fighting words." H. KALVEN, JR., *supra* note 1, at 80-88.

59. *Street*, 394 U.S. at 593.

60. *See, e.g., Commentaries, UN Commission on Human Rights (1989)*, 42 REV. INT'L COMMISSION JURISTS 20 (1989) (report of the 45th session discussing, inter alia, disappearances, mercenaries, torture, and summary or arbitrary executions; and including human rights status reports on countries such as: Afghanistan, Albania, Burma, Chile, Cuba, El Salvador, Guatemala, Haiti, Iran, Iraq, the Israeli-occupied territories, Southern Lebanon, Romania, and South Africa); WuDunn, *A Student's Body Is Honored with Tears of Horror and Cries for Revenge; Crackdown in Beijing: The Students Grieve*, N.Y. Times, June 6, 1989, at A14, col. 1 (describing the beginning of the massacre of democracy demonstrators at Tiananmen Square).

61. *See supra* note 60.

62. *See generally* H. ARENDT, THE ORIGINS OF TOTALITARIANISM 460-79 (1973).

63. *See supra* note 30 and accompanying text.

64. Street v. New York, 394 U.S. 576, 593 (1969).

65. *Id.*

66. *Id.* at 594.

67. 415 U.S. 566, 591-604 (1974) (Rehnquist, J., dissenting).

setts flag misuse statute for wearing an American flag sewn to the seat of his pants.[68] The charge specified that Goguen "did publicly treat contemptuously the flag of the United States."[69] Ignoring the larger flag desecration issue, the Court affirmed the District Court for the District of Massachusetts' reversal of the conviction based on the vagueness of the statute.[70] In his dissent, Justice Rehnquist argued that the jury could not have convicted Goguen of treating the flag contemptuously unless some marginal elements of symbolic speech were involved in his wearing the flag where he did.[71] Based on this hypothesis, Justice Rehnquist proceeded to justify the conviction in the face of first amendment concerns.[72] The doctrinal and emotional arguments encountered in this dissent reappear in *Johnson*.

The main doctrinal argument in the *Goguen* dissent is the concept that even a privately owned flag is special property, whose use the state may regulate.[73] Hence, the dissent asserted, flag laws are just like zoning laws, copyright laws, and laws governing the use of controlled drugs and firearms.[74] According to Justice Rehnquist, however, the state may go further than restricting a flag owner's property rights.[75] The state may also assert "a peculiarly governmental interest in property otherwise privately owned."[76] This interest is akin to that recognized for postage and revenue stamps, money, federal bank notes, military uniforms, and service medals.[77] Thus, Justice Rehnquist classified the flag as one more official instrument, copies of which citizens may own subject to state-imposed use restrictions. The effect of this state-ownership conceptualization of the flag is to make the governmental interest in preserving the flag's physical integrity "unrelated to the suppression of free expression."[78] Also presaging his *Texas v. Johnson* dissent, Justice Rehnquist's dissent in *Goguen* included patriotic references to Benjamin Franklin, Justice Holmes, Iwo Jima, the Star-Spangled Banner, and John Greenleaf Whittier's

68. *Id.* at 570. The Massachusetts statute reads in pertinent part: "Whoever publicly burns or otherwise mutilates, tramples upon, defaces or treats contemptuously the flag of the United States . . . shall be punished by a fine of not less than one hundred dollars or by imprisonment for not more than one year, or both." MASS. GEN. LAWS ANN. ch. 264, § 5 (West 1990).

69. *Goguen*, 415 U.S. at 570 (quoting app. 4).

70. *Id.* at 571, 582.

71. *Id.* at 593.

72. *Id.* at 593-604.

73. *Id.* at 594-96.

74. *Id.* at 594-95.

75. *Id.* at 595.

76. *Id.*

77. *Id.* at 595-96.

78. *Id.* at 599.

heroine, Barbara Frietchie.[79] The National Anthem and Whittier's poem, "Barbara Frietchie," were quoted in full in the *Johnson* dissent.[80]

Compared to *Street* and *Goguen*, the per curiam opinion in *Spence v. Washington*[81] provides little doctrinal basis for the *Texas v. Johnson* decision. *Spence*, however, contains one of the Court's most sensitive articulations of what the flag desecration controversy represents. Spence hung an American flag, with a peace sign taped on it, upside down from his window, thereby violating Washington's improper flag use statute.[82] His motive was to protest the extension of the Vietnam War into Cambodia and the killing of four students during an anti-war demonstration at Kent State University.[83] To the Court, Spence's act was not one of "mindless nihilism" but "a pointed expression of anguish . . . about the then-current domestic and foreign affairs of his government."[84] The Court found that no state interest, including that of "preserving the national flag as an unalloyed symbol of our country,"[85] superseded Spence's freedom of speech rights.[86] The Rehnquist dissent in *Spence*,[87] although not as forceful as the one in *Goguen*, reiterated the conviction that the flag, as a "unique national symbol,"[88] should be removed "from the roster of materials that may be used as a background for communications."[89]

B. *The* O'Brien *Test and the* Clark *Test*

In *Texas v. Johnson*, the Supreme Court not only followed the analytical steps laid down in *Street*, *Goguen*, and *Spence*, but it also

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79. *Id.* at 600-02.
80. Texas v. Johnson, 109 S. Ct. 2533, 2549-50 (1989) (Rehnquist, C.J., dissenting).
81. 418 U.S. 405 (1974) (per curiam).
82. *Id.* at 406-07. The Washington statute reads in part:

> No person shall, in any manner, for exhibition or display:
>
> (1) Place or cause to be placed any word, figure, mark, picture, design, drawing or advertisement of any nature upon any flag, standard, color, ensign or shield of the United States or of this state or authorized by any law of the United States or of this state; or
>
> (2) Expose to public view any such flag, standard, color, ensign or shield upon which shall have been printed, painted or otherwise produced, or to which shall have been attached, appended, affixed or annexed any such word, figure, mark, picture, design, drawing or advertisement . . . .

WASH. REV. CODE ANN. § 9.86.020(1)-(2) (1988).
83. *Spence*, 418 U.S. at 410, 414 n.10.
84. *Id.* at 410.
85. *Id.* at 412.
86. *Id.* at 413-15.
87. *Id.* at 416-23.
88. *Id.* at 423.
89. *Id.*

considered the applicability of the *O'Brien* test.[90] The following criteria for first amendment scrutiny were announced in *United States v. O'Brien:*[91]

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[92]

Professor John Ely has construed this passage as announcing a three-step test for determining whether a governmental regulation violates the first amendment.[93] According to Professor Ely, the middle section of the test—whether "the governmental interest is unrelated to the suppression of free expression"—performs an initial classifying function.[94] Only regulations that meet this criterion proceed to the scrutiny prescribed in the other two steps of the test—whether the regulation "furthers an important or substantial governmental interest" and whether the restrictions imposed on the speaker are "no greater than is essential to the furtherance of that interest."[95] Regulations that fail to pass the threshold inquiry are "switched onto another track" that is "substantially more demanding."[96] According

90. For a discussion of *Texas v. Johnson*, see *infra* Section IV.

91. 391 U.S. 367 (1968) (upholding the conviction of a draft card burner).

92. *Id.* at 377.

93. *See* Ely, *supra* note 7, at 1483-84. Professor Ely discounted the requirement that a regulation be "within the constitutional power of the government" as superfluous in light of the substantiality criterion and the Court's broad notion of what constitutional power encompasses. *Id.* at 1483 n.10.

94. *Id.* at 1484.

95. *Id.* at 1483-84.

96. *Id.* at 1484. According to Professor Ely, the *O'Brien* test is incomplete in the sense that it does not provide criteria for evaluating regulations that are switched out of it and onto the more demanding track. *Id.* In Professor Ely's view, this gap is filled by an alternative "categorizing approach elaborated in other decisions of the late Warren period." *Id.* Those decisions are Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam) (overturning the conviction of a Ku Klux Klan leader under Ohio's Criminal Syndicalism Act), and Cohen v. California, 403 U.S. 15 (1971) (reversing the conviction of a young man for wearing in public a jacket with the saying "Fuck the Draft"). Ely, *supra* note 7, at 1491-92. Professor Ely stated that, after *Brandenburg*, "the expression involved in a given case either does or does not fall within the described category, and if it does not it is protected." *Id.* at 1491. The Court in *Cohen*, Professor Ely added, "clarified[ ] the categorization approach it had adopted in *Brandenburg*" by rejecting "attempts to punish 'offensive language.' " *Id.* at 1492-93.

Professor Laurence Tribe's "two track" analysis parallels Professor Ely's exposition. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 789-94 (2d ed. 1988). Professor Tribe classified the Court's approach to first amendment questions as "track one" if the government's purported attempt to abridge speech was "aimed at communicative impact," and "track two" if the government regulation was "aimed at noncommunicative impact but nonetheless ha[d] adverse effects on communicative opportunity." *Id.* at 789-90. Track one regulations are

to Professor Gerald Gunther, this "switching function" of the *O'Brien* test amounts to a restatement of the "content-based/content-neutral" distinction[97] articulated by the Court in *Police Department v. Mosley*:[98] "[T]he First Amendment means that government has no power to restrict expression because of its messages, its ideas, its subject matter, or its content."[99]

The *Mosley* opinion also incorporates an equal protection notion for speakers to whom the government makes available a public area—the public forum:

> Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.[100]

The doctrine of the public forum, as it has presently evolved, played a crucial role in the Court's decision against the speaker in *Ward v. Rock Against Racism*.[101] Commentators generally credit Professor Harry Kalven, Jr. with coining the term "public forum."[102] The doctrine has its roots[103] in Justice Roberts' comment in *Hague v. CIO*:[104]

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating

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"unconstitutional unless government shows that the message being suppressed . . . falls on the unprotected side of one of the lines the Court has drawn to distinguish those expressive acts privileged by the first amendment from those open to government regulation with only minimal due process scrutiny." *Id.* at 791-92. Track two regulations are constitutional if they do not "unduly constrict the flow of information and ideas." *Id.* at 792. This determination requires balancing "the values of freedom of expression and the government's regulatory interests . . . on a case-by-case basis." *Id.*

97. G. GUNTHER, CONSTITUTIONAL LAW 1175 (11th ed. 1985).

98. 408 U.S. 92 (1972) (invalidating a Chicago ordinance barring picketing within 150 feet of a school unless the picketing was peaceful and occurred in front of a school involved in a labor dispute).

