1993

# Constitutional Identity

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# CONSTITUTIONAL IDENTITY

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Our conventional distinctions—law versus politics, principles versus policies—oversimplify the world of legal adjudication, particularly constitutional adjudication. Supporters of judicial activism gain too much ground from the trivial point that everything a judge does expresses political and moral preferences, and strict constructionists are taken too seriously when they insist that the jurisprudential options reduce legal adjudication to following the drafters' intent or giving free reign to personal values.

Many graduations and nuances inhabit the turf between paradigmatic instances of the nonpolitical and value-free application of rules, on the one hand, and the extra-legal surrender of judges either to private moral judgment or party politics, on the other. Yet we hardly perceive these degrees of law, politics, and morality, for our minds follow the grooves laid out by our well-worn vocabularies.

The aim of this Article is to introduce and clarify a new way of thinking about decisions in close cases, particularly those that address basic issues of constitutional law. When constitutional language fails to offer an unequivocal directive for decision, the recourse of the judge is not always to look "outward" toward overarching principles of political morality. In an illuminating array of cases, the acceptable way to resolve the disputes and to explain the results is to turn "inward" and reflect upon the legal culture in which the dispute is embedded. The way to understand this subcategory of decisions is to interpret them as expressions of the decision makers' constitutional identities.

Some examples are illustrative. In the march of precedents leading to *Miranda v. Arizona*,[1] the Supreme Court had to decide whether it was consistent with our tradition to allow police officers to dominate interrogation sessions without defense lawyers present at the scene of the interrogation. In the 1950s, the prevailing view was that

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[1] Miranda v. Arizona, 384 U.S. 436 (1966). A more lawyerly statement of the case holding would be that the Court extended the Fifth Amendment privilege against self-incrimination (as applied to the states under the Due Process Clause of the Fourteenth Amendment) to custodial interrogation in the absence of counsel.

confessions generated by aggressive and coercive police interrogation were likely to be unreliable and, therefore, should be excluded.

In a pivotal case leading toward *Miranda*,[2] Justice Frankfurter reasoned that these confessions were excluded not because they "are unlikely to be true[,] but because the methods used . . . offend an underlying principle in the enforcement of our criminal law[.]"[3] Why? Because, as Frankfurter described the American legal system, "ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by [its own] coercion prove its charge against an accused out of his own mouth."[4] The point on which Frankfurter's reasoning turned is that Americans are not like *them*—those inquisitorially minded Europeans who are presumably willing to secure confessions at any cost. To Frankfurter, the fact that, with the introduction of public prosecution, the Europeans have a system in which the accusatorial function is separated from fact-finding was meaningless. No, the Court, led by Frankfurter, perceived the Continental tradition as standing for a certain conception of the way in which the state may bear down on the individual in criminal prosecutions. And, he insisted, his adopted country should stay with the Anglo-American way of doing things.

The same way of thinking about law determined the current conservative posture toward abortion in the western part of united Germany. In 1975, the Federal Constitutional Court invalidated a liberal abortion law as a violation of the constitutional provision granting "everyone a right to life."[5] The judges interpreted the term "everyone" broadly to include fetuses because "the historical experience and the moral, humanistic confrontation with National Socialism"[6] required them to bend over backwards to protect life. To the Federal Constitutional Court, the fact that the Third Reich had a conservative position on abortion did not matter.[7] The stigma of Hitler's Final Solution required the court to take a stand in favor of protecting life. The unborn were the beneficiaries of this free-floating anxiety about whether Germans are really sensitive to the value of human existence. As the American Supreme Court sided with the American mode of

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[2] Rogers v. Richmond, 365 U.S. 534 (1961).

[3] *Id.* at 540-41.

[4] *Id.* at 541. Never mind that the proper contrast would have been between an "adversarial" (common law) and "accusatorial" (Continental) mode of trial.

[5] Judgment of Feb. 25, 1975, BVerfG 39 Entscheidugen des Bundesverfassungsgericht [BVerfGE] 1.

