

Pure Symbols and the First Amendment

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When people converse in a common language, mutual understanding is the usual result. To be sure, miscommunication does occur through confusion on the part of the speaker, employment of terms that carry different meanings to speaker and auditor, inattention, and a host of other human failings that add up to ambiguity. Literary deconstructionists go so far as to claim that all language is indeterminate,¹ and wrestle over the possibility of shared meaning in any given community.² If such difficulties are encountered in ordinary speech, one might suppose the task of divining meaning to be even more uncertain when symbols are employed as communicative devices. A moment's reflection, however, will suggest that the problems are quite similar. Consider the swastika: emblem of Nazi hatred or Buddhist mandala? A symbol, like a word, is not a "crystal, transparent and unchanged; . . . [but] the skin of a living thought[,] and may vary greatly in color and content according to the circumstances and the time in which it is used."³ Despite the vagaries of language as a communicative medium, communication occurs through its use. Perhaps symbols, even more than words, contain a distilled clarity that overcomes the ordinary difficulties of communication, and facilitates mutual understanding.

Consider the American flag, a symbol adopted by the nation's government for the purpose of sending some message to the community. Or consider a crucifix, crèche, or menorah—symbols laden with particular religious meaning. What is the message conveyed by these symbols?

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1. For a general survey of the issue, see Heller, *Structuralism and Critique*, 36 STAN. L. REV. 127 (1984).

2. See, e.g., J. WHITE, WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTRUCTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY (1984); S. FISH, IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES (1980); White, *Law as Language: Reading Law and Reading Literature*, 60 TEX. L. REV. 415 (1982); Fish, *Working on the Chain Gang: Interpretation in Law and Literature*, 60 TEX. L. REV. 551 (1982).

3. *Towne v. Eisner*, 245 U.S. 418, 425 (1918).

What consequences flow from the fact that it is a government that chooses to speak through the symbol? May a government mandate that its symbolic speech remain a soliloquy or, once the speech has been uttered, does the community of auditors acquire a right to reply in kind? Both *Texas v. Johnson*,⁴ last term's flag-burning case, and *County of Allegheny v. American Civil Liberties Union*,⁵ which considered the governmental establishment of religion implicit in official display of a crèche and menorah, asked and answered these questions, albeit implicitly. It is my intention here to render more explicit the Court's resolution of these issues and, along the way, to speculate upon the emotional explosion that *Johnson* evoked and its meaning to freedom of speech.⁶

I. The Flag and Free Speech

During the 1984 Republican National Convention, Gregory Johnson publicly burned an American flag as part of a political demonstration both protesting the Reagan Administration and condemning the United States. Johnson was subsequently convicted of desecration of a venerated object, an offense that required proof of Johnson's knowing or intentional physical mistreatment of the flag "in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action."⁷ His conviction was overturned by the Texas Court of Criminal Appeals on the ground that application of the Texas "desecration" statute to Johnson's flag-burning violated the speech clause of the First Amendment.⁸ The United States Supreme Court affirmed.⁹

In its appeal to the Supreme Court, Texas conceded that Johnson's

4. 109 S. Ct. 2533 (1989).

5. 109 S. Ct. 3086 (1989).

6. When "freedom of speech" is mentioned, most Americans reflexively think of the First Amendment. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . ."). By the incorporation doctrine this guarantee has long been enforced against the states. *See, e.g., Fiske v. Kansas*, 274 U.S. 380 (1927). But even prior to adoption of the Constitution the states provided their own independent guarantees of freedom of speech. *See, e.g., Pennsylvania's 1776 Constitution* ("the people have a right to freedom of speech"). 5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 3081-92 (F. Thorpe ed. 1909); 8 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 277-85 (W. Swindler ed. 1979). These guarantees continue to exist independently of the federal Constitution and carry different substantive meaning. *See, e.g., People ex rel. Arcara v. Cloud Books, Inc.*, 68 N.Y.2d 553, 503 N.E.2d 492, 510 N.Y.S.2d 844 (1986) (interpreting the free speech provision of New York's Constitution more expansively than the United States Supreme Court has interpreted the federal analogue).