99. *Id.* at 95.

100. *Id.* at 96.

101. Justice Kennedy, writing for the majority, discussed the characteristics of the Naumberg Bandshell, where Rock Against Racism conducted its concerts, as follows: "Here the Bandshell was open, apparently, to all performers; and we decide the case as one in which the Bandshell is a *public forum* for performances in which the government's right to regulate expression is subject to the protections of the First Amendment." Ward v. Rock Against Racism, 109 S. Ct. 2746, 2753 (1989) (emphasis added).

102. *See* Farber & Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219, 1221 (1984); Fiss, *Kalven's Way*, 43 U. CHI. L. REV. 4, 5 (1975).

103. Farber & Nowak, *supra* note 102, at 1221.

104. 307 U.S. 496 (1939).

> thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.[105]

Professor Kalven analogized permissible regulation in the public forum to the parliamentary "Robert's Rules of Order."[106] The United States Supreme Court's equivalent term is "time, place and manner restrictions."[107] The Court's use of the term "time, place and manner restrictions," however, predates even the *Hague* decision. In *Lovell v. Griffin*,[108] the Court overturned the conviction of a Jehovah's Witness who had distributed religious literature without a license in the city of Griffin.[109] The ordinance was unconstitutional, the Court declared, because it "prohibit[ed] the distribution of literature of any kind at any time, at any place, and in any manner without a permit from the City Manager."[110] Although Justice Roberts had conceded in *Hague* that the state could regulate the public forum for the sake of preserving the comfort and convenience of its citizens,[111] the *Lovell* Court balked at state regulations that would effectively close down the forum.[112] The Court continued to chip away at wholesale state regulation of the public forum in *Schneider v. State*,[113] this time scrutinizing the state's interest in promoting an environmental regulation.

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105. *Id.* at 515-16.

106. Kalven, *The Concept of the Public Forum:* Cox v. Louisiana, 1965 SUP. CT. REV. 1, 12. Professor Alexander Meiklejohn originally endorsed the concept of the orderly conduct of speech activities when describing "the traditional American town meeting" as the paradigm for measuring "free political procedures." A. MEIKLEJOHN, POLITICAL FREEDOM 24 (1960). He painted a vivid picture of a town meeting where a "chairman . . . 'calls the meeting to order' . . . no one shall speak unless 'recognized by the chair' . . . debaters must confine their remarks to 'the question before the house' . . . [and if someone is] declared 'out of order' . . . he may be 'denied the floor' or, in the last resort, 'thrown out' of the meeting." *Id.* at 24-25.

107. *See* G. GUNTHER, *supra* note 97, at 1196 n.9.

108. 303 U.S. 444 (1938).

109. *Id.* at 447-48, 452-53. The *Lovell* decision also extended first amendment protection against "prior restraint" to handbilling. *Id.* at 451. For a discussion of the prior restraint doctrine, see *infra* note 208.

110. *Lovell*, 303 U.S. at 451.

111. Hague v. CIO, 307 U.S. 496, 515-16 (1939).

112. Chief Justice Hughes disapproved of the ordinance's "broad sweep," arguing that it "embrace[d] 'literature' in the widest sense" and was "comprehensive with respect to the method of distribution." *Lovell*, 303 U.S. at 450-51. Consequently, he declared the ordinance "invalid on its face." *Id.* at 451.

113. 308 U.S. 147 (1939).

In *Schneider,* the Court struck down a city ordinance that prohibited handbilling in order to prevent littering.[114] The Court determined that the city's interest in clean streets could not justify the abridgment of constitutional rights securing free communication of information.[115]

These early exercises in defining the when, where, how, and why of public forum control reflect the Court's original solicitude in protecting the public forum speaker. In *Hague, Lovell,* and *Schneider,* the Court was concerned with guaranteeing speakers a minimum level of access rather than simply providing them with equal treatment.[116] In *Ward v. Rock Against Racism,* however, the Court ratified the narrower equal protection concept of public forum analysis[117] adopted in *Mosley.*[118] In *Ward,* the Court applied its latest test on permissible time, place, and manner restrictions in the public forum context, as stated in *Clark v. Community for Creative Non-Violence:*[119]

> Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions. We have often noted that restrictions of this kind are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.[120]

On its face, the *Clark* test appears to continue the speech-protective tradition of the early public forum cases by scrutinizing regulations for content neutrality, narrow tailoring, and a provision of ample alternatives. When the Court applied the *Clark* test in *Ward,* however, it relied on the city's treatment of other users of the Naumberg Bandshell as one of the justifications for upholding the city's sound amplification guidelines.[121] Viewed through the lens of

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114. *Id.* at 165.

115. *Id.* at 162.

116. Professor Gunther characterized these two levels of protection as the broad and the narrow views of the public forum. G. GUNTHER, *supra* note 97, at 1196-99. He asserted that Professor Harry Kalven, Jr., the originator of the public forum nomenclature, endorsed the "broad, guaranteed access view." *Id.* at 1199 n.5.

117. *See infra* note 121 and accompanying text.

118. *See supra* note 100 and accompanying text.

119. 468 U.S. 288 (1984). In *Clark,* the Court upheld the constitutionality of a National Park Service prohibition against overnight sleeping at Lafayette Park, located across from the White House and the Washington Mall. *Id.* at 289-90. The group challenging the regulation intended to dramatize the plight of homeless people, particularly in winter, by sleeping in tents that the Park Service had permitted them to set up. *Id.* at 301-02 (Marshall, J., dissenting).

120. *Id.* at 293.

121. The Court accepted a finding by the district court "that the performers who did use the city's sound system in the 1986 season, in performances 'which ran the full cultural gamut from grand opera to salsa to reggae,' were uniformly pleased with the quality of the sound

Ward, the *Clark* test may be said to endorse the weaker equal protection view of the public forum. In this sense, the *Clark* test has not lived up to its characterization by the Court as being the equivalent of the *O'Brien* test.[122] Absent public forum connotations, the *O'Brien* test calls for an examination of the state's treatment of the speaker as an isolated individual. In the public forum context, on the other hand, a court applying the *Clark* test may take into account the treatment of similarly situated speakers.[123] The resulting dichotomy in first amendment protection becomes starkly obvious when comparing the two cases that are the subject of this Comment. By characterizing the public park concert case as occurring in a public forum[124] and applying the *Clark* test in a narrow equal protection sense, the Court initially embarked on a first amendment track that was less protective of the speaker than the track followed in the flag burning case. Moreover, the Court applied different tests to the two cases despite the fact that the flag burning had also occurred in a public area,[125] hence a public forum. By including the speaker's location as a factor in its test selection process only in *Ward*, the Court applied different tests, which led to very different results.

III. THE FLAG BURNING CASE AND THE PARK CONCERT CASE

A. *The Flag Burning Case:* Texas v. Johnson

During the 1984 Republican National Convention, Gregory Lee Johnson took part in a protest march through the streets of Dallas, Texas.[126] Johnson and his cohorts were denouncing the policies of President Ronald Reagan and of several Dallas-based corporations, emphasizing the aggravating effects of these policies on the threat of nuclear war.[127] Along the way, the protestors vandalized targeted

provided." Ward v. Rock Against Racism, 109 S. Ct. 2746, 2752 (1989) (quoting Rock Against Racism v. Ward, 658 F. Supp. 1346, 1352 (S.D.N.Y. 1987)).

122. In *Texas v. Johnson*, Justice Brennan, writing for the majority, asserted that the *O'Brien* test was little if anything more than a restatement of the time, place, and manner restrictions applied in public forum situations. Texas v. Johnson, 109 S. Ct. 2533, 2540-41 (1989) (quoting Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298 (1984)). In the Court's view, therefore, a government interest survives the *O'Brien* threshold of being "unrelated to the suppression of free expression" if and only if it meets the *Clark* requirement that it be "justified without reference to the content of regulated speech." *Id.* Thus, only state interests that remain free of the content-based suppressive taint should proceed to the weaker level of scrutiny prescribed by both *O'Brien* and *Clark*.

123. Equal protection analysis of freedom of speech issues has the potential adverse effect of justifying lower levels of speech protection on the basis of nondiscrimination.

124. *See supra* note 101.

125. *See infra* text accompanying notes 130-31.

126. *Johnson*, 109 S. Ct. at 2536.

127. *Id.*

corporations' buildings.[128] One protestor—not Johnson—took an American flag from one of the buildings.[129] The march ended in front of Dallas City Hall.[130] At that point, Johnson set fire to the stolen flag while the group chanted: "America, the red, white, and blue, we spit on you."[131] Despite the act's potential for violent confrontation, no disruptions ensued.[132] Some witnesses, however, claimed that they were seriously offended by Johnson's burning of the flag.[133] Johnson was charged with desecration of a venerated object in violation of the Texas Penal Code.[134] A jury convicted Johnson of the desecration charge and sentenced him to one year in prison and a fine of $2000.[135]

Johnson appealed to the Court of Appeals for the Fifth District of Texas.[136] The court affirmed Johnson's conviction, overruling his objections that the Texas statute violated his freedom of speech rights under the first and fourteenth amendments.[137] Although the court recognized that Johnson's act of burning the United States flag constituted symbolic speech protected by the first amendment, it found that the interests advanced by the state—"preventing breaches of the peace and protection of the flag as a symbol of national unity"[138]—justified Johnson's conviction.[139] After granting discretionary review, however, the Texas Court of Criminal Appeals reversed both lower courts and remanded the case to the trial court for dismissal.[140] The court of criminal appeals determined that the state's interests, found sufficiently important below, did not rise to the level necessary to justify an infringment of Johnson's first amendment rights.[141] In an opinion delivered by Justice Brennan, the United States Supreme Court affirmed, holding that Johnson's conviction was not consistent with the first amendment.[142] The Court reexamined the two interests

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 2537.