[6] *Id.*

[7] *Id.*

trying criminals, the German court identified itself with what it took to be a humanist, life-affirming current in German culture.

Of course, in these cases the judges might muster arguments of policy and principle about why lawyers should be present at the time of interrogation or why the fetus should enjoy a right to life. But these arguments quickly run dry. Some choice is necessary between competing systems of values, and yet the choice is not one that skeptics have come to call "political" or "discretionary." The choice is rather one of self-realization and self-definition. The identity of a legal system is both reflected and shaped in these pivotal decisions concerning who the judges are and wish to be.

One should not underestimate the element of yearning in these self-definitional constitutional decisions. An illuminating example is the October 1990 decision[8] by the newly constituted Hungarian Constitutional Court to invalidate capital punishment as an "arbitrary punishment"[9] and a violation of the "right-to-life" provisions of the constitution,[10] which had been transplanted by amendment from the International Covenant on Civil and Political Rights[11] to the constitution originally drafted and adopted by the Hungarian Communists. Although the ten academically minded judges on the court wrote long and seemingly serious opinions on capital punishment, they hardly had a convincing argument for their stand. They did not even address the obvious contradiction between their holding and the International Covenant, which explicitly recognizes the legitimacy of capital punishment.[12] Furthermore, their reliance on the supposed "arbitrariness" of the punishment turns out to be no more than a confession that they cannot think of any good arguments for the institution. Of course, there are no good arguments, for they assume—on the basis of superficial statistical analysis—that the death penalty has no deterrent impact and, further, that retribution could not possibly justify taking a life for a life. Below the surface of these inadequate arguments runs a current of yearning to join the "European House," a democratic homeland governed by human rights and an exaltation of human dignity. Abolishing capital punishment, even on the basis of bad legal arguments, is a way of proving that a postsocialist country has an adequate regard for the values now dominant in Western Europe.

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[8] Judgment of Oct. 24, 1990, Alkotmánybiróság, 1990 Magyar Közlöny [MK.] (Hungarian Gazette) 107.

[9] A MAGYAR KÖZTÁRSASÁG ALKETMÁNYA ch. XII, § 54, para. 1.

[10] *Id.* §§ 54-70.

[11] International Covenant on Civil and Political Rights, U.N. GAOR, 3d Comm., 21st Sess., at 51 (1966).

[12] *Id.* at part III, art. 6.

If this mode of analysis is brought closer to home, one can understand the controversial decisions by the Rehnquist Court on flag burning.[13] In 1989 and 1990, the Court held twice, by five votes to four, that flag burning was a symbolic speech act protected by the First Amendment. Advocates of free speech regard these decisions as self-evidently correct. Yet there are ample signs in these decisions of doctrinal overreaching. There are indeed good grounds for the opposition of the four-vote minority—a minority that, in view of changes in the Court's personnel (Justice Souter for Brennan, Justice Thomas for Marshall), would probably be a six-vote majority if the issue were to come up again.

There are at least three doctrinal hurdles on which the case for First Amendment protection might falter. First, it is not clear that burning a piece of cloth, even the protest burning of a flag, is the type of speech that is addressed by the First Amendment. Second, even if that threshold issue is negotiated, the argument for protection could stumble on the *O'Brien* distinction.[14] Arguably, the prohibition of flag burning speaks only to the means and not the content of the protest, in which case the protestor could well be required to choose another means. The conventional reply runs that the means of protest is bound up with the message, but if this is not true about playing loud music and sleeping in the park (both forms of communication subject to regulation), then it is not self-evidently true about flag burning. Third, even if flag burning is symbolic speech and even if the prohibition against flag burning is regarded as a suppression of speech, the flag might represent the kind of collective interest that warrants a corresponding degree of silence. After all, there are many interests that trump speech—private property, copyright, and reputation to name a few—and one might be forgiven for regarding these interests as less worthy than the people's emotional attachment to their national emblem.