7. TEX. PENAL CODE ANN. § 42.09(b) (Vernon 1989).

8. *Johnson v. Texas*, 755 S.W.2d 92 (Tex. Crim. 1988).

9. *Johnson*, 109 S. Ct. at 2548.

conduct was expression,¹⁰ which brought the case squarely within the framework erected by the Court to test the limits of governmental control of symbolic speech. Most important, of course, is the four-part test of *United States v. O'Brien*,¹¹ which permits governmental regulation of the “non-speech” or “conduct” element of symbolic speech if the government can first establish an interest for the regulation that is strong, legitimate, and not related to suppression of the speech element.¹² Texas offered two interests as sufficient legitimate interests unrelated to suppression of the speech element of Johnson’s flag-burning; both were ultimately rejected, although for slightly different reasons.

Texas contended that its governmental interest in preventing breaches of the peace was sufficiently legitimate and unrelated to suppression of speech to uphold Johnson’s conviction under the desecration statute. The problem with this argument was two-fold. First, there already existed another Texas statute forbidding breach of the peace¹³ that could have readily accomplished Texas’ stated objective. The desecration statute was thus not necessary, a fact that cast considerable doubt on the legitimacy of the asserted interest. Second, the interest advanced by Texas was one that related rather directly to the speech component of Johnson’s flag-burning. Stripped of its rhetorical husk, the argument advanced by Texas was that the state could “ban the expression of certain disagreeable ideas on the unsupported presumption that their very disagreeableness will provoke violence.”¹⁴ In order to prevail on this theory, Texas would have had to establish that Johnson’s flag-burning either fell within the narrow category of fighting words “likely to provoke the average person to retaliation, and thereby cause a breach of the peace”¹⁵ or was “directed to inciting or producing imminent lawless action and was likely to incite or produce such action.”¹⁶ Texas was unable to carry this burden; indeed, it appeared not even to try very hard, for it claimed that the *Chaplinsky* and *Brandenburg* standards were satisfied merely by a showing of *possible* violence.¹⁷ Predictably, the Court concluded that

10. *Id.*

11. 391 U.S. 367 (1968).

12. *Id.* at 377.

13. TEX. PENAL CODE ANN. § 42.01 (Vernon 1989). The statute prohibits, among other actions, the use of “abusive, indecent, profane, or vulgar language,” § (a)(1), and offensive gestures or displays that tend to incite an immediate breach of the peace, § (a)(2).

14. *Johnson*, 109 S. Ct. at 2542.

15. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 574 (1942).

16. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

17. *Johnson*, 109 S. Ct. at 2542 (Texas argued “that it need only demonstrate ‘the *potential* for a breach of the peace.’”) (quoting Brief for Petitioner at 37) (emphasis added).

possibility was simply not enough.¹⁸

Texas also claimed that its interest in preserving the flag as a symbol of nationhood and national unity was sufficiently legitimate and unrelated to suppression of Johnson's expression to bring the desecration statute within the lenient remainder of the *O'Brien* test.¹⁹ The problem with this contention is that Texas' claimed interest—maintaining the integrity of the flag as symbol—is precisely coterminous with the expression that inheres in destroying that symbol as a means of negating its symbolic message. Accordingly, the Court concluded that *Johnson* was “outside of *O'Brien's* test altogether.”²⁰ But that, of course, did not end the inquiry, for even outside of *O'Brien* the state's asserted interest might be sufficient if it could survive “the most exacting scrutiny” applied to statutes that prohibit speech that has a specified emotive impact on the audience.²¹ Texas' interest failed that scrutiny because it sought to maintain a governmental monopoly on the flag as a medium of symbolic speech. The Court stated, “If we were to hold that a State may forbid flag-burning wherever it is likely to endanger the flag's symbolic role, but allow it wherever burning a flag promotes that role . . . we would be saying that . . . the flag . . . may be used as a symbol . . . only in one direction.”²²

