

UC Santa Cruz

UC Santa Cruz Previously Published Works

Title

Political Symbolism and Pop Art: Property and Representation in Texas v. Johnson

Permalink

<https://escholarship.org/uc/item/0v1598vr>

Author

Mathiowetz, DP

Publication Date

2023-12-11

Peer reviewed

### Political Symbolism and Pop Art: 'Property' and Representation in *Texas v. Johnson*

Dean Mathiowetz

Jean-François Lyotard and Franz Kafka are known for their descriptions of how the legal process can silence certain perspectives.<sup>1</sup> I want to suggest one of those perspectives here. Issues of property and representation fall outside the established lines of inquiry found in First Amendment jurisprudence, and the U.S. Supreme Court's 1989 ruling in *Texas v. Johnson* is no exception. Throughout the legal wrangling over flag burning, however, property and representation continually surfaced as part of the ordinary way many of the people involved thought and spoke about the flag as a political symbol. These themes suggest a way to approach flag burning and political symbolism outside the case-study methodology of traditional jurisprudence. Choosing issues of property and representation as an alternative route through *Texas v. Johnson*, this paper turns to the art of Jasper Johns to provoke a better understanding of political symbolism and the law.

By adopting this perspective, my approach departs radically from most discussions of *Texas v. Johnson* in legal scholarship. These discussions have focused almost exclusively on the congruence of the Court's ruling that statutes prohibiting flag burning violated freedom of speech with precedents in

First Amendment case law. On the one hand, many legal scholars characterized *Texas v. Johnson* as an “easy” case. By this they mean that the decision of the court is neatly derived from Constitutional legal precedents. Take, for example, Professor Akhil Amar’s article in the *Harvard Law Review*: “Notwithstanding the sound and fury of its initial critics on and off the Court,” Amar writes, “*Texas v. Johnson* was plainly right, and even easy—indeed, as right and as easy a case in modern constitutional law as any I know.”<sup>2</sup> Amar might be right insofar as the First Amendment precedents *chosen* by the Court from among those argued make it “easy” to judge the case. On the other hand, legal scholar Paul F. Campos argues that, contrary to many scholars’ writings following *Texas v. Johnson*, there was nothing “easy” about the Court’s decision or Justice William Brennan’s opinion on this case.<sup>3</sup> Starting from the fact that there is nothing in the First Amendment that directly answers our question about the legitimacy of laws to prohibit burning a flag, Campos goes further to claim that even the system of precedents cannot clearly guide the legal process. Campos argues a point that should seem trivial: that in light of the precedents’ inability to clearly guide the legal process, the Court relies on *judgment*—rather than precedent alone—to reach its decisions. Campos calls this use of *judgment* by the Court “political,” by which he seems to mean that the Court’s decisions are inappropriately and arbitrarily willful.

Both Amar’s and Campos’ analyses treat the Court’s opinion in *Texas v. Johnson* as the basis from which to evaluate and criticize the case according to the development of First Amendment case law. By departing from this focus, I wish to suggest instead that the Court’s treatment of what I take to be a problem of political symbolism hidden under the rubric of free speech has obfuscated the issues of property and representation. Although they are ultimately submerged when brought before the Court in *Texas v. Johnson*, these issues have received significant attention throughout the history of the flag-burning controversy. Furthermore, my departure from debates over

First Amendment jurisprudence is intended to expand the ways in which we evaluate the activity of the Court. This approach suggests one way we might follow Justice Anton Scalia’s suggestion that we evaluate a case *as a precedent*, rather than as an *outcome* of precedents. Scalia wrote that “a judicial decision cannot be properly evaluated by the desirability of its [immediate] results” because “a judicial decision with good results is not necessarily sound.” A sound decision, according to Scalia, is one that is a *meaningful* precedent by which to guide future judgment. In sum, while supposing that *Texas v. Johnson* is a “good” result—that is, one consistent with the precedents in First Amendment Constitutional Law—I believe that the Court as arbiter has failed to rule on the most important issues in this ongoing controversy. As a result, instead of redressing confusion and political meleé, *Texas v. Johnson* has only perpetuated them.

As I have suggested, issues of property and representation in *Texas v. Johnson* arise in earlier cases surrounding the regulation of the use of the U.S. flag. Therefore, I begin with an examination of a 1907 Fourteenth Amendment case, *Halter v. Nebraska*, to examine the way in which the problems of property and representation were initially treated by the Court. Second, I turn to one of pop artist Jasper Johns’ best-known works, *Flag*, to highlight the continued relevance of the issues of property and representation for controversies surrounding political symbolism. Third, I examine the history of *Texas v. Johnson* to suggest why and how issues of property and representation were or were not brought to the forefront of the Court’s attention. Last, in light of the Court’s opinion in *Texas v. Johnson*, I look at the arguments advanced by the artists who submitted a brief to the Supreme Court in this case. Through an interpretation of this brief, I suggest why some of the fundamental misunderstandings perpetuated in the continuing fray over flag burning cannot be resolved through First Amendment jurisprudence.

While examining the connections between *Halter v. Ne-*

*braska*, Jasper Johns' *Flag*, and *Texas v. Johnson*, it will be helpful to bear in mind the ambiguity in the meaning of 'property' and its relation to the concept of representation. In an important coincidence of our language, 'property' is a characteristic an object both *has* and *can be*. A flag is an object to which both of these meanings adhere in important ways. First, there are particular properties that a thing must *have* in order to be considered or recognized as a flag. That is, a flag has certain qualities that in fact *make it* a flag. Throughout this essay, I will call this meaning one of 'property.' At the same time, a flag can be owned, in which case the flag *is* the property of an individual, a corporation, or the state. I will call this meaning two of 'property.'

It turns out that the concept of representation is tied to both of these meanings of property. Our English word 'representation' comes from the Latin *repraesentare*, meaning "to make present something that is *not* in fact present."<sup>4</sup> The connection to the first meaning of property is straightforward: a representation of an object must have certain characteristics to render the "something" recognizable to us as present when it is not in fact present. A relevant connection to the second meaning of property, common to classical liberal political theory, is exemplified by the writing of John Locke. Man's original property, according to Locke, is his body, and therefore also his own labor. Objective property, according to Locke, results from the addition of a person's labor to nature. In this way, man's (non-bodily) property represents his labor and, by extension, his body.' In other words, an object which a man produces through his own labor, i.e. his 'property,' stands in for or 'represents' his own body. From this perspective, political symbols, and the flag in particular, function in part through the ambiguity in the word 'property' and thus complicate their relationship to representation. Not only has the confusion about how to think about property and representation never been addressed directly by the Court, but also the Court has, at various times, written opinions that make claims about the status of the flag

as property and representation, while ruling only on its status as a vehicle for acts of symbolic free speech. I wish to call into question the Court's oversight of these issues in *Texas v. Johnson* and suggest its implications for our politics. Finally, I offer avenues for further theorizing political symbolism and the limits of the legal process.