Today, free speech issues generate their fair share of paradox. In the Supreme Court, the temporary majority in *Texas v. Johnson*[15] could not coalesce in the 1989 term behind any other significant issue of civil rights or civil liberties. One finds Justices Scalia and Kennedy voting with the old liberal plurality—Justices Blackmun, Marshall, and Brennan—an odd combination that surely would not come together to protect the interests of either minorities or criminal defend-

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[13] *See* United States v. Eichman, 496 U.S. 310 (1990); Texas v. Johnson, 491 U.S. 397 (1989).

[14] United States v. O'Brien, 391 U.S. 367 (1968).

[15] 491 U.S. 397 (1989).

ants. Civil liberties may be in decline, but as of 1990 individual freedom still prevailed over the collective interest in national pride.

There is further paradox in the academic community. Arguments that will justify suppressing hate speech that offends minorities and obscenities that degrade women have become doctrinally chic. Yet hardly a voice emerges to uphold the national community's interest in maintaining the emblems of its historic continuity. The idiom of community comes to the lips of the politically correct who seek to suppress offensive speech on university campuses, but the same communitarian vocabulary fails to yield a convincing case for protecting the flag.

This Article does not aim to debate the doctrinal issues of the First Amendment, for the debate about flag burning has little to do either with the history of free speech, or the theory of free speech as a legal category. Behind the doctrinal moves of the Supreme Court's opinions lies an unarticulated sense of what it means to be American and, in particular, what it means to engage in the American way of protest.

The theme of constitutional identity challenges us in this context, for at first blush those that defend the flag, those that wrap themselves in the red, white, and blue, seem to speak for the United States. At a deeper level, however, the American constitutional spirit is expressed in upholding dissent even where, and particularly where, it collides with the collective interest in national pride.

Consider various ways in which one might formulate the conflict in the flag-burning cases. A German lawyer might well formulate the question in the language of duties. According to the Grundgesetz (Basic Law or Constitution),[16] citizens bear constitutional duties as well as rights;[17] organs of the state are endowed with duties as well as powers.[18] For example, Article I of the Grundgesetz prescribes that it is the duty of all state organs to respect and protect human dignity.[19] The doctrine of "third-party effect"[20] implies that individuals bear this Kantian duty as well, even toward objects—such as the dead—that do not, in any ordinary sense, possess rights.

If one starts with the notion of political duty, a duty to respect the emblems of national unity and solidarity can plausibly be attributed to every citizen (and indeed everyone subject to the legal sys-

16 GRUNDGESETZ [Constitution] [GG] (F.R.D.).

17 *See, e.g.*, *id.* at ch. I, art. 14.

18 *Id.* at ch. I, art. 1.

19 *Id.* at ch. I, art. 1, para. 1.

20 *See id.* at ch. I, art. 2.

tem). Although this specific duty is not spelled out in German constitutional theory, the implications in the criminal code are patent. Those subject to the criminal code must not only respect the German flag—which is defined in the *Grundgesetz*—they must also act with respect for the various other symbols of the *Bundesrepublik*, including its colors, its code of arms, and its national hymn.[21] This duty is violated not just by symbolic speech, but also by using words, by writing and distributing documents, or by speaking in a public gathering in a way that demeans or makes contemptible (*verächtlich macht*) any of these protected objects.[22] Significantly, the special provision protecting the flag is limited to "officially displayed" flags.[23] The same duty of respect extends to the organs of government, but only if the speech act can be qualified as the first step in an effort to overthrow the constitutional order.[24] These provisions have survived constitutional attack under Article 5 of the *Grundgesetz*,[25] the German analogue of our First Amendment.

American lawyers are likely to recoil at these intrusions on freedom of speech. But even more significant for present purposes is the way German lawyers are likely to formulate the issue as a matter of duty rather than rights. The duty of respect prevails over the right to speak. This seems like a perfectly sensible thing to say—if, of course, one believes that there is a civic duty to respect the flag and the symbols of state power. Yet it is doubtful that an American lawyer could be brought to conceptualize the problem of flag burning as a matter of civic duty rather than of conflicting rights and interests.