This is the core of the matter. The flag is a virtually pure symbol: its meaning (and utilitarian function) is almost totally symbolic. Any nonsymbolic function of a pure symbol is so slight as to be overshadowed by the symbolic message. The flag is ordinarily used only as a symbol. When imagining its use as a dustrag, or a seatcover, or a window curtain, one is hard-pressed to extinguish the emotional overtones of its symbolic message. As Marshall McLuhan would have put it, the medium is the message. When a symbol possesses no significant meaning apart from its symbolic message, its physical integrity (the medium) cannot be protected without simultaneously both protecting its message and suppressing the symbolic message of disagreement implicit in destruction of the symbol. In this the flag is almost *sui generis*.

To understand more fully, consider the more usual case of a “mixed symbol,” one that carries a symbolic message but also performs utilitarian functions that are not message-carrying. A Mercedes-Benz, for example, may convey a symbolic message of wealth and privilege but also

18. *Id.*

19. *Id.*

20. *Id.*

21. *Boos v. Barry*, 485 U.S. 312, 321 (1988). In *Boos* the Court struck down a District of Columbia ordinance that prohibited public display of signs within 500 feet of embassies if the sign would bring the foreign government into “public odium” or “public disrepute.”

22. *Johnson*, 109 S. Ct. at 2546.

simultaneously performs the prosaic function of transport. The United States Capitol or the White House may each be a symbol of the nation (or prominent political aspects thereof) but the buildings also perform the more mundane functions of office space, housing, assembly, and museum. To prohibit the destruction of the White House is quite justifiable, even when the bomber is acting out of a sincere desire to deliver a strong symbolic message, since the collateral (and nonsymbolic) aspects of the White House provide a nonspeech-related governmental interest in prohibiting the symbolic speech implicit in destruction of the symbol. The *O'Brien* test is a recognition of this fact, although it does not employ the usage of mixed or pure symbols.

By contrast, when pure symbols—those in which the symbol's corporeal existence is necessarily fused with the message it conveys—are protected by governments from physical assault, the government will be unable to advance an interest unrelated to speech because no such interest exists. To put it slightly differently, since pure symbols carry messages—and *only* carry messages—governments may not stop the conversation once one opinion has been uttered by exhibition of the symbol.²³ When the arena of speech lies wholly in the realm of the purely symbolic, reply in kind is not only to be expected but deserves preservation, lest the guarantee of freedom of speech stop at the frontier of language and symbol.

Does this mean that some future Gregory Johnson is entitled to bomb the Washington Monument, or to ignite his American flag in a town square pungent with leaking natural gas? Hardly. Consider the cases separately. The Washington Monument is possibly not a pure symbol, for its function as a tourist attraction arguably overshadows its symbolic message of remembrance of President Washington. In the realm of the mixed symbol, an easy case can be made for a governmental interest unrelated to speech—public safety—sufficient to prohibit destruction of

23. It might be argued that this doctrine would prevent governmentally established and enforced monopolies in areas such as trademarks, since a trademark has a purely symbolic commercial message. The case of a commercial symbol and the extent of its protection against commercial invasion is quite different from the issue raised by parody of a trademark for wholly political, and noncommercial, purposes. Since trademark parodies undertaken as a means of artistic expression are entitled to some free speech protection, even when commercial gain may be an object, political parodies undertaken for no commercial advantage would seem presumptively protected by the First Amendment. See, e.g., *Cliffs Notes, Inc. v. Bantam Doubleday Dell Publishing Group, Inc.*, 886 F.2d 490 (2d Cir. 1989); *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989) (commercial and artistically expressive trademark parodies subjected to a balancing of consumer confusion and first amendment interests). Under this rationale, *San Francisco Arts & Athletics v. United States Olympic Comm.*, 483 U.S. 522 (1987), which upheld a congressionally established monopoly on the use of the term "Olympic," is a prosaic example of protecting a trademark from commercial exploitation by rivals.

the symbol. A similar argument can be made to suppress ignition of the flag in a cloud of natural gas. While in this case the flag is no less pure symbol, the collateral consequences of the symbolic speech are so large as to permit prohibition. This example is not materially different from the long-recognized set of circumstances that permit suppression of speech that is likely to produce imminent lawless action,²⁴ or that permit reasonable regulation of the time, place, and manner of speech.²⁵ Thus, the destruction of pure symbols, like any other form of symbolic speech, is ultimately subject to the same content-neutral, conduct-focusing standards applicable to all speech.