### Old Glory: Private Property or Patriotic Representation?

Use of the U.S. flag had been regulated by state and federal law since the 1870s. The first case to come before the Supreme Court involving use of the U.S. flag was *Halter v. Nebraska* (1907). *Halter* is of key significance for my argument, because the Court articulated the states' legitimate interest in regulating use of the U.S. flag through the Fourteenth Amendment.<sup>6</sup> More specifically, the states' interests in *Halter* were articulated in terms of property and representation which resonate with the contemporary debate over the flag's symbolic meaning and how its destruction affects it as a symbol.

*Halter v. Nebraska* was a test of the validity of a 1903 Nebraska statute, "An act to prevent and punish the desecration of the flag of the United States." Although the wording and intent of this statute were much the same as those of Texas' in 1986, at issue in this case was the use of the flag or an image of the flag for advertising. Some products were exempted from the act, including any "newspaper, periodical, book, pamphlet, circular, certificate, diploma, warrant, or commission of appointment to office, ornamental picture, article of jewelry, or stationery for use in correspondence,...disconnected from any advertisement."<sup>7</sup> Halter was convicted for selling a bottle of beer "upon which, for the purposes of advertisement, was printed...a representation of the flag of the United States."<sup>8</sup>

Justice John Marshall Harlan wrote the opinion of the Court, which struck down Halter's claim eight votes to one.<sup>9</sup> Harlan takes a moment at the beginning of his opinion to point out that since over half of the states had passed legislation

similar to Nebraska's, the Court must "pause before reaching the conclusion that a majority of the States have, in their legislation, violated the Constitution of the United States."<sup>10</sup> The argument that the Court must give additional weight to the popularity of legislation regulating the use of the U.S. flag in these cases is one that returns frequently throughout the history of the U.S. flag in the courts. However, Harlan's remark is noteworthy insofar as the Court has recently resisted such arguments when the question at hand involves Constitutional rights.<sup>11</sup>

Halter advanced two arguments. First, he argued that Nebraska did not have the power to make laws regulating use of the U.S. flag. In response to this claim, the Court in *Halter* articulated a state's interest in regulating the flag's use. This is why proponents of legislation to regulate use of the flag continue to invoke *Halter* even though the Court was ruling on a Constitutional claim that is now wholly defunct.<sup>12</sup> In a turn of phrase that will haunt the debate over flag burning for years to come, Harlan writes that Nebraska's enactment of legislation to regulate the use of the U.S. flag is itself symbolic political expression. According to Harlan, "the State may exert its power to strengthen the bonds of the Union and therefore, to that end, may encourage patriotism and love of the country among its peoples."<sup>13</sup> Legislation to proscribe the use of the U.S. flag is encouragement by the state for the citizens to love the Union of which it is a part. The flag is not merely an expression of this love, but rather an essential medium of this expression, insofar as "love both of the common country and of the State will diminish in proportion as respect for the flag is weakened."<sup>14</sup> Harlan's rationale connects the states' interest with an essential act of political expression on the part of the government. In so doing, Harlan responds to Halter's first claim by emphasizing Nebraska's legitimate interest as an act of symbolic speech.

Second, Halter argued that the exemption of certain products from the law barring use of the flag on an item for sale

arbitrarily distinguished between legitimate and illegitimate uses of the flag, and therefore the statute violated the Fourteenth Amendment provision that "no State...shall deprive any person of...property, without due process of law." The Nebraska statute, he said, violated the Fourteenth Amendment by arbitrarily depriving some groups of a property that other people would find secure under the statute. Those who might place the flag on a bottle of beer, for example, are denied the return provided by using a flag to promote their product. Those who would place a flag on a book or political pamphlet, on the other hand, are not deprived of this property. While Fourteenth Amendment claims of this nature have been rejected out of hand since *Carolene Products*,<sup>15</sup> the Court in *Halter* makes arguments relevant to the contemporary problem of the law and political symbolism.

In response to Halter's Fourteenth Amendment claim, Harlan's opinion goes beyond establishing the flag as an essential medium of patriotism. This case is the first instance of the Court connecting the flag as property and the flag as representation in a way that speaks for the states' legitimate interest in regulating its use. Note how the ambiguity in the meaning of 'property' comes into play. In Halter's view, the flag is property because it is potential revenue, and therefore its use in advertising is protected by the Fourteenth Amendment. Harlan, who was generally known for his opposition to the gradual narrowing of civil rights guaranteed by the Fourteenth Amendment, responds:

If it can be said that there is a right of property in the tangible thing upon which a representation of the flag has been placed, the answer is that such representation—which, in itself, cannot belong, as property, to an individual—has been placed on such thing in violation of law and subject to the power of Government to prohibit its use for purposes of advertisement.<sup>16</sup>

Harlan shifts Halter's Fourteenth Amendment claims away from the revenue potential of using the flag in advertising and toward property in the *representation* of the flag itself. The flag, for Harlan, is not just a "tangible thing," but a tangible thing imbued by a representation. Though the "tangible thing" might be private property, the representation of the flag is not. Earlier in his opinion, he characterizes this representation as a result of "the American people...prescrib[ing] a flag as symbolical of the existence and sovereignty of the Nation."<sup>17</sup> As a result, Nebraska's legitimate attempt to "cultivate a feeling of patriotism" cannot be said to infringe on Halter's constitutional right to property. "On the contrary," he reasons, "a duty rests upon each State in every legal way to encourage its people to love the Union with which the State is indissolubly connected."<sup>18</sup> The state legitimately protects and promotes its interest in the bonds of federalism by regulating commercial use of the representation of a U.S. flag.

The legitimacy of the state's interest is apparently due to the fact that the state, through an act of political expression, created and hence *owns* (as property, meaning two) the representation of the flag. Of course, the property (meaning one) of a flag, owned by the state, is the fact of representation: Old Glory has thirteen red and white stripes, fifty stars on a field of blue, etc. A conundrum emerges in the Court's logic, however. What the flag represents—liberty, freedom, unity, revenue, etc.—cannot be property (meaning two) at all, unless the representation of the flag itself is a property, at the disposal of the body to which it belongs. Here, that body is the state, which in turn represents a unified body politic. That is, the state owns the abstract representation of the flag, and therefore also owns every concrete representation of it as well, in distinction to the "tangible thing" upon which that concrete representation is placed. Harlan's opinion asserts that an *individual* cannot own (as property, meaning two) the representation of the U.S. flag. While this might seem strange at first, this is in fact the position of the Court in response to Halter's claim.

Curiosities in the logic of *Halter* point toward the central conflicts between opposing sides on the issue of the flag's protection, particularly when the issue is use of the flag in precisely the manner Harlan extols: as symbolic political expression. This issue of representation, as it is raised in *Halter*, brings along with it a series of crucial questions, the first being: What is a flag? Put another way, this question asks: What are the properties (meaning one) of a flag? Only after the essence of a flag has been determined, could one ask: In what sense might the flag *be* property (meaning two)? How are the flag as property and the properties of the flag to be regulated, if at all, were it even possible to do so?

