

# POLITICAL SYMBOLS IN TWO CONSTITUTIONAL ORDERS: THE FLAG DESECRATION DECISIONS OF THE UNITED STATES SUPREME COURT AND THE GERMAN FEDERAL CONSTITUTIONAL COURT

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Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes, ~~lands~~ and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design.<sup>2</sup>

## H. INTRODUCTION

A symbol is a sign or representation, suggesting an idea or quality as by resemblance or by convention.<sup>3</sup> Daily life is saturated with symbols of all kinds: graphical, audible and textual symbols, gestures, facial expressions, clothes and odors. Symbols often operate on a subconscious or emotional level. This might explain why the treatment of political symbols such as flags or national anthems in constitutional jurisprudence sometimes has aroused immense passion.<sup>4</sup>

A recent example is the United States Supreme Court (Supreme Court) decision in *Texas v. Johnson*.<sup>5</sup> By a close five to four vote, the Court held that the conviction of Gregory Lee Johnson for burning the American flag in political protest violated his First Amendment right to free speech. In the public uproar that followed the Court's decision, a proposal to amend the United States Constitution failed and Congress enacted a federal Flag Protection Act, which the Supreme Court invalidated in the decision *United States v. Eichman*.<sup>6</sup> On March 7, 1990, three months before the Supreme Court handed down the *Eichman* decision, the German Federal Constitutional Court (Bundesverfassungsgericht)

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2.     -*West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 632 (1943).

3.     -See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 2316 (Philip Babcock ed., 1986).

4.     -See also *Anerkennung für das Sonnenbanner*, FRANKFURTER ALLGEMEINE ZEITUNG -[FAZ], May 19, 1999, at 9; Kathryn Tolbert, *A Pledge of Allegiance*, WASH. POST, Mar. 2, 2000, at A13 for the controversy around the so-called flag-and-anthem bill passed in Japan in 1999.

5.     -491 U.S. 397 (1989).

6.     -496 U.S. 310 (1990).

unanimously reversed the conviction of the manager of a book distribution company charged with defiling the federal flag. The company had sold numerous copies of a book on the back cover of which the photographs of a military ceremony and the photograph of a male figure urinating were combined in such a way that the urine was directed against a flag held by the soldiers.<sup>7</sup>

On the face of it, the decisions of the Supreme Court as well as the decisions of the Bundesverfassungsgericht seem to stand for the proposition that the state has no valid interest in penalizing the desecration of one of its symbols. However, a closer reading of the flag case of the Bundesverfassungsgericht reveals profound differences in approach and content. In particular, whereas the majority holding of the Supreme Court is based on the principle that a state may not “foster its own view of the flag by prohibiting expressive conduct relating to it,”<sup>8</sup> the Bundesverfassungsgericht considers the flag . . . as an important integration device through the leading state goals it embodies [whose] disparagement can . . . impair the necessary authority of the state.<sup>9</sup>

This article will compare the background, the doctrinal approach, and the broader implications of the flag desecration decisions of the Supreme Court and the Bundesverfassungsgericht. It will argue that there is an enigma in the role that flags occupy in society compared to the role that flags are allowed in constitutional jurisprudence. On the one hand, the United States flag is treated as an almost sacred symbol. The flag occupies a predominant role in the American civil religion, is venerated and can be desecrated. In contrast to this, the German flag is considered as the symbol of the German nation, but it gains only little public attention. The German flag as a symbol can be defaced. It cannot be desecrated in the strict sense of the term, however, as it has never been consecrated. On the other hand, however, the majority of the Supreme Court holds that statutes prohibiting flag desecration are unconstitutional, whereas the Bundesverfassungsgericht acknowledges the state’s interest in protecting its symbols as a constitutional value of its own. This article will call this situation the “flag enigma.” One Court does not protect what the public considers to be worth protecting, whereas the other Court protects what the public regards with indifference. The “flag enigma” will be explained by different concepts of democracy in the United States and Germany.

Part II of this article will introduce political symbolism. Part III will explain the “flag enigma” by depicting the role of the United States flag and the German federal flag and comparing the approaches of the Supreme Court to flag

7. Bundesverfassungsgericht [BVerfG], decision of Mar. 7, 1990, 81 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 278 (“flag case”).

8. *Johnson*, 491 U.S. at 415.

9. 81 BVerfGE at 293-94. - All translations are those of the author, unless otherwise noted. Translations of the decisions of the Bundesverfassungsgericht are those of DECISIONS OF THE BUNDESVERFASSUNGSGERICHT – FEDERAL CONST. COURT – FEDERAL REPUBLIC OF GERMANY, 1958-1995 (Members of the Court eds., 1998).

desecration with those of the Bundesverfassungsgericht. Part IV will scrutinize the underlying reasons for the "flag enigma."<sup>2</sup> First, it will examine factual differences and differences in free speech doctrine that do not explain the "flag enigma."<sup>2</sup> In particular, it will argue that the Supreme Court would not have decided the *Johnson* and *Eichman* cases differently had it been confronted with the facts of the German flag case. Similarly, the Bundesverfassungsgericht would not have decided the German flag case differently had it been confronted with the facts of the *Johnson* and *Eichman* decisions. Moreover, it will explain why the fact that the American concept of freedom of expression only ~~knows-encompasses~~ a general right to free expression, whereas the German concept acknowledges a specific right to free artistic expression, does not explain the "flag enigma."<sup>2</sup> Second, Part IV of this article will investigate differences in the concept of democracy that ~~do~~-underlie the enigma. While the American concept of democracy is based on the spirit of popular sovereignty, the German concept of democracy is based on the notion that a democratic state needs to defend its own foundations.

## II. POLITICAL SYMBOLISM

Every nation has its distinctive political symbols. Most (if not all) scholars agree that nations need symbols,<sup>10</sup> but the reasons for symbols being this important are less obvious. If it were only the intellectual function of a symbol to identify the nation, one might argue that political symbols are important and in common usage, but not that they are irreplaceable. However, political symbols accomplish much more on the emotional level than they achieve on the purely intellectual level. The emotional function of political symbols underlies the state's interest in their protection, and is thus of particular importance to the analysis of the flag decisions.

One can distinguish at least two functions political symbols fulfill on the emotional level.<sup>11</sup> These two functions are interrelated and influence each other, but they also have their own unique implications. First, political symbols

<sup>10</sup> See Herbert Krüger, *Von der Staatspflege überhaupt*, in DIE SELBSTDARSTELLUNG DES STAATES 21, 49 (Helmut Quaritsch ed., 1977); HELMUT QUARITSCH, PROBLEM DER SELBSTDARSTELLUNG DES STAATES 19 (Recht und Staat in Geschichte und Gegenwart No. 478/479, 1977); WILBUR ZELINSKY, NATION INTO STATE: THE SHIFTING SYMBOLIC FOUNDATIONS OF AMERICAN NATIONALISM 13 (1988) (citing sources defending the contention that states cannot exist without symbols).

<sup>11</sup> See KAREN CERULO, IDENTITY DESIGNS: [THE SIGHTS AND SOUNDS OF A NATION](#) 15-32 (1995); ALOIS FRIEDEL, DEUTSCHE STAATSSYMBOLS 10-11 (1968) (noting functions of political symbols).

“crystallize the national identity”<sup>12</sup> by making tangible what would otherwise be difficult to apprehend. They codify the subjective nature of the nation.<sup>13</sup> “[The nation] is invisible; it must be personified before it can be seen, symbolized before it can be loved, imagined before it can be conceived.”<sup>14</sup> Symbols tell citizens “who they are, by demarcating what is authentically theirs from what is alien.”<sup>15</sup> A symbol, however, has no intrinsic value in itself. Rather, it is a sign, a representation for something else. As a sign, a symbol gets filled with meaning only by the meaning of the complex it represents.<sup>16</sup>

In a second related function, national symbols create bonds between the citizens of a nation in that they have unifying power.<sup>17</sup> The unifying power of a political symbol emerges from its usage.<sup>18</sup> “By uttering the same cry, pronouncing the same word, or performing the same gestures in regard to these [symbolic] objects, individuals become and feel themselves to be in unison.”<sup>19</sup> However, national symbols can only display their unifying power when a community accepts them.<sup>20</sup> If the acceptance rate is too low, symbols lose their unifying value.

The flag makes the functions of political symbols apparent. The flag serves as an apprehensible sign to identify the nation. In itself, it is only a piece of cloth, but by a shared understanding the flag identifies the nation. The flag has its own history and meaning, and it is connected with certain shared values. It codifies these values. Displaying the flag unites those who share the values represented by the flag. The citizens become aware of their unison, the community created by the symbol and what it represents.

12. CERULO, *supra* note 11, at 15. See also ALBERT BOIME, THE UNVEILING OF THE NATIONAL ICONS: A PLEA FOR PATRIOTIC ICONOCLASM IN A NATIONALIST ERA 18 (1998) (“No other patriotic symbol [than the American flag] is as integral to the construction of our national identity.”).

13. See CERULO, *supra* note 11, at 3.

14. Michael Walzer, *On the Role of Symbolism in Political Thought*, 82 POL. SCI. Q. 191, 194 (1967).

15. ANTHONY D. SMITH, THE ETHNIC ORIGINS OF NATIONS 202 (1986).

16. See QUARITSCH, *supra* note 10, at 18; Herwig Roggemann, *Von Bären, Löwen und Adlern – zur Reichweite der §§ 90a und b StGB*, Juristenzeitung ~~[JZ]~~ [JZ] 934, 937 (1992).

17. See 81 BVerfGE at 293; CERULO, *supra* note 11, at 4; Karl Loewenstein, *Betrachtungen über den politischen Symbolismus*, in GEGENWARTSPROBLEME DES INTERNATIONALEN RECHTS UND DER RECHTS-PHILOSOPHIE 559, 561 (D.S. Constantopoulos & Hans Wehberg eds., 1953); FRIEDEL, *supra* note 11, at 11; ANTHONY D. SMITH, NATIONAL IDENTITY 16-17 (1991); Thomas Würtenberger, *Kunst, Kunstfreiheit und Staatsverunglimpfung (§ 90a StGB)*, Juristische Rundschau ~~[JR]~~ [JR] 309, 311 (1979).

18. CERULO, *supra* note 11, at 17.

19. EMILE DURKHEIM, THE ELEMENTARY FORMS OF RELIGIOUS LIFE 262 (Joseph W. Swains trans., 1915).

20. FRIEDEL, *supra* note 11, at 10.

The question of the functions of symbols leads to the question of the state's interest in the protection of these symbols. As the state can demand respect for its symbols, and not for the ideas and values they represent,<sup>21</sup> it has to justify why it nevertheless intends to outlaw certain forms of disrespect of its political symbols. The justification lies in the emotional functions of political symbols. Considering these various emotional functions, the state cannot only claim an interest in the protection of its symbols for their own sake. The state is more likely to claim an interest in preserving the emotional functions of symbols. In fact, the emotional functions of political symbols underlie most of the various arguments stated in the flag controversies.

### III.III. THE "FLAG ENIGMA"

One would expect that the flag's role in constitutional jurisprudence corresponds to the flag's role in history and society: ~~t~~The more history and society would venerate the flag, the higher the protection constitutional jurisprudence would grant it. Yet, this seemingly easy rule does not apply to the cases of the United States flag and the German flag. This article will call this situation the "flag enigma."<sup>2</sup> This third part of the article examines the enigma in scrutinizing the flag's role in society as well as its role in constitutional jurisprudence.

#### A.A. The Flag's Role in Society

##### 1. The United States Flag as a Sacred Symbol of Veneration

The ascendancy of the United States flag<sup>22</sup> began with the start of the Civil War. The lowering of the flag at Fort Sumter elevated it as an object of public adoration. Its use spread from military and naval life to art, poetry, music, literature, and election campaigns. Moreover, during the Civil War the flag

21. ~~-~~Loewenstein, *supra* note 17, at 575.