By contrast, the dissent's approach to the problem of governmental protection of pure symbols was both to broaden ominously the "fighting words" exemption from free speech²⁶ and to endorse suppression of symbolic speech so long as other means of speech are left open. Seizing upon *Chaplinsky's* observation that "fighting words" are "no essential part of any exposition of ideas,"²⁷ Chief Justice Rehnquist argued that flag-burning also was no essential part of any exposition of ideas.²⁸ To the extent this passage may be taken to mean that content and form are separable—and thus that the state should be permitted to insist upon an undisturbing *form* of the message—it is readily evident that the premise upon which the dissent forms its judgment is simply not there. For in the case of pure symbols, both form and content, and medium and message are bonded into a single undifferentiated mass. Either the dissent failed to understand this point or, fully understanding it, was willing to embark upon the uncharted and stormy seas of content regulation. If that was indeed the dissent's ambition, the dissenters owed us a glimpse of the test they would employ to filter acceptable content from the unacceptable. This they failed to do, although they did suggest that such prohibitions would be acceptable if they left the symbolic speaker with other modes of symbolic speech and the usual verbal forms of expression.²⁹ But, once again, this is an approach that fails in the world of pure symbols, for the protected symbol carries a message unique to its status as a combined object and message. Response to that unique message may be fully possible only via the same combination of medium and message, since pure symbols are apt to be highly charged emotive devices.

24. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

25. See *United States v. Grace*, 461 U.S. 171, 177 (1983).

26. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

27. *Id.*

28. *Johnson*, 109 S. Ct. at 2553 (Rehnquist, C.J., dissenting).

29. *Id.* at 2554.

The high emotional pitch of pure symbols—whether flag, crucifix, or some other device—complicates considerations of free speech in a dialogue of symbol and its destruction. But the issue is even more complicated by the fact that *Texas v. Johnson* involved a meeting between two symbols: the pure symbol of the flag and the increasingly refined and pure symbol of free speech. Dean Lee Bollinger has argued that free speech requires a society that professes to protect it to allow the most distasteful ideas to be aired, in order to cultivate the virtues of tolerance and self-restraint.³⁰ Cultivation of these virtues may be important in and of themselves, but Bollinger suggests that “toleration of undesirable and unwanted behavior . . . [illuminates] troublesome tendencies within those wishing to be intolerant, often by the community’s engaging in self-restraint toward the very behavior it seeks to avoid.”³¹ Tolerating abhorrent speech permits us to identify our biases, and perhaps enables us to purge ourselves of hidden intolerance. Paradoxically, societal growth and even transformation are accomplished by tolerating the conduct we seek to extirpate.

This paradox may be understood best by drawing an example from humanistic psychology. Carl Jung posited that within every person lies a “shadow,” a largely unconscious and morally uncontrollable collection of archetypal primitive emotions, judgments, and impulses that function as a dark side to every personality.³² The shadow has a tendency to escape recognition because it is usually projected onto some other person. Hence, when a person loathes someone else it may well be that the loathing is really of one’s own unrecognized evil.³³ It is the rare person who moves beyond stubborn resistance to recognition of this projection, but once a person has done so—and faced “the relative evil of his nature”³⁴—he has begun the process of transforming and transcending his inner demon.

From a societal perspective, toleration of ugly speech, whether racist epithet or burning flag, may be the avenue to recognition of our collective shadow, the first step in its eventual voluntary extirpation by transformation. The intolerant impulse—banning racist speech or flag-burning—may have counterproductive long-term results, for it enables the society to tell itself (smugly and falsely) that *it* has no problem; the problem lies within those horrid offenders whom we have righteously muzzled. Pro-

30. See generally L. BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* (1986).

31. *Id.* at 238.