One might be tempted, in an effort to put an end to the debate over flag burning, to make a legal argument establishing the flag as *one* kind of property and partaking in *one* kind of representation. One can imagine, according to the familiar terms of the American political landscape, the two positions that might arise from this temptation. An imaginary conservative would argue (and as we shall see, Texas did argue in *Texas v. Johnson*) that the representation (image) of the flag is in fact the property of the government—and therefore destruction of a representation destroys essentially *public* property. An imaginary liberal would argue that each particular flag is the *private* property of the defendant—and that its destruction represents the free personal expression of the protester. Confronted by these positions, it may be worthwhile to look for a third way to think through the problems of property and representation raised by flag burning. Pop artist Jasper Johns' work suggests that when it comes to Stars and Stripes, regulation can be neither a matter of the "time, manner, and place" typically invoked in First Amendment jurisprudence, nor a matter of privileging one meaning of 'property' over another. Rather, it is a matter of object—Stars and Stripes as a fundamentally representative object, with unique properties that cannot be regulated at all, a fact that frustrates attempts to treat flag burning as an issue of free speech and would render useless an

attempt to amend the Constitution.

### Flag: Representation or Replica?

Flags were a big deal in 1954. On Flag Day, the *New York Times* editorial page called out for the need to reestablish Old Glory as the symbol of national unity; on November 11 the famous Iwo Jima Marine Memorial was dedicated at Arlington National Cemetery.<sup>19</sup> It was also in 1954 when Jasper Johns, an artist often associated with the beginnings of the "Pop Art" movement in New York, created the most famous of his early works, *Flag*.

Johns, who did his best-known and most-studied work from the late 1950s through the mid-1970s, is especially emblematic of the Pop Artists' break with the Abstract Expressionist tradition. Whereas Abstract Expressionist painting sought to reconcile the conflict between the three-dimensionality of the "thing" represented in two-dimensional painting by doing away with representation altogether, Johns sought to restore conflict to painting by creating three-dimensional representations of two-dimensional objects, such as maps, targets, and flags. This approach to representation draws the viewing public's attention not only to the nature of painting but also to aspects of symbolism and representation. Johns' work is also concerned with the possible range of meanings attached to symbols. Art critic Fred Orton writes that "Johns...attempts, consciously or unconsciously, to escape censure by making paintings that resist, evade or control the interpretations and meanings that can be produced for them."<sup>20</sup> Johns inaugurated this theme with *Flag* and continued to devote himself to it during this period.

Johns' *Flag* raises the problem of what a flag *is*. According to United States Statutes at Large,

[t]he word 'flag'...as used herein shall include any flag...or any picture or representation [thereof], made of any substance

or represented on any substance, of any size evidently purporting to be...of said flag...of the United States of America or a picture or representation [thereof], 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...of the United States of America.<sup>21</sup>

Is Johns' *Flag* a flag, or a "picture or representation thereof?" To see how Johns approaches the question of what a flag is, one needs to determine what *Flag* is, and how *Flag* and the U.S. flag are connected as a political symbol. After all, one might be tempted to say that *Flag* is merely a painting of a flag, and like silk-screened underwear or an emblazoned credit card, is not itself a flag, capable of desecration.

*Flag* is listed as composed of encaustic, oil, and collage on canvas. Encaustic, which is essentially hot wax, enabled Johns to create a three-dimensional Stars and Stripes by layering newspaper clippings in the wax coating. Johns' Stars and Stripes, then, almost takes on the quality of an impressionist painting: the simple image seen from far away appears increasingly distorted and complicated as one gets closer to it. Johns also used oil paint to "clean up" the final product, straightening the divisions between the stripes and sharpening the outlines of the various stars. The text of the newspaper clippings remains visible through the encaustic and oil, a point to which I shall return below.

Is *Flag* merely a painting of a flag? The question is an important one of representation in art and, in the case of political symbols, representation in politics. As Hanna Pitkin writes, "the history of art and art criticism demonstrates that artistic representation has always been a matter of style and convention, as well as of skill...Even in paintings of the most painstaking accuracy, even in *trompe-l'oeil*, the artist does not reproduce reality but combines paint in complex ways on

canvas."<sup>22</sup> Orton's description of Johns' technique greatly complicates the matter stated by Pitkin:

Whatever the technique is, it is and is not 'painting.' Which is to say that *Flag* makes sense—albeit an uncertain sense—if we understand it as made of something that is neither collage nor painting but simultaneously collage and painting.<sup>23</sup>

Orton's statement, while convoluted, makes at least one clear point: Johns' technique, when combined with his subject matter, exactly blurs the distinction between a "real" Stars and Stripes and a "representation" of Stars and Stripes. A "real" Stars and Stripes—the kind made by Betsy Ross—is a collage: each part of the flag is a separate piece of cloth, and the pieces are sewn together in such a way as to create Stars and Stripes. Johns' *Flag* is a collage not only insofar as its surface is covered with wax-laden newspaper clippings, but also insofar as the "painting" is really three canvases fastened together, in much the same way that the panels of the Betsy Ross-version of Stars and Stripes are put together: one panel for the canton, or field of stars; another for the seven stripes to the right of the canton; and a third for the six stripes below the canton. With *Flag* thus in view, one could respond to Ernst H. Gombrich's assertion in *Art and Illusion* that "a representation is never a replica"<sup>24</sup> by saying that when it comes to political symbolism, every replica is a representation.<sup>25</sup> Calling to mind Justice Harlan's assertion in *Halter* about the nature of representation in the flag, Johns' art suggests that there can be no distinction drawn between the "tangible thing" and the representation of the flag.

To end our discussion of *Flag*'s attack on conventional notions of representation here would collapse Harlan's paradox and concede the case too quickly to our imaginary conservative who, as I suggested, might argue that the flag is, in fact, the property (meaning two) of the government. If every replica is a representation, property in the flag could be held only by the state that created it as an act of political expression. But let

me further complicate this reasoning. Johns' *Flag* is not merely a representation-replica of Stars and Stripes. Orton also reads it, in part, as an intensely personal document; he finds among the pieces of collages references to events and items which could be meaningful only to Johns' close friends (or those intimately acquainted with Johns' life). He notes,

the fragment, close to the map of the United States, in which is mentioned Port Arthur, Texas,... [is a reference] to Rauschenberg, who grew up there; and an ad claiming that "any one of these [...] agents can help you [...] on your fire insurance"...[was] indexed to Rachel Rosenthal, who had a fire in her loft in the winter of 1955.<sup>26</sup>

While Johns' technique eviscerates our imaginary liberal's assertion that the flag is the *property* of the defendant, the destruction of which represents the free expression of the protester, it simultaneously asserts the problem of conveying a standardized, public message through regulation of the representation-replica.