22. ~~-~~For historical accounts of the development of the US flag see BOLESLAW & MARIE-LOUISE D'OTRANGE MASTAI, THE STRIPES AND STARS: THE EVOLUTION OF THE AMERICAN FLAGARS AND STRIPES (1973); WILLIAM R. FURLONG & BYRON McCANDLESS, SO PROUDLY WE HAIL (1981); SCOT M. GUENTER, THE AMERICAN FLAG (1990); HENRY PREBLE, HISTORY OF THE FLAG OF THE UNITED STATES OF AMERICA AND OF THE NAVAL YACHT-CLUB SIGNALS, SEALS AND ARMS, AND PRINCIPAL SONGS OF THE UNITED STATES (4th ed. 1894); WHITNEY SMITH, THE FLAG BOOK OF THE UNITED STATES (rev. ed. 1975). For a historical account of the development of flag worship see BOIME, *supra* note 12, at 18-81.

became for the first time the object of widespread symbolic protest.<sup>23</sup> In 1924, the Second Flag Conference finalized a Flag Code, which Congress legalized in 1943.<sup>24</sup> This civil code of flag etiquette is a particularity of the United States, and it reflects the predominant role the flag enjoys in the American society. Moreover, by 1932, almost all states enacted laws concerned with the penalizing of flag desecration.<sup>25</sup> Congress reacted to flag burning at the time of the war in Vietnam by enacting, in 1967, a federal flag desecration statute.<sup>26</sup> The Supreme Court struck it down in its revised form in the [United States v. Eichman decision](#).<sup>27</sup>

The flag occupies a role in the American society that is unparalleled by the importance national symbols gain in most other states.<sup>28</sup> The flag is a ubiquitous feature of the American society. It can be found in schools, government buildings, museums, factories, parks, and private homes.<sup>29</sup> Athletic, cultural and social events honor the flag. America was the first nation to adopt a Flag Code, to celebrate a Flag Day, or to make the Pledge of Allegiance part of the regular school day.<sup>30</sup> For most Americans, the flag has an intellectual as well as an emotional dimension. On the one hand, the flag simply represents the Republic. On the other hand, the flag forms part of the American civil religion.<sup>31</sup>

[C]urious liturgical forms have been devised for “saluting” the flag, for “dipping” the flag, for “lowering” the flag, and for

23. See ROBERT JUSTIN GOLDSTEIN, SAVING “OLD GLORY” 3--11 (1995); GUENTER, *supra* note 22, at 133.

24. 4 U.S.C. §§ 1-10 (1932), amended by 4 U.S.C. §§ 1-10 (2000). See GUENTER, *supra* note 22, at 154-185.

25. See Albert M. Rosenblatt, *Flag Desecration Statutes: History and Analysis*, WASH. U. L.Q. 193 (1972) and the list of state statutes cited in [Texas v. Johnson](#), 491 U.S. 397, at 428 (1989) (Rehnquist, J., dissenting).

26. 18 U.S.C. § 700 (1988).

27. [Eichman](#), 496 U.S. 310, at 314 (1990).

28. See GUENTER, *supra* note 22, at 183; [for the role of the flag after September 11, 2001](#) see [for the role of the flag after ‘September 11’](#) Blaine Harden, *Flag Fever: the Paradox of Patriotism*, N.Y. TIMES, Sept. 11, 2001, § Sect. 4, at p. 1.

29. See ZELINSKY, *supra* note 10, at 204-07.

30. See GUENTER, *supra* note 22, at 22-23.

31. The concept of civil religion originated in Jacques Rousseau’s *Contract Social*. JEAN JACQUES ROUSSEAU, [4 THE SOCIAL CONTRACT](#) ch. 8 (H. Tozer trans., 3d ed. 1948). Civil religion can be described as the “web of understandings, myths, symbols, and documents” that justified the new American nation following the Revolution. Civil religion is a secular religion, but consists of items of worship analogous to traditional religion, the flag, the Declaration of Independence, and the Constitution. See SANFORD LEVINSON, CONSTITUTIONAL FAITH 10 (1988). See also Robert Jewett & Constance Collora, *On Turning the Flag Into a Sacred Object*, 37 J. CHURCH & ST. 741 (1995) (criticizing from a theological standpoint to “enshrine ‘in the Constitution a new religion of the flag as an object of final loyalty.’”).

“hoisting” the flag. Men bare their heads when the flag passes by; and in praise of the flag poets write odes and children sing hymns. In America young people are ranged in serried rows and required to recite daily, with hierophantic voice and ritualistic gesture, the mystical formula: “I pledge allegiance to our flag and to the country for which it stands, one nation, indivisible, with liberty and justice for all.” Everywhere, in all solemn feasts and fasts of nationalism the flag is in evidence, and with it that other sacred thing, the national anthem.<sup>32</sup>

One commentator has described the flag as a modern tribal totem.<sup>33</sup> It is “for many Americans . . . literally a sacred object.”<sup>34</sup> “Millions and millions of Americans regard it with an almost mystical reverence regardless of what sort of social, political, or philosophical beliefs they may have.”<sup>35</sup> The language used in many flag desecration statutes reflects the role of the United States flag as a central object of the American civil religion. For example, the Texas statute struck down in the *Johnson* decision describes the flag as a ‘venerated object’ that one can “desecrate.”<sup>36</sup>

## 2.2. The German Flag as National Symbol of Little Public Attention

The German flag has never reached the public adoration that its American counterpart enjoys. The German colors – black-red-gold – originate from the 19<sup>th</sup> century movement for a free, unitary nation-state.<sup>37</sup> In 1949, the Parliamentary Council chose black-red-gold when it adopted Article 22 of the German Constitution, which reads, “The federal flag is black-red-gold.”<sup>38</sup> Only a few statutes concern the federal flag.<sup>39</sup> Important, however, is section 90(a) § 1 of

32. CARLTON J. HAYES, *ESSAYS ON NATIONALISM* 107-08 (1962).

33. See Michael Frisch, *American History and the Structure of Collective Memory*, *AM. J. HIST.* 1130, 1146 (1986).

34. ZELINSKY, *supra* note 10, at 196 (citing *Who Owns the Stars and Stripes?*, *TIME*, July 6, 1976, at 15).

35. *Johnson*, 491 U.S. 397, at 429 (Rehnquist, C.J., dissenting).

36. TEX. PENAL CODE ANN. § 42.09 (1989), cited in *Johnson*, 491 U.S. at 400 n. 1.

37. For historical accounts of the development of the German flag see FRIEDEL, *supra* note 11, at 23-44; *see also* BERNDT GUBEN, SCHWARZ, ROT UND GOLD (1991); GUNTER HOOG, *DEUTSCHES FLAGGENRECHT* (1982); Eckhart Klein, *Commentary to Art. 22 GG*, in *BONNER KOMMENTAR ZUM GRUNDGESETZ* 18-48 (46. Lieferung, Zweitbearbeitung, Dec. 1982); EKKEHART KUHN, *EINIGKEIT UND RECHT UND FREIHEIT* (1991).

38. *BGBI. [Federal Gazette] I, 1949, p. 1 Bundesgesetzblatt, Teil I [BGBI.I], 1949 (BGBI. I S. 1).*

39. Gesetz über das Flaggenrecht der Seeschiffe und die Flaggenführung der Binnenschiffe (Flaggengesetz), *Bundesgesetzblatt, Teil I [Federal Gazette], 1994, (BGBI. p. I*



the German Penal Code [Strafgesetzbuch, StGB],<sup>40</sup> which deals with the defiling of the state and its symbols and provides:

Whoever publicly, in an assembly or through the dissemination of writings

1. Insults or maliciously defiles the Federal Republic of Germany or one of its federal states or its constitutional order or
  2. Defiles the colors, the coat of arms or the hymn of the Federal Republic of Germany or one of its federal states,
- shall be punished by a term of imprisonment of up to three years or with a fine.<sup>41</sup>

It comes as a surprise that the German federal flag, though based on the idea of freedom and national unity and protected by the Penal Code, never gained the central role that the American flag has occupied in the minds of many Americans. Indeed, the contemporary German citizen almost seems to ignore the flag. A visitor to Germany will hardly see a flag in front of a private home.<sup>42</sup> One political scientist observed that Germans are suffering from a "symbol neurosis" (Symbolneurose).<sup>43</sup> German tourists abroad sometimes display the federal flag. Citizens waved it after the German reunification,<sup>44</sup> but the public enthusiasm faded quickly. As a commentator remarked in 1996:

Flag and hymn today are elevated articles of practical use. They bear witness to the state and its institutions. But for that nobody loves them; they capsule no value per se. The cloth in front of a building indicates federal presence and most Germans are only touched by the hymn if its sounds to confirm success in sports. Black-red-gold and the Haydn melody are trademarks of the

[S. 79](#)); Section 124 § 1 Ordnungswidrigkeitengesetz, v. 1987 (BGBl. I [Sp.](#) 602); Section 145 § 1 No. 1, 3 Markengesetz, v. 1994, (BGBl. I [Sp.](#) 3082).

40. ~~§ Section 90(a) StGB~~ ~~Section 90(a) StGB~~ can be traced back to section 135 of the Penal Code of 1871 (Reichsstrafgesetzbuch – RStGB). The crime of lèse majesté was intended to protect the German emperor and the sovereigns of the German Länder against any attack on their authority and reputation, see Gottfried Krutzki, *Verunglimpfung des Staates und seiner Symbole*, KRITISCHE JUSTIZ [\[KJ\]](#)–~~[KJ]~~ 294, 295–296 (1980); Bernd-Rüdeger Sonnen, *Commentary to section 90 a StGB*, in ALTERNATIVER KOMMENTAR ZUM STRAFGESETZBUCH, BAND 3, §§ 80–145d, 8–13 (Heribert Ostendorf ed., 1986).

41. 1998 (–BGBl. [\[Federal Gazette\]](#)–I [Sp.](#) 3322).

42. ~~See the observation of~~ ZELINSKY, *supra* note 10, at 197.

43. ~~FRIEDEL~~, *supra* note 11, at 21.

44. ~~In~~ 1959, the German Democratic Republic gave itself its own flag. The flag shows a garland of corn, a hammer and a compass on the colors black-red-gold. With the German reunification, the federal flag of the Federal Republic of Germany became effective for the five new Länder.



business location Germany. If our troublemakers want to attack the state, they beat up policemen or blow up power poles. They only rarely burn federal flags. Why debase a symbol about which we do not know the meaning?<sup>45</sup>

The reasons for this "symbol neurosis" are manifold. It might be based on a lack of civic responsibility, on the division of Germany, or on a skepticism derived from the German use of symbols for propaganda during the Nazi dictatorship.<sup>46</sup>

The language of the statutory provisions concerned with the attack on the flag illustrates the contrast between the role that the flag occupies in the German society and the role of its American counterpart in American society. In United States law, the misdemeanor or crime of burning a flag is called 'flag desecration.'<sup>47</sup> Section 90(a) StGB, on the other hand, is entitled 'Verunglimpfung des Staates und seiner Symbole.'<sup>48</sup> The term 'Verunglimpfung' has no religious connotations, it simply stands for an act of defamation or denigration.<sup>49</sup> As nobody has consecrated the German flag, nobody can desecrate it.

## **B.** **The Flag's Role in Constitutional Jurisprudence**

### **1. The Johnson and Eichman decisions: Protection of United States Flag Not a Valid State Interest**<sup>50</sup>

#### **a. Early Flag Desecration Decisions**

In *West Virginia State Board of Education v. Barnette*,<sup>51</sup> the Supreme Court first<sup>52</sup> addressed a case involving the United States flag and decided on First

45. Kurt Kister, *Angst vor dem Vaterland*, SÜDDEUTSCHE ZEITUNG, June 8, 1996, at 4.

46. FRIEDEL, *supra* note 11, at 22; Eckart Klein, *Die Staatssymbole*, in § 17 HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND I, 5-6 (Josef Isensee & Paul Kirchhof eds., 1987).

