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O'er the Land of the Free: Flag Burning and the First Amendment*

Paul R. Baier**

SOLDIERS OF THE OLD WAR SKULE:—

Do you know Oliver Wendell Holmes, Jr., of the Twentieth Massachusetts?¹ Perhaps not. I trust you know his enemy in Arms, Louisiana's Edward Douglass White, a soldier boy of sixteen captured by the Union at Port Hudson and parolled upon the plea of an anxious mother of Thibodaux and Bayou Lafourche.²

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* *Speech* before Boyd-Ewing Post 58, The American Legion, Louisiana State University, December 4, 1995. Professor Baier has annotated his speech for publication in the *Law Review's* first *Ruminations* issue. This is the last in a forthcoming first edition of Baier's *Speeches and Select Legal Papers*, with a *Foreword* by Justice Harry A. Blackmun.

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1. Holmes, age 20, enlisted in the Federal Army in July, 1861. He served for two years in the Twentieth Massachusetts Volunteer Infantry at Ball's Bluff, the Peninsula Campaign, and Antietam. He was wounded three times, taking a Confederate ball through the neck at the Battle of Antietam, September 17, 1862—Constitution Day. "Usual luck—ball entered at the rear passing straight through the central seam of coat & waistcoat collar coming out toward the front on the left hand side—Yet it don't seem to have smashed my spine or I suppose I should be dead or paralyzed or something . . ." Liva Baker, *The Justice From Beacon Hill: The Life and Times of Oliver Wendell Holmes* 132 (1991). Antietam broke the Twentieth's proud boast that Massachusetts troops had never been hit in the back: "We have stood side by side in a line—we have charged and swept the enemy—and we have run away like rabbits," Holmes told the Regimental Association thirty years later. Holmes was hit in the back of the neck while he was "bolting" as fast as he could, which was "all right—but not so good for the newspapers." *Id.* In the winter of '63-64, Holmes served as *aide de camp* to General Sedgwick of the Sixth Corps. He served through the Wilderness Campaign and the Siege of Vicksburg "and, then, exhausted and telling himself that his duty lay in pursuing his philosophy, he left the army when his three-year term of enlistment was up." 1 *The Collected Works of Justice Holmes* 9 (Sheldon M. Novick ed., 1995). Holmes, Sr., urged the boy to reenlist for the duration of the war, but Wendell returned home to Boston. "Whatever romance war had held for Holmes had by this time dissipated in the smoke of realities." Baker, *supra*, at 131.

2. In White's own words:

Like everyone else in my environment, as a little boy I went into the army on the side that didn't win. I know I did myself more harm than I did harm to anybody else. I was taken prisoner, and carried to the town where I lived, and my mother went to the officer in charge of the prison and asked permission to come to see me. . . .

On the next morning, I had a prison number, and my number was called out, and I was marched by the corporal of the guard along the dead line, where if a man tries to cross, he is shot. I was taken out into the guardroom, and there stood a gentleman. He asked my name, and he said, "Come along with me,"

[W]hen we got out into the street—it was a cold February day—there stood a hansom. There was an orderly holding the horse, and the gentleman said, "My boy,"—and he looked at me—he said, "You have no coat on." I had nothing on but a thin flannel shirt.

"The Chief Justice and I had been enemies,"³ Captain Holmes could later quip when he and White sat cheek by jowl on the Nation's highest Court—I mean the Supreme Court of the United States. As for me, a Boy Scout grown into a teacher of liberty at LSU, I know the difference between "About Face!" and "Parade Rest!"; and I have walked the sacred soil of Arlington Cemetery, Port Hudson's National, and our own Memorial Oak Grove at LSU. The Blue and the Gray, if I may speak in imagery, lie side by side in each.

In my classroom at LSU Law School, we confront these two soldiers of the law sitting on the Supreme Court. I must teach their faith in the Campaign we call Constitutional Law. This is not battle as you know it, or as Superintendent Sherman⁴ instructed the cadets in his day at Louisiana State Seminary of Learning and Military Academy. But the Supreme Court's work is war nonetheless. I teach the *Selective Draft Law Cases*,⁵ vintage 1918, written by Chief Justice White for Captain Holmes and Court when the Nation was at war. It will not surprise you to learn that Congress may conscript young men, make soldiers of them, and ship the boys overseas to risk death.

This is not "involuntary servitude," as our Thirteenth Amendment prohibits it, E. D. White told a world at war.⁶ "As the mind cannot conceive an army without the men to compose it," said Chief Justice White, "on the face of the Constitution the objection that it does not give the power to provide for such men would seem too frivolous for further notice."⁷ Captain Holmes joined White's opinion.

Here is law that fits the soldier's faith as Holmes and White lived it, mirrored in the Law of the Constitution as I teach it at LSU.

