

ISSA Proceedings 1998 - 'The Search For Grounds In Legal Argumentation: A Rhetorical Analysis Of Texas v. Johnson'



Legal opinions are essentially rhetorical documents: they pronounce a decision then justify that decision through a series of arguments aimed at particular audiences. Although law has often been held up as an archetype of practical argument, legal arguments must adhere to a stricter level of scrutiny than many other types of argument. Court decisions, particularly those made by the Supreme Court, are analyzed by a variety of experts, some of who have direct influence on the argument as it is being constructed (Golden and Makau, 1982: 172). These audiences constrain the possible means of persuasion which may be incorporated into the argument.

These constraints serve to limit the types of arguments which may be made in a case, the types of evidence which may be used to support the argument, and the very form that the argument may take. Despite these restrictions, legal argument is dynamic; new arguments are made and accepted, the law changes over time.

Legal argumentation covers a wide variety of issues. Each issue has a different set of questions which must be addressed by the Court when it announces a decision. Free speech cases provide a limited set of non-legal concepts which the judge may integrate into the decision. These concepts include the speaker, the speech and the audience of the speech. These become the materials which the judge may use to overcome the constraints set on the decision by the audience. In this paper, I will examine how the Court uses the construct of audience in the Texas v Johnson case. This case reveals how dynamic legal argumentation can be, even given the strict constraints the Supreme Court must operate under.

1. Developing a Theory of Constraints

Court documents are constrained by the expectations of the audience. These constraints are not formally codified; they exist in the author's conception of the expectations of this audience. The audience judges the correctness of a justice's

interpretation of the law, and this judgment is internalized by the author of the opinion.

James Boyd White notes, "In every opinion a court not only resolves a particular dispute one way or another, but validates or authorizes one kind of reasoning, one kind of response to argument, one way of looking at the world and at its own authority, or another" (1988: 394).

Stare decisis is the most pressing constraint on a Supreme Court judge. Golden and Makau note, "Use of stare decisis gives the court's readers greater confidence in the Justices' impartiality" (Golden and Makau 1982: 160).

The tapestry of the law forms the backdrop for the finding of any particular case. The author of an opinion must weave his or her finding into the cloth in such a way as not to radically disrupt the patterns which the audience has come to expect for the type of case being decided. These patterns consist of the materials which a justice may use to justify the opinion including the constitution, state law, and prior court cases. Stanley Fish provides an excellent example of a decision which would be considered a break from the pattern of the law, "A judge who decided a case on the basis of whether or not the defendant had red hair would not be striking out in a new direction; he would simply not be acting as a judge, because he could give no reasons for his decision that would be seen as reasons by competent members of the legal community" (1989: 193).

Fish's observations about the nature of the legal system culminated in the idea of the "interpretive community." Although there is no clear delineation of this community's boundaries, Fish did provide that an interpretive community is, "not so much a group of individuals who shared a point of view, but a point of view or way of organizing experience that shared individuals in the sense that its assumed distinction, categories of understanding, and stipulations of relevance and irrelevance were the content of the consciousness of community members who were therefore no longer individuals, but, insofar as they were embedded in the community's enterprise, community property" (1989: 141). Interpretive communities explain why judges are constrained in the writing of the opinion, the judges, invested in the community, are pressured to uphold the community's standards.

Fish's theory is reminiscent of Perelman and Olbrechts-Tyteca's theory of audience. Perelman and Olbrechts-Tyteca argue that the primary criteria for whether an argument is reasonable is the universal audience. This audience is bounded by the culture; a culture shared by both the speaker and the audience

(1969: 33). Fish's interpretive communities flesh out those boundaries; he defines the cultural expectations under which both the Supreme Court justices and their audience operate.

Fish's notion of interpretative community is far from static, "neither interpretive communities nor the minds of community members are stable and fixed, but are, rather, moving projects - engines of change - whose work is at the same time assimilative and self-transforming" (1989: 152). Change in the community occurs thorough interpretation. Each time a decision is made, it reflects both the concerns of the present situation and the interpretive community's conception of the past, "the hand of the past can appear to us only in an interpreted form, in the form of a constructed intention that can always be constructed again in the light of whatever evidence from whatever source seems relevant; and therefore the past we will be bound to will acquire its shape within the horizons of the living and lived-in present" (1994: 183). Each new situation encountered reshapes the community's conception of the past and leads the community into an alternate future. Much like Gadamer's fusion of horizons, Fish's interpretive community continually rewrites its history in terms of its present conditions (Gadamer 1989: 293).

Fish's theory of interpretive communities provides valuable insight into the norms of the legal community. The interpretive community of the law legitimizes a way of thinking about the law which is inculcated into its practitioners at each level of participation from law school through judgeship. Central to this socialization is the judicial opinion, it is studied by law students, read by lawyers, and written in respect to other opinions by judges.

Fish's interpretive community explains some of the constraints that a Supreme Court justice must negotiate when writing an opinion.

The judge must begin the discourse with a particular case; past cases are read in relation to the present circumstances. The community expects that the present case will be understood in relation to the past, but the present case also molds the past. Yet these constraints also free the opinion writer to manipulate the texts on which the opinion is based, as long as this manipulation is justified within the bounds of the community's expectations. Fish writes, "Interpreters are constrained by their tacit awareness of what is possible and not possible to do, what is and is not a reasonable thing to say, what will and will not be heard as evidence in a given enterprise; and it is within these same constraints that they

see and bring others to see the shape of the documents to whose interpretation they are committed" (1989: 98).

Stanley Fish explains that the materials that the judge uses to justify an opinion are constrained, but he does not explain precisely the expectations for using these materials as support for an argument.