32. C. JUNG, *THE PORTABLE JUNG* 144-48 (J. Campbell ed. 1971).

33. *Id.* at 146.

34. *Id.* at 148.

jection of our evil onto others in order to escape recognition of it in ourselves is as common to societies as individuals.

When free speech is viewed as a symbol of the aspirations of a community to tolerance, the grating deviations from our customary norms test the limits of our aspiration and our commitment to the symbolic ideal. Fidelity to free speech becomes the miner's canary of our aspiration to tolerance.³⁵ Thus it assumes a symbolic importance of its own, quite transcendent of the value of speech it preserves. Free speech is both a tangible doctrine to secure the open marketplace of ideas we revere, and a placeholder for societal hopes that go far beyond speech itself—indeed, which go to the vision of meaning we have for our society. When free speech is elevated to a plane of such symbolic importance, its invocation in the dimension of flag-burning represents an intersection of highly charged emotional vectors. Pure symbols, like pure hydrogen, are volatile.

It is therefore hardly surprising that the reaction to *Texas v. Johnson* has been so vehement. The call for a constitutional amendment, while not ended, has been considerably muted.³⁶ Nevertheless, the "Flag Protection Act of 1989"³⁷ has become law, and has spawned almost immediate arrests for flag-burning.³⁸ The issue will thus be revisited by the Court, for the recent Act prohibits the knowing mutilation of the flag, without regard to the emotive impact of the act upon any particular audience.³⁹ In *Johnson* redux, the Court will be forced to consider the limits of its commitment to the logic of pure symbols. If the purely symbolic nature of the flag is the crux of *Johnson*, the Court will likely find the

35. Before the advent of sophisticated systems to measure the levels of coal gas in mines, coal miners brought canaries into the shafts to test for presence of the deadly gas. The canaries were more sensitive than humans; when the birds died, the miners were warned to evacuate. My colleague Brian Gray brought this metaphor to my attention.

36. The Senate rejected a proposed amendment on October 19, 1989. See *N.Y. Times*, October 20, 1989, at A1, col. 1 (late ed.).

37. PUB. L. NO. 101-131, 1989 U.S. CODE CONG. & ADMIN. NEWS (103 Stat.) 777 (to be codified at 18 U.S.C. § 700).

38. *N.Y. Times*, Oct. 31, 1989, at A25, col. 1 (late ed.). Among those arrested for burning a flag on the steps of the U.S. Capitol was none other than Gregory Johnson. The next day, formal charges under the Flag Protection Act were filed against Johnson's three compatriots, but not against Johnson. *S.F. Chronicle*, Nov. 1, 1989, at A18, col. 1.

The first judicial decision finding the Flag Protection Act unconstitutional was *United States v. Haggerty*, No. CR89-315R (W.D. Wash. Feb. 21, 1990) LEXIS 1652, which invalidated the Act as applied to persons who burned the flag as part of a political protest.

39. The Act also requires immediate certification to the United States Supreme Court of the question of the constitutionality of the Act, and mandates that the Supreme Court accept jurisdiction and expedite decision.

1989 "Flag Protection Act" invalid.⁴⁰ A contrary decision may send more mixed signals. Prudential conservation of the First Amendment from radical pruning by overwrought legislators may dictate judicial confusion of pure symbols and conduct, albeit at some considerable cost to the symbolic and substantive values imbedded in free speech. Or the Court may simply not be as wedded to the fusion of message and symbol as its *Johnson* opinion implies. We shall see.

II. Religious Symbols and the Establishment of Religion

Disagreement among the Justices in *Johnson* focused not on what the government said through the symbolic medium of its flag, but on the significance to free speech of the statement. In *County of Allegheny v. American Civil Liberties Union*,⁴¹ the government also spoke through symbols, but the Court was divided over what was said. During the Christmas season, the Allegheny County Courthouse displayed a crèche surrounded by poinsettias. The crèche was owned by the local Roman Catholic diocese, which fact was duly noted in the display, and occupied about one-half of the main staircase. One block away, the Pittsburgh city government displayed an eighteen-foot privately owned menorah on the outside of its municipal offices and a forty-five-foot decorated Christmas tree next to the menorah. The Court concluded that display of the crèche violated the Establishment Clause⁴² but display of the menorah did not.