If many of the texts of *Flag* are so personal, what makes *Flag* political? One might look to the more general newspaper clippings which make up the collage and are visible under the encaustic surface to find some kind of political statement, perhaps even the kind of anti-government statement often associated with flagburning. Orton points out that this is not the case. Instead, Orton finds, among many things:

several texts from a "Dondi" comic strip that was published in the *Daily News* on Wednesday, 15 February 1956;...a fragment of the title and author of the serialized '[And] Death Cam[e Too b]y Anthony G[ill]'... Elsewhere there are bits of essays and articles... "A Famous Hollywood Figure Tells You How To Reduce"—what? Weight, I guess. Here is a recipe for applesauce; there...fragments from at least two chapters of a medical textbook, one with the title "The Nervous System."<sup>27</sup>



The point is that behind the stars and stripes, behind the paint and the encaustic, is not a collage of protest, but instead a collage of ordinariness in American life. It is a collage of the sort we might not typically consider a part of the Stars and Stripes, but there's no mistaking Johns' *Flag* for anything else. Newspaper comics, apple sauce, pulp fiction, Hollywood and medical science—*Flag* is American indeed.

But the political quality of *Flag* goes beyond its reflections on the "Good Life" of 1950's America. Being a flag itself, *Flag* generated controversy before it was even publically displayed, a conflict that can only be understood as centered on the way in which *Flag* is a flag. The Board of Trustees at the Museum of Modern Art in New York City originally declined to purchase *Flag*, fearing that "it would offend patriotic sensibilities" and concerned that it might leave the MOMA "open to attack from groups like the American Legion."<sup>28</sup> It was not until 1973 that the museum purchased *Flag* and still then amid substantial controversy.<sup>29</sup> If *Flag* is so coyly American, then why this controversy among the Board of Trustees? It must be understood by what Alan R. Solomon describes as Johns' "unwillingness to let his pictures function as a means to expression [of a symbol] in the traditional way."<sup>30</sup> It is precisely this feature of his work, alongside how meticulously Johns' *Flag* is a representation-replica of Stars and Stripes, that must have generated the controversy in 1956. It is also this feature of his work that points directly to the impossibility of choosing among the meanings of property (as that which is either essential to an object or points to the owner of the object) when it comes to public symbols such as the Stars and Stripes. Simultaneously replica and representation, the flag as a political symbol eludes attempts to fix its meaning.

Then how can it be that the flag, as a political symbol, conveys meanings so direct and powerful that it becomes a highly controversial site of public protest? When a flag is occasionally burned, the meaning of the act is rarely as ambiguous

as that conveyed by Johns' art or suggested by a reading of a Fourteenth Amendment case with more than ninety years of hindsight. By turning now to an instance of flag burning that has defined the law on the issue, we can observe issues of property and representation as they emerge in the legal process surrounding the concrete facts of a particular case. We can follow these issues through their displacement by the rhetoric of free speech. Finally, from a theoretical perspective highlighting the fundamentally representative nature of the flag as a political symbol, I suggest what more we can learn about political symbolism and the legal process.

### Does Destroying the Replica Destroy the Representation?

On August 22, 1984, demonstrators took to the streets of Dallas to protest the Republican National Convention, where Ronald Reagan was re-nominated as the Republicans' Presidential candidate.<sup>31</sup> This demonstration of seventy-five to one hundred people, many of whom participated as part of the Revolutionary Communist Youth Brigade, was led by Gregory Lee "Joey" Johnson and Denise Williams. The protest began unremarkably. In a downtown officetower lobby the protesters conducted a "die-in," in which they fell to the floor and groaned in theatrical agony for several minutes to protest the proliferation of nuclear weapons. In a bank lobby, the protesters tore up deposit slips and uprooted plants. They then made their way through downtown Dallas, spray-painting the walls and windows of buildings. Along the way Johnson, Williams, and the protesters passed the Mercantile National Bank building. In front of the building were three flagpoles, flying the U.S., Texan, and Mercantile National Bank's flags. A demonstrator bent down the flagpole bearing the U.S. flag, which was then removed from the pole and handed to Johnson. The group moved on toward City Hall, spray-painting buildings and sidewalks, conducting "die-ins," chanting slogans and obscenities.

When they reached City Hall, the protesters began to chant, "America, red, white, and blue, we spit on you." Williams and Johnson held the flag while Johnson tried unsuccessfully to ignite it with a cigarette lighter. A demonstrator handed Johnson a can of lighter fluid, with which he doused the flag. Johnson's second attempt to light the flag was successful, and it was burned without further incident until uniformed police arrested Johnson over half an hour later. Daniel Walker of the U.S. Army Corps of Engineers gathered the charred remains of the flag and buried them in his backyard.

No other arrests were made in connection with the protest, despite various graffiti, destruction of property, and miscellaneous disturbances of the peace. Ed Hasbrouck, a First Amendment activist who was close to Johnson and who has been involved in the flag burning issue since *Texas v. Johnson* was taken up by the Supreme Court, suggests "that the reason...only Johnson was arrested was that the Dallas Police had targeted [him] in advance, as a 'ringleader,' 'agitator,' or 'trouble-maker.' The flag burning was merely an excuse or opportunity." Johnson was charged with "desecrating a national flag" under section 42.09 of the Texas Penal Code. The code reads, in part:

Desecration of a Venerated Object.

(A) A person commits an offense if he intentionally or knowingly desecrates...

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.<sup>32</sup>

Despite Johnson's role in the events preceding the flag's burning, no other charges were brought against him and he did

not testify on his own behalf in the trial court. Three witnesses who observed the march for the American Civil Liberties Union presented the evidence for the defense.<sup>33</sup> They testified that Johnson had not burned the flag.<sup>34</sup> The prosecution also called three witnesses to the stand. Officer Stover, who was acting undercover for the Dallas Police Department at the demonstration, said that she was "seriously offended" by seeing the burning of the flag, but did not see who had done it. Officer Tucker, who was also acting undercover for the Dallas police, said he saw Williams holding the flag while Johnson set it aflame. He was also "seriously offended" by Johnson's actions. Walker, who gathered the remains of the flag after the protest, testified that

this was the first time that I ever saw the flag burning and I told them what I felt—my feelings, as I felt that it was...an individual and corporate suicide. And they said, "what do you mean by corporate?"

And I said that in every society, those who try to destroy it will usually succeed in destroying themselves...<sup>35</sup>

One cannot help but notice in Walker's statement a plain appeal to notions of patriotic representation in the flag. Specifically, Walker's testimony suggests that political community is maintained by the representation of that community's unity through political symbols. Drawing on this notion, the lawyer for Texas told the jury in his concluding remarks that "Johnson posed a danger to Texas... 'by what he does and the way he thinks.'"<sup>36</sup> Johnson was convicted under section 42.09 and sentenced to one year in prison.