47. See Rosenblatt, *supra* note 25.

48. BGBI. [Federal Gazette] I, 1998, Sp. 3322.

49. DUDEN, ETYMOLOGIE 226 ('glimpflich') (Günter Drosdowski & Paul Grebe eds., 1963); FRIEDRICH KLUGE, ETYMOLOGISCHES WORTERBUCH DER DEUTSCHEN SPRACHE 862 ("verunglimpfen"), 328 ("glimpflich") (Elmar Seebold ed., 23d ed. 1999).

50. For details on the history of the controversy about the desecration of the American flag see ROBERT JUSTIN GOLDSTEIN, *BURNING THE FLAG* (1996); ROBERT JUSTIN GOLDSTEIN, *DESECRATING THE AMERICAN FLAG* (1996); ROBERT JUSTIN GOLDSTEIN, *supra* note 23.

Amendment grounds.<sup>53</sup> In *Barnette*, the Court held that public schools could not force students to salute and pledge allegiance to the flag. In a now famous quote, Justice Jackson emphasized: “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”<sup>54</sup>

*Street v. New York*,<sup>55</sup> decided more than twenty years later, marked the first time that the Supreme Court confronted the question of whether the prohibition of flag burning in political protest was constitutional. Yet, the Court in *Street* and other pre-*Johnson* cases avoided the issue. The defendant in *Street* had protested the shooting of a civil rights leader by burning the American flag, exclaiming, “If they let that happen to Meredith, we don’t need an American flag.”<sup>56</sup> Because the flag desecration statute under which the trial court convicted him made it a misdemeanor to cast contempt upon any flag of the United States “either by words or act,”<sup>57</sup> the Court treated the question as a pure speech case and thus sidestepped the crucial issue of whether the burning of the flag itself was protected under the First Amendment.<sup>58</sup>

The next flag desecration decision handed down by the Supreme Court was *Smith v. Goguen*.<sup>59</sup> Again, the Court avoided the *Johnson* issue. Massachusetts prosecuted the defendant under a statute that criminalized wearing a small flag sewn on the seat of his pants. The statute made it a crime to publicly mutilate, trample upon, deface or treat contemptuously the flag of the United States.<sup>60</sup> The Supreme Court reversed the defendant’s conviction, holding that the statute was void for vagueness.<sup>61</sup>

In *Spence v. Washington*,<sup>62</sup> the defendant had affixed with removable tape a peace sign to an American flag, which he hung upside down outside his

51. 319 U.S. 624 (1943).

52. Most early flag desecration cases involved the improper use of the flag for advertising purposes. Cases like *Halter v. Nebraska*, 205 U.S. 34 (1907) (selling of beer bottles depicting the US flag) have little precedential value, as they were decided before the Supreme Court held the First Amendment guarantees to be binding upon the states. See Rosenblatt, *supra* note 25, at 193.

53. U.S. CONST. amend. I (The First Amendment to the US Constitution reads in relevant part, “Congress shall make no law . . . abridging the freedom of speech . . .”).

54. *Barnette*, 319 U.S. at 642.

55. 394 U.S. 576 (1969).

56. *Id.*, at 579.

57. N.Y. PENAL LAW § 1425 (16)(d) (McKinney 1909) (cited in *Street*, 394 U.S. at 578).

58. See *Street*, 394 U.S. at 590.

59. 415 U.S. 566 (1974).

60. MASS. GEN. LAWS ANN. ch. 264, § 5 (West 1970), cited in *Smith*, 415 U.S. at 568-69.

61. See *Smith*, 415 U.S. at 582.

62. 418 U.S. 405 (1974).

apartment window to protest the United States invasion of Cambodia and the Kent State killings. In this case, the Supreme Court first confronted the question of whether the symbolic use of the flag, not combined with words, was protected speech under the First Amendment. Moreover, the Court for the first time in a majority opinion dealt with the question of whether the state had a valid interest in preserving the “national flag as an unalloyed symbol.”<sup>63</sup> However, on somewhat murky grounds, the Supreme Court again circumvented the real issue of whether the state may punish the burning of the flag in political protest. In a very narrow reading of the state interest at stake, the Court held that the statute was unconstitutional as applied to Spence. “There was no risk that appellant’s acts would mislead viewers into assuming that the Government endorsed his viewpoint.”<sup>64</sup> Furthermore, Spence did not “permanently disfigure the flag or destroy it.”<sup>65</sup>

**b.b.** *Texas v. Johnson* and *United States v. Eichman*

Finally, in the *Texas v. Johnson* case,<sup>66</sup> the Supreme Court had to decide whether a flag desecration statute was unconstitutional. Gregory Lee Johnson and about one hundred others had participated in a political demonstration during the 1984 Republican National Convention in Dallas to protest the Reagan politics. The demonstration ended in front of the Dallas City Hall where Johnson burned an American flag. Texas convicted Johnson under a Texas Statute<sup>67</sup> that forbade the desecration of a venerated object. The law defined “desecrate” as “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.”<sup>68</sup> In an opinion delivered by Justice Brennan, the Supreme Court reversed Johnson’s conviction. The Court had little difficulty in determining that Johnson’s burning of the flag was expressive conduct covered by the First Amendment. Applying the test developed in *Spence v. Washington*,<sup>69</sup> the Court found Johnson’s conduct

63. *Id.* *Spence*, 418 U.S. at 412.

64. *Id.*; at 414.

65. *Id.*; at 415.

66. 491 U.S. at 397 (1989).

67. ~~TEXAS PENAL CODE ANN. § 42.09 (1989)~~, cited in *Johnson*, 491 U.S. at 400. The statute reads in relevant part, “§ 42.09. Desecration of Venerated Object (a) A person commits an offense if he intentionally or knowingly desecrates: . . . (3) a state or national flag.”

68. ~~TEX. PENAL CODE ANN. § 42.09-(b) (1989)~~, cited *id.* NOTE — IS “id” appropriate here, or is it “supra?” This is a Bluebook question

69. In *Spence v. Washington*, 418 U.S. 405, at 410-411 (1974), the Court asked whether “[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.”

“sufficiently imbued with elements of communication”<sup>70</sup> to bring the First Amendment into play. Pivotal to the Supreme Court’s opinion, however, was the determination of whether the level of scrutiny was the more lenient *O’Brien* standard for content-neutral restrictions on speech, or the more stringent standard for restrictions related to the suppression of free expression.<sup>71</sup>

Texas attempted to justify Johnson’s conviction on two grounds: first, preventing breaches of the peace, and second, preserving the flag as a symbol of nationhood and national unity. As to the first ground, the Court simply held that the record did not indicate a breach of the peace. As to the second ground, the Court held that preserving the symbolic character of the flag was related to expression. The Court observed that:

[T]he state . . . is concerned that [Johnson’s] conduct will lead people to believe either that the flag does not stand for nationhood and national unity, but instead reflects other, less positive concepts, or that the concepts reflected in the flag do not in fact exist, that is, that we do not enjoy unity as a Nation. These concerns blossom only when a person’s treatment of the flag communicates some message . . .<sup>72</sup>

Consequently, the Court had to subject Texas’ interest in preserving the symbolic character of the flag to “the most exacting scrutiny.”<sup>73</sup>

However, Texas failed to show that its interest was compelling enough to justify the suppression of expression. First of all, “the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”<sup>74</sup> Moreover, the Court refused to recognize a special exception from established First Amendment principles for cases involving the American flag.<sup>75</sup> Last, “forbidding criminal punishment for conduct such as Johnson’s will not endanger the special role played by our flag or the feeling it inspires.”<sup>76</sup>

In a concurring opinion, Justice Kennedy agreed with the dissenting Justices, stating that “the flag holds a lonely place of honor in an age when absolutes are distrusted and simple truths are burdened by unneeded apologetics.”<sup>77</sup> Nevertheless, he found that “the law and the constitution”

70. *Johnson*, 491 U.S. at 406.

71. *Id.* at 403 (citing *United States v. O’Brien*, 391 U.S. 367, 377 (1968)).

72. *Id.* at 410.

73. *Id.* at 412 (citing *Boos v. Barry*, 485 U.S. 312, 321 (1988)).

74. *Johnson*, 491 U.S. at 414.

75. *See Id.*

76. *Id.* at 413.

77. *Id.* at 421 (Kennedy, J., concurring).

compelled the result reached by the majority.<sup>78</sup> “It is poignant but fundamental that the flag protects those who hold it in contempt.”<sup>79</sup>

The two dissenting opinions stressed the role of the American flag in history and society, and on that basis tried to justify a special protection of the flag. Chief Justice Rehnquist, for himself and Justices White and O’Connor, not only recollected the history of the American flag, but also extensively cited poetry as well as the national anthem. However, his arguments for subjecting the burning of the flag to a constitutional analysis different from other First Amendment cases ~~did~~ not seem very persuasive.<sup>80</sup> Justice Rehnquist first suggested that the state might assert a kind of property right in the flag as a symbol.<sup>81</sup> Second, he proposed to characterize Johnson’s flag burning as “fighting words.”<sup>82</sup> Last, he stressed that Johnson “conveyed nothing that could not have been conveyed and was not conveyed just as forcefully in a dozen different ways.”<sup>83</sup>

In the second dissent, Justice Stevens said ~~that~~ “[e]ven if flag burning could be considered just another species of symbolic speech under the logical application of the rules that the Court has developed in its interpretation of the First Amendment in other contexts, this case has an intangible dimension that makes those rules inapplicable.”<sup>84</sup>

78. *Id.*

79. *Id.*

80. *Id.*—For criticism of the dissenting opinions see *infra* notes 81-84; ~~see also and, e.g.,~~ Kent Greenawalt, *O’er the Land of the Free: Flag Burning as Speech*, 37 UCLA L. REV. 925, 941-47 (1990); Arnold H. Loewy, *The Flag-Burning Case: Freedom of Speech When We Need it Most*, 68 N.C. L. REV. 165, 169-173 (1989); Sheldon H. Nahmod, *The Sacred Flag and the First Amendment*, 66 IND. L.J. 511, 526-27 (1991); Geoffrey R. Stone, *Flag Burning and the Constitution*, 75 IOWA L. REV. 111, 114-16 (1989).

81. *Id.*—*See Johnson*, 491 U.S. at 429-30 (Rehnquist, C.J., dissenting). —An analogy to the state’s property interest in the protection of national monuments cannot justify the protection of the physical integrity of the flag. National monuments are protected because they are physically unique, but the flag is not. *Id.*

82. *Id.*—*See id.* at 430 et seq. (Rehnquist, C.J., dissenting) (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)). —Fighting words are words “which by their very utterance inflict injury or tend to incite an immediate breach of the peace.” *Chaplinsky*, 315 U.S. ~~at~~, at 572. The doctrine only applies to verbal assaults made in a face-to-face encounter. Moreover, it requires the likely or imminent danger that the speech will cause the average addressee to fight. These elements are not given in the *Johnson* case.

83. *Id.*—*Johnson*, 491 U.S. at 431 (Rehnquist, C.J., dissenting). —This argument runs afoul of established First Amendment jurisprudence of the Supreme Court. The Court has never accepted that content-based restrictions on free speech are permissible if they merely ban a particular means of expression of an idea and not the idea itself. ~~See (see, e.g.,~~ *Cohen v. California*, 403 U.S. 15, 26 (1971) (~~holding~~ holding that the wearing of a jacket bearing the words ‘Fuck the draft’ in a courthouse was protected under the First Amendment, although less offensive ways of expression might have been possible).