133. *Id.* One of the witnesses collected the charred remains after the demonstration and buried them in his backyard. *Id.* at 2536.

134. *Id.* at 2537. For the text of the statute, see *supra* note 19.

135. Johnson v. State, 706 S.W.2d 120, 122 (Tex. Ct. App. 1986), *rev'd*, 755 S.W.2d 92 (Tex. Crim. App. 1988), *aff'd sub nom.* Texas v. Johnson, 109 S. Ct. 2533 (1989).

136. *Id.* at 122.

137. *Id.* at 122-25.

138. *Id.* at 123.

139. *Id.* at 123-24.

140. Johnson v. State, 755 S.W.2d 92, 98 (Tex. Crim. App. 1988), *aff'd sub nom.* Texas v. Johnson, 109 S. Ct. 2533 (1989).

141. *Id.* at 96-97.

142. Texas v. Johnson, 109 S. Ct. 2533, 2536 (1989).

advanced by the state[143] and found that "Johnson's conduct did not threaten to disturb the peace"[144] and that Johnson's right to engage in political expression was paramount to the state's interest in preserving the symbolism of the flag.[145]

B. *The Park Concert Case:* Ward v. Rock Against Racism

From 1979 to 1985, Rock Against Racism (RAR) sponsored "yearly 'musical/political event[s]' " at the Naumberg Bandshell in New York City's Central Park.[146] RAR was an "unincorporated association . . . 'dedicated to the espousal and promotion of anti-racist views.' "[147] Its annual events included musical group performances and speakers who were members of groups opposed to racism.[148] In 1985, the city initially denied RAR a concert permit, citing noise and crowd control problems experienced in past years.[149] After the city and the rock group reached an agreement, however, the 1985 concert went on at the Bandshell.[150] In March 1986, the city of New York issued "Use Guidelines" for the Bandshell.[151] The extensive regulations required all Bandshell concert sponsors to use the sound amplification equipment and operating technician provided by the city.[152] RAR challenged the regulations, alleging a deprivation of its first amendment rights, and the United States District Court for the Southern District of New York issued an injunction exempting RAR

143. *Id.* at 2541-44.

144. *Id.* at 2548.

145. *Id.*

146. Rock Against Racism v. Ward, 658 F. Supp. 1346, 1349 (S.D.N.Y. 1987), *aff'd in part, rev'd in part*, 848 F.2d 367 (2d Cir. 1988), *rev'd*, 109 S. Ct. 2746 (1989).

147. *Id.* at 1348 (quoting plaintiff).

148. Rock Against Racism v. Ward, 848 F.2d at 368.

149. Ward v. Rock Against Racism, 109 S. Ct. at 2750-51. The city had received complaints about excessive noise during RAR's previous concerts from visitors to the adjacent Sheep Meadow, a quiet area of the park, and from residents of Central Park West. *Id.* at 2750. At the 1984 concert, the police cut off power to the sound system in response to noise complaints, thereby causing the audience to become unruly and hostile. *Id.* Rock Against Racism's brief, however, stated: "Sheldon Horowitz, the Special Events Director of the Department of Parks admitted that he did not receive any complaints in 1985 about the RAR event." Brief for Respondent at 8, Ward v. Rock Against Racism, 109 S. Ct. 2746 (1989) (No. 88-226) (citation to trial transcript omitted). Moreover, a Rock Against Racism concert organizer claimed "that the Parks Department had released only three letters of complaint in recent years." Greenhouse, *High Court Upholds Noise Rule for the Central Park Bandshell*, N.Y. Times, June 23, 1989, at B1, col. 2, B4, col. 6.

150. Ward v. Rock Against Racism, 109 S. Ct. at 2751.

151. Rock Against Racism v. Ward, 658 F. Supp. 1346, 1349 (S.D.N.Y. 1987).

152. *Id.* at 1351. Counsel for Rock Against Racism likened the regulation to "requiring all violinists to use a city violin, [and] even if the city violin was [sic] a Stradivarius [, t]here will always be some violinists who would rather use their own." Brief for Respondent at 19, Ward v. Rock Against Racism, 109 S. Ct. 2746 (1989) (No. 88-226).

from the "Use Guidelines" during its 1986 concert.[153] After a bench trial, however, the court vacated the injunction as it pertained to the Sound Amplification Guidelines (SAG).[154] The district court found that the city's interest in volume control was legitimate and that the regulations were narrowly tailored to further that interest, despite the fact that the regulations interposed the city's equipment and technician between the concert sponsors and the audience, thereby impinging on the creative aspects of the music.[155]

On RAR's appeal of the trial court's refusal to permanently enjoin enforcement of the SAG, the United States Court of Appeals for the Second Circuit affirmed in part, reversed in part, and remanded to the trial court for a modified order.[156] While conceding that noise levels could be regulated, the court struck down the SAG because the city had at its disposal less restrictive alternatives to further its interest in volume control.[157] The United States Supreme Court reversed.[158] In an opinion by Justice Kennedy,[159] the Court found the Second Circuit's reliance on the least restrictive alternative test misguided.[160] The Court reaffirmed the appropriateness of scrutinizing the regulations to ensure that they were narrowly tailored to achieve the state's interest in volume control,[161] but it foreclosed judicial inquiry into available alternatives as a practical means of making that determination.[162]

C. *Substantive Similarities Between the Two Cases*

Thoughtful scrutiny of the situations represented by *Ward* and *Johnson* reveals substantive similarities between the two cases. Both speakers engaged in outrageous, attention-grabbing conduct. In each case, the conduct occurred in a public setting, and the message con-

153. Rock Against Racism v. Ward, 658 F. Supp. at 1351. The district court based its decision to grant the preliminary injunction on the city's intention "to impose upon RAR a sound system of unknown quality, seemingly under the sole control of an individual owing his allegiance to a City contractor and not to RAR as sponsor of the event." *Id.*

154. *Id.* at 1360-61.

155. *Id.* at 1353.

156. Rock Against Racism v. Ward, 848 F.2d 367, 372 (2d Cir. 1988). The Second Circuit "sustained the right of the city to limit volume of performances broadcast from the bandshell to a level otherwise specified as reasonable." *Id.* The court, however, reversed the trial court's order upholding "the SAG requirement of the use of a sound system furnished by the city and operated by a technician designated by the city." *Id.*

157. *Id.* at 370-71.

158. Ward v. Rock Against Racism, 109 S. Ct. 2746, 2760 (1989).

159. *Id.* at 2750.

160. *Id.* at 2753.

161. *Id.* at 2757.

162. *Id.* at 2762 (Marshall, J., dissenting).

veyed by each speaker implicated political protest. Moreover, each case presented a first amendment challenge to the validity of a local law that impinged on the speaker's message. The extent and significance of these similarities make the two cases comparable in terms of free speech demands; hence, they are deserving of equivalent degrees of protection.

The outrageous quality of the flag burner's conduct was derived entirely from the flag's symbolism. Symbols play an essential role in human culture.[163] The American flag is the embodiment of our Nation's history.[164] Throughout those two hundred years of history, showing respect for the flag has been the outward expression of Americans' love of country and pride in its achievements.[165] Respect for the flag also conveys a feeling of gratitude to American soldiers who have died in combat.[166] The shock value of burning the flag lies in its violation of these deeply held patriotic sentiments.[167] The offensive

163. *See generally* E. CASSIRER, AN ESSAY ON MAN (1944); F. DILLISTONE, THE POWER OF SYMBOLS IN RELIGION AND CULTURE (1986); H. DUNCAN, SYMBOLS AND SOCIAL THEORY (1969); R. WAGNER, SYMBOLS THAT STAND FOR THEMSELVES (1986).

164. *See* J. MOSS, THE FLAG OF THE UNITED STATES: ITS HISTORY AND SYMBOLISM 34-40 (rev. ed. 1941); *see also* S. REP. NO. 152, 101st Cong., 1st Sess. —, *reprinted in* 1989 U.S. CODE CONG. & ADMIN. NEWS 610, 611-15.

165. *See supra* note 164.

