"Decisions We Do Not Like": Flag Desecration Case Law and the Culture War

Jack Granahan[541]

The years following the Reagan Administration were defined by a newfound American cultural conservatism. The First Amendment's protection of flag desecration as a form of symbolic speech was one of the most divisive issues in American politics, and it comprised a major facet of the cultural conflict between liberals and conservatives.[542] *Although the Supreme Court issued several conservative rulings on cultural issues at this time, the decisions of Texas v. Johnson (1989) and United States v. Eichman (1990) did not follow this trend. This paper analyzes the extent to which the Supreme Court in general, and the Court's conservative wing in particular, repudiated culture war pressures to uphold constitutional civil liberty.*

I. Introduction

During the 1992 Republican National Convention (RNC), presidential candidate and traditionalist conservative stalwart Pat Buchanan gave a speech in which he described the political division of the United States as "a cultural war, as critical to the kind of nation we will one day be as was the Cold War itself," and called upon Republican voters to "take back [their] culture, and take back [their] country."[543] According to Buchanan, this marked an increased political relevance of cultural issues, which positioned traditionalist, nationalist, and

[541] Brandeis University Undergraduate, Class of 2026.
[542] Henderson, "Today's Symbolic Speech Dilemma," 534.
[543] Collins, *Transforming America*, 171.

religious conservatives against countercultural, secular, and multicultural liberals.[544]

Over three decades later, America still appears to be in the midst of a culture war. In the 2022 U.S. midterm elections, three prominent cultural issues—abortion, gun policy, and parental oversight of education—held special significance in the eyes of voters, with over half of registered voters considering these issues to be "very important."[545]

The shift of American politics toward a focus on the cultural issues Buchanan described can be traced back ten to twenty years prior to his RNC speech. Following the conservative backlash against the counterculture movement during the Nixon era, American politics experienced a liberalization under Gerald Ford and Jimmy Carter's presidencies. Shortly thereafter, the presidency of Ronald Reagan ushered in a period of increased conservatism, religious faith, and American patriotism. Increased reverence for the American flag was indicative of the Reagan era resurgence of patriotism—one of the most prominent facets of the culture war.[546] Conversely, desecration (usually by burning) of the American flag became a symbol for some of Reagan's political opponents.[547]

With few exceptions, the holdings of cases heard by the late Burger Court and early Rehnquist Court overwhelmingly took traditionalist stances on cultural issues. In the 1986 case of *Bowers v. Hardwick*, which upheld Georgia's criminal statute prohibiting sodomy, Chief Justice Warren Burger appealed to traditional perceptions of sexuality. More specifically, he pointed to the Blackstonian view of homosexuality as an "infamous crime against nature," stating

---

[544] *Ibid*, 171.
[545] Schaeffer and Green, "Key Facts about U.S. Voter Priorities Ahead of the 2022 Midterm Elections."
[546] Hunter, *Culture Wars*, 147.
[547] Goldstein, *Flag Burning and Free Speech*, 44.

that "to hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching."[548] Although it upheld *Roe v. Wade*'s federal protection of reproductive rights, the Supreme Court's 1992 holding in *Planned Parenthood v. Casey* also rolled back many of *Roe*'s provisions and created additional obstacles for those seeking abortions.[549] In his concurrence, Chief Justice William Rehnquist compared abortion to the other traditional vice of bigamy, "with which entire societies of reasonable people disagree."[550] The Supreme Court's traditionalist streak during and after the peak of the Reagan era was indicative of a "spiteful *kulturkampf*" (or cultural clash), motivated by religious and national conservative values.[551] The Supreme Court's decisions in *Texas v. Johnson* and *United States v. Eichman* are unique in that, unlike in cases regarding other cultural issues, they rejected the application of cultural conservatism to their jurisprudence in favor of protecting the constitutional rights of Americans.

II. History of Flag Customs

Although reverence for the American flag is usually seen as ubiquitous in the United States, this was not the case for much of the country's history. In the decades following the American Revolution, even the United States military did not fight under the flag, and the "demand for flags was so low that no private company manufactured them until after 1845."[552] In fact, it was not until the Civil War that the American flag received its current reputation, as it was Union veterans of the

[548] Bowers v. Hardwick, 478 U.S. 186, 92 L. Ed. 2d 140, 106 S. Ct. 2841 (1986).
[549] Planned Parenthood v. Casey, 505 U.S. 833, 120 L. Ed. 2d 674, 112 S. Ct. 2791 (1992).
[550] *Ibid.*
[551] Schulman, "Kulturkampf and Spite," 62.
[552] Goldstein, *Flag Burning and Free Speech*, 1.