I said, "Yes, that is so." But he said, "Go back and get your coat." I said, "I cannot go back and get what I have not got." "Oh," he said, and putting his hand up to the long heavy blue braided coat which kept the cold from his vitals, he unbuttoned it, button by button, took it off his own shoulders and said, "My boy, I am more warmly clad than you are. Put on my coat."

Address of Chief Justice White, 12 Princeton Alumni Wkly. 525-26, quoted in Hugh J. Fegan, *Edward Douglass White, Jurist and Statesman*, 14 Geo. L.J. 1, 4-5 (1925). For a color portrait of White as Chief Justice and details of his fairy-tale life, see Paul R. Baier, *Edward Douglass White: Frame for a Portrait, Oration at the unveiling of the Rosenthal Portrait of E. D. White, before the Louisiana Supreme Court, October 29, 1982*, 43 La. L. Rev. 1003 and facing portrait (1983).

3. Letter from Oliver Wendell Holmes, Jr. to Sir Frederick Pollock (June 1, 1917), in 1 Holmes-Pollock Letters 245 (Mark D. Howe ed., 1941).

4. Yes, the same General William Tecumseh Sherman, Scorching of the South, was LSU's first Superintendent.

5. 245 U.S. 366, 38 S. Ct. 159 (1918).

6. [A]s we are unable to conceive upon what theory the exaction by government from the citizen of the performance of his supreme and noble duty of contributing to the defense of the rights and honor of the nation, as the result of war declared by the great representative body of the people, can be said to be the imposition of involuntary servitude in violation of the prohibitions of the Thirteenth Amendment, we are constrained to the conclusion that the contention to that effect is refuted by its mere statement.

Id. at 390, 38 S. Ct. at 165.

7. *Id.* at 377, 38 S. Ct. at 161.

The Selective Draft Law opinion was written at a time when it was difficult for White to do any work at all. "I have constantly ringing in my ears the noise of the awful conflict along the Belgian and French border," the Chief Justice wrote in a letter, "and the appalling thought of the splendid men who are giving up their lives haunts me day and night."⁸

You may have heard that the Court has captured the Flag in the joust of the First Amendment; Congress grabbed it back for a moment; and now Old Glory is off to Bosnia with our boys at the call of the President: "Task Force Eagle." We may see the Stars and Stripes burning in protest, just as in my day at Harvard Law School the Red, White and Blue went up in flames over Vietnam. I participated neither as a soldier nor a flag burner. Bum knees kept me at Cambridge, if you must know, and I was too busy with law books to look out the window.

What would Holmes and White make of flag burning and the First Amendment? And your Commander has asked me to tell Post 58 of the Old War Skule's American Legion what I think about amending the Constitution to subtract the Flag from our Bill of Rights.

As to Edward Douglass White, he knew the flag as a symbol—I mean the Stars and Bars of the Confederacy. There was a time when White and his fellows hated the National Flag. The United States Reports recounts details of General Butler's occupation of New Orleans and Flag-officer Farragut's demand of the citizenry. This is April 1862, as reported in a boat case, *The Schooner Venice*.⁹ Here, plainly, in the campaign books of the Court are clashing recognitions of the sovereignty and the symbolism of the flag. I quote:

On the 26th, the flag-officer sent a letter, No. 2, to the mayor, in which he says:

"I came here to reduce New Orleans to obedience to the laws, and to vindicate the offended majesty of the Government. The rights of persons and property shall be secured. I therefore demand the unqualified surrender of the city, and that the emblem of sovereignty of the United States be hoisted upon the City Hall, Mint, and Custom House, by meridian of this day. And all emblems of sovereignty other than those of the United States must be removed from all public buildings from that hour."

To this the mayor transmitted, on the same day, an answer, which he says "is the *universal sense of my constituents*, no less than the prompting of my own heart."

—That's a quotation.

8. George W. Wickersham, *Address, Exercises at the Ceremony of Unveiling the Statute of Edward Douglas White, Chief Justice of the United States in front of the Court House on Royal Street, New Orleans, La., April 8, 1926*, at 19, 43 (1926).

9. 2 Wall. 258 (1864).

"The city is without the means of defense. To surrender such a place were an idle and unmeaning ceremony. The place is yours by the power of brute force, not by any choice or consent of its inhabitants. *As to hoisting any flag other than the flag of our own adoption and allegiance, let me say to you that the man lives not in our midst whose hand and heart would not be paralyzed at the mere thought of such an act; nor can I find in my entire constituency so wretched and desperate a renegade as would dare to profane with his hand the sacred emblem of our aspirations. . . . Your occupying the city does not transfer allegiance from the government of their choice to one which they have deliberately repudiated, and they yield the obedience which the conqueror is entitled to extort from the conquered.*"

At 6 A.M. of the 27th, the National flag was hoisted, under the directions of Flag-officer Farragut, on the Mint, which building lay under the guns of the Government fleet; but at 10 A.M. of the same day an attempt to hoist it on the Custom House was abandoned; "the excitement of the crowd was so great that the mayor and councilmen thought that it would produce a conflict and cause great loss of life."