166. J. MOSS, *supra* note 164, at 35.

167. President George Bush's reaction to the flag burning decision was an immediate call for a constitutional amendment. *See President Will Propose Amendment to Overturn Flag-Burning Decision*, 45 Crim. L. Rep. (BNA) 2236, 2236 (June 28, 1989) (quoting President Bush: "Support for the First Amendment need not extend to desecration of the American flag."). The amendment would have exempted any symbolic speech involving the national flag from the freedom of speech clause of the first amendment. *See* Lewis, *Happy Birthday*, N.Y. Times, July 2, 1989, at E13, col. 1. Supporting the President's position, the American Society for the Defense of Tradition, Family, and Property held a patriotic march down a busy street in Miami, Florida in August 1989. The paraders, 30 strong, carried a towering American flag accompanied by this message: "Amend the Constitution: Save the Honor of the Flag." *Supporting the Flag*, Miami Herald, Aug. 31, 1989, at 1B, col. 1 (photograph and caption). Legislators, however, declined to follow the President's lead. Green, *Senate Kills Flag-Burning Amendment*, Miami Herald, Oct. 20, 1989, at 1A, col. 1; *Flag-Protection Amendment Dealt Setback in Senate*, Miami Herald, Oct. 18, 1989, at 12A, col. 1; *see also* Tribe, Testimony presented on July 18, 1989 before the Civil and Constitutional Rights Subcommittee of the House Judiciary Committee during the course of hearings on the desecration of the American flag, *reprinted in* CONG. DIG., Aug.-Sept. 1989, at 215 (advocating the passage of a federal statute rather than a constitutional amendment to handle the flag burning controversy: "On its 200th birthday, the Bill of Rights deserves a better present than a needless amendment."). Even cartoonist Garry Trudeau joined the constitutional amendment fray. His November 5, 1989 *Doonesbury* strip showed an oversized picture of the American flag with this brain-teaser: "Try disposing of today's comix section without violating George Bush's proposed constitutional amendment on flag desecration! Sure, this flag's only paper, but it's still our Nation's Symbol! Solution? There is none! You're stuck with this flag until it crumbles!" Miami Herald, Nov. 5, 1989, (Comics), at 1. On June 26, 1990, the flag amendment died legislatively when the Senate's vote fell short of the required two-thirds. Hess, *Flag Amendment Fails Senate Test*, Miami Herald, June 27, 1990, at 3A, col. 1. The vote was

character of flag burning, or any other form of flag desecration, lends

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largely ceremonial because the House had already rejected the amendment the prior week. *Id.* The controversy, however, will continue to play a role in the political arena, especially when legislators' records come under scrutiny in next fall's elections. *Id.*

The negative impact of flag desecration on people's sensibilities also comes into play in artistic expression involving the flag. *See, e.g.*, People v. Radich, 26 N.Y.2d 114, 117, 257 N.E.2d 30, 31, 308 N.Y.S.2d 846, 847 (1970), *aff'd by an equally divided Court sub nom.* Radich v. New York, 401 U.S. 531 (per curiam), *reh'g denied*, 402 U.S. 989 (1971) (art gallery proprietor convicted of displaying "protest art" using the American flag, inter alia, "in the form of the male sexual organ, erect and protruding from the upright member of a cross"); *see also* D'Amato & Fein, *Censorship: Is 'The Flag on the Floor' Valid Speech?*, 75 A.B.A. J. 42 (1989) (arguing for and against the proposition: Is "the flag on the floor" valid speech?); Hochfield, *Flag Furor*, ARTNEWS, Summer 1989, at 43 (describing the controversy that arose from the exhibition of Scott Tyler's *What Is the Proper Way to Display a U.S. Flag?* at the School of the Art Institute of Chicago; visitors were invited to write their answers on a ledger placed on a shelf, but to get to the shelf, visitors had to step on an American flag).

Although the United States Supreme Court in *Texas v. Johnson* did not address the validity of the federal flag desecration statute, Congress reacted to the decision by amending the statute in an attempt to eliminate its perceived constitutional infirmity. The Flag Protection Act of 1989, enacted on October 28, 1989, amended 18 U.S.C. § 700. The Flag Protection Act provides:

> FLAG PROTECTION ACT OF 1989
>
> An Act to amend section 700 of title 18, United States Code, to protect the physical integrity of the flag.
>
> *Be it enacted by the Senate and House of Representatitves of the United States of America in Congress assembled.*
>
> SECTION 1. SHORT TITLE.
>
> This Act may be cited as the "Flag Protection Act of 1989".
>
> SEC. 2. CRIMINAL PENALTIES WITH RESPECT TO THE PHYSICAL INEGRITY OF THE UNITED STATES FLAG.
>
> (a) IN GENERAL.—Subsection (a) of section 700 of title 18, United States Code, is amended to read as follows:
>
> "(a)(1) Whoever knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States shall be fined under this title or imprisoned for not more than one year, or both.
>
> "(2) This subsection does not prohibit any conduct consisting of the disposal of a flag when it has become worn or soiled."
>
> (b) DEFINITION.—Section 700(b) of title 18, United States Code, is amended to read as follows:
>
> "(b) As used in this section, the term 'flag of the United States' means any flag of the United States, or any part thereof, made of any substance, of any size, in a form that is commonly displayed."
>
> SEC. 3. EXPEDITED REVIEW OF CONSTITUTIONAL ISSUES.
>
> Section 700 of title 18, United States Code, is amended by adding at the end the following:
>
> "(d)(1) An appeal may be taken directly to the Supreme Court of the United States from any interlocutory or final judgment, decree, or order issued by a United States district court ruling upon the constitutionality of subsection (a).
>
> "(2) The Supreme Court shall, if it has not previously ruled on the question, accept jurisdiction over the appeal and advance on the docket and expedite to the greatest extent possible."

Flag Protection Act of 1989, Pub. L. No. 101-131, 1990 U.S.C.A. 103 Stat. 777, 18 U.S.C.A. § 700 (Supp. 1990) (amending 18 U.S.C. § 700). To address the concern, that the statute, even as amended, might fail to pass constitutional muster, Congress added Subsection d, which

newsworthiness to the act. This sensationalist quality is part of the message that the protestor is conveying in order to direct media attention to himself.[168] For protestors who lack the financial means to reach a wide audience, this potential for access to the media makes such conduct attractive.[169] Similarly, the playing of loud rock music is a sure-fire attention grabber. Our health-conscious society views

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provides for expedited consideration of constitutional challenges by allowing appeals to be taken directly from the district court to the Supreme Court. 135 CONG. REC. S12601 (daily ed. Oct. 4, 1989) (statement of Sen. Biden); *see also* Yang, *Senate Approves Flag Bill After It Adds Wording that May Be Unconstitutional*, Wall St. J., Oct. 6, 1989, at A4, col. 1. The constitutional challenge before the Supreme Court did not take long. The test case was scheduled for oral argument on May 14, 1990. *High Court to Rush Ruling on Flag Law*, Miami Herald, Mar. 31, 1990, at 22A, col. 3. The Court reviewed two district court rulings declaring the flag law unconstitutional. *Id.* In one of the rulings, a federal district judge in Seattle, Washington "dismiss[ed] charges against four young people who burned American flags in defiance of the law moments after it took effect." *Flag Burning Law Is Rejected: Issue Returns to High Court*, Miami Herald, Feb. 22, 1990, at 1A, col. 1. According to the defendants in the case: "[T]his battle is far from over. . . . This is a fight we are determined to win." *Id.* at 18A, col. 1; *see also Vietnam Vets Burn Flags to Protest New Law*, Miami Herald, Oct. 29, 1989, at 7A, col. 1 (describing the wide range of demonstrations that took place in Seattle in response to the flag law). The second challenge to the Flag Protection Act arose from an incident in the nation's capital. Shortly after Congress passed the law, police arrested Scott W. Tyler and three other protestors in front of the U.S. Capitol for torching three American flags while chanting "burn, baby, burn." *Burn, Baby, Burn*, Miami Herald, Oct. 31, 1989, at 2A, col. 3 (picture and caption). Tyler had earlier created the "flag on the floor" controversy. *See* D'Amato & Fein, *supra*, at 42. Like the Seattle judge, the federal district judge in Washington, D.C. declared the flag law unconstitutional and "threw out the government's case." *Flag Burning: Second U.S. Judge Rules Against Law*, Miami Herald, Mar. 6, 1990, at 9A, col. 2. The Supreme Court affirmed both district court decisions in United States v. Eichman, 58 U.S.L.W. 4744, 4746 (1990) (declaring the flag law unconstitutional on the grounds that, like the Texas statute in Texas v. Johnson, 109 S. Ct. 2533 (1989), "it suppresses expression out of concern for its likely communicative impact").

168. For evidence of the degree of media attention that flag burning attracts, see, for example, Achenbach, *A Symbol-Minded Solution*, Miami Herald, Sept. 10, 1989, Tropic Magazine, at 8; Toner, *Spirit of 89: The Uproar over What America Owes Its First Allegiance to*, N.Y. Times, July 2, 1989, at E1, col. 1; Greenhouse, *Justices, 5-4, Back Protesters' Right to Burn the Flag*, N.Y. Times, June 22, 1989, at A1, col. 5.

169. *See* Pemberton, *The Right of Access to Mass Media*, in THE RIGHTS OF AMERICANS 276 (N. Dorsen ed. 1970). Mr. Pemberton expressed concern that the level of outrageousness of the device used to attract media attention may obscure the message and, in the end, "provide[ ] no real solution to the problem of access to the media." *Id.* at 281. As a result of the use of sensational techniques to gain access to the media, "the medium—a demonstration and the reaction to it—[becomes] the message." *Id.* at 279. One solution to this media access dilemma for unconventional speakers might be a constitutionally mandated allocation of media resources among all strata of society. The Court, however, is not likely to engage in such an exercise in wealth redistribution. *See* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (holding unconstitutional, on freedom of the press grounds, the Florida "right to reply" law which granted political candidates equal space to reply to published criticism by a newspaper). Therefore, despite its potentially adverse effect on audiences, non-establishment speakers seeking to reach wide audiences must resort to their own devices, including outrageous conduct, to accomplish this goal.

noise pollution, even in musical form, as a significant evil.[170] Being subjected to loud music may affront some people as deeply as seeing the American flag burned. Thus, the sensationalism of noisy rock music is akin to the sensationalism of flag burning in that both activities offend high priority values.[171]

Intimately related to the outrageous nature of the speakers' conduct in the two cases is the public setting of the conduct. Johnson burned the flag in front of Dallas City Hall after a march through the streets of Dallas. Rock Against Racism (RAR) concerts were presented in New York City's Central Park. Public exposure goes hand in hand with the attention-grabbing effect desired by the speakers. Private burning of the flag would have brought no headlines. Only in a public place can flag burning attract the media, who splash pictures of the event on the evening news and the next morning's front page. Similarly, RAR's playing in a less visible area than Central Park would have reduced its message to a whisper. The intrusion of rock music on the quiet surroundings of the Bandshell area—the Sheep Meadow and the residences along Central Park West—brought attention to the antiracism message. The common public settings of the two cases is a significant factor in terms of the first amendment doctrine of the public forum.