The grooves in the American legal mind lead one toward identifying the rights of the individual and the opposing interests of the state or community. There is no slot for duty, no niche for civic responsibility as a constitutional principle. As soon as one begins to think in this American way, the issues take a form that leads liberals to an ineluctable result.

The government's interest in the flag is formulated either too strongly or too weakly. The issue is stated too strongly in the original understanding of the flag desecration statutes, which regarded the flag as a quasi-sacred object subject to be rendered profane by abuse and misuse.[26] The issue is phrased too weakly, when presented as "a sym-

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21 STRAFGESETZBUCH [Penal Code] [StGB] § 90(a)(1) (F.R.G.).

22 *Id.*

23 *Id.* § 90(a)(2).

24 *Id.* § 90(b).

25 GG ch. I, art. 5.

26 18 U.S.C. § 1700 (1990) (held unconstitutional in United States v. Eichman, 496 U.S.

bol of nationhood and national unity."[27] As liberals aptly respond, torching a piece of painted cloth does not affect the symbol behind the cloth; therefore, this assertion of a state interest simply misses the mark. Either phrased too strongly or too weakly, the state interest asserted against freedom of speech invariably collapses in the face of our regard for the individual right of free expression.

One would be hard-pressed to claim that an idiom of constitutional duties, if transplanted into American English, would generate a different result. However, at least one could think about the problem with a different focus, without concern that requiring a less offensive means of expression would be tantamount to fascist-style claims about collective honor and pride.

Using the phrase "national honor and pride" generates its own characteristic mode of American reaction. Sentiments may be different today, after the explosion of patriotic sentiment during the 1991 Gulf War, but at least at the time of the flag-burning litigation,[28] invoking these values of honor and pride seemed to run against the American constitutional grain. Still, it would be dubious American constitutional rhetoric, then or now, to invoke the values of honor and pride as a basis for regulating and compromising freedom of speech.

Yet our sensing weakness in the government's side of the argument is not the full story. There is something less than transparent about our concern that Johnson and Eichman be able to register their political disaffection by insulting the majority of Americans who have some lingering feeling that the flag is a nearly sacred object. There is, first of all, the obviously exploitative nature of the communication. Burning a piece of cloth, colored red and white and blue, would hardly be a political protest unless other people held the cloth in reverence. The greater the injury, the more intense the communication. In this regard, flag burning resembles hate speech. It makes its point by hurting those who hear it.

What, after all, is the point of letting Johnson and Eichman speak in this way? What good does it do? Their political message is hardly coherent. Granted, they are against patriotism; if they simply told us, we would get the point. No one who believes in the First Amendment could be opposed to their expressing their disaffection in words. Yet it is difficult to see how protecting speech-by-torching en-

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310 (1990)); TEX. PENAL CODE ANN. § 42.09 (West 1989) (held unconstitutional in Texas v. Johnson, 491 U.S. 397 (1989)).

27 *Johnson*, 491 U.S. at 407 (language used by the State).

28 *Eichman*, 496 U.S. at 310; *Johnson*, 491 U.S. at 397.

courages democratic discourse, self-government, the marketplace of ideas, the pursuit of truth, or any other interest that could justify the intangible injury they intentionally inflict on those who value the flag. Yet invoking these group values misses something peculiar in the unusually strong American attachment to freedom of speech.

The way to understand *Johnson* and *Eichman* is to recognize that a value shift has occurred in the structure of the First Amendment. For almost fifty years, from *Barnette*[29] in 1943 to *Smith*[30] in 1990, religion was accepted as the arena in which individuals were particularly entitled to express themselves. Jehovah's Witnesses did not have to salute the flag; Sabbatarians were entitled to unemployment compensation even if they refused work on the Sabbath; the Amish did not have to send their children to public school beyond the eighth grade. Neutral and universal rules could not justify the government's encroachment on these protected spheres of individual and communitarian liberty.