Civil War who founded the Flag Protection Movement (FPM) in the 1890s.[553] This movement was a conglomeration of organizations that sought to prevent the flag from being desecrated, commercialized for profit, or otherwise disrespected.

The first state law banning flag desecration was enacted in South Dakota, in 1897.[554] By 1932, every state had a ban on flag desecration.[555] In the first half of the 20th century, approximately two dozen individuals were prosecuted for flag desecration, most of whom committed such acts in protest of American entry into World War I.[556] However, only one of these prosecutions, that of New York clergyman Bouck White in 1916, involved the burning of the flag, which is generally considered the gravest offense against the flag.[557]

Flag desecration, particularly flag burning, made a resurgence in the late 1960s, following the deployment of American troops in the Vietnam War. This protest was accompanied by a spike in popularity for the anti-establishment counterculture movement.[558] In response, Congress passed the Flag Protection Act of 1968, a federal statute that banned "publicly mutilating, defacing, defiling, burning, or trampling upon" the American flag.[559] Shortly after the passage of this law, the American flag became, as described by a 1970 *Time* story, "the emblem of disunity."[560] Many cultural liberals saw the desecration of the flag as a symbol of protest, whereas their conservative counterparts saw the flag itself as a powerful symbol of traditional American culture.[561] The conservative

[553] *Ibid*, 7.
[554] Codified Law 22-9-1.
[555] Guenter, *The American Flag, 1777-1924*, 144.
[556] Guenter, *The American Flag, 1777-1924*, 167–169.
[557] Goldstein, *Flag Burning and Free Speech*, 27.
[558] Goldstein, *Flag Burning and Free Speech*, 23.
[559] H.R.10480 - 90th Congress (1967-1968).
[560] Goldstein, *Flag Burning and Free Speech*, 24.
[561] *Ibid*, 23.

Reagan Revolution of the 1980s coincided with the increased flying of the American flag.[562] As Reagan-era American patriotism eclipsed the counterculture movement's skepticism of the idealist American vision, so too did reverence for the flag eclipse disdain for the flag. This is perhaps why so many Americans had such visceral reactions to flag burnings, including the one by Gregory Lee Johnson on August 22, 1984.

III. Background of *Texas v. Johnson*

The 1984 RNC in Dallas, Texas, was met with left-wing political demonstrations against President Reagan. One particular protest was carried out by the Revolutionary Communist Party (RCP), an anti-capitalist organization that "advocated violent revolution in the United States," particularly in light of the rise of Reagan-era nationalist conservatism.[563] At the end of the protest, RCP member Gregory Lee Johnson set an American flag, in his possession, on fire.[564] Johnson's disdain towards the American flag was certainly a product of his reaction to cultural conservatism. In his own words, Johnson saw "a need to condemn and repudiate" Reagan's "belligerent American patriotism" by "burning the flag of the empire."[565] Johnson also compared Dallas, which had "flags draped all over the place," to "a modern Nuremberg Rally."[566]

Johnson was convicted under Texas's flag desecration law and sentenced to one year in prison and a $2,000 fine.[567] He subsequently appealed his case to the Texas Supreme Court,

---

[562] Hunter, *Culture Wars*, 147.
[563] Goldstein, *Flag Burning and Free Speech*, 44.
[564] Texas v. Johnson, 491 U.S. 397, 105 L. Ed. 2d 342, 109 S. Ct. 2533 (1989).
[565] Johnson, Gregory Lee Johnson Interview.
[566] *Ibid*.
[567] Taylor, "The Protection of Flag Burning as Symbolic Speech and the Congressional Attempt to Overturn the Decision," 1477.

which struck down the state's law and vacated Johnson's conviction.[568] When Texas appealed to the U.S. Supreme Court, famed civil liberties attorney William Kunstler defended Johnson. Kunstler's defense hinged upon the First Amendment to the Constitution, which states that "Congress shall make no law [...] abridging the freedom of speech."[569] In previous cases, however, the Supreme Court had ruled that speech can be restrained when it is "likely to produce a clear and present danger of a serious substantive evil that rises far and above public inconvenience, annoyance, or unrest."[570]