The facts of *Ward* and *Johnson* are also analogous because the message that each speaker sought to convey implicated political protest speech. The flag burner's message conveyed dissatisfaction with governmental policies, specifically President Reagan's, and the social policies of several Dallas-based corporations. The flag burner was allegedly concerned with the effect of these policies on the threat of nuclear war. The rock band's message conveyed dissatisfaction with

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170. *See* Benzaia, *Hold on to Your Hearing*, SATURDAY EVENING POST, Jan./Feb. 1989, at 40 (describing the adverse effects on hearing of excessive noise exposure); Cohen, *Sound Effects on Behavior*, PSYCHOLOGY TODAY, Oct. 1981, at 38 (analyzing the relationship between noise and mental illness); Raloff, *Noise Can Be Hazardous to Our Health*, 121 SCI. NEWS 377 (1982) (part two of a comprehensive look at noise in modern society); Raloff, *Occupational Noise—The Subtle Pollutant*, 121 SCI. NEWS 347 (1982) (part one of a comprehensive look at noise in modern society); *Noise Pollution: Irritant or Hazard?*, HARV. MED. SCH. HEALTH LETTER, June 1986, at 1 (attributing to noise both hearing damage and losses in learning ability, social interaction, and productivity). The preoccupation with the health effects of noise is not limited to this country. For evidence of similar concerns in Britain, see White, *Britain Gets Noisier*, PSYCHOLOGY TODAY, Oct. 1981, at 45; *A Quieter Life*, ECONOMIST, Oct. 29, 1988, at 65.

171. Ironically, even the noise created by a flapping flag has created a legal controversy. A Navy veteran was convicted of violating a noise ordinance in Las Cruces, New Mexico because his nylon flag was flapping in the wind. A neighbor brought the complaint which resulted in an initial conviction, but the case was overturned on appeal. *Judge Throws out Conviction in Case over a Flapping Flag*, N.Y. Times, July 12, 1989, at A10, col. 6; *Old Glory, Long May You Wave, But in Las Cruces, Do So Quietly*, Wall St. J., July 5, 1989, at B1, col. 1.

social conditions, specifically racism. In terms of content, both messages are entitled to the same degree of first amendment protection. Indeed, during the 1960's civil rights protest period, the Court repeatedly protected civil rights activists, thereby ensuring that the antiracist message was heard.[172]

Finally, both cases presented a challenge to the validity of local laws on first amendment grounds.[173] Johnson questioned the validity of Texas' flag desecration statute. Rock Against Racism (RAR) disputed New York City's Sound Amplification Guidelines (SAG) for users of the Bandshell. The Texas statute challenged by Johnson prohibited using the flag as a symbol for conveying political messages if such use physically mistreated the flag in a way that offended others.[174] By interfering with Johnson's expression of his political views, the Texas statute ran afoul of the first amendment.[175] Similarly, the New York SAG challenged by RAR interposed the city's sound amplification system and technician between the band and the audience, thereby making the city a participant in RAR's musical expression.[176] New York's interference with musical expression

172. *See, e.g.*, Shuttlesworth v. Birmingham, 394 U.S. 147 (1969) (declaring a Birmingham parade permit ordinance unconstitutional in the face of a challenge that was spearheaded by the 1963 Good Friday civil rights protest march in Birmingham; several black ministers, including the petitioner, Rev. Shuttlesworth, led the march); Gregory v. Chicago, 394 U.S. 111 (1969) (reversing the conviction of civil rights leader Dick Gregory for leading a protest picket to the home of Chicago Mayor Richard Daley); Cox v. Louisiana, 379 U.S. 536 (1965) (overturning convictions under a breach of the peace statute arising from a 1500-strong mass demonstration by blacks in a predominantly white business district); Edwards v. South Carolina, 372 U.S. 229 (1963) (reversing the conviction of 187 picketing black students under a breach of the peace statute); *see also* H. KALVEN, JR., *supra* note 1, at 96-105.

173. The incorporation of the first amendment into the fourteenth occurred in Gitlow v. New York, 268 U.S. 652 (1925).

174. For the text of the Texas statute, see *supra* note 19.

175. *See supra* text accompanying notes 142-45.

176. Rock Against Racism's brief provided the technical basis for this assertion by reproducing parts of the testimony given by its own sound engineer at trial. The engineer described his function at the mixing desk—"a console that combines multiple signals into one signal which is then fed into a sound system"—as "part of the band, because I am balancing all of their instruments together to sound right to their taste." Brief for Respondent at 6, Ward v. Rock Against Racism, 109 S. Ct. 2746 (1989) (No. 88-226). Asked to "approximate how many different individual variations there are for a song," the engineer replied: "Well, I have somewhere between 200 and 300 separate adjustments that can be made, and during the course of a song my hands will be moving all over the board continually, constantly making adjustments." *Id.* at 7. In reply to the question of whether "manipulation of the dials require[d] any type of artistic understanding," the engineer answered:

> Absolutely. For instance when you have a concert where there is [sic] several different types of music available one has to have a very deep understanding of what a reggae audience or a reggae band would want other than a folk type band. In other words in a reggae type of thing the high hat is supposed to be louder than in any other type of band and the bass guitar is

under the guise of noise regulation was no less violative of the first amendment than Texas' impingement on the flag burner's expressive conduct under the guise of flag protection.

IV. CRITIQUE OF THE TWO CASES

Despite the substantive similarities discussed in the previous Section, the two cases yielded opposite results. This Section examines the Court's opinion in each case, noting the Court's lack of sensitivity toward the speaker in the park concert case. The Comment concludes that this lack of sensitivity in applying first amendment tests, which may in fact be inextricably related to the chosen test, is the source of the inconsistent results.

A. *Achieving Consistent Results*

Equally situated speakers deserve equal protection under the first amendment. This consistency may be achieved in one of two ways: by protecting or by silencing the speakers. One of the intriguing features of the two cases discussed in this Comment is that each decision was accompanied by a strong dissent.[177] Examining the majority opinion of each case in conjunction with the other's dissent highlights the arguments for consistency, whether it favors or hurts the speaker.

1. PROTECT THE SPEAKER

The flag burner and the rock band were similarly situated in terms of their unconventional positions.[178] These positions prompted them to resort to outrageous methods in order to get their messages across. In a society where the means of communication are controlled by the established media, headline grabbing conduct is de rigueur for the effective protestor. Tolerance of speakers' unorthodox

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supposed to be very dominant and very boomy and when you go to the next band they want a completely different setup.

Id. Testimony from the city's sound expert on cross-examination corroborated this assessment of the role of a sound mixer by adding that "the most important factor in the accurate and aesthetic reproduction of amplified music is the individual working the sound board or mixing board." *Id.* at 8 (citation omitted).

177. Chief Justice Rehnquist, together with Justices White, O'Connor, and Scalia, joined Justice Kennedy's majority opinion in *Ward v. Rock Against Racism*; Justice Blackmun concurred in the judgment; and Justices Marshall, Brennan, and Stevens dissented. Ward v. Rock Against Racism, 109 S. Ct. 2746, 2750 (1989). In *Texas v. Johnson*, Justice Brennan wrote the majority opinion, joined by Justices Marshall, Blackmun, and Scalia; Justice Kennedy filed a separate concurring opinion; and Chief Justice Rehnquist wrote a dissenting opinion, joined by Justices White and O'Connor, while Justice Stevens filed an additional dissent. Texas v. Johnson, 109 S. Ct. 2533, 2536 (1989).

178. For a discussion of these similarities, see *supra* Section III.

methods in these situations would insure that they are heard, thereby vindicating the three widely accepted theories underlying the first amendment—the search for truth embodied in the "marketplace of ideas" metaphor;[179] the need for a free flow of ideas without which self-government is impossible;[180] and the notion that personal liberty and self-actualization require the ability to express oneself[181]—as well as a complementary fourth value—"checking the abuse of power by public officials."[182]

These first amendment values were in fact vindicated in the *Texas v. Johnson* decision. Protecting the flag burner's message

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179. Justice Holmes endorsed this theory in his famous dissent in Abrams v. United States, 250 U.S. 616 (1919):

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.

Id. at 630 (Holmes, J., dissenting). The origins of the concept as a justification for free speech date back to John Milton's *Areopagitica, A Speech for the Liberty of Unlicensed Printing, to the Parliament of England (1644)*:

> And though all the windes of doctrin were let loose to play upon the earth, so Truth be in the field, we do injuriously by licencing and prohibiting to misdoubt her strength. Let her and Falshood grapple; who ever knew Truth put to the wors in a free and open encounter?

J. MILTON, AREOPAGITICA 51-52 (J. Hales ed. 1949).

John Stuart Mill also advocated the open search for truth:

> But the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.

J. MILL, ON LIBERTY (1859) 20 (S. Collini ed. 1989).

180. The key proponent of this justification was the noted philosopher Alexander Meiklejohn, who wrote: "These conflicting views may be expressed, must be expressed, not because they are valid, but because they are relevant. . . . To be afraid of ideas, any idea, is to be unfit for self-government." A. MEIKLEJOHN, *supra* note 106, at 28.

181. In his recent book, *Human Liberty and Freedom of Speech*, C. Edwin Baker advances this theory as a replacement for the "marketplace of ideas" which he finds unpersuasive. C. BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 3-5 (1989).

182. Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 527. Professor Blasi argues that this value, as compared to the three traditionally acknowledged values, better addresses the free speech demands asserted by post-civil rights and anti-war protest groups. "The need for fresh thinking at the theoretical level is all the more imperative because many of the First Amendment claims of powerful movements and institutions can be granted only at considerable cost to competing social and individual interests." *Id.* at 525. These interests include "individual reputation, adjudicative fairness, efficient public administration, and peace and quiet." *Id.* (footnotes omitted).

ensured its access to the marketplace of ideas. Because the message was political, it fell within the category of messages that should be heard by a self-governing society. Moreover, the flag burner's expression of his political views was an exercise in self-actualization. In terms of the traditional justifications for the first amendment, therefore, the Court was correct in protecting Johnson. Finally, protecting Johnson's expression against President Reagan's policies served the checking value of the first amendment. Absent this protection, it becomes easier for an administration to abuse its power by imposing its own policies on an uninformed and possibly unwilling citizenry.