Johnson appealed the decision to the Texas Court of Criminal Appeals, arguing that the statute was too broad. In particular, the language of section 42.09 (B), which reads "'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,"

clearly constitutes a "heckler's veto," which the Court of Criminal Appeals ruled unconstitutional in *Gregory v. Chicago*.<sup>37</sup> Moreover, section 42.09 (A)(3) includes any "state or national flag" among venerated objects included under the statute. Rather than rule on these aspect of Johnson's case, however, which cut right to the heart of Texas' definition of "desecration" and "flag" and hence the statute itself, the Court of Criminal Appeals spoke instead in the familiar First Amendment terms of symbolic speech. In so doing, the Court ruled on the specific events surrounding Johnson's arrest, rather than on the language of the statute itself.

The Texas Court of Criminal Appeals overturned the lower court's ruling. The majority in the appellate court concluded that Johnson's act, in the context in which it arose, constituted symbolic speech under *U.S. v. O'Brien*.<sup>38</sup> However, they did not find that Johnson's First Amendment rights, *if any* in this instance, outweighed the state's interests—preventing a breach of the peace and preserving the flag as a symbol of national unity—in regulating this type of conduct. Rather, the majority questioned the validity of those interests (i.e. the state's) in this particular case. The appellate court insisted that there was no evidence that Johnson's "decision to burn the flag caused unrest or the imminent likelihood of unrest."<sup>39</sup> Further, in language that strikes at the heart of Harlan's opinion in *Halter*, the court maintained that

[r]ecognizing that the right to differ is the centerpiece of our First Amendment freedoms, a government cannot mandate by fiat a feeling of unity in its citizens. Therefore, that very same government cannot carve out a symbol of unity and prescribe a set of approved messages to be associated with that symbol when it cannot mandate the status of feeling the symbol purports to represent.<sup>40</sup>

By making this argument, the Texas Court of Criminal Appeals raises the question of the relationship between symbols and political discourse. Is it the case that, as Harlan argued,

feelings of patriotism are created and maintained by representations of publicly established symbols of patriotism? Or is it rather the case that, as the Texas Court of Criminal Appeals suggests, chthonic feelings of patriotism are what create and maintain these symbols? The disagreement between *Halter* and the Texas Court of Criminal Appeals is centered on the relationship of political feeling—in this case, patriotism or protest—to political symbolism. My reading of Harlan's opinion in *Halter* suggests that the flag must be understood as mediating political feeling through its *representative* quality. Jasper Johns' *Flag* contributes the insight that the flag, as a political symbol, is fundamentally representative in a way that does not compromise the distinctive expression of each instance of its use. That is, although each representation is "the real thing," the messages through the representation are not similarly standardized. Taken together, *Halter* and *Flag* indicate that we must address the problem of representation to determine whether patriotism (or protest) is created or maintained by political symbolism, or vice-versa.

The Texas Court of Criminal Appeals ruled on behalf of Johnson and cast doubt on the validity of Texas' statute, but it did not strike down the law itself. Considering the many weaknesses of the state's case it is surprising that John Vance, a Texas District Attorney, pursued the case at the federal level.<sup>41</sup> To shore up its chances in the Supreme Court, Texas tried a somewhat different approach, now more directly (although perhaps unwittingly) invoking property and representation. This time, the reasoning forwarded by Texas was two-headed: For one, Texas has the right to regulate the non-speech aspects involved in burning a U.S. flag. To that extent, Texas claimed that its statute was "content-neutral," which is to say that the statute prohibits the physical act of flag burning, "regardless of the message that the actor is trying to convey...A protestor can say whatever he or she wishes about the flag in the meantime."<sup>42</sup> Consistent with this position, Texas also argued for an intermediate level of judicial scrutiny in cases which were content-neutral. In effect, Texas argued against treating Johnson's act

of flag burning as an act of free expression.

Of course, Texas was unable to ignore the fact that its own Court of Criminal Appeals had considered Johnson's act one of "symbolic expression" as defined in *Spence v. Washington*,<sup>43</sup> thereby blurring the legal distinction between the action itself and its meaning. While in *Spence* the Court did not rule on the interest of the state in protecting the flag as a symbol of national unity, Texas' second argument sought to distinguish its case from *Spence* by pointing to a long judicial tradition of special respect for the flag to justify the state's interest in the flag as a venerated object. To that end, Texas cited Justice White in *Smith v. Goguen* as saying "the flag is itself a monument, like the Lincoln Memorial, and therefore is subject to similar protection."<sup>44</sup> Lest opponents of Texas' position insist that, unlike the Lincoln Memorial, a flag need not be public property, Texas cited a Georgia case, *Monroe v. State*. The opinion in this case points directly back to Harlan's reasoning in *Halter*. Recall that according to *Halter*, the representation of the flag is itself the property of the State, even if the "tangible thing" is privately held. In *Monroe*, the court puts a slight twist on Harlan's reasoning, stating that "while it is true that a physical reproduction of this symbol in the form of red, white, and blue cloth may be privately purchased and donned, that which the flag represents is not subject to private ownership."<sup>45</sup> Texas went ahead with this argument despite the Texas Court of Criminal Appeals' comment that "the government...cannot mandate the status of feeling the symbol purports to represent,"<sup>46</sup> a view which directly contravenes *Halter's* logic that what the flag represents cannot be property unless this representation can be created by and at the disposal of the body to which it belongs.

Discussion of flag burning in terms of property and representation was stopped short by the ACLU, which argued that the Texas Court of Criminal Appeals' decision ought to stand. "[Texas'] case," the ACLU wrote, "is largely devoted to describing events and precedents that are not germane to the legal question presented [in this case]."<sup>47</sup> This statement reveals the

ACLU's attempt to confine the arguments of *Texas v. Johnson* to the rubric of the First Amendment. Two of the ACLU's main points specifically foreclose arguments made about property and representation. First, the ACLU argued that Johnson's act clearly constituted symbolic speech, as in *Spence*. Second, the ACLU claims that the interests of the state in preserving a symbol of national unity are *misplaced* rather than central to this issue:

While it is true that this Court has never resolved this question in precisely this form, it is equally true that this Court has often indicated in related contexts that the nation's choice of symbols cannot be forced on its citizens. As this Court stated in its memorable opinion in *West Virginia Board of Education v. Barnette*, "A person gets out of a symbol the meaning he puts into it."<sup>48</sup>

The important question of political symbolism—whether the state maintains patriotism through political symbols or instead the symbols are an expression of chthonic patriotic feeling—is collapsed once and for all in a most unhelpful way by the Supreme Court's opinion in *West Virginia Board of Education v. Barnette*. While it is surely true that a political symbol has some degree of personal meaning, it is precisely that symbol's political—that is, shared—significance that either justifies its patriotic regulation or makes it a unique site of meaningful public protest. Put another way, the destruction of a replica of a political symbol necessarily reaffirms its representative status. By treating the flag as one among many equivalent avenues of essentially personal expression, however, the ACLU's position ultimately disposes of the significant public character of the flag as a symbol and chooses the imaginary liberal's point of view with respect to property and the flag.