84. *Id.*—*Johnson*, 491 U.S. at 436 (Stevens, J., dissenting). — Justice Stevens does not convincingly explain why the general rules applicable to First Amendment cases should not

For most commentators, the Supreme Court correctly decided *Texas v. Johnson* on the basis of established First Amendment principles.<sup>85</sup> Nevertheless, a “firestorm of indignation”<sup>86</sup> across the United States followed the Supreme Court’s decision. President George H.W. Bush, who had already used the issue of the flag in his 1988 election campaign, denounced flag burning as “dead wrong” and proposed a constitutional amendment to overturn the *Johnson* decision.<sup>87</sup> Within a week of delivery of the decision, 508 members of Congress voted for resolutions expressing disapproval of the Supreme Court’s decision, while only eight members agreed with the decision.<sup>88</sup> The debate soon centered on the question of whether to circumvent the *Johnson* decision by law or by constitutional amendment. A constitutional amendment<sup>89</sup> was presented before Congress, but after the first uproar had ebbed, Congress realized that the issue of flag burning was ultimately a matter of only secondary importance that did not justify carving out an exception to the Bill of Rights. Consequently, Congress agreed not to amend the Constitution as long as other alternatives were available. Hoping that the Supreme Court might uphold a content-neutral flag desecration statute,<sup>90</sup> Congress then passed the Flag Protection Act of 1989.<sup>91</sup>

Only a few days after the federal Flag Protection Act became law, Eichman and several other protesters burned flags in Seattle and on the steps of the Capitol in Washington, D.C. The federal government prosecuted them for

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be applicable to the flag. In particular, Justice Stevens’ comparison of flag desecration with the defacement of the Lincoln Memorial—(see *id.*, at 396) does not take into consideration that the Lincoln Memorial is unique public property, while the flags at issue in the flag desecration decisions are generally neither unique nor public property. *Id.* (see *supra* at 436-38 n. 81).

85. See, e.g., Greenawalt, *supra* note 80, at 927; Nahmod, *supra* note 80, at 522; Stone, *supra* note 80, at 111-16.

86. GOLDSTEIN, BURNING THE FLAG, *supra* note 50, at 113 (citing *NEWSDAY*, July 2, 1989).

87. Robert Justin Goldstein, *The Great 1989-1990 Flag Flap: An Historical, Political, and Legal Analysis*, 45 U. MIAMI L. REV. 19, 27 (1990).

88. GOLDSTEIN, BURNING THE FLAG, *supra* note 50, at 113-14.

89. The text of the proposed constitutional amendment read as follows: “[T]he Congress and the States shall have power to prohibit the physical desecration of the flag of the United States.” (S.J. Res. 14, 106th Cong., 1st Sess. (March 17, 1999)).

90. The supporters of the Flag Protection Act based this hope on the grounds that the Texas statute defined desecration as to “seriously offend” an observer. The Supreme Court in the *Johnson* decision had stressed that “[t]he Texas law is . . . not aimed at protecting the physical integrity of the flag in all circumstances, but is designed instead to protect it only against impairments that would cause serious offense to others.” (*Texas v. Johnson*, 491 U.S. 397, at 411 (1989)).

91. The Act provided in relevant part, “(a)(1) Whoever knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States shall be fined under this title or imprisoned for not more than one year, or both.” 18 U.S.C. § 700 (Supp. I 1988).

violating the Flag Protection Act. Only a year after *Texas v. Johnson*, the Supreme Court thus had to rule again on the constitutionality of the prohibition of flag desecration. In *United States v. Eichman*,<sup>92</sup> the Supreme Court in essence followed its reasoning in *Johnson*. Writing for a majority of five Justices, Justice Brennan admitted that “the Flag Protection Act contains no explicit limit on the scope of prohibited conduct,” but determined that “it is nevertheless clear that the Government’s asserted interest is ‘related to the suppression of free expression,’ and concerned with the content of such expression.”<sup>93</sup> He stressed that the Government’s interest in protecting the physical integrity of the flag “is implicated ‘only when a person’s treatment of the flag communicates [a] message’ to others that is inconsistent with those ideals.”<sup>94</sup> Also, the language of the Act “unmistakably . . . suggests a focus on those acts likely to damage the flag’s symbolic value.”<sup>95</sup> Therefore, the Act was subject to “the most exacting scrutiny.”<sup>96</sup> “[F]or the reasons stated in *Johnson*, the Government’s interest cannot justify its infringement on First Amendment rights.”<sup>97</sup> Justice Brennan concluded, “Punishing desecration of the flag dilutes the very freedom that makes this emblem so revered, and worth revering.”<sup>98</sup>

Justice Stevens, joined by Chief Justice Rehnquist and Justices White and O’Connor, dissented. Similar to the *Johnson* dissent, Justice Stevens emphasized the symbolic value of the flag and concluded that the “[g]overnment has a legitimate interest in protecting the symbolic value of the American flag.”<sup>99</sup>

The *Eichman* decision triggered public indignation similar to the reaction after the *Johnson* decision. President George H.W. Bush renewed his call for an amendment to the Constitution. Yet, on June 21, 1990, the ~~A~~ amendment failed in the House of Representatives with ~~thirty-four~~<sup>34</sup> votes short of the required two-thirds majority. On June 26, 1990, the ~~A~~ amendment also failed in the Senate by a ~~fifty-eight~~<sup>58</sup> to ~~forty-two~~<sup>42</sup> vote, nine votes short of the required two-third majority.<sup>100</sup> Since then, members of Congress have recurrently called for a ~~C~~onstitutional Amendment. In June 1995, the House of Representatives endorsed the ~~A~~ amendment by a clear 312 to 120 vote. But the ~~A~~ amendment failed again in the Senate, just three votes short of the required two-thirds majority.<sup>101</sup> In June 1997, the House of Representatives passed the amendment with 310 against 114 votes. In the Senate, however, the amendment failed for the

92. ~~496 U.S. at~~ 310 (1990).

93. ~~Id.~~ at 315.

94. ~~Id.~~ at 316.

95. ~~Id.~~ at 317.

96. ~~Id.~~ at 318.

97. ~~United States v. Eichman~~, 496 U.S. at ~~Id.~~ at 318 (citation omitted).

98. ~~Id.~~ at 319.

99. ~~Id.~~ at 319 (Stevens, J., dissenting).

100. GOLDSTEIN, BURNING THE FLAG, *supra* note 50, at 298-99, 303-04.

101. ~~Id.~~ at 373.



third time.<sup>102</sup> On June 24, 1999, the House of Representatives, by a 305 to 124 vote, for the fourth time passed the amendment. By a ~~sixty-three~~ thirty-seven vote, the amendment on March 29, 2000 failed in the Senate, just four votes short of the required two-thirds majority.<sup>103</sup>

## 2.2. The Flag and National Anthem Decisions: Protection of the German Flag Valid State Interest

Contemporaneously with the *Johnson* and *Eichman* decisions of the United States Supreme Court, the German Bundesverfassungsgericht handed down two decisions that addressed the state's interest in the protection of its national symbols. The first decision<sup>104</sup> was concerned with the protection of the German federal flag, while the second decision<sup>105</sup> was concerned with the protection of the German national anthem.

In the flag desecration decision, the Bundesverfassungsgericht reversed the conviction under section 90(a) § 1 No. 2 StGB<sup>106</sup> of the manager of a book distribution company. The company had sold numerous copies of an antimilitarist paperback called 'Just Leave Me in Peace' ('Laßt mich bloß in Frieden'). The back cover of the book showed a collage composed of two pictures. The lower half of the collage consisted of the picture of a swearing-in ceremony in which soldiers were holding a federal flag. The upper half of the collage depicted a male torso urinating. The pictures combined in such a way that the urine "ma[de] its way across the photo montage onto the spread-out flag in the lower picture."<sup>107</sup>

The Bundesverfassungsgericht held that the conviction violated the manager's right to artistic expression under Article 5 § 3 of the German Constitution (known as the Basic Law) [GG].<sup>108</sup> The Court first had to determine whether to consider the collage as artistic expression protected by Article 5 § 3 GG. The German Constitution in Article 5 § 1 GG contains several separate

102. Francis X. Clines, *Flag Measure Stirs Lawmakers' Blood*, N.Y. TIMES, June 13, 1997, at A22.

103. John Whitehead, *The burning issue . . . with a risk factor*, WASH. TIMES, Apr. 4, 2000, at A17.

104. ~~81~~ BVerfGE 81, 278 (1990).

105. ~~BVerfG, decision of March 7, 1990—81 BVerfGE 81 at 298 (1990)~~ (This March 7, 1990 case is often referred to as the "German National Anthem Case").

106. ~~See supra~~ text accompanying note 41 and accompanying text.

107. BVerfGE 81 at 280. In a companion case that the Bundesverfassungsgericht decided in the same opinion as the case just described, the editor of a magazine was sentenced to a 700 DM fine under the national symbol provision of the German penal code. The magazine had published a satire on the seizure of the book 'Just Leave Me In Peace.' The satire reprinted the two pictures used in the collage separately, with an invitation to the reader to cut them out and put them together.

108. Bundesverfassungsgericht, Teil I v. 1949 (BGBl. I. S. 1.1).

provisions dealing with freedom of expression,<sup>109</sup> whereas freedom of artistic expression is guaranteed in Article 5 § 3 GG as a distinct constitutional right.<sup>110</sup> The Court held that the collage was art in the sense of Article 5 § 3 GG.<sup>111</sup> It stated that a collage is now a “conventional form of art.”<sup>112</sup> Moreover, “[t]he work’s creator makes an original statement capable of, and requiring, interpretation.—He expressed his view of the oath-taking ceremony through free, creative invention.”<sup>113</sup> Furthermore, although the artist tried to convey a political message, the right to artistic expression in Article 5 § 3 GG remained the controlling right - not the general right to freedom of expression in Article 5 § 1 GG. Last, the manager of the book distribution company performed an “indispensable mediatory function between artist and public.”<sup>114</sup>

However, the various forms of expression are not absolutely guaranteed. Therefore, the Bundesverfassungsgericht in a second part of its opinion had to determine the limits of artistic expression. General freedom of expression finds its limits in the “provisions of the general laws.”<sup>115</sup> On the other hand, artistic

109. Grundgesetz [GG] [Constitution] art. 5 § 1 (F.R.G.) GG provides, “[e]veryone has the right freely to express and to disseminate his opinion by speech, writing and pictures and freely to inform himself from generally accessible sources. Freedom of the press and freedom of reporting by radio and motion pictures are guaranteed. There shall be no censorship. For freedom of speech in the German constitutional order, see Edward J. Eberle, *Public Discourse in Contemporary Germany*, 47 CASE W. RES. L. REV. 797 (1997); DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 366-443 (1989); Peter E. Quint, *Free Speech and Private Law in German Constitutional Theory*, 48 MD. L. REV. 247 (1989).

110. ~~Grundgesetz [GG]~~ [Constitution] aArt. 5 § 3 (F.R.G.) GG states in relevant part, “Art and science, research and teaching are free. Freedom of teaching does not absolve from loyalty to the Constitution.”

111. The Court in the *Mephisto* decision, ~~(BVerfG, decision of February 24, 1971, 30 BVerfGE 30, 173 (1979))~~, and in the *Anachronistic Parade Case*, ~~(BVerfG, decision of July 17, 1984, 67 BVerfGE 67, 21308 (1984))~~, developed three theories to determine whether a particular expression can be considered as art protected by Article 5 § 3 of the Constitution GG. The Court employs these theories cumulatively. According to the first theory, “[t]he essence of artistic activity is free creative action through which the artist’s impressions, his knowledge and experience are made directly perceptible through the medium of a particular formal language.” ~~(30 BVerfGE 30, 173 at (188-189) (1971))~~. According to the second theory, “the essence of a work of art is considered to be that from a formal, typological perspective, the requirements of a certain type of work are fulfilled.” ~~(67 BVerfGE 67, 213 (at 226-227) (1984))~~. According to the third theory, a “characteristic feature of artistic expression is that it can be interpreted in any number of ways.” ~~(67 BVerfGE 67, 213 (at 227) (1984))~~.