Kunstler's argument explained that flag desecration, while controversial and inflammatory, did not produce a clear and present danger.[571] Kunstler cited *West Virginia State Board of Education v. Barnette*, a 1943 Supreme Court ruling that held students could not be legally compelled to recite the Pledge of Allegiance to the American flag in their classrooms.[572] The *Barnette* decision specifically held that mandating respect for the flag "cannot be justified as a means of meeting a 'clear and present danger' to national unity," with Justice Robert Jackson famously opining that "compulsory unification of opinion achieves only the unanimity of the graveyard."[573]

According to Kunstler, *Barnette* and *Johnson* shared the same premise, and if the government "can't order you to salute the flag," it also "can't order you to do all these obeisances with relation to the flag," such as not burning it.[574] In addressing Chief Justice William Rehnquist, who was "easily

[568] *Ibid*.
[569] Constitution Annotated.
[570] Terminiello v. Chicago, 337 U.S. 1, 93 L. Ed. 2d 1131, 69 S. Ct. 894 (1949).
[571] Texas v. Johnson.
[572] *Ibid*.
[573] West Virginia State Board of Education v. Barnette, 319 U.S. 624, 87 L. Ed. 1628, 63 S. Ct. 1178 (1943).
[574] Texas v. Johnson.

the most conservative member" on the bench at the time, Kunstler stated that the predicament created by Johnson's burning of the flag was exactly what the First Amendment was written to protect.[575] Kunstler reasoned that "to hear things or to see things that we hate test[s] the First Amendment more than seeing or hearing things that we like [...] it wasn't designed for things we like."[576]

District Attorney Kathi Drew, who argued on behalf of the state of Texas, pushed back against Kunstler's reasoning. While being questioned by Justice Antonin Scalia, Drew stated that the "preservation of the flag as a symbol of nationhood and national unity is a compelling and valid state interest," and the flag desecration law was crucial to preventing a "breach of the peace."[577] Drew also attempted to frame the American flag's status as one transcending private property ownership in favor of being "this nation's cherished property," to which Justice Scalia responded, "I never thought that the flag I owned is your flag."[578] This was the first indication of Scalia's hesitancy to rule on behalf of traditional patriotic values in *Johnson*, despite his conservative approach to jurisprudence. He was not convinced that the collective interest of the state outweighed the personal agency of the individual burning the flag.

IV. Politics of the Rehnquist Court

For William Kunstler, arguing before the Supreme Court in *Texas v. Johnson* was an uphill battle. At the time of this case, the judicial branch of the federal government was not immune to the culture wars. In his two terms, President Reagan appointed more federal judges than any other American president, and the Supreme Court was no exception. Three

---

[575] "Biography: Chief Justice William Rehnquist."
[576] Texas v. Johnson.
[577] *Ibid.*
[578] *Ibid*.

conservative Supreme Court justices—Anthony Kennedy, Sandra Day O'Connor, and Antonin Scalia—were appointed by Reagan, while the Nixon-appointed William Rehnquist had been elevated to the position of Chief Justice in 1986.[579]

Additionally, the Ford-appointed John Paul Stevens, while known for his more liberal tendencies, fell squarely within the conservative wing of the Supreme Court on questions of American patriotism.[580] Stevens, an outspoken World War II veteran, gave an emotionally charged response to Kunstler's argument that flag desecration constituted free expression. During these exchanges with Kunstler, Stevens reportedly "turned red and was clearly quite angry."[581] The reliably centrist Byron White similarly had a history of ruling conservatively on flag use cases, having previously joined Rehnquist's dissent in the 1974 case of *Spence v. Washington*. In *Spence*, the Supreme Court held that adorning an American flag with peace symbols was a constitutionally protected form of free speech.[582] This left three liberal justices—Harry Blackmun, William Brennan, and Thurgood Marshall—for Kunstler to rely on, compared to the six justices who would ostensibly be eager, as evidenced by their past decisions regarding cultural issues, to reinstate the conviction of a man who had committed, what many had deemed to be, the most egregious offense against the American flag.[583]

V. The *Johnson* Decision

On June 21, 1989, the Supreme Court handed down its decision in *Texas v. Johnson*. In an unexpected rebuke of culture war conservatism, the ruling was 5-4 in favor of

[579] Hunter, *Culture Wars*, 251–252.
[580] Goldstein, *Flag Burning and Free Speech*, 106–107.
[581] *Ibid*, 95.
[582] *Ibid*, 99.
[583] *Ibid*, 98.