The arguments in the chambers of the Supreme Court on March 21, 1989, were relaxed and brief. First Assistant District Attorney for the state of Texas, Kathy Drew, opened with a

concession: Texas would assume the “symbolic speech standard” of First Amendment jurisprudence applied to this case, and would instead argue for “Texas’s compelling interest in regulating [flag burning].”<sup>49</sup> Immediately after Drew’s opening statement, Justice Scalia began a line of questioning reminiscent of the disagreement, which I pointed out earlier, between the logic of *Halter* and the opinion of the Texas Court of Criminal Appeals. Drew argued that “if a symbol over a period of time is ignored or abused it can, in fact, lose its symbolic effect.”<sup>50</sup> Justice Scalia weighed in on the side of the Texas Court:

It seems to me you’re running a quite different argument—not that [the flag burner is] destroying [the flag’s] symbolic character, but that he is showing disrespect for it, that you not just want a symbol, but you want a venerated symbol, and you don’t make that argument [directly] because then you’re getting into a sort of content preference.<sup>51</sup>

This kind of content preference is specifically prohibited by First Amendment jurisprudence and would automatically override any state interest in regulating the conduct. A few moments later, Drew was forced by Justice Sandra Day O’Connor to make another concession: that section 42.09 [B] of the Texas Penal Code constituted a heckler’s veto, in which case Texas was left to argue that “the pivotal point is, in a way, how the conduct is effectuated, how it is done, not what an individual may be trying to say, not how onlookers perceive the action, not how the crowd reacts, but how it is done.”<sup>52</sup> Drew was now backed into a corner. “How it is done” could only turn around the idea of property:

We believe that there are compelling state interests that will...override this individual’s symbolic speech rights, and that preserving the flag as a symbol, because it is such a national property, is one of those.

I think the flag is this nation’s cherished property, [in which] every individual has a certain interest. The government

may maintain a residual interest, but so do the people. And you protect the flag because it is such an important symbol of national unity.<sup>53</sup>

Drew effectively reiterated the point that the flag is property, and specifically, that it is the property of the state. Attorney William Kunstler, in turn, made his argument on behalf of Johnson first by pointing to the vagueness inherent in any statute regulating the use of a flag and then by invoking *West Virginia Board of Education v. Barnette*. By basing his argument upon a logic which argues for freedom of expression at the expense of recognizing the specifically political nature of the symbol through which the expression is mediated, Kunstler once and for all collapsed the issues of property and representation in such a way as to exclude arguments outside the rubric of First Amendment case law.

#### Political Symbolism Is Essentially Contested Representation

The question of political symbolism raised in *Texas v. Johnson* and foreclosed by Kunstler is addressed in a brief submitted on behalf of Johnson by sixteen well-respected American Pop Artists. Among them is Jasper Johns, along with Robert Rauchenberg, Claes Oldenburg, Paul Conrad, Coosje Van Bruggen, Mark Disuvero, Hans Haacke, Irving Petlin, Faith Ringgold, Jenny Holzer, Michael Glier, Nancy Spero, Leon Golub, Sol Lewitt, Carl Andre, and John Hendricks. This brief is particularly worthy of attention because its arguments go beyond the mundane questions posed by Johnson’s and the ACLU’s briefs about heckler’s vetos and sufficient state interests. Their brief further demonstrates the salience of issues of property and representation as they relate to political symbolism.

The artists justify their contribution by pointing out that “artists do not communicate through words, but reach their audiences through the use of symbols and recognized images.”<sup>54</sup>

In this single stroke the artists acknowledge the necessity of symbolic expression as well as affirm the role of symbols and recognized images in all public discourse. It is after all the same brand of expression from which the *representative* character of the flag draws its strength and efficacy as political expression, as Harlan so eloquently suggests in his discussion of the flag's proscription as a symbol in *Halter v. Nebraska*.

The artists' brief raises two questions. The first is a germane question about due process. "Due process," the artists insist, "requires that people not be required to guess at the meaning of a statute, especially a criminal statute. Yet several of the terms in section 42.09, 'seriously offend,' 'national flag,' and 'deface, damage, or physically mistreat,' are vague and require such guesswork."<sup>55</sup> This question of due process further leads the artists to what I believe to be the crux of their argument about symbolic expression and flag burning and to the issue that, as I have argued, Jasper Johns' art specifically addresses: What is a flag?

On the most basic level, the artists point out that "flag" is nowhere defined in the Texas Penal Code, [hence] an artist could reasonably conclude that the statute applies not only to three-dimensional flags that might be used in a construction or sculpture, but also to any depiction of a flag on paper or canvas."<sup>56</sup> An understandable response to the artists' complication of this aspect of regulating flags' use would be that interpretation of the law involves some kind of common sense not wholly different from Justice Potter Stewart's famous assertion about obscenity: "I will not define [it]...but I know it when I see it."<sup>57</sup> The artists' concern goes deeper, though, than just the legal nightmare of arriving at a common-sense definition of a flag:

At first blush, the question "What is a flag?"...might seem odd. But in a day when people rise before major league games to the Star Spangled Banner and salute a two-dimensional representation of the flag projected upon a giant video screen or light

board and in a time of widely varying attitudes and tastes for displaying something as ubiquitous as the U.S. flag *and representation of it* the question is not at all frivolous.<sup>58</sup>

Although the artists are particularly concerned with the use of the flag in art, their question is more broadly applicable. Of course flags are printed on cloth, paper, and plastic; they appear in television advertising and on the Internet; they are sewn into jackets, shirts, and boxer shorts; they are printed on credit cards, transformed into bunting, and frosted on birthday cakes. It is instructive to consider all of these places where one sees flags and ask: Which of these representations are *really* flags? Which are not? What, then, is the *real difference* between these two classes of representations of flags? Put another way, what are the *properties* of an American flag?

The artists point out that even a "common sense" approach to determining the properties of a flag is in principle incapable of guiding the interpretation of a law prohibiting the desecration of a flag. The ambiguity in "common sense" reasoning is not so trivial as it might seem. One might be tempted, for example, to suggest that a representation of a flag is only *really* a flag if its use or destruction counts as desecration. Under this reasoning, wearing a flag as underwear or clipping an expired credit card in half could not count as desecration, and these representations are not "flags." But now the question, "What is a flag?", has finally been replaced by a more fundamental question, "What does it mean to desecrate a flag?" The answer to this question is only certain when the meaning of the flag itself is certain.

With respect to the flag, this is the essence of political symbolism. Insofar as a public feeling creates the flag through representation, it cannot do so unanimously and for all time. As a political symbol, the flag must be capable of representing and replicating the multiplicity of political feelings through which, and in spite of which, it arises. Simultaneously public and private, it cannot itself create political unity, yet is essential to

the shared public discourse that is the only substitute for unity in political life. In an age of information technology, virtual reality, and disappearing public spaces, the representation-replicas of political symbols may be the most salient sites of public contests over policy, meaning, and right.<sup>59</sup>

### Another First Amendment Ruling: Now What?

On June 21, 1989, the Court struck down the Texas law in a five-to-four vote. Justice Brennan wrote the opinion of the Court. He began by casually addressing the debate between the Court's reasoning in *Halter*, as invoked by Texas, and the Texas Court of Criminal Appeals' ruling on behalf of Johnson. In a hint reminiscent of talk about "venerated objects," Brennan wrote that "there is a special place reserved for the flag in this Nation."<sup>60</sup> This essay has argued that this "special place" as a political symbol makes the meaning of Johnson's protest possible and unique.