112. ~~81 BVerfGE 81, 278 (at 291) (1990)~~.

113. *Id.*

114. *Id.* at 292.

115. GG aArt. 5 § 2 of the Basic Law (providing), “These rights are limited by the provisions of the general laws, the provisions of laws for the protection of youth and by the right to inviolability of personal honor.”)

expression seems to be guaranteed without reservation. But the Bundesverfassungsgericht in the landmark *Mephisto* case<sup>116</sup> had held that the right to artistic expression is not granted without all restriction either. “[A] dispute for consideration in the context of the guarantee of artistic freedom is to be resolved in accordance with the constitutional value system and having regard to the unity of the underlying value system, by constitutional interpretation.”<sup>117</sup> The Court in the flag desecration decision reaffirmed these principles in arguing that “a well-ordered human co-existence requires not only the mutual consideration of citizens, but also a functioning governmental order, which is a prerequisite for guaranteeing the effectiveness of any basic rights protection at all.”<sup>118</sup> Thus, countervailing norms, which can be individual or social, can limit the right to free artistic expression. In contrast to Article 5 § 1 GG, however, Article 5 § 3 GG cannot be limited by statutes alone, but only by competing constitutional interests. Even if such an interest is incorporated in a statute, the statute can still be found to reflect a constitutional interest and as such limit the freedom of artistic expression. Thus, the Court had to determine whether section 90(a) § 1 No. 2 StGB, which “protects the flag of the Federal Republic of Germany as a state symbol,”<sup>119</sup> is intended to protect a constitutional interest.

The Court held that it is. This intention to protect a constitutional interest followed “neither directly nor exclusively from Article 22 GG.”<sup>120</sup> However, the Bundesverfassungsgericht held that Article 22 GG presupposes “the right of the state to use symbols to portray itself. It is the purpose of these symbols to appeal to the citizens’ sense of civic responsibility (Staatsgefühl).”<sup>121</sup> “As a free state, the Federal Republic relies on the identification of its citizens with the basic values represented by the flag. The values protected in this sense are represented by the state colors, stipulated in Article 22 GG. They stand for the free democratic basic order (freie demokratische Grundordnung).”<sup>122</sup> “The flag serves as an important integration device through the leading state goals it embodies; its disparagement can thus impair the necessary authority of the state.”<sup>123</sup> Consequently, the

116. ~~BVerfGE 30, 173~~<sup>Supra note 111</sup>. In a 3 to ~~2~~<sup>3</sup> vote, the Bundesverfassungsgericht upheld a ~~prohibition~~<sup>injunction</sup> against the publication of a novel entitled “Mephisto. Roman einer Karriere” by Klaus Mann. The novel is about an actor named Hendrik Höfgen, who disowns all ethical convictions to make a career in National Socialist Germany. The model for the novel’s character was the actor Gustaf Gründgens, whose son and sole heir won a defamation suit on behalf of Gründgens. The Bundesverfassungsgericht held that the right to human dignity as guaranteed in Art. 1 § 1 GG restricts the artist’s right to freedom of art.

117. ~~81-BVerfGE 81, 278 (2<sup>at</sup> 193) (1990)~~.

118. ~~81-BVerfGE~~<sup>Id.</sup> at 292.

119. ~~Id.~~ at 293.

120. ~~Id.~~

121. ~~Id.~~

122. ~~BVerfGE 81, 278 (293) (1990)~~<sup>Id.</sup>

123. ~~Id. at Id. at 293-944~~.

constitutional value protected by section 90(a) § 1 No. 3 StGB follow from the basic order that the colors established in Article 22 GG represent.

Yet, the Court's conclusion that the protection of the flag is constitutionally founded did not end its inquiry. The regulation of artistic expression is not limited to cases of "clear and present danger."<sup>124</sup> Rather, the Court's doctrine requires a case-by-case balancing of the countervailing constitutional interests. As a result, the defendant's interest in the protection of his artistic expression and the state's interest in protecting the flag had to be balanced. This balancing of the conflicting constitutional principles was primarily the task of the lower courts. But in criminal cases, the Bundesverfassungsgericht considers a more intensive scrutiny to be necessary.<sup>125</sup> Therefore, in the flag desecration case, the Court held that the lower court had not performed the balancing properly. The court had not evaluated the collage in the light of the structural characteristics of a satire (werkgerechte Interpretation).<sup>126</sup> In interpreting a satire, a distinction has to be drawn between the core of the statement (Aussagekern) and the form it takes (Einkleidung). The standard for judging the form of a satire is less strict than that for judging the core of a statement, because the form of a satire is intended to distort.<sup>127</sup> The Bundesverfassungsgericht concluded that the lower court had misinterpreted the core of the collage. The core did not show contempt for the flag, but attacked militarism. If the lower court had interpreted the collage in this way, its balancing might have led to a different result.<sup>128</sup> In light of this, the Bundesverfassungsgericht held that the conviction of the defendant violated his right to artistic expression and remanded the case to the lower courts for reconsideration.

The Bundesverfassungsgericht handed down the German National Anthem decision<sup>129</sup> on the same day as the flag desecration decision and used very similar reasoning. The defendant was the responsible editor of a Nürnberg city-magazine, which had published a parody on the German national anthem criticizing aspects of modern German life, for example the pursuit of money, German peep shows, the brutality of hooligans, and militarism. The lower courts convicted the defendant under section 90(a) § 1 No. 2 StGB for denigrating the German national anthem.<sup>130</sup> The Bundesverfassungsgericht held that the parody was artistic expression in the sense of Article 5 § 3 GG.<sup>131</sup> But section 90(a) § 1 No. 2 StGB protects the national anthem as a symbol of the Federal Republic of

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124. *Id.* at 292-93.

125. *Id.* at 289-90.

126. *Id.* at 294.

127. *Id.*

128. ~~BVerfGE 81, 278 (295-96) (1990)~~ *Id.* at 295-96.

129. ~~81 BVerfGE~~ *Id.* at 299.

130. *Id.*

131. *Id.* at 305.

Germany.<sup>132</sup> The Court referred to its flag desecration decision and without further explanation asserted that the “protection of the anthem, like that of the flag, is based on the Constitution.”<sup>133</sup> Since only the third verse of the Deutschland Song is sung on state occasions, the Court held that the protection of the symbol can refer only to this verse.<sup>134</sup> As in the flag desecration case, the Court sought to fairly balance among the opposing principles. The Bundesverfassungsgericht held that the lower court had not adequately distinguished between the expressive core and form of the satire.<sup>135</sup> Thus, the conviction violated Article 5 § 3 GG.

When compared to the public reaction in the United States to the *Johnson* and *Eichman* decisions, the German public reacted neutrally to the flag desecration decision. Legal academics, on the other hand, discussed the soundness of the decision. The president of the Federal Administrative Court in a law review commentary criticized the Bundesverfassungsgericht for being too liberal.<sup>136</sup> Other academics endorsed the criticism,<sup>137</sup> while most commentators regarded the decision as correct.<sup>138</sup>

#### **IV-IV. THE UNDERLYING REASONS FOR THE "FLAG ENIGMA"**

This section will explore the underlying reasons for the “flag enigma.” More concretely, it will offer an explanation for why the majority of the Supreme Court Justices sees ~~itself themselves~~ as unable to protect the U.S. flag, whereas the Bundesverfassungsgericht recognizes the state’s interest in the protection of its symbols. The first part will consider factual differences and differences in free speech doctrine that might explain the “flag enigma,” but which at closer

132. [81 BVerfGE](#), at 308.

133. [Id.](#)

134. [BVerfGE 81, 278 \(308\) \(1990\)](#), [Id.](#)

135. [Id.](#)

136. Horst Sendler, *Liberalität oder Libertinage?*, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] [f\[NJW\]](#) 2157, 2158 (1993).

137. DANIEL BEISEL, DIE KUNSTFREIHEITSGARANTIE DES GRUNDGESETZES UND IHRE STRAF-RECHTLICHEN GRENZEN 366-67 (1997) (rejecting any justification on the constitutional level for the protection of more symbols); Josef Isensee, *Grundrecht auf Ehre*, in STAATSPHILOSOPHIE UND RECHTS-POLITIK 5, 25-26 (Burkhardt Ziemse et al. eds., 1997) (arguing that the disrespect of national symbols injures the reputation of the state); Christian Stark, *Commentary to Art. 5 Abs. 3*, in DAS BONNER GRUNDGESETZ 318 (Christian Stark ed., 4th ed. 1999) (arguing that the form of a satire can be defamatory in itself).

138. Ernst Gottfried Mahrenholz, *Freiheit der Kunst*, in § 26 HANDBUCH DES VERFASSUNGSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND, 93-95 (2nd ed. 1994); Friedhelm Hufen, *Verunglimpfung von Staatssymbolen durch künstlerische Darstellung*, JURISTISCHE SCHULUNG [\[JUS\]](#) [JUS] 687, 690 (1991).

inspection do not. The second part will look into differences in the concept of democracy that explain the "flag enigma."

So far, this article has examined the role of the United States and the German flags in their respective societies—, and ~~their—the flags'~~ roles in constitutional jurisprudence. The role of the United States flag in the American society is very different from the role of the German flag in the German society. Although the American and German flag stem from comparable historical backgrounds, the American flag is treated with reverence while the German flag is treated with indifference. The American flag occupies a predominant role in the minds of many Americans. There is a cult around the flag, with the flag being its almost sacred center of veneration. The German flag, however, plays a minor role for most Germans. It identifies the German nation-state, but there is no Flag Day, no pledge of allegiance to the flag, not even private display of the flag of any significance.

Regarding the prominent role of the United States flag in the American society, one would expect that the United States Supreme Court in its constitutional jurisprudence would try to protect the flag and its symbolic value. In the case of a conflict between the state's interest in protecting the flag and the individual's interest in exercising free speech, one would expect that the Supreme Court would give priority to the state's interest in protecting the flag. In particular, in the case of flag desecration through the exercise of the First Amendment right to free speech, one would expect that the Supreme Court would uphold a conviction under a state or federal flag desecration statute.

On the other hand, regarding the minor role of the German flag in the German society, one would expect that the ~~Bundesverfassungsgericht German Federal Constitutional Court~~ would show little interest in the protection of the national flag. If a conflict between the state's interest in the protection of the flag and the individual's interest in the exercise of free speech rights arises, one would expect that the Bundesverfassungsgericht would give the individual's interest to free speech greater weight than the state's interest in the protection of its symbols. In the case of flag desecration through the exercise of the right to free expression, one would expect that the Bundesverfassungsgericht would strike down a conviction under the federal flag statute.

Yet, the flag decisions of the Supreme Court and the flag and national anthem decisions of the Bundesverfassungsgericht do not support these conclusions. Although both ~~C~~eourts struck down the convictions for desecration of the flag or the national anthem, the reasons underlying the decisions reveal such profound differences in the Courts' willingness to protect the flag and its symbolic value that it is justified to speak of a "~~flag enigma.~~"<sup>2</sup>

On the one hand, the Supreme Court, which seemed poised to give great protection to the flag, categorically rejected that the state might have a valid interest in the protection of its flag. In the *Johnson* decision, the Supreme Court struck down the conviction for flag desecration under the content-based Texas flag desecration statute. In the *Eichman* decision, the Supreme Court struck down

the conviction for flag desecration under the federal flag desecration statute, even though the statute on its face might be considered as content-neutral.<sup>139</sup> Taken together, the *Johnson* and *Eichman* decisions stand for the proposition that there can be no valid state interest in the protection of the flag that might justify the abridgment of First Amendment rights. The *Johnson* decision made clear that Texas' interest in the protection of the flag is content-based.<sup>140</sup> Moreover, the decision showed that this interest is not compelling enough to survive strict scrutiny.<sup>141</sup> The *Eichman* decision showed that every interest advanced by the state to justify the punishment of flag desecration is content-based.<sup>142</sup> As a consequence, every flag desecration statute is unconstitutional on its face.<sup>143</sup> There can be no seditious libel in the constitutional jurisprudence of the Supreme Court.