In both instances the government spoke through the use of religious symbols, but a shifting coalition of Justices, pivoting upon Justices Blackmun and O'Connor, found greater significance for the Establishment Clause in the message communicated via the crèche than in that transmitted through the menorah. Justices Brennan, Marshall, and Stevens (the "secularists") joined Justices Blackmun and O'Connor in invalidating the crèche but dissented from their judgment upholding display of the menorah. Justices Rehnquist, Scalia, Kennedy, and White (the "ac-

40. In *United States v. Haggerty*, *supra* note 38, Judge Barbara Rothstein concluded that the governmental interests advanced in support of the Act were related to the suppression of expression precisely because the government employed the flag as a symbol. A Cook County (Chicago) Circuit Court judge has also read *Texas v. Johnson* in this fashion, relying upon it to strike down Chicago's ordinance banning flag desecration. Judge Kenneth Gillis enjoined enforcement of the Chicago ordinance, finding that it had a "deterrent effect on freedom of expression" and noting that "[w]hen the flag is displayed in a way to convey ideas, such display is protected by the First Amendment." *N.Y. Times*, Nov. 1, 1989, at B7, col. 4. (late ed.).

41. 109 S. Ct. 3086 (1989).

42. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . ."). The Establishment Clause has bound the states via the Fourteenth Amendment's Due Process Clause since *Everson v. Board of Education*, 330 U.S. 1, 15-16 (1947).

commodationists") joined Justices Blackmun and O'Connor in upholding the menorah but dissented from the crèche decision. Because the effective balance of power on this issue was held by the centrist alliance of Justices Blackmun and O'Connor, it is important to understand the fashion in which they parse the establishment clause meaning of governmental use of religious symbols.

Modern establishment clause jurisprudence begins with *Lemon v. Kurtzman*⁴³ and unravels shortly thereafter. Under *Lemon*, a governmental action survives scrutiny if it has a secular purpose, if its effect (regardless of purpose) neither advances nor inhibits religion, and if it does not involve excessive "entanglement" of government and religion.⁴⁴ In the context of governmental displays of religious symbols during December, the most recent word prior to *Allegheny* was *Lynch v. Donnelly*,⁴⁵ in which the Court upheld municipal display of a crèche surrounded by various secular symbols of the season including Santa Claus and his fabled reindeer. Unfortunately, as Justice Blackmun candidly observed in *Allegheny*, "[t]he rationale of the majority opinion in *Lynch* is none too clear."⁴⁶

More lucid to Justice Blackmun was Justice O'Connor's *Lynch* concurrence, in which she sought to focus inquiry on whether the government had made "adherence to a religion relevant in any way to a person's standing in the political community."⁴⁷ In Justice O'Connor's view, governments might do this in one or both of two ways: by entanglement with religion to such an extent that government loses its independence from religion, or by governmental "endorsement or disapproval of religion [that] . . . sends a message to the non-adherents [or religious believers] that they are outsiders, not full members of the political community."⁴⁸ Justice Blackmun stitched together the common reasoning of Justice O'Connor and the four *Lynch* dissenters in order to conclude that governmental use of religious symbols violates the Establishment Clause if "it has the effect of endorsing religious beliefs."⁴⁹ But "the effect of the government's use of religious symbolism depends upon its context."⁵⁰

43. 403 U.S. 602 (1971).

44. *Id.* at 612-13 (quoting *Walz v. Tax Commission*, 397 U.S. 664, 674 (1970)).

45. 465 U.S. 668 (1984).

46. *Allegheny*, 109 S. Ct. at 3101.

47. *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring).

48. *Id.* at 688.

49. *Allegheny*, 109 S. Ct. at 3103.