Despite the salience of the issues of property and representation to people involved with the case from those at the site of the protest to those in the chambers of the Supreme Court, *Texas v. Johnson* came through the courts as a First Amendment case. Ignoring the frequency with which the problem of political symbolism was raised in the Court's chambers, in the testimony of the trials, and in the respective briefs submitted by Texas and the artists, Justice Brennan couched the centerpiece of his argument around the familiar terms of First Amendment jurisprudence:

[I]f there is a bedrock principle underlying the First Amendment, it is the idea that the Government may not prohibit the expression of an idea because society finds the idea itself offensive or disagreeable. We have not recognized an exception to this principle even where our flag is involved.<sup>61</sup>

By pointing out that nothing in the First Amendment allows

for an exception to its principles for the U.S. flag, the Court implies that the amendment process offers the only viable resolution. Unfortunately, as my examination of *Halter, Flag* and *Texas v. Johnson* demonstrates, pivotal issues raised by flag burning are resolved at our peril through an amendment to the Constitution. Nevertheless, debates over flag desecration statutes continue to appear on the floor of the House every year. While the issue is losing its salience among the public, such continued congressional discussion reminds us that we have not yet begun to address the problem of how we are to think, politically and legally, about the flag as a political symbol.

My approach has a particularly ironic implication. I have argued that a conservative position raises fundamental issues about property and representation, which, when addressed through art and theory, make the most specific argument *against* the conservative case. Meanwhile, the liberal position's foreclosure of these issues, in an attempt to secure individual liberty, ultimately limits their resolution. As fundamentally representative objects, imbued with the ambiguities political representation entails, political symbols bridge the distance between personal expression and shared political meaning. Attempts to regulate these symbols' meaning is contrary to the nature of political symbolism.

In *Texas v. Johnson*, we see an important issue submerged by the legal process, but not exactly as Paul Campos' perspective might suggest. Of course it is sensible to agree with Campos that this process was not guided in a tidy way by precedents. But at the same time the Court did not merely choose, "politically" or even "arbitrarily," among precedents to reach its decision. The legal process as a whole, leading up to and including the opinion of the Court, is comprised also by habits of thought. As an exercise of political theory, this essay takes up an example of how routinized habits of thought, like those which guide the legal process, can make it difficult to examine political problems along new and perhaps more promising routes. This essay also suggests that an alternative route need not necessarily be

charted from some distant place in the theoretical imagination. In many cases, the signposts of an untried route are before our very eyes.

## Notes

<sup>1</sup>Lyotard describes the *differend* as the space between experiences of the most extreme oppression and the language, particularly legal language, available to describe those experiences. "You are informed," he writes in *The Differend*, "that human beings endowed with language were placed in a situation such that none of them is now able to tell about it...How can you know that the situation itself existed?" While the situation I describe does not involve the most extreme oppression, it does highlight the process by which political ideas can be submerged by legal language. See Jean-François Lyotard, *The Differend: Phrases in Dispute* (Minneapolis: University of Minnesota Press, 1988), 3. See also Franz Kafka, *The Trial* (New York: Schocken Books, 1956).

<sup>2</sup>Akhil Amar, "The Case of the Missing Amendments," in *Harvard Law Review* 106, 125.

<sup>3</sup>Paul F. Campos, "Advocacy and Scholarship," in *California Law Review* 81, no. 4, (July 1993), 817-862.

<sup>4</sup>Hanna Pitkin, *The Concept of Representation* (Berkeley: University of California Press, 1967), 92.

<sup>5</sup>John Locke, *Second Treatise of Government* (Indianapolis: Hackett Publishing Co., 1980), 19.

<sup>6</sup>The Fourteenth Amendment of the Constitution of the United States reads, in relevant part: "No state...shall deprive any person of life, liberty, or property without due process of law." Enacted in 1868 to extend federal protections to newly freed slaves, by the turn of the century it had become used primarily to limit the power of the federal government to regulate corporations. See W.E.B. DuBois, *Black Reconstruction* (New York: Harcourt, Brace and Co., 1935).

<sup>7</sup>Act of the State of Nebraska, 3 July 1903, sec. 2375g.

<sup>8</sup>*Halter v. Nebraska*, 205 U.S. 34, 38 (1907).

<sup>9</sup>Justice Peckham dissented, but did not write a dissenting opinion.

Peckham's belief in as little government interference as possible in business may have led him to dissent in *Halter*.

<sup>10</sup>*Halter v. Nebraska*, 40.

<sup>11</sup>For example, in *U.S. v. Eichman* where the Court stated: "We decline the Government's invitation to reassess this conclusion in light of Congress' recent recognition of a purported 'national consensus' favoring a prohibition on flag burning...Even assuming such a consensus exists, any suggestion that the Government's interest in suppressing speech becomes more weighty as popular opposition to that speech grows is foreign to the First Amendment." *U.S. v. Eichman et al.*, 496 U.S. 310, 318 (1990).

<sup>12</sup>In the late nineteenth and early twentieth centuries, corporations routinely evoked the due-process clause of the Fourteenth Amendment against the regulatory power of Congress on the theory that regulation reduced their profits, in effect depriving them of property. In *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), Justice Stone wrote in the opinion that the Court would no longer hear Fourteenth Amendment claims by corporations, since corporations have access to the traditional political channel of the legislature to make their grievances known. The Court would in turn defer to legislative authority to regulate interstate commerce as it saw fit. In the famous fourth footnote of the opinion, Justice Stone suggested that the Court would instead examine only those Fourteenth Amendment claims brought by minorities who, by their "discrete and insular" status, were unable to represent their grievances in normal political arenas (i.e., legislatures and electoral politics).

<sup>13</sup>*Halter v. Nebraska*, 44.

<sup>14</sup>*Ibid.*

<sup>15</sup>See note 13, above.

<sup>16</sup>*Halter v. Nebraska*, 43.

<sup>17</sup>*Ibid.*, 41.

<sup>18</sup>*Ibid.*, 43.

<sup>19</sup>Fred Orton, *Figuring Jasper Johns* (Cambridge, Mass.: Harvard University Press, 1994), 103.

<sup>20</sup>*Ibid.*, 41.

<sup>21</sup>*U.S. Statutes at Large* 61 (1947), 642.

<sup>22</sup>Pitkin, *The Concept of Representation*, 66.

<sup>23</sup>Orton, *Figuring Jasper Johns*, 116.

<sup>24</sup>Ernst H. Gombrich, *Art and Illusion* (New York: Pantheon



Books, 1960), 370.

<sup>25</sup>The logic is commutative: every representation is a replica as well.