On the other hand, the Bundesverfassungsgericht, which we expected to give little protection to the state's national symbols, acknowledges the state's interest in the protection of its symbols. In the first part of the flag decision, the Bundesverfassungsgericht held that the interest in the protection of the flag has constitutional underpinnings, although Article 22 GG does nothing but identify the colors of the federal flag.<sup>144</sup> In the national anthem decision, the Bundesverfassungsgericht even awarded constitutional underpinnings to the state's interest in the protection of the national anthem, although the national anthem is nowhere mentioned in the Basic Law.<sup>145</sup> The Court thus held that section 90(a) § 1 No. 2 StGB, which protects the national symbols of the Federal Republic of Germany, is constitutional on its face. The crime of seditious libel survives even in the face of the constitutional guarantees to free expression.

Only in a second part of its opinions did the Bundesverfassungsgericht balance the state's interest in the protection of its symbols and the individual's right to free speech. Regarding the facts underlying the Court's decisions, it held that – in the particular cases it had to decide – the individual's interest in free expression outweighed the state's interest in the protection of its symbols. However, the Court might come to a different result if it were confronted with a different fact pattern. The Bundesverfassungsgericht is willing to protect the state's interest in the protection of its symbols, even though these symbols play a minor role in the German society.

This article has called this situation the "flag enigma." The Supreme Court categorically refuses to protect what the public considers to be worth protecting, while the Bundesverfassungsgericht is willing to protect what the public regards with indifference.

139. *United States v. Eichman*, 496 U.S. 310, at 315 (1990).

140. *Johnson*, 491 U.S. at 410.

141. *Id.* at 407-20 et seq.

142. *Eichman*, 496 U.S. at 315-24 et seq.

143. *See id.*, at 318.

144. *See* 81 BVerfGE 81, 278 (at 283) (1990).

145. *See* 81 BVerfGE *Id.* at 308.



### **A.A. Factual Differences and Differences in Free Speech Doctrine**

The facts underlying the flag-burning decisions of the Supreme Court and the national symbol decisions of the Bundesverfassungsgericht are strikingly similar. First, the decisions are all concerned with the misuse of a national symbol. Second, the defendants all misused this symbol to express political protest. Last, the state prosecuted them under statutes that made it criminal to deface this symbol.

However, there are also several factual differences. The *Johnson* and the *Eichman* decisions involved flag burning – the physical destruction of the flag. In contrast, the flag decision of the Bundesverfassungsgericht did not involve the physical destruction of the flag, but, rather, its misuse in a collage. In this respect, the German case somewhat resembles the United States Supreme Court’s decision in *Street v. New York*,<sup>146</sup> in which the defendant was prosecuted for casting contemptuous words upon the flag. One might also draw parallels to *Spence v. Washington*<sup>147</sup> and *Smith v. Goguen*<sup>148</sup> also cases in which the flag was misused rather than destroyed. Yet, the German flag decision is not like these cases either; ~~because~~ it did not concern any actual flag, but, rather, a black and white photograph of a flag.<sup>149</sup>

However, these factual differences<sup>150</sup> do not explain the “flag enigma.”<sup>151</sup> The Bundesverfassungsgericht might have been even more willing to respect the state’s interest in the protection of its symbols had an actual flag been burned. Moreover, the balancing of the state’s interest in the protection of the flag and the defendant’s interest in free expression – and thus, the final outcome of the case decided by the Bundesverfassungsgericht – might have been different had the Court been confronted with the facts of the *Johnson* decision. And the Justices forming the Supreme Court’s majority most likely would have been even less willing to acknowledge the state’s interest in the protection of the symbolic value

146. See *supra* notes 55-58 and accompanying text.

147. See *supra* notes 62-65 and accompanying text.

148. See *supra* notes 59-61 and accompanying text.

149. Quint cites an American flag desecration case, the facts of which are similar to those of the German flag case. Peter E. Quint, *The Comparative Law of Flag Desecration*, 15 HASTINGS INT’L & COMP. L. REV. 613, at 628 n.-92. In *Korn v. Elkins*, 317 F. Supp. 138 (D. Md. 1970), the court held that the distribution of a student magazine depicting the burning of a flag on its cover is protected by the First Amendment. University officials at the University of Maryland had refused to permit the publication of the issue. The students brought an action challenging this refusal. The court held that the case involved expression only, in the form of art, which was protected by the First Amendment.

150. See *supra* notes 146-49.

151. See Quint, *supra* note 149, at 628.

of the flag had no actual flag been burned.<sup>152</sup> As is the case the Supreme Court's majority, the Supreme Court's minority might have given priority to the First Amendment right to free expression, too, had the *Johnson* and *Eichman* decisions involved the use of the flag in a collage.

In fact, many artists have extensively used the American flag in works of art. Beginning with the flag series of Jasper Johns in the 1950s, an entire art genre developed which made use of the American flag.<sup>153</sup> This – often critical – use of the United States flag in works of art has hardly ever been challenged.<sup>154</sup> In 1989, however, the display of an artwork created by Scott Tyler, a student of photography at the School of Art Institute in Chicago, titled "What Is the Proper Way to Display the American Flag?" aroused immense public uproar and was also challenged in a lawsuit.<sup>155</sup> The artwork included an American flag placed on the floor in front of a shelf on which a ledger was positioned for spectators to write down their impressions. To write comfortably, the viewer had to stand on the flag.<sup>156</sup> One might argue that this incidence indicates that the dissenting Justices in the *Johnson* and *Eichman* decisions might also have been willing to protect the symbolic value of the flag had they been confronted with flag desecration through art. Yet, in contrast to the German flag case, Tyler's work involved an actual flag, and the flag was exhibited during the heated controversy around the *Johnson* decision. Most probably, the collage at issue in the flag decision of the Bundesverfassungsgericht would have offended the dissenting Justices less than Tyler's artwork. Even the Justices dissenting in the *Johnson* and *Eichman* decisions might have given priority to the right to free expression had they faced

152. Furthermore, some state statutes only seem to prohibit the physical desecration of the flag. The Texas statute at issue in *Johnson*, e.g., defines "desecrate" as "deface, damage, or otherwise physically mistreat . . ." (emphasis added). Similarly, the Flag Protection Act of 1989, [Pub. L. No. 101-131, 103 Stat. 777](#), provided in relevant part, "Whoever knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground or tramples upon . . ."

153. See Jasper Johns, *Jasper Johns' Flags, 1955-1994* (1996); Old Glory, *The American Flag in Contemporary Art: June 14 – August 14, 1994* Cleveland Center for Contemporary Art (1994).

154. The only Supreme Court flag desecration case involving artistic expression was *Radich v. New York*, 26 N.Y.2d 114 (1970), *aff'd*, 401 U.S. 531 (1971). The Court, in an equally divided vote, upheld the conviction of an art dealer who in his gallery displayed art 'constructions' to protest the Vietnam War. One of the 'constructions' consisted of an American flag stuffed and shaped in a form suggesting a human body hanging from a yellow noose around its neck. Among the other 'constructions' was one in the form of a phallic symbol wrapped in an American flag (for the background of the decision see BOIME, *supra* note 12, at 57-58).

155. [Radich, 26 N.Y.2d at 114](#). The circuit court judge dismissed the suit, arguing that "merely placing the flag on a clean floor" did not violate the federal flag desecration statute.

156. For details of the 1989 Chicago "Flag on the Floor" controversy see GOLDSTEIN, *BURNING THE FLAG*, *supra* note 50, at 77-90.

the facts underlying the German flag decision. As a result, differences in the facts underlying the decisions cannot explain the "flag enigma."<sup>157</sup> Indeed, the factual differences might even enforce the "flag enigma."<sup>158</sup>

An alternative way to explain the "flag enigma"<sup>159</sup> concerns differences in free speech doctrine. In particular, the Supreme Court decided the flag-burning decisions on the basis of the First Amendment, which prohibits the state from interfering with the general right to freedom of expression. In contrast, the Bundesverfassungsgericht based its decision on Article 5 § 3 GG, which guarantees the specific right to free artistic expression. To determine whether this difference can explain the "flag enigma,"<sup>160</sup> it has to be asked whether the Supreme Court would have decided the *Johnson* and *Eichman* cases differently had it been confronted with a case involving freedom of artistic expression and, similarly, whether the Bundesverfassungsgericht would have decided the flag desecration case differently had it been confronted with a case involving general freedom of expression. Both cases would probably have come to the same result. On the one hand, the First Amendment of the United States Constitution guarantees freedom of speech. The Court therefore does not consider artistic expression in its own right, but regards it under general First Amendment principles. Today, it is well settled in the Supreme Court's First Amendment jurisprudence that artistic expression enjoys full First Amendment protection.<sup>157</sup> Had the Supreme Court been confronted with a case of flag desecration through art, it would most probably have come to the same conclusion as it reached in the *Johnson* and *Eichman* decisions.

On the other hand, the German Constitution contains several distinct provisions that establish rights of expression. Article 5 § 1 GG guarantees the general freedom of opinion, whereas Article 5 § 3 GG establishes the right to artistic expression. General freedom of opinion is subject to the limitations in "the provisions of the general laws, the provisions of law for the protection of youth and by the right to inviolability of personal honor,"<sup>158</sup> while artistic expression seems unlimited.<sup>159</sup> Thus, artistic expression is in theory the stronger right.<sup>160</sup> However, the Bundesverfassungsgericht balances freedom of artistic expression with other constitutional rights.<sup>161</sup> Moreover, the Bundesverfassungsgericht's willingness to acknowledge that a simple, general law can represent a

157. See, e.g., *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991) (plurality opinion) (discussing nude dancing); *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) (discussing music); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975) (discussing theater); *Miller v. California*, 413 U.S. 15, 34-35 (1973) (discussing all artistic expression except unless-obscene expression); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (discussing film).

158. See [Grundgesetz \[GG\] art. 5 § 2 \(F.R.G.\)](#); [Article 5 § 2 GG](#).

159. See [Grundgesetz \[GG\] article 5 § 3 \(F.R.G.\)](#); GG, which does not refer to Article 5 § 2 GG.

160. See Roggemann, *supra* note 16, at 936.

161. See *supra* note 105 and accompanying text.

countervailing constitutional interest has somewhat blurred the differences between Article 5 § 1 GG and Article 5 § 3 GG.<sup>162</sup> Therefore, it is most likely that the Federal Constitutional Court would have decided similarly had it confronted a case not involving artistic expression, ~~but~~ instead, involving general freedom of opinion. Moreover, because the freedom of artistic expression is the stronger right in the German constitutional order, it is possible that the Court would have been even more willing to protect the symbolic value of the flag had the flag decision been a general free opinion case.<sup>163</sup> Consequently, differences in doctrine cannot explain the "flag enigma."

### **B.B. Differences in the Concept of Democracy**

What, then, explains the differences between the flag decisions of the Supreme Court and the Bundesverfassungsgericht? Perhaps the United States and Germany have different concepts of democracy. While the American concept of democracy is based on the spirit of popular sovereignty,<sup>164</sup> the German concept is based on the notion that the democratic state needs to defend its own foundations.<sup>165</sup> These two concepts of democracy influenced the way the Courts dealt with attacks on national flags. The Supreme Court's flag decisions were based on the notion that the people as the sovereign retain the authority to define national symbols. The Bundesverfassungsgericht, on the other hand, recognized the state's interest in protecting itself against attacks on its national symbols.