In its analysis of Texas' assertion that enforcement of such a statute was constitutional, the Court addressed the two interests that Texas advanced to support its claim.[183] On the facts of the *Johnson* case, the Court found that Texas' first interest—"preventing breaches of the peace"—could not be sustained.[184] The only evidence that Texas adduced in support of this interest consisted of the testimony of witnesses who were "seriously offended" by Johnson's act.[185] These seriously offended witnesses, the Court argued, were not likely to breach the peace. As it had done in *Street*, the Court set the breach of the peace standard at *Brandenburg*'s "incitement to imminent lawless action"[186] and *Chaplinsky*'s "fighting words,"[187] thereby finding serious offense wanting.[188]

Texas' second interest—"preserving the flag as a symbol of nationhood and national unity"[189]—fared no better when subjected to the switching function of the *O'Brien* test. In *Spence*, the Court had already declared a state's interest in preserving the flag's symbolic value to be "directly related to expression."[190] To buttress this assertion, the Court in *Johnson* presented a reductio ad absurdum argument: Unless the flag desecrator is trying to convey a message, there is no reason for the state to proffer an interest implicating the flag's symbolic value—the messages for which the flag should stand; if the flag desecrator is conveying a message, however, then the state's asserted interest necessarily implicates expression.[191]

After determining that Johnson's symbolic speech in burning the

183. Texas v. Johnson, 109 S. Ct. 2533, 2541-47 (1989).
184. *Id.* at 2541.
185. *Id.*
186. *See supra* notes 48-49 and accompanying text.
187. *See supra* notes 53-54 and accompanying text.
188. *Johnson*, 109 S. Ct. at 2542.
189. *Id.*
190. Spence v. Washington, 418 U.S. 405, 414 n.8 (1974) (per curiam).
191. *Johnson*, 109 S. Ct. at 2542-43.

American flag fell outside the ambit of the *O'Brien* test,[192] the Court switched its level of analysis to a stricter scrutiny track, indeed, the "most exacting scrutiny."[193] When subjected to these rigorous requirements, the state's interest in preserving the flag as a symbol of nationhood and national unity failed to justify Johnson's criminal conviction for burning the flag.[194] The Court cited an array of precedents for the proposition that "the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[195] Relying primarily on *Street* and *Barnette,* the Court refused to except the flag from this principle.[196] The Court concluded that the state may not inhibit expressive conduct involving the flag. To allow the state to appropriate the flag as a symbol and limit its use to the expression of state-approved messages would lead into a "territory having no discernible or defensible boundaries."[197] Ultimately, the Court predicted, the state could impose political views on the citizenry in direct contravention of the first amendment.[198]

Justice Kennedy's concurring opinion in *Johnson* states: "It is poignant but fundamental that the flag protects those who hold it in contempt."[199] These words reiterate the burdensome reality of what true commitment to the principles of the first amendment entails and echo Justice Jackson's remarks in *Barnette* concerning the emotional difficulty of adjudicating flag cases.[200]

The logic of the majority opinion's arguments compels the conclusion that the flag burning case was decided correctly. Consistency in first amendment adjudication compels the conclusion that the park concert case should also have been decided in favor of the speaker. Applying the underlying theories of the first amendment to the park concert case reaffirms this conclusion. Protecting the rock band's antiracist, hence political, message would have vindicated both the marketplace of ideas and the self-government values of the first amendment by letting the idea compete for acceptance against opposing ones. In terms of the liberty notion, the rock band's musical performance constituted an act of self-expression and, therefore, self-actualization. Moreover, by publicly challenging racist policies,

192. *Id.* at 2542.
193. *Id.* at 2543 (quoting Boos v. Barry, 485 U.S. 312, 321 (1988)).
194. *Id.* at 2548.
195. *Id.* at 2544.
196. *Id.*
197. *Id.* at 2546.
198. *Id.*
199. *Id.* at 2548 (Kennedy, J., concurring separately).
200. *See supra* text accompanying note 29.

RAR's conduct served to "check" governmental furtherance of such policies. Thus, promotion of the checking value of the first amendment called for upholding the group's free speech demands, even when one of the interests at stake was "peace and quiet."[201]

Justice Marshall's dissenting opinion in *Ward v. Rock Against Racism* advocated a decision in favor of the speaker. While accepting the majority's application of the *Clark* test, the dissent took issue with the majority's method for determining whether a regulation is narrowly tailored.[202] Rather than requiring judicial scrutiny of less restrictive alternatives available to the city of New York for regulating volume in Bandshell concerts, the majority sanctioned judicial deference to the city's rational determination of how to accomplish its goal.[203] If the courts may not look at alternative methods of achieving the state interest, the dissent asked, how are they to determine if the regulation is in fact narrowly tailored?[204] The dissent concluded that, on this analysis, a city's banning of handbilling would pass constitutional muster merely on the basis of the city's assertion that it was the most effective means to achieve the goal of having a clean city.[205] The repercussion of this doctrinal shift is a lowered level of first amendment protection for public forum speakers.[206] This is an ironic result given the origins of the doctrine, which advocated that use of the public forum "must not, in the guise of regulation, be abridged or denied."[207]

The dissent raised an even stronger point of contention: the prior restraint characteristics of the city regulations.[208] The dissent stated

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201. *See supra* note 182. For diverging views regarding the noise complaints generated by Rock Against Racism's performances, see *supra* note 149.

202. Ward v. Rock Against Racism, 109 S. Ct. 2746, 2761 (1989) (Marshall, J., dissenting).

203. *See id.* at 2759.

204. *Id.* at 2762.

205. *Id.* The dissent was analogizing to early public forum cases. The majority called this analogy "imaginative but misguided." *Id.* at 2758 n.7.

206. *Id.* at 2762-63.

207. Hague v. CIO, 307 U.S. 496, 516 (1939); *see also supra* text accompanying notes 108-16.

208. Ward, 109 S. Ct. at 2763 (Marshall, J., dissenting). "The concept of prior restraint, roughly speaking, deals with official restrictions imposed upon speech or other forms of expression in advance of actual publication." Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648, 648 (1955). Professor Emerson ascribed the articulation of the doctrine to Chief Justice Hughes in Near v. Minnesota, 283 U.S. 697 (1931). Emerson, *supra*, at 649. The key passage from *Near* discussed the instances when protection from prior restraint is not unlimited, such as wartime publication of troop movement information, obscenity, incitement to acts of violence, and overthrow of the government by force; the passage then went on to state: "The exceptional nature of its limitations places in a strong light the general conception that liberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from

that although the city regulations purported to seek "appropriate sound quality,"[209] the city effectively provided a censor by placing a city technician at the sound amplification controls.[210] Determining the constitutionality of a prior restraint system requires closer scrutiny than that accorded by the majority.[211] The majority accepted the city's goal without stopping to inquire what guided the technician in achieving the city's objective during a live concert, notwithstanding the city's promise of prior consultation with the concert sponsors.[212] The dissent concluded that the decision effectively condoned a prior restraint, thereby eviscerating the first amendment.[213]

The result in *Ward v. Rock Against Racism* may also be criticized as anomalous in light of the similarities, discussed above, between the flag burning case and the park concert case. The two cases presented substantively comparable first amendment demands.[214] Through selective application of tests, however, the cases yielded contrary results. The majority in the flag burning case properly applied the *O'Brien* test to make a threshold determination that the Texas statute was content based. This determination led to "switching" the flag burner out of the *O'Brien* test and onto a higher level of first amendment protection.[215] In the park concert case, however, a different majority[216] characterized the fact pattern as a public forum scenario

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previous restraints or censorship." *Near*, 283 U.S. at 716. From a historical perspective, the first amendment reflected the widespread abhorrence of licensing acts through which the English Crown had attempted to control the printing press. Emerson, *supra*, at 650-51; *see also* Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 9-12 (1948) (tracing the Blackstonian view that the free speech clause applied only to prior restraints). Indeed, historians postulate that the original purpose of the first amendment was no more and no less than the prohibition of prior restraints. Emerson, *supra*, at 652. Not until the twentieth century did the United States Supreme Court clarify this issue by extending the protection of the first amendment to free speech infringement arising from "subsequent punishment." *Id.* Credit for deciding the subsequent punishment issue goes to Justice Holmes in the seminal first amendment case, Schenck v. United States, 249 U.S. 47 (1919). Emerson, *supra*, at 652 n.15. Although the prior restraint doctrine has been a mainstay of first amendment adjudication since the *Near* decision in 1931, commentators have criticized its categorizing tendencies as misleading. *See, e.g.*, Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53, 55 (1984).

209. *Ward*, 109 S. Ct. at 2764. The dissent argued, however, that musical expression cannot be divorced from sound quality because the way the music tones are mixed and amplified before reaching the audience is as much a part of a song as the words and the instruments. *Id.*

210. *Id.*

211. *Id.* at 2763.

212. *Id.* at 2764.

213. *Id.* at 2765.

214. *See supra* text accompanying notes 163-76.

215. *See supra* text accompanying notes 192-94.

216. *See supra* note 177.

and proceeded to apply the *Clark* test, employing a narrow equal protection level of scrutiny.[217] In applying the *Clark* test, the Court completely bypassed a situation-sensitive, individualized evaluation of the rock band's message, an evaluation afforded to the flag burner.[218] The Court did not take into consideration the band's unconventional position when evaluating the city's proferred interest in sound quality during Bandshell events.[219] Indeed, the Court dismissed the rock band's claim that the city's requirements impinged on artistic expression, hence on message content.[220] In so doing, the Court failed to protect legitimate first amendment claims of a rock band only one day after upholding similar claims in the controversial flag burning decision.