On the 29th, General Butler reports that he finds the city under the domination of the mob. "They have insulted," he says, "our flag; torn it down with indignity. . . . I send a marked copy of a New Orleans paper containing an *applauding* account of the outrage."¹⁰

So much, then, for flag desecration in the Civil War Reports of the Supreme Court.

As Chief Justice of the United States, Edward Douglass White spoke of his change of heart towards Old Glory. This was at a gathering of the American Bar Association in Washington on the occasion of White's twentieth anniversary on the Supreme Court. "Do you recall the toymaker and his blind daughter," White asked the group,

created by the great genius of Dickens in "Cricket on the Hearth," where with a tenderness which may not be described . . . the father pictured to the blind one whom he so much loved his environment as one of prosperity and affluence? Let us listen to her as she places her hand upon his threadbare gray coat, which she deemed from his description to be one of some rich fabric, and hear her question, "What color is it, father?" "What color, my child? Oh, blue—yes—yes, invisible blue."¹¹

10. 2 Wall. at 261-62.

11. Edward Douglass White, *The Supreme Court of the United States: Response of the late Chief Justice White to Toast at the Annual Banquet of the American Bar Association at Washington, Oct. 22, 1914*, 7 A.B.A. J. 341, 342 (1921).

At this point, White spoke from his heart, no longer the Union's prisoner at Port Hudson, but her servant as Chief Justice of the United States: "And now with the mists of the conflict of the Civil War cleared from my vision, as my eyes fall with tender reverence upon that thin gray line, lo, the invisible has become the visible, and the blue and the gray, thank God, are one."¹²

As for Captain Holmes of the Twentieth, his view of the Flag is preserved in his remarks on John Marshall. It may surprise you to learn that in my law classes at LSU, we read Holmes's *Speeches*¹³ as well as his constitutional opinions fired off from the Court. Our recruits get a better feel for the secret juices that shape our law, or so I believe. Here is what Soldier Holmes said apropos the Flag:

We live by symbols, and what shall be symbolized by any image of the sight depends upon the mind of him who sees it. . . . It is all a symbol if you like, but so is the flag. The flag is but a bit of bunting to one who insists on prose. Yet, thanks to Marshall and to the men of his generation—and for this above all we celebrate him and them—its red is our life blood, its stars our world, its blue our heaven. It owns our land. At will it throws away our lives.¹⁴

But what of Gregory Lee Johnson, Shawn D. Eichman, and their ilk, who would burn the Flag of our Fathers? This caused a big stir in the Congress and a political campaign to rescue the Flag from the Court by statute—I mean the Flag Protection Act of 1989.¹⁵ But the Court said no.

"Why is that?" a soldier might justly ask. The answer lies in "the joust of principles protected by the First Amendment"¹⁶—I quote Justice Brennan's

12. *Id.* at 342.

13. Oliver Wendell Holmes, Jr., *Speeches* (Boston 1891) ("THESE chance utterances of faith and doubt"). "If not quite a Bible, still a book of most uncommon legal prayer"—this is how Colonel Frederick Bernays Wiener, U.S. Army, Retired, described Holmes's *Speeches* at a black-tie dinner in the Colonel's honor at the Plantation Room of the LSU Union, October 16, 1979. Colonel Wiener quoted from Holmes's 1900 speech to the Boston Bar in winding up his own postprandial address. Listening in on Holmes's *Speeches* for the first time struck my soul. The next day I discovered the original, Little, Brown 1891 edition of *Speeches* on the open stacks of the LSU Law Library. I could tell from the circulation card inside the back cover that the book had never been checked out.

14. *John Marshall, In Answer to a Motion that the Court Adjourn, On February 4, 1901, the One Hundredth Anniversary of the Day on Which Marshall Took His Seat as Chief Justice*, in Oliver Wendell Holmes, *Collected Legal Papers* 266, 270, 271 (1920). For an explicit link between Holmes's view of the Flag and the Court's holding in *Johnson* and *Eichman*, see Sheldon M. Novick, *Holmes, Brennan, and the Flag-Burning Cases*, *Trial*, Nov. 1990, at 24, 28. And more: "To paraphrase Justice Holmes, we submit that nobody can suppose that this one gesture of an unknown man will change our Nation's attitude towards its flag." *Texas v. Johnson*, 491 U.S. 397, 418, 109 S. Ct. 2533, 2547 (1989) (Brennan, J.) (citing *Abrams v. United States*, 250 U.S. 616, 628, 40 S. Ct. 17, 21 (1919)).