162. See Herbert Bethge, *Commentary to Article 5 GG*, in MICHAEL SACHS, GRUNDGESETZ 198 (2d ed. 1999); Johann Friedrich Henschel, *Die Kunstfreiheit in der Rechtsprechung des BVerfGE*, 32 NEUE JURISTISCHE WOCHENSCHRIFT 1997, 1940-41 (1990) NJW 1937, 1941 (1990).— A good illustration for this is the national anthem case. See BVerfGE 81, 278 (299) ~~supra note 129~~. The Bundesverfassungsgericht held that the protection of the German national anthem is based on the Constitution. See ~~id.~~ BVerfGE 81, 278 (at 308-308). However, in contrast to the federal flag, the national anthem is not even mentioned in the Basic law. The Haydn melody and the text by Hoffmann von Fallersleben were declared to be the German national anthem only by a correspondence between the then Federal Chancellor Konrad Adenauer and the Bundespräsident Theodor Heuss. See BVerfGE 81, 278 ~~id.~~ (at 309). The Court's insecurity as to whether the constitutional protection only extends to the third verse or also the first and second verses of the Deutschland song underlines the difficulties in the Court's approach to assign a constitutional status to almost every relevant interest.

163. See Roman Herzog, *Commentary to Article 22 GG*, in GRUNDGESETZ KOMMENTAR, BAND II, Art. 22-69, 29 (Theodor Maunz & Günter Dürig eds., Nov. 1997). See BVerfG, decision of Feb. 14, 1978, 47 BVerfGE 198 ("election campaign spot"), in which the Bundesverfassungsgericht held that section 90(a) § 1 StGB is a general law in the sense of Article 5 § 2 GG that can restrict the right of a political party to have an election spot transmitted. *Id.* at 232-33.

164. See *infra* notes 167 et seq. and accompanying text.

165. See *infra* notes 182 et seq. and accompanying text.

### 1.1. The American Approach: Protection of Popular Sovereignty

A democratic state whose legitimacy is challenged by the exercise of basic democratic rights faces a dilemma.<sup>166</sup> It can either decide to defend itself, which might entail prohibiting to some the exercise of certain democratic freedoms, or it can refuse to defend itself, which might endanger its own existence.

The United States is committed to a concept of democracy that is based on James Madison's concept that "[t]he people, not the Government, possess the absolute sovereignty."<sup>167</sup> Madison stressed that as a consequence "the censorial power is in the people over the Government, and not in the Government over the people."<sup>168</sup> In accordance with the Madisonian view of popular democracy, the Supreme Court's free speech jurisprudence is based on a "profound national commitment . . . that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attack on government and public officials."<sup>169</sup> Thus, in *New York Times v. Sullivan*,<sup>170</sup> the Court unanimously struck down a libel judgment brought by a public official against criticism of his official conduct. The United States concept of democracy allows every vision of the nation to prevail in public discourse; and to preserve this possibility, criticism cannot be barred from public discourse.<sup>171</sup> Consequently, one of the central meanings – if not the central

166. See KARL LOEWENSTEIN, VERFASSUNGSLEHRE 348 (3d ed. 1975); see also GREGOR PAUL BOVENTER, GRENZEN POLITISCHER FREIHEIT IM DEMOKRATISCHEN STAAT 16-18 (1985).

167. 4 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 569-70 (1876), cited in *New York Times Co. v. Sullivan*, 376 U.S. 254, 274 (1964). See also the following statement of James Madison in which he distinguished the American nature of government from its European counterparts, "[I]n Europe, charters of liberty have been granted by power. America has set the example . . . of charters of power granted by liberty." James Madison, cited in Gregory Herbert, *Waiving Rights and Burning Flag: The Search for a Valid State Interest in Flag Protection*, 25 HARV. C.R.-C.L. L. REV. 591, 622 (1990).

168. 4 ANNALS OF CONGRESS 934 (1794), cited in *Sullivan*, 376 U.S. at 273.

169. *Sullivan*, 376 U.S. at 270 (citations omitted).

170. *Id.* at 254. L.B. Sullivan, an Alabama police commissioner, had sued the *New York Times* for publishing an advertisement soliciting contributions for a civil rights campaign. The advertisement, which did not mention Sullivan, contained statements, some inaccurate, complaining of police brutality toward civil rights protestors. The jury awarded Sullivan a \$500,000 dollar verdict.

171. See ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 184-191 (1995). See *Sullivan*, 376 U.S. at 269, "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity

meaning of the First Amendment is that seditious libel cannot be made the subject of a government sanction.<sup>172</sup> Under the American concept of democracy and free speech, it can—not be a crime to criticize the government or to injure its reputation.<sup>173</sup>

Applying the American concept of democracy to the question of whether the state can claim an interest in protecting its national symbols against criticism illustrates that there can be no such interest. Punishing flag burners would reintroduce the concept of seditious libel into American law.<sup>174</sup> However, the spirit of popular sovereignty demands that the people retain the authority to define national symbols. Symbols possess only the subjective meaning that is given to them by the interpreters.<sup>175</sup> Any attempt legally to punish the desecration of the flag would contradict the American concept of democracy.<sup>176</sup> In the words of Justice Stevens, the “flag is a symbol for more than ‘nationhood and national unity’, . . . it is a . . . symbol of . . . courage, . . . determination, . . . gifts of nature, . . . freedom, . . . equal opportunity, . . . religious tolerance, and . . . good will for the other peoples.”<sup>177</sup> From this perspective, flag burners do not endanger the flag’s symbolic value, but “may be said to affirm an ideal vision of a possible nation whose identity is under contention, the possible nation that is [also](#)

essential to the security of the Republic, is a fundamental principle of our constitutional system.” [Sullivan, 376 U.S. at 269.](#)

172.—See *Sullivan*, 376 U.S. at 268; Harry Kalven, *The New York Times Case: A Note on “The Central Meaning of the First Amendment”*, 1964 SUP. CT. REV. 191, 209 (1964).

173.—For definitions of seditious libel see Judith Schenck Koffler & Bennett L. Gershman, *The New Seditious Libel*, 69 CORNELL L. REV. 816 (1984); LEONARD W. LEVY, *EMERGENCE OF A FREE PRESS* 8 (1985), “Seditious libel has always been an accordion-like concept, expandable or contractible at the whim of judges. Judged by actual prosecutions, the crime consisted of defaming or condemning or ridiculing the government: its form, constitution, officers, laws, conduct, or policies, to the jeopardy of the public peace. In effect, any malicious criticism about the government that could be construed to have the bad tendency of lowering it in the public’s esteem, holding it up to contempt or hatred, or of disturbing the peace was seditious libel . . . .”

174.—*Statutory and Constitutional Responses to the Supreme Court Decision in Texas v. Johnson: Hearings Before the Subcomm. On Civil and Constitutional Rights of the House Committee on the Judiciary*, 101st. Cong. 203, 224 (1989) (statement of Prof. Charles Fried), reprinted in *THE FLAG AND THE LAW*, Vol. III (Marlyn Robinson & Christopher Simoni eds., (1993)) (comparing punishment of flag burning to crime of lèse majesté and lèse nation); *Proposing An Amendment to the Constitution of the United States Authorizing Congress to Prohibit the Physical Desecration of the Flag of the United States: Hearing on S. 1338, H.R. 2978, and S.J. Res. 18 before the Committee on the Judiciary United States Senate*, 106th Cong. 309, 316, 331 (statement of Professor Parish) (reprinted in *THE FLAG AND THE LAW*, Vol. II); Frank Michelman, *Saving Old Glory: On Constitutional Iconography*, 42 STAN. L. REV. 1337, 1348 (1990).

175.—CHARLES D. ELDER & ROGER W. COBB, 38 *THE POLITICAL USES OF SYMBOLS* (1983).

176.—See Herbert, *supra* note 167, at 622.

177.—*Texas v. Johnson*, 491 U.S. 397, at 436-437 (1989) (J. Stevens, dissenting).

potentially hers, the one with which she identifies.”<sup>178</sup> In the American nation, which is not a folk-nation comparable to the German nation but “rather an ideological construct, the materialization of novel ideas,”<sup>179</sup> symbols create a common identity, and these symbols represent not only nationhood but also liberty and the right to dissent.<sup>180</sup>

In light of this, a review of *Texas v. Johnson* illustrates that the majority opinion is based on the principles of popular sovereignty in public discourse, although the Supreme Court nowhere in its decision used the words “seditious libel” or “democracy.” In accord with the principle of popular sovereignty, the Court introduced its discussion with the “bedrock principle underlying the First Amendment . . . that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”<sup>181</sup> The Court concluded that “nothing in our precedents suggests that a state may foster its own view of the flag by prohibiting expressive conduct relating to it.”<sup>182</sup> This statement affirms the Court’s conviction that the crime of seditious libel is inconsistent with the principle of popular democracy established by the Constitution.

## 2.2. The German Approach: Protection of the Free Democratic Basic Order

Germany has chosen an alternative approach to the “democratic dilemma,” which is to defend the state against attacks on its own basic principles and authority. In German constitutional jurisprudence, this concept has become known as the concept of a “militant democracy”<sup>183</sup> (wehrhafte or streitbare

178. Michelman, *supra* note 174, at 1362. [See also Johnson, 491 U.S. at 419. The Court in Johnson stated, “\[w\]e are tempted to say, in fact, that the flag’s deservedly cherished place in our community will be strengthened, not weakened, by our holding today. Our decision is a reaffirmation of the principles of freedom and inclusiveness that the flag best reflects, and of the conviction that our toleration of criticism such as Johnson’s is a sign and source of our strength.” 491 U.S. at 419](#)

179. ZELINSKY, *supra* note 10, at 16–17; [see also similar](#) RUSSEL BLAINE NYE, THIS ALMOST CHOSEN PEOPLE 47 (Michigan, 1966), “American nationalism has always been connected not to place but to principles.” On American nationalism see also HANS KOHN, THE IDEA OF NATIONALISM 263 (1944) (German translation HANS KOHN, DIE IDEE DES NATIONALISMUS (Günter Nast-Kölb trans., revised ed., 1961)).

180. For example, Francis Bellamy and James Upham wrote the Pledge of Allegiance in order to assimilate and Americanize immigrant children. They published the Pledge of Allegiance on September 8, 1892 in the Boston based *The Youth’s Companion* magazine for students to repeat on Columbus Day that year. See BOIME, *supra* note 12, at 30–35.

181. *Johnson*, 491 U.S. at 414.

182. *Id.* at 415.

183. The German-American political scientist Karl Loewenstein developed the term, see Karl Loewenstein, *Militant Democracy and Fundamental Rights*, 31 AM. POL. SCI.



Demokratie). The reasons for the emergence of militant democracy lie in the historic background leading to the promulgation in 1949 of the German Constitution. One of the central failings of the Weimar Republic that led to the Hitler state was its tolerance of extremist parties intending to destroy democracy.<sup>184</sup> In fact, what constitutional scholars of that time praised as its virtue, they view today as a pivotal failure of the Weimar Republic.<sup>185</sup> Recalling the conditions that led to the Nazi dictatorship, the Parliamentary Council<sup>186</sup> that prepared the Grundgesetz decided that the new republic could not be neutral in the face of its enemies. It introduced in the Basic Law a set of provisions intended to protect the state against attacks on its basic principles. In particular, Article 21 § 2 GG allows the ~~Bundesverfassungsgericht Federal Constitutional Court~~ to decide on the question of unconstitutionality of political parties which “seek or impair or destroy the free democratic basic order or to endanger the existence of the Federal Republic of Germany.” Article 9 § 2 GG prohibits associations whose “purpose or activities . . . are directed against the constitutional order or the concept of international understanding.” Article 5 § 3 GG resolves that the freedom to teach “shall not absolve from the loyalty to the Constitution,” and Article 18 GG states that fundamental rights can be limited or forfeited if used to combat or abolish the constitutional order.<sup>187</sup>

The Bundesverfassungsgericht further held that the concept of a militant democracy is a general principle of the Basic Law<sup>188</sup> and as such reaches beyond

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REV. 417, 638 (1937). The Bundesverfassungsgericht first used it in the Communist Party case, BVerfGE 5, 85, ~~decision of August 17, 1956, 5 BVerfGE 85, 139~~ (declaring the Communist Party of Germany, KPD, unconstitutional under Art. 21 § 2 GG); ~~s.~~ See also KOMMERS, *supra* note 109, at 222-244.