What precisely was the nature of this religious liberty? Religious liberty represents a recognition that believers are subject to conflicting sovereignties, and, therefore, in certain spheres, the state will not force believers to choose Caesar over their commitment to God.[31] In a more secular world, this interest is interpreted to be nothing more than an individual's right to express himself in the arena of conscience. The interest comes to resemble what the German constitution aptly labels the "free flourishing of personality" ("*die freie Entfaltung seiner Persönlichkeit*").[32]

As soon as the interest in religious freedom is formulated as an expression of personality, then we are embarrassed by the limitation of this freedom to believers. All those who feel strongly about something, all those who experience what we loosely call a commitment of conscience should be able to express themselves freely. In the end, one has no tools for distinguishing the anti-patriotic conscience of Johnson from the anti-public school conscience of the Amish. The locus of special freedom, the rubric under which individuals are exempt from at least some general and nondiscriminatory laws, shifts from one clause of the First Amendment to another, from freedom of religion to freedom of speech.

It was no coincidence that Justice Scalia was the intellectual ar-

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29 West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

30 Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872 (1990) (the peyote case).

31 *See, e.g.*, Perry Dane, *The Maps of Sovereignty: A Meditation*, 12 CARDOZO L. REV. 959 (1991) (discussing conflicts between Native American and United States sovereignty).

32 GG art. 2.

chitect of a revisionist opinion in the peyote case[33]—an opinion that dishonestly dismisses fifty years of free-exercise-of-religion law and provided the indispensable votes in *Johnson*[34] and *Eichman*.[35] The common denominator in Scalia's jurisprudence is that speech, not religion, should be the medium in which individuals express their autonomy from the state and its interests. This position has its antecedents in Justice Jackson's views expressed in his opinions of the early 1940s[36] that led later generations of lawyers to believe the Court's opposition to an obligatory Pledge of Allegiance was based on principles of free speech rather than the free exercise of religious conscience.

One is left, then, with a view of the First Amendment that invests freedom of speech with a particularly heavy burden. The First Amendment is *the* clause in our Constitution that bears the full weight of individual autonomy, the full burden of individuals bearing their souls and expressing their innermost nature in the face of organized demands of conformity and self-restraint. Here is the American spirit at work again, the irreverence of the ongoing American revolution. As Germans are committed to constitutionalizing a right of rebellion against tyranny, the American Revolutionary ethos seeks to domesticate dissent and expressions of conscience as constitutional rights. If the *Smith* decision survives, religion will no longer generate a legal sphere for appeals to higher law, for submissions to conscience, and for resorts to values over which the state has no control. The values of dissent, freedom of the inner self, and the free flourishing of individuals must be borne as emanations of free speech.

At least one can hope that the American regard for dissent continues to flourish. Given tendencies on college campuses today, one might have serious doubts. If those who witness flag burning are offended, their indignation is considered *their* problem, the price they have to pay for a robust democracy. But, if minorities and women are offended in class or on campus, their offense becomes a respectable argument for disciplining students and exerting pressure on "insensitive" faculty. For the time being, however, one can be thankful that the lower federal courts have not succumbed to the new jurisprudence that celebrates individual offense and depreciates the values of academic freedom. Our federal judges still believe that part of what it means to be American is to defend the First Amendment. However,

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[33] *Smith*, 494 U.S. at 874.

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

[35] United States v. Eichman, 496 U.S. 310 (1990).

[36] *See* West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 652 (1943); Douglas v. City of Jeannette, 319 U.S. 157, 166 (1943).

in view of the changing membership on the Supreme Court this pattern may not continue. This nation may end up with an unsavory alliance of left and right that promotes dissent neither as a matter of religion nor of speech. Whatever personal doubts one may feel concerning *Johnson* and *Eichman*, there may come a time when the vast majority of Americans look back fondly on an American spirit that takes the inner expressive needs of each individual as its constitutive value.