50. *Id.*

Applying these principles, Justices Blackmun, O'Connor, and their allies of the accommodationist block concluded that the menorah was acceptable because it was part of a pluralistic, and partially secular, display that conveyed a secularized message.⁵¹ The purity of the religious symbol was diluted, both by context (the presence of a larger Christmas tree and an utterly secular sign saluting liberty) and by the Court's conclusion that Chanukah is both a religious and a secular celebration.⁵² The first point assumes that pure symbols can be diluted—or adulterated—by association with other pure symbols. The presumed effect of such commingling of symbolic messages is delivery of an ambiguous message, much like a political candidate responding to inquiry about his position on abortion by saying "I remain resolutely opposed to abortion, but steadfastly supportive of a woman's right to undo an unwanted pregnancy."⁵³ Joint display of the United States and Soviet Union flags may convey a message of friendship, or suggest that the United States is a communist dictatorship, or imply that the Soviet Union has become a representative democracy. The meaning of the message lies in the purposes of the exhibitor and the apprehensions of the viewer.

The second point is really a conclusion that the menorah may be a pure symbol in the sense that its function is almost wholly symbolic, but the message it carries is mixed, in that it is neither wholly religious nor entirely secular. Thus, from the perspective of pure symbols, the governmental display of the menorah is a case of speech sufficiently ambiguous to render its meaning unintelligible. Governments may speak through religious symbols if we can't understand what they are saying.

The same principles, applied to the crèche by Justices Blackmun, O'Connor, and their secularist allies, resulted in a conclusion that because its message was a sufficiently clear endorsement of religion, its effect was to advance religion. This symbol, carrying only a religious message, was inherently more pure than the menorah, and its context was not sufficiently diluted. Poinsettias, apparently, are not enough, but Santa and his reindeer are adequate dilutants. Left for another day are questions as to the efficacy of elves, mistletoe, and holly sprigs.

It is unfortunate that the Court chose to focus solely on the effect prong of *Lemon*, since employment of pure symbols, especially when diluted by association with other pure symbols, raises troublesome ques-

51. *Id.* at 3112-13.

52. *Id.* at 3112.

53. Taylor, *The Abortion Thing, Revisited*, S.F. Recorder, Nov. 1, 1989, at 6, col. 2.

tions about the *purpose* of such display.⁵⁴ Suppose that Pittsburgh exhibited together a crèche, a menorah, an image of the Buddha, a copy of the Koran, and a sign exhorting atheism. Is this sufficient dilution to satisfy the *Allegheny* refinement of *Lynch* and *Lemon*? If not, would the whole thing be saved by adding a few Christmas trees and Easter bunnies?⁵⁵ Quite apart from the effect on the viewer of this commingling of symbols is the question of the government's purpose in choosing such a combination. Was it to ridicule religion or to express neutrality about any particular religion? How are we to know? Suppose that the government sincerely intended to express neutrality but the message to viewers was one of governmental hostility?

The secularists would resolve these issues by requiring that governments completely eschew the use of religious symbols;⁵⁶ the accommodationists would tolerate governmental use of religious symbols so long as they are "[n]on-coercive" and merely a "passive acknowledgment of . . . practices that are accepted in our national heritage."⁵⁷ While these groups bring widely divergent norms to the task of interpreting the Establishment Clause, they do agree that religious symbols are pure symbols. For that reason the secularists argue that such symbols should be forbidden to governments, for their use in isolation delivers a message that government is not neutral with respect to religion, and their use in association with other religious or secular symbols risks offense to religious practitioners, promotes divisiveness within the community, and fails to communicate neutrality. For the same reason—the purity of the religious symbol—the accommodationists argue for permitting governmental use, since the message is wholly symbolic, lacking the bite of coercion and carrying only acknowledgment of cultural heritage. Disagreement centers on the significance to the Establishment Clause of the pure symbol's message—both that intended to be delivered and that

54. The Court noted that there was no need to review *Lemon's* purpose or entanglement tests because those issues were not considered by the court of appeals. *Allegheny*, 109 S. Ct. at 3101 n.45. Nevertheless, some illuminating dicta in these directions would have been welcome.