15. For a yeoman recital of the Congressional details, see Daniel H. Pollitt, *Reflection on the Bicentennial of the Bill of Rights, The Flag Burning Controversy: A Chronology*, 70 N.C. L. Rev. 612 (1992).

16. *Texas v. Johnson*, 491 U.S. 397, 418, 109 S. Ct. 2533, 2547 (1989).

metaphor—rehearsed in two opinions of the Court that I make bold to leave at the feet of Boyd-Ewing Post 58.

*Texas v. Gregory Lee Johnson*¹⁷ says no to a state statute that condemns flag burnings where passers-by might be offended. *United States v. Shawn Eichman*¹⁸ says no to Congress's heroic effort to rewrite federal law aimed solely at saving the Star Spangled Banner as a sacred symbol of the Nation. The Supreme Court split itself open at the seams, so to speak, as Holmes knew the Court's heroism—five votes to four *not* to subtract flag burning as symbolic speech from the First Amendment.

The Court builds on general principles over time, you will read. And so when a woman of nineteen named Stromberg, a citizen of the United States by birth but a believer in the Young Communist League, taught class consciousness and the solidarity of the workers to summer-camp school children, California put her in jail. The charge recited a daily ceremony, in which Stromberg directed children in raising a red flag—"a camp-made reproduction of the flag of Soviet Russia, which was also the flag of the Communist Party in the United States,"¹⁹ the Court tells us. More of flags in the reports.

For raising the red flag of Soviet Russia, and for nothing more, the jury might have convicted Stromberg. But the display of Russia's red flag is speech, the Court recognized. "The principles to be applied have clearly been set forth in our former decisions. It has been determined that the conception of liberty under the due process clause of the Fourteenth Amendment embraces the right of free speech."²⁰ I quote the Court. And with that, Liberty and the First Amendment embrace the flag, I tell my students. Holmes joined this 1931 opinion.

"Oh, but the red flag is not our Flag," a buried soldier might reply. But what kind of symbol do you want? Is it the colors that count, or the freedoms our Flag guarantees?

The Supreme Court is dutibound, and free, to take the long view. Through its opinions, it echoes the faith of our Fathers. Through the Bill of Rights, as petitioners come and go, it confronts the ultimate question, What kind of country do we want? "Behind every scheme to make the world over, lies the question, What kind of world do you want?"²¹ This from Captain Holmes of the Twentieth Massachusetts.

Our first General—I mean George Washington, can you imagine—defiled the flag of King George.²² John Endecott, later elected Governor of Massachusetts,

17. *Id.*

18. 496 U.S. 310, 110 S. Ct. 2404 (1990).

19. *Stromberg v. California*, 283 U.S. 359, 362, 51 S. Ct. 532, 533 (1931) (Hughes, C.J.).

20. *Id.* at 368, 51 S. Ct. at 535.

21. Oliver Wendell Holmes, *The Soldier's Faith*, in *The Occasional Speeches of Justice Oliver Wendell Holmes* 73, 75 (Mark D. Howe ed., 1962).

22. When he took command of the Continental Army at Cambridge, Mass., July 3, 1775, no flag represented the Thirteen Colonies, as a whole. General Washington took one of the flags of the

cut the cross of St. George from the British flag at Salem in 1634, for which he was jailed by colonial courts. "Much matter was made of this, as fearing it would be taken as of rebellion," Winthrop's *History of New England* tells us.²³

Petitioner Spence taped a peace sign to his American Flag and hung it from his window to protest the killings at Kent State. The Court set him free.²⁴ It was not enough to overcome freedom of speech, that his hand had touched our American Flag.

I was at the front, so to speak, when the *Eichman* case was argued in the crucible of the Court. We call the Government's lawyer the "Solicitor General," and Ken Starr is a friend of mine. I knew William Kunstler only as a defender of radicals and had never laid eyes on him before. But his argument for his clients was first-rate, measured by what I teach my students are the Court's first principles.

General Starr stepped on a land mine during the argument. Another soldier on the bench, Justice Anthony Kennedy asked him the following:

QUESTION: We don't like, Mr. Starr, to compare our flag with any other flag, but would you be concerned if in Eastern Europe or some foreign country a government punished demonstrators for marching with a defaced flag in support of the demonstrators' cause for freedom?

MR. STARR: I think those are considerations, Justice Kennedy, that are very important for Congress to weigh in the balance. But I would refer the Court to the Senate—

QUESTION: Well, but isn't the point that this is a recognized—internationally recognized form of protest?

MR. STARR: It certainly, at this particular stage in our history, is affiliated or associated with forms of protest.²⁵

Mother Country "and upon this flag he caused to be sewed six white stripes," thus giving it the thirteen stipes of alternate red and white—"The Thirteen Rebellious Stripes," as it was seen. "[T]he stripes standing for the union of the colonies and their revolt against the mother country," said General Washington. W.O. Hart, *The Story of the American Flag*, 58 Am. L. Rev. 161, 167 (1924).