2. SILENCE THE SPEAKER

An alternative approach to achieving consistency between the two cases is to support the silencing of both speakers. In this view, the park concert case was decided correctly, but the flag burning case was decided incorrectly. Chief Justice Rehnquist, by concurring in the park concert case and authoring the dissent in the flag burning case, advocated this position.

As a preliminary step to deciding *Ward v. Rock Against Racism*,

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217. *See supra* text accompanying notes 116-21. Indeed, even the dissent endorsed this level of analysis: "The Guidelines indisputably are content-neutral as they apply to all Bandshell users irrespective of the message of their music." *Ward*, 109 S. Ct. at 2761 (Marshall, J., dissenting) (citations omitted).

218. The Court determined that the Sound Amplification Guidelines were content neutral by looking at the city's purpose in issuing the guidelines: noise control and sound quality. *Ward*, 109 S. Ct. at 2754. Although noise control may be said to be facially neutral, Justice Black's words of caution regarding noise regulations should be kept in mind. *See infra* text accompanying note 268. Sound quality, on the other hand, necessarily implies a value judgment. It is difficult to see how government views on what constitutes good sound could be divorced from the imposition of regulations to achieve good sound. Moreover, a rock band's notion of sound quality might not coincide with a government's notion. By evaluating the city's interests in noise control and sound quality in a generalized public forum context, however, the Court failed to detect any conflict between the government's purpose and the rock band's message.

219. In analyzing the city's interest, the Court did not accept RAR's argument that imposition of the city's sound equipment and technician for the purpose of ensuring sound quality amounted to enforcement of a "bureaucratically determined, value-laden conception of good sound." *Ward*, 109 S. Ct. at 2754.

220. The Court argued: "The city has disclaimed in express terms any interest in imposing its own view of appropriate sound mix on performers. To the contrary, as the District Court found, the city requires its sound technician to defer to the wishes of event sponsors concerning sound mix." *Id.* As noted in the dissent, the majority completely ignored the potential for deviation, during the performance itself, between the concert sponsors' wishes and the technician's real-time mixing and controlling of sounds prior to feeding them to the sound amplification system. *Id.* at 2764.

the United States Supreme Court classified the site of the rock concert, the Naumberg Bandshell in New York City's Central Park, as a public forum.[221] The Court then analyzed the city's imposition of Sound Amplification Guidelines (SAG) in light of the allowable time, place, and manner restrictions most recently articulated in *Clark*.[222] The *Clark* test requires: (1) that restrictions be justified without reference to the content of the regulated speech; (2) that they be narrowly tailored to serve a significant governmental interest; and (3) that they leave open ample alternative channels for communication of the information.[223] The Court considered each of these requirements seriatim.

First, the Court found the SAG to be content neutral.[224] According to the Court, the city's two justifications for the SAG, to control noise levels and to ensure the quality of sound, had nothing to do with content.[225] The Court dismissed the argument advanced by Rock Against Racism (RAR) that the SAG amounted to interference with artistic judgment by pointing to the requirement that the technician defer to the wishes of event sponsors concerning sound mix.[226]

The Court also found the SAG to be narrowly tailored to serve a significant governmental interest, the second requirement of the *Clark* test.[227] The Court looked at two aspects of sound control in evaluating the substantiality of the governmental interest advanced by the SAG. Primarily, the city sought to protect its citizens from unwelcome noise caused by excessively loud performances.[228] The city also sought to ensure adequate amplification levels so that concert goers could enjoy Bandshell performances.[229] Both goals, the Court argued, met the substantiality test.[230] To advance these interests without running afoul of the *Clark* test, however, the city's guidelines had to be narrowly tailored. According to the Court, the SAG met this requirement by not being substantially broader than necessary to achieve the interest.[231] On the record, the Court determined that the SAG served the city's interest in a direct and effective way.[232] The

221. *Id.* at 2753.
222. *Id.*
223. *Id.*
224. *Id.* at 2754-56.
225. *Id.*
226. *Id.* at 2754.
227. *Id.* at 2756.
228. *Id.*
229. *Id.* at 2757.
230. *Id.* at 2756-57.
231. *Id.* at 2758.
232. *Id.* at 2759.

Clark test, the Court stated, required no more.[233] The court of appeals' diligent search for alternative regulatory methods against which to measure the SAG was not required in the context of the *Clark* test.[234] The court should have deferred to the city's reasonable determination of the best way to accomplish the goal of sound control.[235]

The Court concluded its analysis with the statement that the SAG easily met the third *Clark* requirement—leaving open ample alternative channels of communication.[236] Use of the Bandshell was still available to RAR, albeit within the circumscribed guidelines.[237] Absent a showing that remaining avenues were inadequate, the Court refused to consider objections on these grounds.[238]

In addition to rejecting Rock Against Racism's free speech claims, the Court's conservative segment[239] offered strong arguments against the flag burning decision through Chief Justice Rehnquist's dissenting opinion. Quoting Justice Holmes' assertion that "a page of history is worth a volume of logic,"[240] Justice Rehnquist's dissent in *Texas v. Johnson* marshalled pages of history to counteract the majority's inescapable logic. Justice Rehnquist traced the flag's role in American history from the Revolutionary War to the Vietnam War.[241] He also recounted the flag's role in our daily lives from its appearance in eighty-six postal stamps to the pledge of allegiance.[242] This preamble was aimed at supporting the *Smith v. Goguen* and *Spence v. Washington* arguments, discussed in Section II, that as a "visible symbol embodying our Nation,"[243] the flag should be exempted from competition in the "marketplace of ideas,"[244] hence placed outside the scope of first amendment scrutiny.

Having accorded the flag this unique symbolic status, Justice Rehnquist proceeded to argue that the flag must accrue special property rights, which the states and Congress may protect.[245] According to Justice Rehnquist, this is no different than granting the United

233. *Id.* at 2757.
234. *Id.* at 2759.
235. *Id.*
236. *Id.* at 2760.
237. *Id.*
238. *Id.*
239. *See supra* note 177.
240. Texas v. Johnson, 109 S. Ct. 2533, 2548 (1989) (Rehnquist, C.J., dissenting) (quoting New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921)).
241. *Id.* at 2549-51.
242. *Id.* at 2551.
243. *Id.* at 2552.
244. *Id.*
245. *Id.*

States Olympic Committee exclusive rights over the use of the word "Olympic"[246] or upholding a news agency's property rights in the news it acquires as a result of organization and the expenditure of labor, skill, and money.[247]

Justice Rehnquist failed to convince the Court that his "special property" theory could trump any first amendment concerns arising from prohibiting the use of the flag to convey "undesirable" political messages. This approach of carving an area out of first amendment protection, however, spearheaded the drive for a flag amendment.[248]

B. *Manipulating the Tests*

One wonders how the decisions in *Ward* and *Johnson* would have come out if the Court had reversed the test it used in each case. After all, Justice Brennan stated in *Texas v. Johnson* that both the *Clark* and *O'Brien* tests are aimed at the same threshold determination: Is the regulation content based?[249] Put another way, is the government regulating the speech because of what the speaker is saying? Indeed, the Second Circuit treated the two tests as interchangeable when it borrowed the least restrictive alternative language from *O'Brien* in applying the *Clark* test to invalidate the Sound Amplification Guidelines in the park concert case.[250]

It is not difficult to picture the scenario of deciding *Texas v. Johnson* under the *Clark* test. Johnson marched down the streets of Dallas and burned the flag in front of City Hall. He was in a public forum. In the public forum setting, the Court applies the *Clark* test.

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246. *Id.* (citing San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522 (1987)).

247. *Id.* (citing International News Serv. v. Associated Press, 248 U.S. 215 (1918)). On the surface, the concept of a special property right appears reasonable. According to Chief Justice Rehnquist, the state may assert these rights for the flag. *Id.* But aren't the American people, rather than the state, the ones who earned this property right through 200 years of labor? And isn't the flag desecrator one of the people? The fatal flaw of substituting the state for the people as right-owner reveals exactly the dangerous course down which such conceptualization leads, the very danger that the first amendment was designed to prevent. This fallacy arises more clearly in Justice Stevens' separate dissent. *Id.* at 2555 (Stevens, J., dissenting). Justice Stevens analogized flag desecration to writing graffiti on a public monument, *id.* at 2556, or to extinguishing the eternal flame at John F. Kennedy's tomb, *id.* at 2557 n.*. The point missed by Justice Stevens' discussion is that the state, as representative of the people, may claim a property interest in public monuments or historical treasures, such as the flag made by Betsy Ross. But the state, as representative of the people, may not claim a monopoly in the ways in which people express views through the use of the flag as a symbol without running afoul of the first amendment. The people of the United States "are, it is true, 'the governed.' But they are also 'the governors.' " Meiklejohn, *supra* note 4, at 253-54.

248. *See supra* note 167.

249. *See supra* note 122.

250. Rock Against Racism v. Ward, 848 F.2d 367, 370 (2d Cir. 1988).

Applying the *Clark* test to the Texas statute in the same manner that the Court applied it in *Ward* would have yielded the result that the statute was content neutral. Content neutrality would have been supported by the fact that all flag burners were equally punishable under the statute, without regard to the various messages that they might wish to convey.[251] Having found the Texas flag desecration statute to be content neutral, the Court would have proceeded to the next phase of the *Clark* test: determining if the statute was a reasonable time, place, and manner regulation; if it was narrowly tailored; and if it left open ample alternatives for communication.[252] Under the standard of judicial deference announced in *Ward*, the only question would have been whether the statute represented Texas' reasonable determination of how best to accomplish its goals.[253] In view of the flag's symbolic meaning, it is perfectly reasonable for Texas to pursue its avowed interests in "preventing breaches of the peace"[254] and "preserving the flag as a symbol of nationhood and national unity"[255] by prohibiting flag desecration. Moreover, in light of these lowered standards, the statute also easily met the additional requirement that the state leave ample alternatives for communication. Johnson was free to convey his disagreement with the government's policies through expressive conduct not involving the flag.[256] Thus, by applying the *Clark* test, the Court could have decided the flag burning case against the speaker.