Gregory Lee Johnson. As expected, Rehnquist, O'Connor, Stevens, and White sided with the state of Texas and voted to reinstate Johnson's conviction for flag desecration. Anthony Kennedy and Antonin Scalia, however, defected from their conservative colleagues to side with the liberal wing of the Court in opposition to the legal prohibition of flag desecration.[584] Justice William Brennan wrote the opinion for the majority, in which he applied several legal standards to Texas's flag desecration law.[585]

First, Brennan clarified that Johnson's burning of the American flag, especially outside of a political convention in protest of a political action or entity, constitutes "expressive conduct" of an "overtly political nature."[586] Though Johnson himself had uttered no words in the process of setting the flag alight, he had, in Brennan's view, made a powerful enough non-verbal statement for the First Amendment to be applicable.[587] Brennan also discredited Kathi Drew's testimony on behalf of the state of Texas under the *O'Brien* test. The *O'Brien* test stipulates that, for the government to prohibit an act of symbolic speech, there must be a "legitimate governmental interest" in doing so that "is unrelated to restricting expression."[588]

This test originated from *O'Brien v. United States*, a 1968 case that held that the First Amendment did not protect draft card burning because such an act, while expressive, interfered with the state interest of raising a military force via conscription.[589] Therefore, to uphold the Texas statute would

[584] Texas v. Johnson, 491 U.S. 397, 105 L. Ed. 2d 342, 109 S. Ct. 2533 (1989).
[585] *Ibid*.
[586] Goldstein, *Flag Burning and Free Speech*, 103.
[587] Texas v. Johnson, 491 U.S. 397, 105 L. Ed. 2d 342, 109 S. Ct. 2533 (1989).
[588] Henderson, "Today's Symbolic Speech Dilemma," 550–551.
[589] Taylor, "The Protection of Flag Burning as Symbolic Speech and the Congressional Attempt to Overturn the Decision," 1479–1480.

require the state to prove that flag desecration impedes the government's ability to further its interests. Upon analyzing the purported interest of the state of Texas in preventing a breach of the peace, the Supreme Court found that Johnson's burning of the flag did not increase the risk of such an event, nor did Texas's legal counsel even attempt to prove such a risk.[590]

Brennan's opinion also challenged the supposed importance of the Texas law in maintaining "nationhood and national unity," which the Supreme Court found to be an insufficient interest, due to the inherently expressive nature of opposing such a form of patriotism.[591] Brennan wrote that the motive behind the Texas law was instead to prohibit an action that an audience could take "serious offense" to, a concern that Brennan countered by pointing out that the "bedrock principle underlying the First Amendment" is that "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[592]

VI. Justice Kennedy's Concurrence

Justice Anthony Kennedy's concurrence in *Texas v. Johnson* was perhaps the most powerful indicator of the case's rejection of the culture war. Agreeing with Brennan's definition of flag burning as a form of constitutionally protected political expression, Kennedy emphasized that "the hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result."[593] Justice Kennedy, a Reagan-appointed conservative, made no secret of his opposition to flag desecration. However, he also firmly

[590] Birkett, "Flag Desecration Statutes after Texas v. Johnson," 640.
[591] *Ibid*, 642.
[592] Texas v. Johnson, 491 U.S. 397, 105 L. Ed. 2d 342, 109 S. Ct. 2533 (1989).
[593] Henderson, "Today's Symbolic Speech Dilemma," 573.

argued that "the flag is constant in expressing beliefs Americans share, beliefs in law and peace and that freedom which sustains the human spirit," and that "it is poignant but fundamental that the flag protects those who hold it in contempt."[594] Despite his own disgust with the practice of flag burning, he acknowledged that the law is not to be solely based on his own personal views, and that the First Amendment's protection of free expression had been settled long before Gregory Lee Johnson burned the flag.