23. John Winthrop, 1 *The History of New England from 1630 to 1649*, at 175 (James Savage ed., 1953). Governor Winthrop's full recital of this early New England flag attack—our earliest Puritan precedent—shows that clashing opinions and truths are part of the bunting:

Much matter was made of this, as fearing it would be taken as an act of rebellion, or of like high nature, in defacing the king's colors; though the truth were, it was done upon this opinion, that the red cross was given to the king of England by the pope, as an ensign of victory, and so a superstitious thing, and a relique of antichrist.

Id. Three hundred years later, William J. Brennan, Jr., not of Salem but of the Supreme Court, voiced the same view: We may hate Gregory Lee Johnson's assault on Ronald Reagan and Republicans, but we are not free to jail him as the devil.

24. *Spence v. Washington*, 418 U.S. 405, 94 S. Ct. 2727 (1974).

25. 194 Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law, 1989 Term Supplement (Philip B. Kurland & Gerhard Casper eds., 1991), No. 89-1433, *United States v. Eichman*, Oral Argument, May 14, 1990, at 827.

This is enough, I trust, to give you a feel for the rockets' red glare at the Court.

And so in *Eichman* the Court, including Justice Scalia and Justice Kennedy, whose votes surprised some patriots watching from the sidelines, refused to subtract the American Flag from the Bill of Rights. The majority made liars out of Shawn Eichman and company: You cannot destroy America's Flag by burning it.

I am advised that foot soldiers don't give a damn for details; and I must conclude. I have read a mountain of scholarship in preparing my remarks²⁶—the fat Senate *Hearings on Measures to Protect the Physical Integrity of the American Flag*,²⁷ bound in Government green; and more than enough books on the history of our Flag.²⁸

I will tell Boyd-Ewing Post 58: I am content where we are.

26. *Inter alia* Arnold Loewy's brilliant three-act play, *Ivanavitch*, some twenty years ahead of the Supreme Court. See Arnold E. Loewy, *Punishing Flag Desecrators: The Untimate in Flag Desecration*, 49 N.C. L. Rev. 48 (1970). Equally insightful is Steven Gey's connecting Rene Magritte's painting *The Treachery of Images* ("Ceci n'est pas une pipe") to the flag fracas. Steven G. Gey, *This is Not A Flag: The Aesthetics of Desecration*, 1990 Wis. L. Rev. 1549, 1585-91. And then there is Frank Michelman's good sense, *Saving Old Glory: On Constitutional Iconography*, 42 Stan. L. Rev. 1337, 1362-63 (1990), *viz.*:

I don't want to idealize flag mutilators, who I'm sure span a wide spectrum of attitudes, manners, moral, motives, and beliefs. I only want to say that the *paradigmatic* flag burner models not repudiation but political indignation and contention. A remote avatar, perhaps, is Moses destroying the tablets of the law (wordlessly, so far as we are told) in reproachful indignation at the sight of Israel's idolatry. Moses was certainly not disparaging the ideal embodied in those tables, and he was certainly not repudiating Israel.

I count several of the *amici curiae* briefs filed in the *Eichman* case as radiant scholarship, especially Brief of the American Bar Association as Amicus Curiae in Support of Appellees, Nos. 89-1433, 89-1434, *United States v. Eichman*, *United States v. Haggerty*. My friend and *quondam* correspondent Stanford Law School's Gerald Gunther signed off on the A.B.A. *amicus*—another of Gunther's mighty achievements.

The Flag Act, *nota bene*, caused some notable constitutional scholars to waive back and forth. See Murray Dry, *Flag Burning and the Constitution* 1990 Sup. Ct. Rev. 69, 87-88, 88 nn.78, 79. Former Harvard Law School Professor and sometime Solicitor General Charles Fried at first opined in written testimony to the House that he saw no flaw in a Flag Act that would protect the physical integrity of the bunting. Two days later, he told the same House Committee he opposed the constitutionality of the Act. Professor Fried explained his abrupt change of mind by saying his first response was "prompted by a telephone call to me in the south of France, where I was vacationing" and that the *Côte d'Azur* was not conducive to "sober constitutional reflection." *Id.* at 87.

27. *Hearings on Measures to Protect the Physical Integrity of the American Flag Before the Senate Committee on the Judiciary*, 101st Cong., 1st Sess. (1989) [hereinafter *Hearings*].

28. *Inter alia* George H. Preble, *History of the Flag of the United States of America, and of the Naval and Yacht Club Signals, Seals, and Arms, and Principal National Songs of the United States, with a Chronicle of the Symbols, Standards, Banners, and Flags of Ancient and Modern Nations* (Boston, 2d rev. ed. 1880); Milo M. Quaife, *The Flag of the United States* (1942); Boleslaw Mastai & Marie-Louise D'Otrange Mastai, *The Stars and the Stripes: The American Flag as Art and as History from the Birth of the Republic to the Present* (1973); Scot M. Guenter, *The American Flag, 1771-1924: Cultural Shifts from Creation to Codification* (1990).