Conversely, the Court could have applied the *O'Brien* test to the New York City park concert regulation. In this scenario, the threshold inquiry would have been whether the city regulation was interfering with the content of speech. That is, would placing a technician provided by the city at the sound amplification controls have, by definition, interfered with musical expression, which is protected speech? The inextricable relationship between musical expression and sound

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251. This is similar to saying that all concert sponsors in *Ward* were subject to the city's guidelines regardless of the type of music they played. "[T]he city's equipment and its sound technician could meet all of the standards requested by the performers, including RAR." Ward v. Rock Against Racism, 109 S. Ct. 2746, 2755 (1989). This equal protection standard, however, reduces the level of protection afforded to the public forum speaker vis-a-vis a speaker whose place of conduct is not taken into account. *See supra* notes 116-21 and accompanying text.

252. *See supra* text accompanying note 120.

253. *See supra* text accompanying notes 227-35.

254. *See supra* text accompanying note 184.

255. *See supra* text accompanying note 189.

256. Obviously, the media-attraction quality of this alternative would have been null. The *Ward* Court, however, did not seem concerned with the access-to-the-media problems encountered by non-establishment speakers. *See supra* notes 163-71 and accompanying text.

amplification supports such a determination.[257] Having failed the content neutrality test, the case would have fallen out of the *O'Brien* test into a stricter scrutiny track.[258] This level of scrutiny would have required weighing the city's alleged interest in preserving quiet in both the park areas and the neighborhood surrounding the Bandshell against the rock band's first amendment right to convey an antiracist message. Having sacrificed the patriotic symbolism of the flag on the altar of government protest speech, the Court would have been hard pressed to refuse to sacrifice a few hours of peace and quiet, once a year, on the altar of racial protest speech.[259]

The foregoing exercise lends credence to the notion that the Court's choice of tests in first amendment adjudication might be outcome determinative. By selecting the *O'Brien* test to switch the flag burner onto a strict scrutiny track, Justice Brennan, a strong advocate of first amendment rights,[260] ensured that the flag burner received maximum first amendment protection. By selecting the *Clark* test and weakening it, Justice Kennedy, who had reluctantly concurred in the flag burning case,[261] ensured that the rock band remained outside first amendment protection. This notion, however, stands the first amendment on its head. The legitimacy of constitutional adjudication resides in the Court's ability to ground its results in objective historical, linguistic, and analytical methods of interpretation.[262] The

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257. Counsel for Rock Against Racism advanced this argument, albeit unsuccessfully:

> This case is not about the regulation of "noise," but rather petitioners' attempt to control "artistic expression." . . . Local authorities should no more be permitted to tell musicians or concert promoters what kind of sound system they can use or who can operate it than they should be permitted to instruct painters what colors to use or authors what words to write.

Brief for Respondent at 12, Ward v. Rock Against Racism, 109 S. Ct. 2746 (1989) (No. 88-226). In characterizing the city's Sound Amplification Guidelines, the brief called them "analogous to (a) requiring the publisher of a newspaper to have a governmental agent control its presses to stop undesirable material from being printed or (b) mandating the owner of a radio station to have a state operator reduce or eliminate its signal for the same reason." *Id.* at 14 n.7.

258. *See supra* text accompanying notes 93-96.

259. *See supra* note 182.

260. In New York Times v. Sullivan, 376 U.S. 254 (1964), Justice Brennan, writing for the majority, expressed the view "that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Id.* at 270 (citations omitted).

261. *See supra* note 199 and accompanying text.

262. *See* I. Stotzky, General Reflections on the Fourth Amendment and Its Literature (Mar. 1990) (unpublished manuscript) (available from Professor Stotzky at the University of Miami School of Law); *see also* Mentschikoff & Stotzky, *Law—The Last of the Universal Disciplines*, 54 U. CIN. L. REV. 695, 703 (1986) (discussing the role of the law in society and the cultural tools that lawyers use to fulfill that role); Stotzky & Swan, *Due Process Methodology and Prisoner Exchange Treaties: Confronting an Uncertain Calculus*, 62 MINN.

manipulation of tests to achieve desired results robs the Court of legitimacy by tainting its decisions with the shadow of expediency.

To protect the legitimacy of the judicial process, the use of tests in first amendment adjudication must be sensitive and thoughtful, not outcome oriented or mechanical. In *Kovacs v. Cooper*,[263] Justice Frankfurter complained about "how easy it is to fall into the ways of mechanical jurisprudence through the use of oversimplified formulas."[264] When submerged in the application of these formulas, it is dangerous for adjudicators not to resurface and regain sight of the fact that the first amendment guarantees one substantive right—freedom of speech. The speaker is entitled to have this right safeguarded, regardless of the location of its exercise. Sensitivity to the speaker, even if he acts or sounds outrageous, is essential to avoid abridging first amendment rights. Effective line drawing, as required by the first amendment tradition, must be a thoughtful and fluid process. While grounding itself in the rich soil of precedent, the Court must soar to meet the continuing challenge of reconciling society's priorities vis-a-vis individual freedoms.[265]

V. CONCLUSION

Noise, like flag burning, upsets people. But, noise, like flag burning, may be the only means available to draw attention to an idea. Although the interest of society in peace and quiet is indeed compelling, the gut reaction of finding noise offensive may lead to overregulation of the potential noise maker. Nevertheless, both the flag burner and the rock musician are using cultural tools to express an idea; they are exercising their right to political protest by means of symbols. With modern means of global communication, the media, rather than the soap box on the street corner, is the way for the marketplace of

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L. REV. 733, 749-65 (1978) (applying these concepts to due process issues under prisoner exchange treaties).

263. 336 U.S. 77 (1949).

264. *Id.* at 96 (Frankfurter, J., concurring).

265. Professor Harry Kalven's view of the first amendment tradition reflected this fluidity. It incorporated T.S. Eliot's conceptualization of literary creation as steeping oneself in the past while articulating the present. Kalven, *Foreword* to H. KALVEN, JR., *supra* note 1, at xviii-xxiii.

ideas to work.[266] The words of Justice Black in *Saia v. New York*[267] serve as a reminder of the need for tolerance towards the unconventional speaker:

> In this case a permit is denied because some persons were said to have found the sound annoying. In the next one a permit may be denied because some people find the ideas annoying. Annoyance at ideas can be cloaked in annoyance at sound. The power of censorship inherent in this type of ordinance reveals it vice.[268]

The flag burning case was decided correctly. The majority opinion exhibited the degree of sensitivity and thoughtfulness required to ensure that freedom of speech retains the preferred position that the Founding Fathers accorded it. The park concert case was decided incorrectly. The majority opinion fell into the trap of mechanically applying a test without regard for the speaker's substantive first amendment rights. Moreover, in applying the test, the majority also weakened it. Hence, the negative effects of the park concert decision are likely to extend to future first amendment decisions.

Controversies that are similar to flag burning and disturbingly loud rock music have recently arisen with art[269] and rap lyrics.[270]

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266. Justice Black first articulated an economic theory of the first amendment which stated that it is just as important for first amendment freedom to keep open the inexpensive channels of communication for non-establishment speakers as it is to protect the established media:

> There are many people who have ideas that they wish to disseminate but who do not have enough money to own or control publishing plants, newspapers, radios, moving picture studios, or chains of show places. Yet everybody knows the vast reaches of these powerful channels of communication which from the very nature of our economic system must be under the control and guidance of comparatively few people. On the other hand, public speaking is done by many men of divergent minds with no centralized control over the ideas they entertain so as to limit the causes they espouse. It is no reflection on the value of preserving freedom for dissemination of the ideas of publishers of newspapers, magazines, and other literature, to believe that transmission of ideas through public speaking is also essential to the sound thinking of a fully informed citizenry.

Kovacs, 336 U.S. at 102 (Black, J., dissenting).

267. 334 U.S. 558 (1948).

268. *Id.* at 562.

269. Robert Mapplethorpe's homoerotic art exhibit has created a national uproar. *See* Coleman, *Robert Mapplethorpe: Washington Project for the Arts*, ARTNEWS, Oct. 1989, at 213; Madoff, *Shadowboxing with the Arts*, ARTNEWS, Sept. 1989, at 204; Ferguson, *Mad About Mapplethorpe*, NAT'L REV., Aug. 4, 1989, at 20.

270. The Miami, Florida musical group, 2 Live Crew, has been the focus of similar controversy. Florida Governor Bob Martinez "ordered a statewide investigation of the group's record company for possible violation of obscenity and racketeering laws" after calling their lyrics "vulgar" and "disgusting." Miami Herald, Feb. 23, 1990, at 1A, col. 5 (quoting Gov. Martinez). On June 6, 1990, a federal district judge declared 2 Live Crew's recording *As Nasty As They Wanna Be* legally obscene. Skyywalker Records, Inc. v. Navarro, 739 F. Supp. 578 (S.D. Fla. 1990). In response to the ruling, Broward County sheriff's deputies arrested

The level of outrageousness required for access to the media[271] led speakers to violate society's symbolic values in the flag burning case, antinoise-pollution environmental preferences in the park case, and religious and sexual taboos in the explicit rap lyrics and homoerotic art controversies. Rap lyrics, homoerotic art, and similar motifs will present new challenges to the courts and new opportunities for line drawing. Equitable adjudication of these cases will require sensitivity to the unconventional speaker who relies on outrageousness to convey his message.

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two band members after a live performance of the obscene lyrics. Lutes, *Charges Filed After Raunchy Act*, Miami Herald, June 11, 1990, at 1A, col. 2.

271. *See supra* notes 163-71 and accompanying text.