VII. Dissenting Opinions

Chief Justice William Rehnquist, joined by Justice Sandra Day O'Connor and Justice Byron White, wrote the primary dissenting opinion. The Chief Justice's dissent rejected the overtly legal angle to flag desecration law taken by the majority, in favor of an emotionally charged exaltation of the American flag as a unique symbol deserving special legal protection.[595] Most importantly, Chief Justice Rehnquist disagreed with the premise that the flag represented "simply another 'idea' or 'point of view' competing for recognition in the marketplace of ideas."[596] Instead, he claimed that "millions and millions of Americans regard it with an almost mystical reverence" and a "uniquely deep awe and respect" that would create a legitimate interest under the O'Brien test.[597] Sentiment like that of the Chief Justice was well at home in the 1980s; as a result of the culture war, the American flag was "monopolized" as a "symbol of legitimacy" for the conservative movement.[598] Among an American populace that

[594] Texas v. Johnson, 491 U.S. 397, 105 L. Ed. 2d 342, 109 S. Ct. 2533 (1989).
[595] Texas v. Johnson, 491 U.S. 397, 105 L. Ed. 2d 342, 109 S. Ct. 2533 (1989).
[596] *Ibid*.
[597] Goldstein, *Flag Burning and Free Speech*, 106.
[598] Hunter, *Culture Wars*, 147.

had elected Ronald Reagan president twice in a row in landslide victories, it is likely that very few individuals would not take offense to the destruction of the American flag.[599]

Following this surge of American patriotism, Justice John Paul Stevens wrote a separate dissenting opinion that decried the majority's belief that the flag was but an expendable symbol of a political ideology. A testament to Justice Stevens' military service and immense patriotism, this dissent drew heavily on military iconography, stating that the flag, which had motivated "the Philippine Scouts who fought at Bataan and the soldiers who scaled the bluff at Omaha Beach," was "itself worthy of protection from unnecessary desecration."[600] In contrast with the conservatives of the majority, Stevens, a justice with moderate conservative-to-liberal tendencies, heavily incorporated cultural conservatism in his decision.[601]

VIII. Reactions to *Johnson*

The Supreme Court's ruling in *Texas v. Johnson*, which invalidated all state laws prohibiting flag desecration, received nearly instantaneous backlash. According to a Washington, D.C. dispatch from the day following the decision, "citizens across America were outraged by the Supreme Court decision yesterday ruling that flag burning is not a crime."[602] Some

---

[599] Goldstein, *Flag Burning and Free Speech*, 108.
[600] Texas v. Johnson, 491 U.S. 397, 105 L. Ed. 2d 342, 109 S. Ct. 2533 (1989).
[601] There is academic skepticism that cultural conservative assumptions are able to fully explain Stevens' dissent. I am grateful to Professor Daniel Breen of the Brandeis University Legal Studies Department for pointing out that Justice Stevens' use of cultural conservatism is not the most important or heaviest part of this descent. To read more on why this skepticism is warranted, see the words of one of his former clerks: "The Least Popular Dissent," *SCOTUSblog* (blog), May 4, 2010, https://www.scotusblog.com/2010/05/the-least-popular-dissent/.
[602] Hunter, *Culture Wars*, 28.

opponents of the decision went as far as "gather[ing] on the steps of the high court… to burn a mock Supreme Court justice's robe."[603]

On the night of the decision, Peter Jennings told ABC evening news viewers that "there are very few Supreme Court decisions which we can imagine evoking such a gut reaction as this one," while a *USA Today* poll taken two days after the *Johnson* decision found that "69 percent [of Americans] supported a constitutional amendment" prohibiting flag desecration.[604] President George H.W. Bush stated that the Supreme Court's decision to effectively legalize the desecration of a "banner of freedom" was "wrong, dead wrong."[605] Meanwhile, the House of Representatives voted 411-15 to condemn the ruling and the Senate voted 97-3 to express "profound disappointment" with the Supreme Court.[606]

Although the *Johnson* decision struck down all state-level flag desecration statutes, it did not preclude the federal government from acting on the issue. Both houses of Congress quickly moved to legally circumvent *Johnson*, with Jack B. Brooks (D-TX) leading the charge in the House of Representatives and Joseph R. Biden (D-DE) in the Senate.[607] After initial arguments over whether to introduce a constitutional amendment or a more feasible federal statute, Representative Brooks and Senator Biden each proposed a bill to amend the Flag Protection Act of 1968 in their respective chambers. To avoid a challenge similar to *Johnson*, the Flag Protection Act of 1989 amended the 1968 Act to criminalize flag desecration in the name of any ideology. The Flag

---

[603] *Ibid*, 28.
[604] Goldstein, *Flag Burning and Free Speech*, 108–112.
[605] Henderson, "Today's Symbolic Speech Dilemma," 564.
[606] Goldstein, *Flag Burning and Free Speech*, 114.
[607] *Ibid*, 115.