In five terms teaching the flag burning cases at LSU Law School, I have suggested to my students that Gregory Lee Johnson and Shawn D. Eichmann, whose affidavits of record I distribute to my students,²⁹ are cry babies³⁰ we should ignore. Do you really want to reward them with the first amendment to our Bill of Rights in history?

My law dean, Erwin N. Griswold, who also saw duty as Solicitor General, told the Senate Judiciary Committee:

[I]t seems to me this is a case for the application of broad, general judgment, wisdom, and, yes, statesmanship.

It is appealing to wrap ourselves in the flag, and indeed it may be popular at the moment. But I do not believe it is truly statesmanlike.

I do not think that the Republic is shaken by the Supreme Court's decision in the *Johnson* case.

The Republic still stands. It is going to stand. This is not going to happen very often.³¹ When it does happen, it will tend to be either screwballs or somebody with a legitimate complaint who thinks he cannot get attention in some other way, and that, it seems to me, is really the essence of the First Amendment.³²

Justice Anthony Kennedy joined LSU's law students in class the other day. This is like having General Graves Erskine of LSU back at Military Science from Iwo Jima's Mt. Suribachi.³³ Justice Kennedy spoke of his concurring opinion in *Texas v. Johnson*. "It is poignant but fundamental," said Justice Kennedy, "that the flag protects those who hold it in contempt."³⁴

29. They are readily available on the computer, via LEXIS: GenFed; Briefs; 89-1433; .FO; "DECLARATION OF SHAWN D. EICHMAN"; KWIC. I owe this high-tech cite to my friend and computer wizard Charlotte B. Melius, Head of Public Services, LSU Law Library.

30. Or, to use Holmes's lance: "puny anonymities." *Abrams v. United States*, 250 U.S. 616, 629, 40 S. Ct. 17, 22 (1919) (Holmes, J., dissenting).

31. Dean Griswold's good sense is supported by the flag scholarship of Robert J. Goldstein, *Saving Old Glory* (1995). Professor Goldstein has unearthed court records showing "fewer than 45 reported incidents of flag burnings . . . in all of American history between the adoption of the United States flag in 1771 and the *Texas v. Johnson* Supreme Court decision in 1989." Sarah Boxer, *The Flag Bulletin: Two Centuries of Burning Flags, A Few Years of Blowing Smoke*, N.Y. Times, Dec. 17, 1995, at sec. 4, p. 7, col. 1.

32. *Hearings, supra* note 27, at 248, 250.

33. LSU's Graves B. Erskine, B.A. 1917, entered USMC, 1917, advanced through W.W. I and the grades to General, 4 stars. "The Big E" led the Marine's assault on Iwo Jima, 1945. "Victory was never in doubt. Its cost was . . . What was in doubt, in all our minds, was whether there would be any of us left to dedicate our cemetery at the end, or whether the last Marine would die knocking out the last Japanese gun and gunner . . ."—Major General Graves Erskine at the dedication of the Third Marine Division Cemetery at Iwo Jima, March 14, 1945. Bill D. Ross, *Iwo Jima: Legacy of Valor* v (1985). Erskine died May 21, 1973; buried Arlington Nat. Cemetery, Arlington, Va.

34. 491 U.S. at 421, 109 S. Ct. at 2549.

Chief Justice Rehnquist—you can read him after class—recites the history of Old Glory and powerful poetry in his *Johnson* dissent.³⁵ Justice John Paul Stevens says in *Eichman* it all comes down to judgment,³⁶ and I agree with him completely.

Five years ago—this was a speech on the Bicentennial of the Supreme Court of the United States from the pulpit of our Louisiana Supreme Court—I told my audience what I thought of the Supreme Court of the United States, just as Soldier Holmes had his say at the Marshall Centennial in Massachusetts. Here is what I said:

The justices—like other mortals—are a product of their times. Yet the power to say what the law is, is also a power to say what we as a nation may become. I can't help but believe that in the last half century the Supreme Court has helped spark the flame of human freedom that—for a moment—burned brightly in Tiananmen Square. So too the candles recently lighted in the shadow of what *was* the Berlin Wall.³⁷

I abide this view; nothing in the debates over flag burning and the First Amendment convinces me otherwise. We should not substitute "O'er the Land of the Flag" for "O'er the Land of the Free." I am content where we are.

Three days after the Flag Burning Amendment failed of passage in the United States House of Representatives and in the United States Senate, Red China passed its first flag desecration law.³⁸

The German Constitution has the Black, the Red, and the Gold written into it; their Constitutional Court, the *Bundesverfassungsgericht*, as the Germans say, has elevated the flag above freedom of speech in the name of "the free basic democratic order"—I translate from the German.³⁹

This is not our tradition. Nor do I think it wise to put *Staatsgefühl* and the flag into America's Constitution.