184. GOTTHART JASPER, *DER SCHUTZ DER REPUBLIK* (1963). To the reasons leading to the failure of the Weimar Republic see KARL DIETRICH ERDMANN & HAGEN SCHULZE, *WEIMAR, SELBSTPREISGABE EINER DEMOKRATIE* (1980).

185. Jürgen Becker, *Die wehrhafte Demokratie des Grundgesetzes*, in § 167 HANDBUCH DES STAATSRICHTS DER BUNDESREPUBLIK DEUTSCHLAND, BAND VII, 5 (Josef Isensee & Paul Kirchhof eds., 1992) (providing additional references).

186. The members of the Parliamentary Council (Parlamentarischer Rat) were elected by the state governments. On May 18, 1949, the Parliamentary Council, in a fifty-three to twelve vote, decided that the Grundgesetz should be the new constitution for the Federal Republic of Germany.

187. There is a dispute about the question of whether the concept of a militant democracy is limited to the protection of the state through means provided for in the Basic Law, or whether it also encompasses the protection of the state through penal norms. See Friedrich Karl Fromme, *Die Streitbare Demokratie im Bonner Grundgesetz*, in VERFASSUNGSSCHUTZ UND RECHTSSTAAT 185, 195 (Bundesministerium des Innern ed., 1981) (asserting penal norms are not part of the concept of militant democracy); Becker, *supra* note 185, at 42 (asserting penal norms are part of the concept of militant democracy).

188. BVerfGE 28, 36 (48-49) (“principle of militant democracy”) (“extremist resolution – Extremistenbeschluss”); BVerfGE 28, 51 (55) (“principle of the Constitution”)

the explicit provisions contained therein. What is protected by the principle of militant democracy is the free democratic basic order (*freie demokratische Grundordnung*).<sup>189</sup> In short, the German concept of democracy is based on the assumption that the basic structures of democracy are not safe from internal dangers. Therefore, stability, internal peace, and the authority of the state have to be defended.

Applying this concept of democracy to the German flag case explains why the Bundesverfassungsgericht acknowledged an interest of the state in the protection of its symbols.<sup>190</sup> The attack on the symbol – the flag – is understood to include an attack on the symbolized – the free democratic basic order. In this situation, the concept of militant democracy requires the state to defend itself. Thus, the state has an interest – if not a duty – to outlaw flag desecration. To formulate this idea differently, the German flag case presupposes that the state can protect itself against seditious libel.<sup>191</sup>

A review of that part of the flag decision of the Bundesverfassungsgericht in which the Court dealt with the state's interest in the protection of the flag clarifies the Court's reasoning as an application of the principle of a militant democracy. First, the Court described the functions of national symbols in saying that “[i]t is the purpose of [national] symbols to appeal to the citizens' sense of civic responsibility. As a free state, the Federal Republic relies on the identification of its citizens with the basic values represented by the flag.”<sup>192</sup> Then, in accordance with the value it considers to be protected by the concept of a militant democracy, the Court stated that “[t]he values protected . . .

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(“extremist resolution – Extremistenbeschluss”); BVerfGE 30, 1 (21) (“basic decision of the Basic Law for a militant democracy”) (“wiretapping case – Abhörurteil”).

189. In 1952 the Bundesverfassungsgericht held the following criteria to be essential components of the free democratic basic order: a legal system excluding any violent or arbitrary state power, the rule of law based on the principle of self-determination of the people, the application of a democratic majority rule, the protection of freedom and equality, the respect of the fundamental rights of the Constitution, in particular the right to life and the right to free personal development, the sovereignty of the people, the separation of powers, the responsibility of the government, the legality of the administration, the independence of the courts, the plurality of political parties, the equality of chances for all these parties, and the right to form and exercise an opposition. BVerfGE 2, 1 (198) (“Sozialistische Reichspartei – Socialist Reich Party Case”).

190. See Eberle, *supra* note 109, at 801 n.6; Fletcher, *Constitutional Identity*, 14 CARDOZO L. REV. 737, 740-46 (1993). Related to this explanation is the notion that the German Basic Law sets forth both rights and duties. While the US Constitution can be considered as value-neutral, the German Constitution presupposes that certain community norms restrict the way rights can be exercised. From that follows a duty to respect the symbols of national unity, a duty which might prevail over the right to freedom of expression

191. See Eberle, *supra* note 109, at 867; Quint, *supra* note 1496, at 632; see also Quint, *supra* note 109, at 249-250.

192. ~~81~~ BVerfGE 81, 278 (~~at~~ 293) (citations omitted).

are represented by the state colors, stipulated in Article 22 GG. They stand for the free democratic basic order.”<sup>193</sup> Last, the Bundesverfassungsgericht explained the reasons why the attack on the symbol also constitutes an attack on the free democratic basic order. “The flag serves as an important integration device through the leading state goals it embodies; its disparagement can thus impair the necessary authority of the state.”<sup>194</sup>

In the part of its opinion that follows these observations, however, the Bundesverfassungsgericht modified the notion that the state can protect itself against seditious libel. The Court remarked that “[i]n the light of Article 5 § 3 first sentence GG . . . the protection of symbols must not lead to an immunization of the state against criticism and even against disapproval,”<sup>195</sup> and required a balancing of the state’s interest in the protection of its symbols with the interest to free artistic expression. The Court held that the lower court had not performed the balancing properly. It had mistakenly interpreted the collage as an attack on the German state, although a more plausible interpretation was that the collage was directed against militarism.<sup>196</sup> The Court decided to impose on the lower courts the duty not to choose an interpretation of a communication unfavorable to the speaker if a more favorable interpretation would be possible. This approach is common in the jurisprudence of the Bundesverfassungsgericht.<sup>197</sup> Yet the Court could also have interpreted the collage to include an attack on the flag and the state. It seems that the Court was reluctant to enforce proper respect for the flag against the individual interest embodied in the freedom of artistic expression.<sup>198</sup> This reluctance stands in conformity with a tendency in German constitutional literature that discusses whether the concept of military democracy is still appropriate.<sup>199</sup>

193. *Id.*

194. *Id.* at 293-94.

195. *Id.* at 294.

196. *Id.* at 294-96.

197. *See, e.g., BVerfG, decision of April 19, 1990, 82-BVerfGE 82, 43-* (“Anti Strauss Placard”). Demonstrators had protested the policies of Franz Josef Strauss, the Bavarian minister president at that time. One of their placards stated, “Strauss protects Fascists”, another one read “Strauss, the Fascist’s friend, protects Hoffmann, the Oktoberfest murderer” (a right-wing extremist who killed and wounded several people at the Munich Oktoberfest). The Bundesverfassungsgericht reversed the defendant’s conviction for defamation. The court held that rather than defamation, the placard was an important contribution to the formation of public opinion. *Id.* at 53. *See also infra* note 204 to the “soldiers are murderers” decisions.

198. Quint, *supra* note 149, at 637.

199. *See* Fromme, *supra* note 187; Hans-Gerd Jaschke, *Wertewandel in Politik und Gesellschaft – Ist die “streitbare Demokratie” noch zeitgemäß?*, in VERFASSUNGSSCHUTZ IN DER DEMOKRATIE 225 (Bundesamt für Verfassungsschutz ed., 1990).

## V. CONCLUSION

The comparative approach shows that a nation can be committed to different concepts of democracy. The German concept finds its justification in the failure of the Weimar Republic and the German experience under the Nazi dictatorship. It is a concept of democracy different from the American ideal, but a democracy nonetheless.<sup>200</sup>

In observing German free speech jurisprudence over the last decade, it is interesting to note a speech-protective trend one might want to explain with the nation's growing stability and self-confidence.<sup>201</sup> The flag and national anthem cases of the Bundesverfassungsgericht support this proposition. While the Court presupposed that the state can protect itself against seditious libel, it also assumed that, in the cases it had to decide, the individual's interest in free expression outweighs the state's interest.

In a recent decision, the Bundesverfassungsgericht struck down the conviction of a demonstrator for defamation of the Federal Republic of Germany under section 90(a) § 1 No. 1 StGB.<sup>202</sup> In a demonstration against the killing of thirteen people at the Oktoberfest in Munich by neo-Nazis in 1980, the man had distributed leaflets in which he accused the authorities of "covering the fascistic attack on the Oktoberfest."<sup>203</sup> The ~~Bundesverfassungsgericht~~ ~~Federal Constitutional Court~~ held that the lower court had misinterpreted the leaflet. It was not clear that the leaflet equated the Federal Republic of Germany with a fascist state. Referring extensively to its recent controversial 'soldiers are murderers' decisions,<sup>204</sup> in which the Bundesverfassungsgericht struck down

200. See Lawrence Lessig, *Post Constitutionalism*, 94 MICH. L. REV. 1422, 1463 (1996); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1279-80 (1999) (both comparing the German and American concepts of democracy).

201. Eberle, *supra* note 109, at 900-900+.

202. BVerfG, *Neue Juristische Wochenschrift* [NJW] 3, 204; BVerfGE, *Neue Juristische Wochenschrift* [NJW] 8, 596 (holding a song entitled "Germany has to die" does not violate section 90(a) § 1 No. 1 StGB).

203. BVerfGE, NJW 3, 204.

204. The "soldiers are murderers" decisions of the Bundesverfassungsgericht aroused passions comparable to those stirred after the flag desecration decision of the Supreme Court. BVerfG, *Neue Juristische Wochenschrift* [NJW], 45, 2943; BVerfGE 93, 266. The decisions involved several antimilitarist remarks – made on stickers, in pamphlets and in a letter to the editor of a local newspaper – that "soldiers are murderers" or "soldiers are potential murderers." The lower courts found that the communications were punishable as group defamation of the German army. The Bundesverfassungsgericht, however, held that the convictions violated the speakers' right to free expression. The Bundesverfassungsgericht held that the speakers made reference to all soldiers, which indicates that their statements were directed against war generally. Consequently, the statements were not intended to inflict personal harm and could thus not be understood to be defamatory. In American free speech jurisprudence, the "soldiers are murderers" decisions are easy cases. In German free speech jurisprudence, however, honor and

several convictions for collective defamation of the Bundeswehr (the German Federal Armed Forces) through expressions like ‘soldiers are murderers,’ the Court emphasized the value of freedom of expression in order to question and criticize the government. The Court held that opinions can be protected by Article 5 § 1 GG even “if they are expressed in a sharp or exaggerated manner.”<sup>205</sup> In cases in which the provision limiting freedom of opinion is intended to protect the state, the Bundesverfassungsgericht in its recent decisions was willing to give particular weight to freedom of opinion, “because Article 5 § 1 GG grew specifically out of the special need to protect criticism of power.”<sup>206</sup> The language used by the Bundesverfassungsgericht is reminiscent of the language used by Justice Brennan in *New York Times vs. Sullivan* that the “debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attack on government and public officials.”<sup>207</sup> Most probably, the Bundesverfassungsgericht would have decided similar cases differently twenty years ago.<sup>208</sup> To some degree, German constitutional jurisprudence is moving towards its American counterpart.

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personal dignity generally prevailed over conflicting free speech rights. See, e.g., the *Mephisto* decision, ~~supra note 111 and 116~~ *BVerfGE* 30, 173. This might explain the vehement reaction to the “soldiers are murders” decisions (for a discussion of the decisions in English language see Eberle, *supra* note 109, at 878).

205. *BVerfG*, NJW 3, 204.

206. *Id.*

207. *Sullivan*, 376 U.S. at 268.

208. See the cases mentioned by Krutzki, *supra* note 40, at 304--313, which have not been challenged in front of the Bundesverfassungsgericht.