Protection Act of 1989 passed in both houses, before President Bush allowed it to pass without signing it.[608]

IX. *United States v. Eichman* Tests the *Johnson* Decision

The immense public backlash to the *Johnson* ruling may suggest that the decision was a regrettable mistake by the Supreme Court. This possibility was soon eliminated when the Flag Protection Act of 1989 received its first test. On the day of the law's codification into federal law, Gregory Lee Johnson and seven others burned American flags in protest of the law in Washington, D.C. and Seattle, Washington.[609] All eight were charged with violating the 1989 law, though charges against Johnson were dropped after witness testimony confirmed that his flag had not ignited.[610] Just as supporters and opponents of the Flag Protection Act had planned, the case was appealed to the Supreme Court, with the case being submitted as *United States v. Eichman* (Johnson's fellow activist, Shawn Eichman, was listed as the primary appellee).[611]

After almost a year of the public relations firestorm that had resulted from the *Johnson* decision, it certainly would not have been surprising for any of the five justices who had voted with the majority—especially a conservative justice who had only tentatively sided with Johnson—to change their mind on the flag desecration issue. Nevertheless, on June 11, 1990, the Supreme Court once again ruled 5-4 that the flag desecration ban was unconstitutional, and every justice voted the same as in *Texas v. Johnson*.[612] William Brennan's majority opinion in *Eichman* was nearly identical to his *Johnson* opinion, slamming the Flag Protection Act as "suppression of free

---

[608] Text - H.R.2978 - 101st Congress (1989-1990).
[609] Goldstein, *Flag Burning and Free Speech*, 174.
[610] *Ibid*, 175.
[611] United States v. Eichman, 496 U.S. 310, 110 L. Ed. 2d 287, 110 S. Ct. 2404 (1990)."
[612] Goldstein, *Flag Burning and Free Speech*, 206.

expression."[613] John Paul Stevens's *Eichman* dissent also mirrored his *Johnson* dissent, claiming that the federal government, like Texas's state government, "has a legitimate interest in protecting the symbolic value of the American flag."[614]

Since the Supreme Court's decision in *Eichman*, the focus of supporters of a flag desecration ban has shifted towards passing a constitutional amendment to circumvent *Johnson* and *Eichman*. Such an amendment would supersede the First Amendment to prohibit flag desecration, exempting the ban from the O'Brien test. The most recent of these attempts was in 2006 when Orrin Hatch (R-UT) introduced a Senate resolution proposing an amendment to ban flag desecration, which would ultimately fall one vote short of the two-thirds majority needed to pass in the Senate.[615]

X. Conclusion

Shortly before his 1990 retirement from the Supreme Court, William Brennan expressed his disappointment with the Supreme Court's shift towards cultural conservatism but also stated firmly that he was "not discouraged to the point of giving up [...] after all, Kennedy and Scalia joined me on the flag-burning case, for God's sake."[616] In the words of Gregory Lee Johnson, "being able to criticize the government is at the heart of the First Amendment—without that, the First Amendment really means nothing."[617] This was the view of flag desecration taken by five members of the Supreme Court in *Texas v. Johnson* and *United States v. Eichman*, not the least surprising of whom were Anthony Kennedy and Antonin

[613] United States v. Eichman, 496 U.S. 310, 110 L. Ed. 2d 287, 110 S. Ct. 2404 (1990).
[614] *Ibid*.
[615] S.J.Res.12 - 109th Congress (2005-2006).
[616] Goldstein, *Flag Burning and Free Speech*, 101.
[617] Johnson, Gregory Lee Johnson Interview.

Scalia. For these two conservative, Reagan-appointed justices to join the liberal wing of the Supreme Court in affirming a constitutional civil liberty, not once, but twice, was no accident.

By choosing to rule in favor of Gregory Lee Johnson and later Shawn Eichman, et. al., Kennedy and Scalia were able to set their own conservative leanings aside to rule in a way that they believe most appropriately interpreted the First Amendment. To paraphrase Kennedy, the two made a decision they did not like, but in doing so made the right decision, compelled by the law and the Constitution.[618] Thus, as the Supreme Court becomes more motivated by partisan politics, perhaps the sitting justices should heed the words of Anthony Kennedy and make more decisions they do not like.

[618] Texas v. Johnson, 491 U.S. 397, 105 L. Ed. 2d 342, 109 S. Ct. 2533 (1989).