But I must take leave of the law—in the company of soldiers—and conclude. May I say I have spoken on the Court and the Bill of Rights in Mrs. Benton's fourth-grade class at LSU's Lab School. I have talked to prisoners on habeas corpus and the Eighth Amendment at Hunt Correctional Institute in St. Gabriel. My last outing was before the Baton Rouge Daughters of the American

35. *Id.* at 421-35, 109 S. Ct. at 2549-56 (Rehnquist, C.J., White, J., and O'Connor, J., dissenting).

36. "These cases therefore come down to a question of judgment." *Eichman*, 496 U.S. at 322, 110 S. Ct. at 2411 (Stevens, J., Rehnquist, C.J., White, J., and O'Connor, J., dissenting).

37. Paul R. Baier, *Time and the Court*, 28 La. B.J. 9, 12 (1990); 1991 Rep. La. B. Found. 38, 41.

38. *World Wire*, Wall St. J., June 29, 1990, at A 10.

39. *Freiheitlich demokratische Grundordnung*, or "FDGO" as the Germans mouth it. See Judgment of Mar. 7, 1990, *BVerfG*, 81 *Entscheidungen des Bundesverfassungsgerichts* 278 (F.R.G.). For those untutored in what Mark Twain called "The Awful German Language," you can find all this in plain English thanks to Peter E. Quint's radiant scholarship, *The Comparative Law of Flag Desecration: The United States and the Federal Republic of Germany*, 15 *Hastings Int'l & Comp. L. Rev.* 613 (1992).

Revolution at the Woman's Club.⁴⁰ I wore "The Flag Tie," Michael—Age 13, of the Save the Children Collection. This was a gift from one of my students. I wore it out of respect for our fore-bearers, sons and daughters of our Fathers. The Ladies of the D.A.R. liked it.

But you are my first class of soldiers. Duty and the high honor of your invitation brings me here. I now know the proud history of the Old War Skule;⁴¹ I have paid my respects to David Ewing's marker unearthed from seven inches of mulch in our Oak Memorial Grove.⁴² Your *LSU Legionnaire* teaches me that W. F. Milling lost his oak tree and his brass memory to fate.⁴³ And I have walked between the polished cannons of Fort Sumter's fate that guard Military Science—General William Tecumseh Sherman's gift to LSU.

I will take leave with my own small gift to Boyd-Ewing Post 58. Holmes and White exchanged red roses each Constitution Day, September 17th.⁴⁴ This

40. Paul R. Baier, *Preserving Our Past*, Remarks to the Baton Rouge D.A.R. (Sept. 18, 1995).

41. Mined into gold by LSU's premier Dean of Education and Boyd-Ewing Chaplain, Peter A. Soderbergh, *Tower, Tablet and Tree: LSU and the American Legion* (1983). Boyd-Ewing is a rarity on university soil. "A Legion post could not easily serve (to quote Carol Guber) Minerva and Mars simultaneously," says Soderbergh. *Id.* at iv. But the partnership has proudly flourished since 1920 when President Thomas D. Boyd and his faculty admitted David J. Ewing Post 58 into LSU's terrain. From its inception

the LSU-Legion relationship was not one in which contrary ideologies struggled to co-exist on common turf. It was, and remains, a bonding of LSU men in a series of endeavors that benefited their University on the one hand and complemented the Legion's mission on the other. This explains how for [seventy-five] years the partnership has defied the odds one would levy against such a liaison lasting very long. In a true sense, LSU and the Legion were two entities with a single soul.

Id. at v.

42. "The brass plaque commemorating David J. Ewing, for whom Boyd-Ewing Post 58 was named, has been found under seven inches of mulch at the base of an oak tree in the LSU Union Memorial Grove." *LSU Legionnaire*, Vol. 95-96, No. 4, at 1 (Whitney R. Mundt ed., Dec. 1995).

43. "And Milling's plaque? It wasn't switched to any other tree, and Milling's name cannot be found in all of the Memorial Grove, although there are large live oaks there—undedicating to any of LSU's war dead." *Id.* The reader is invited to join our Campaign to give Milling his marker, suggested by the author to the Soldiers of the Old War Skule. "I think it a noble and pious thing to do whatever we may by written word and molded bronze and sculptured stone to keep our memories, our reverence, and our love alive and to hand them on to new generations all too ready to forget." Oliver Wendell Holmes, *Ipswich*, in *The Occasional Speeches of Justice Oliver Wendell Holmes* 136 (Mark D. Howe ed., 1962).

44. "There is no authentic account of the reason for this ritual," says Justice Dennis.