55. The answer of the secularists is clearly "no." "There can be no doubt that, when found in . . . [the] company [of religious symbols], the [Christmas] tree, serves as an unabashedly religious symbol." *Id.* at 3126 (Brennan, J., concurring and dissenting).

56. But the secularists would tolerate such direct messages as the motto "In God We Trust," presumably because we don't. "[S]uch practices as the designation of 'In God We Trust' as our national motto, or the references to God contained in the Pledge of Allegiance can best be understood . . . as a form of 'ceremonial deism,' protected from establishment clause scrutiny chiefly because they have lost through rote repetition any significant religious content." *Lynch v. Donnelly*, 465 U.S. 668, 716 (1985) (Brennan, J., dissenting) (footnote omitted).

57. *Allegheny*, 109 S. Ct. at 3138 (Kennedy, J., concurring and dissenting).

actually received—rather than on the message itself or its purely symbolic quality.

The centrists, by contrast, see religious symbols as less pure, particularly when their message is obscured, diluted, or adulterated by association with other such symbols. The centrists seem more willing than either the secularists or the accommodationists to read diffuse and ambiguous meaning into governmental use of religious symbols. The centrists see a clear distinction “between a specifically Christian symbol, like a crèche, and more general religious references, like the legislative prayers”⁵⁸ at issue in *Marsh v. Chambers*.⁵⁹ Neither the accommodationists nor the secularists see any significant distinction, for establishment clause purposes, between the messages conveyed in the two cases. But the centrists do agree that when the message *is* pure, and purely religious, its meaning is clear and governments may not transmit it. The debate between the centrists and both the other camps is over the purity of the message delivered by religious symbols. The accommodationists and secularists agree on the purity of the symbolic message but argue about its significance to the Establishment Clause.

III. Conclusion

The Court has recognized the power of symbolic communication, and appears to discern the difference between pure symbols (which function *only* as communicators and deliver a uniform, clear message), and mixed symbols (which perform both communicative and other functions, or which deliver an ambiguous message). But disagreement rages about the significance to the Constitution of pure symbols. To confound the problem, only three (and perhaps as many as five) Justices maintained fully consistent positions in *Johnson* and *Allegheny* with respect to both recognition of pure symbols and their constitutional significance.

Justices Brennan and Marshall both recognize the pure quality of the symbols at issue and attach constitutional significance to that fact. Justice Blackmun generally recognizes the purity of the symbols (although he is more willing to find ambiguity with religious symbols) and finds constitutional significance in their purity.

Chief Justice Rehnquist and Justice White either fail to recognize the flag as pure symbol or attach no constitutional significance to the ramifications of that fact.⁶⁰ Both recognize the purity of religious sym-

58. 109 S. Ct. at 3106.

59. 463 U.S. 783 (1983).

60. See text accompanying notes 23-26.

bols but find that purity to be of no importance to the Establishment Clause.

Justices O'Connor and Stevens likewise either fail to recognize the flag as pure symbol or find no constitutional significance in that purity. Both recognize the purity of religious symbols (though Justice O'Connor shares Justice Blackmun's doubts about their purity) but, unlike Justices Rehnquist and White, they ascribe establishment clause significance to pure religious symbols.

Justices Scalia and Kennedy are consistent in finding both flags and religious icons to be pure symbols, but they see significance in that recognition only when it comes to the Free Speech Clause. For these Justices, perhaps the pure symbolism of free speech is the added ingredient that leads them to hear the alarm bells of constitutional invalidity when confronted with governmental deployment of a pure symbol in a speech context, but to hear only silence when similarly pure symbols are used by governments in an establishment clause context.

These cases are only an early chapter in a new saga of constitutional development. The intersection of pure symbols with the Free Speech and Establishment Clauses will see more activity, and we will probably not have to wait very long for this judicial pot to boil. Unfortunately, it is considerably more difficult to divine what will come out of the pot.