Bibliography

Birkett, William C. “Flag Desecration Statutes after Texas v. Johnson - A Legislative Solution to a Political Problem.” *Southern Illinois University Law Journal* 14, no. 3 (1990 1989): 625–56.

Collins, Robert M. *Transforming America: Politics and Culture in the Reagan Years*. New York: Columbia University Press, 2007.

Congress.gov. “H.R.2978 - 101st Congress (1989-1990): Flag Protection Act of 1989.” Legislation, October 28, 1989. 10/28/1989. https://www.congress.gov/bill/101st-congress/house-bill/2978.

Congress.gov. “S.J.Res.12 - 109th Congress (2005-2006): A Joint Resolution Proposing an Amendment to the Constitution of the United States Authorizing Congress to Prohibit the Physical Desecration of the Flag of the United States.” Legislation, June 27, 2006. 06/27/2006. https://www.congress.gov/bill/109th-congress/senate-joint-resolution/12/.

Constitution Annotated: Analysis and Interpretation of the U.S. Constitution. “First Amendment.” Accessed March 9, 2023. https://constitution.congress.gov/constitution/amendment-1/.

Goldstein, Robert Justin. *Flag Burning and Free Speech: The Case of Texas v. Johnson*. Landmark Law Cases & American Society. Lawrence, Kan: University Press of Kansas, 2000.

GovTrack.us. “H.R.10480 - 90th Congress (1967-1968): Flag Protection Act of 1968.” Legislation, July 5, 1968. 07/05/1968. https://www.govtrack.us/congress/bills/90/hr10480/text.

Guenter, Scot M. *The American Flag, 1777-1924: Cultural*

Shifts from Creation to Codification. Rutherford, N.J: Fairleigh Dickinson University Press, 1990.

Henderson, Michael A. "Today's Symbolic Speech Dilemma: Flag Desecration and the Proposed Constitutional Amendment Comment." *South Dakota Law Review* 41, no. 3 (1996): 533–73.

Hunter, James Davison. *Culture Wars: The Struggle to Define America*. New York: BasicBooks, 1991.

Johnson, Gregory Lee. Gregory Lee Johnson Interview. Interview by Author. SoundCloud audio, April 1, 2021. https://soundcloud.com/user-565827568/gregory-lee-johnson-interview.

PBS NewsHour. "Biography: Chief Justice William Rehnquist," September 4, 2005. https://www.pbs.org/newshour/politics/law-july-dec05-rehnquist_09-04.

Schaeffer, Katherine, and Ted Van Green. "Key Facts about U.S. Voter Priorities Ahead of the 2022 Midterm Elections." *Pew Research Center*. Accessed April 22, 2023. https://www.pewresearch.org/short-reads/2022/11/03/key-facts-about-u-s-voter-priorities-ahead-of-the-2022-midterm-elections/.

Schulman, Alex. "Kulturkampf and Spite: The Rehnquist Court and American 'Theoconservatism.'" *Law and Literature* 22, no. 1 (2010): 48–75.

SCOTUSblog. "The Least Popular Dissent," May 4, 2010. https://www.scotusblog.com/2010/05/the-least-popular-dissent/.

South Dakota Legislature. "Codified Law 22-9-1." Accessed November 17, 2023. https://sdlegislature.gov/Statutes/22-9-1.

Taylor, R. Neil III. "The Protection of Flag Burning as Symbolic Speech and the Congressional Attempt to Overturn the Decision: Texas v. Johnson Case Note."

University of Cincinnati Law Review 58, no. 4 (1990 1989): 1477–1508.

Cases Cited

Bowers v. Hardwick, 478 U.S. 186, 92 L. Ed. 2d 140, 106 S. Ct. 2841 (1986).
Planned Parenthood v. Casey, 505 U.S. 833, 120 L. Ed. 2d 674, 112 S. Ct. 2791 (1992).
Terminiello v. Chicago, 337 U.S. 1, 93 L. Ed. 2d 1131, 69 S. Ct. 894 (1949).
Texas v. Johnson, 491 US 397 (1989).
Texas v. Johnson, 491 U.S. 397, 105 L. Ed. 2d 342, 109 S. Ct. 2533 (1989).
United States v. Eichman, 496 U.S. 310, 110 L. Ed. 2d 287, 110 S. Ct. 2404 (1990).
West Virginia State Board of Education v. Barnette, 319 U.S. 624, 87 L. Ed. 1628, 63 S. Ct. 1178 (1943).