<sup>26</sup>Orton, *Figuring Jasper Johns*, 127.

<sup>27</sup>*Ibid.*, 126.

<sup>28</sup>*Ibid.*, 93.

<sup>29</sup>Johns was perhaps too little-known as an artist when the MOMA first proposed a purchase in 1958. The controversy in 1973 may have been heightened by the recent strife over the war in Vietnam, but discussion centered around the character of Johns himself. The Board of Trustees was subsequently assured that Johns was "an elegantly dressed Southerner" who "disclaimed any unpatriotic intentions and, in fact, insisted that he had 'only the warmest feelings toward the American flag.'" The lengths to which the patrons went to assuage the fears of the Trustees leads Orton to suggest that "in the art community, the purchase was regarded as a political act." Orton, *Figuring Jasper Johns*, 93-94.

<sup>30</sup>Alan R. Solomon, *Jasper Johns* (New York: The Jewish Museum of New York, 1964), 7.

<sup>31</sup>This account of events is taken from the brief submitted to the Supreme Court on behalf of the Petitioner. *Texas v. Johnson*, 491 US 397 (1989), 6-11.

<sup>32</sup>*Ibid.*, 1.

<sup>33</sup>According to Hasbrouck, "it has become quite common—standard, even—for demonstrators who fear police attacks...to arrange for observers from civil liberties groups, as witnesses.." Ed Hasbrouck, letter to the author, 7 February 1996.

<sup>34</sup>Whether or not they testified that the flag was burned at all is unclear.

<sup>35</sup>Texas' "Petition to Grant a Writ of Certiorari," submitted to the Supreme Court in *Texas v. Johnson*, 11.

<sup>36</sup>Stephanie Guitton and Peter Irons, ed., *May It Please the Court* (New York: W.W. Norton, 1993), 152.

<sup>37</sup>*Gregory v. City of Chicago*, 349 U.S. 111 (1969). The "heckler's veto" is the term used by the Court to describe any regulation of speech that might consider the noisy protest of one bystander against the speaker to constitute a breach of the peace. The Court rejects such regulations on the grounds that free speech is not secure if one person in disagreement can bring the power of the state to bear against a speaker.

<sup>38</sup>*U.S. v. O'Brien* 391 U.S. 367 (1967). O'Brien burned his draft card to protest the draft. The state argued that the draft card was state property and therefore regulation of the use of the card did not violate O'Brien's First Amendment rights. The Court found for the state and, in its opinion, articulated what has come to be known as a "four-point test" to determine whether an action is considered "symbolic speech."<sup>39</sup>"The Respondent's Brief in Opposition to Grant a Writ of Certiorari," submitted to the Supreme Court in *Texas v. Johnson*.

<sup>40</sup>*Ibid.*, 4.

<sup>41</sup>Ed Hasbrouck points out that even Texas may have known that it had a losing case. After all, the State Attorney General himself declined to argue the case for Texas. This surely alerted Vance to the untenability of Texas' case. Vance did not even take the case on himself, but instead assigned young First Assistant District Attorney Kathy Drew, whom Hasbrouck described as "way out of her league." Ed Hasbrouck, interview with the author, 14 December 1995. One can only guess why, in the face of the State Attorney General's decision not to carry the case, Vance went ahead with it anyway. One possibility is that the prosecution of flag burners was a politically popular move for Vance, a Republican, who was up for re-election in 1990. Meanwhile, not even the federal government took an interest in *Texas v. Johnson*. Typically the government files an *Amicus* brief if it has an initial interest in the case, but this did not happen. Drew was alone, petitioning for a writ on behalf of Texas in a losing case for the political benefit of her superior. Given the weaknesses of Texas' case, it probably seemed unlikely to her or to anybody else that the Supreme Court would hear it.

<sup>42</sup>Texas' "Petition to Grant a Writ of Certiorari," submitted to the Supreme Court in *Texas v. Johnson*, 29.

<sup>43</sup>*Spence v. Washington*, 418 U.S. 405 (1974). The Court invalidated a statute forbidding "flag misuse" on the grounds that the wording of the statute forbids specifically those actions which are "directly related to expression."

<sup>44</sup>*Smith v. Gougen*, 415 U.S. 566 (1974). The Court invalidated a statute forbidding "contemptuous" treatment of the flag where the state considered nonceremonial adornment with a flag to be an act of contempt. "Contemptuous," the Court held, was too vague a term for use in this law.

<sup>45</sup>Note that the Court does *not* claim that the representation *itself* is public property, but the thrust of the argument is the same.

<sup>46</sup>"The Respondent's Brief in Opposition to Grant a Writ of Certiorari," submitted to the Supreme Court in *Texas v. Johnson*, 4.

<sup>47</sup>ACLU's "Response in Opposition to the Petition to Grant a Writ of Certiorari," submitted to the Supreme Court in *Texas v. Johnson*, 3.

<sup>48</sup>*Ibid.*, 5-13.

<sup>49</sup>Guittton and Irons, ed., *May It Please the Court*, 153.

<sup>50</sup>*Ibid.*, 153.

<sup>51</sup>*Ibid.*

<sup>52</sup>*Ibid.*, 154-5.

<sup>53</sup>*Ibid.*, 155.

<sup>54</sup>*Amicus Curie* brief submitted on behalf of the Respondent in *Texas v. Johnson*, 3.

<sup>55</sup>*Ibid.*, 5.

<sup>56</sup>*Ibid.*, 7.

<sup>57</sup>*Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).

<sup>58</sup>Jaspar Johns et al. in *Texas v. Johnson*, 8-9, emphasis mine.

<sup>59</sup>For more on this theme, see Manuel Castells, *The Power of Identity*, vol. 2 of *The Information Age: Economy, Society and Culture* (Oxford: Blackwell Publishers Ltd. 1997), 314. Other authors who have considered similar themes include Baudrillard, Edelman, Feenberg, and Habermas.

<sup>60</sup>*Texas v. Johnson*.

<sup>61</sup>*Ibid.*

## The Language of Law/The Law of Language: A Critique of the Adjudication of Expression

Jill Stauffer

This essay orbits around an objection to its argument. Perhaps this sounds too circular, too precious, or in any case too shaky a ground on which to begin. The argument is: Positive law seeks to make language certain—it renders all forms of expression subject to laws of certainty as to their meaning—and thereby positive law becomes inescapably an institution of coercive violence. Language is what makes us human, as thinking-speaking animals, and is what underlies our every belief system, accepted mode of behavior, and cultural assumption. Language's power is paradoxical in that we create it, use it, and it, at times, exceeds us, points us to what is prior to our mastery. Language, as what must underlie every interpretation of what is just or unjust, authorizes or contains power and its attendant violence—thus, how could it be that what enables power could also be subject to that power? The answer: It cannot. This is what makes certain political speech acts so powerful—they step outside of an imposed order in some unexpected utterly new manner. This is the site of human possibility.

Martin Heidegger, in his later work on language, has shown that there is something of language that is beyond our mastery,