It is believed that because the two Justices had fought on opposite sides in the Civil War and because September 17th was the date of the Battle of Antietam in which Holmes had been wounded, that the scarlet rose symbolized the renewal of brotherhood after the shedding of brotherly blood. But September 17th is also Constitution Day, the day of the signing of our great charter of government. Thus, it may be that White and Holmes also wished to signify the renewed strength of the Constitution and the unity of the nation following the strife of the Civil War.

James L. Dennis, *Address*, in *Commemorative Proceedings for the Bicentennial of the Supreme Court of the United States*, 573-574 So. 2d xxxix, xlv (Feb. 2, 1990).

was a symbol of lives lost in war as they knew it. I invite you to join me after class in laying the red rose I have brought to your Boyd-Ewing table at the base of Oak Tree 29. I like to think we save our traditions at LSU.

If you care nothing for the clash of Supreme Court opinions in the flag cases I have brought along as a teacher of Liberty at LSU, perhaps you would enjoy hearing Captain Oliver Wendell Holmes on "The Soldier's Faith," a speech he gave to a graduating class at Harvard University. This was a hundred years ago, on Memorial Day 1895. I will close with these connected excerpts:

ANY DAY in Washington Street, when the throng is greatest and busiest, you may see a blind man playing a flute. I suppose that some one hears him. Perhaps also my pipe may reach the heart of some passer in the crowd.

Now, at least, and perhaps as long as man dwells upon the globe, his destiny is battle, and he has to take the chances of war.

War, when you are at it, is horrible and dull. It is only when time has passed that you see that its message was divine. I hope it may be long before we are called again to sit at that master's feet. But some teacher of the kind we all need. Out of heroism grows faith in the worth of heroism. The proof comes later, and even may never come.

Behind every scheme to make the world over, lies the question, What kind of world do you want?

We do not save our traditions, in this country. The regiments whose battle-flags were not large enough to hold the names of the battles they had fought, vanished with the surrender of Lee, although their memories inherited would have made heroes for a century.

Three years ago died the old colonel of my regiment, the Twentieth Massachusetts. He gave our regiment its soul. No man could falter who heard his "Foreward, Twentieth!" I went to his funeral. From a side door of the church a body of little choir-boys came in like a flight of careless doves. At the same time the doors opened at the front, and up the main aisle advanced his coffin, followed by the few gray heads who stood for the men of The Twentieth, the rank and file whom he had loved, and whom he led for the last time. The church was empty. No one remembered the old man whom we were burying, no one save those next to him, and us. And I said to myself, The Twentieth has shrunk to a skeleton, a ghost, a memory, a forgotten name which we older men alone keep in our hearts. And then I thought: It is right. It is as the colonel would have had it. This is also a part of the soldier's faith: Having known great things, to be content with silence. Just then there fell into my hands a little song sung by a warlike people on the Danube, which seemed to me fit for a soldier's last word, another song of the sword, but a song of the sword in its scabbard, a song of oblivion and peace.

A soldier has been buried on the battle-field.

And when the wind in the tree-tops roared,
 The Soldier asked from the deep dark grave:
 "Did the banner flutter then?"
 "Not so, my hero," the wind replied,
 "The fight is done, but the banner won,
 Thy comrades of old have borne it hence,
 Have borne it in triumph hence."
 Then the soldier spake from the deep dark grave:
 "I am content."

.....
 Then he heareth the lovers laughing pass,
 And the soldier asks once more:
 "Are these not the voices of them that love,
 That love—and remember me?"
 "Not so, my hero," the lovers say,
 "We are those that remember not;
 For the spring has come and the earth has smiled,
 And the dead must be forgot."
 Then the soldier spake from the deep dark grave:
 "I am content."⁴⁵

SOLDIERS OF THE OLD WAR SKULE:—

Next Veteran's Day I will join you on LSU's Parade Ground in the shadow of our Memorial Tower and your American Legion medallion. You may think me a blind fiddler if you must. I hope you will also consider me your friend. [Salute.]^{***}

45. Captain Oliver Wendell Holmes, Jr., *The Soldier's Faith*, in *The Occasional Speeches of Justice Oliver Wendell Holmes* 73, 75, 80, 75, 81, 82-83 (Mark D. Howe ed., 1962).

^{***} *Editor's Note*: A week after Baier's speech to the soldiers of Boyd-Ewing, the U.S. Senate again defeated a Flag Amendment to the Constitution. See *Boston Globe*, Dec. 17, 1995, A 20 (FOCUS: "NO AMENDMENT FOR OLD GLORY"). The defeat was narrow: 63 votes for, 36 against—just shy of the two-thirds majority necessary for passage. "I assure my colleagues, this amendment is not going to go away," Senator Orin Hatch, a fervent Flag supporter, told the Senate. *Boston Globe*, Dec. 15, 1995, at 27.