Ronald Dworkin's theory is an attempt to determine how these materials are used to support a legal argument. His position complements Fish's interpretive communities, Dworkin is interested in what counts as good evidence in a judicial opinion.

Dworkin views judicial opinion writing as argumentation. His primary goal is to discover the grounds of legal argument which serve as valid starting points for the legal community. Dworkin's work exemplifies the constraints placed by the audience on Supreme Court opinions; his search for correct interpretation of the law is an explanation of what first principles are accepted by the legal community. Dworkin is in search of theoretical disagreements, or what he calls "law's grounds." Like Stanley Fish, Dworkin notes that the grounds for legal argument are determined by the community: "Legal practice, unlike many other social phenomena, is argumentative". Every actor in the practice understands that what it permits or requires depends on certain propositions that are given sense only by and within the practice; the practice consists in large part in deploying and arguing about these propositions. People who have law make and debate claims about what law permits or forbids that would be impossible without law and a good part of what their law reveals about them cannot be discovered except by noticing how they ground and defend these claims" (1986:13).

Law's Empire, Dworkin's primary treatise on legal interpretation, presents two main themes: law is interpretation and law has integrity. It is the second theme that has drawn the greatest criticism from legal scholars. However, Dworkin's identification of the legal community's shared expectations provides an outstanding explanation of how judges are constrained by their community.

Dworkin notes, "Judges normally recognize a duty to continue rather than discard the practice they have joined" (1986: 87). The practice which constrains judges include a shared world view, set of values and vocabulary (1986: 63). Members of the legal community reinforce their standards through education and practice, judges are highly invested in their social structure. Each case a judge hears and decides adds to and reinforces those standards, the judge's decision in these

cases rests on an interpretation of these standards.

For Dworkin, interpretation should be constructive. He defines this as, “a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it belongs” (1986: 52). Dworkin notes that the object under question is constrained by the history of a practice. An interpreter of social practices, of which law is a subset, engages in creative interpretation. Creative interpretation using a constructive approach is “a matter of interaction between purpose and object” (1986: 52). The purpose, or context, of the interpretation sets the standards by which an object is to be judged. Dworkin does not believe that context provides an Archimedean point, but allows judgment of an interpretation.

There are three stages, or steps, to interpretation in Dworkin’s theory. The first is called the “preinterpretive” stage. During this time, “the rules and standards taken to provide the tentative content of the practice are identified” (1986: 65-6). According to Dworkin, there is a strong need for consensus at this stage in order to preserve harmony amongst the interpretive community. This is when the raw materials of interpretation are decided upon. A judge must determine what counts as evidence to the audience in terms of the particular decision being rendered. The second stage is called the “interpretive stage.” During this period the interpreter, “settles on some general justification for the main elements of the practice identified at the preinterpretive stage” (1986: 66). Here the interpreter finds a value judgment which shows the practice of law at its best. For Dworkin, this act of justification is solitary, but is preformed against the knowledge of the values of the community.

The justification process involves two types of issues: does the justification “fit” the practice which is being interpreted, and what types of substantive issues would show the practice in the best light? The justification for both of these issues includes an argument as to why the decision is worth pursuing; what values does it upholds for the community? The second stage allows judges to escape the constraints of the legal community, if only for a moment. It is in this stage that a judge frames the opinion and establishes the value hierarchy to which the legal materials gathered in the pre-interpretive stage will be applied.

Finally, there is a “postinterpretive” or “reforming” stage. During this stage interpreters adjust their conception of what is “really require(d) so as better to serve the justification he accepts at the interpretive stage” (1986: 66). Dworkin notes that in the real world interpretive judgments do not progress cleanly

through each of these stages, but instead they are more a matter of, “seeing at once the dimensions of their practice, a purpose or aim in that practice, and the post-interpretive consequence of that purpose ” (1986: 67).

Dworkin’s most valuable contribution is his explanation of why conflicts of interpretation occur. He identifies core beliefs which can be used by an interpreter to explain where interpretations differ, “at the first level, agreement collects around discrete ideas that are uncontroversially employed in all interpretations; at the second the controversy latent in this abstraction is identified and taken up. Exposing this structure may help to sharpen argument and will in any case improve the community’s understanding of its intellectual environment”(1986: 71). At the abstract level, there is no controversy, it is only when values are applied to concrete issues that interpretations differ. This echoes Perelman And Olbrechts-Tyteca’s claim that it is only the creation of hierarchies, necessitated by particular concerns, which will bring values into conflict (1969: 80).

The analogy of a tree is used to explain Dworkin’s conception of stasis. The trunk represents the starting points of any argument in a field, those ideas which are uncontroversial to an audience. Dworkin calls this a plateau. The branches contain arguments that may be disputed, “(political philosophers) can, however, try to capture the plateau from which argument about justice largely proceed, and try to describe this in some abstract proposition taken to define the ‘concept’ of justice for their community, so that arguments over justice can be understood as arguments about the best conception of that concept.” (1986: 74) This would suggest that differences of interpretation would occur not over the importance of a value, but in how it is portrayed.

Value arguments play a pivotal role in the justification of legal argument. However, these value arguments need connection to particular situations. The particularization of a value construct is done through the creation of a paradigm. Dworkin argues that the paradigms play a more important role in legal argumentation than abstract value propositions, “The role the paradigms play in reasoning and argument will be even more crucial than any abstract agreement over a concept. For the paradigms will be treated as concrete examples any plausible interpretation must fit, and argument against an interpretation will take the form, whenever this is possible, of showing that it fails to include or account for a paradigm case” (1986: 72).

Conceptions are values; universal and timeless, but they cannot come into play without a connection to the events which precipitated the controversy being decided. Paradigms are specific to a particular set of events, they are the application of values.

Dworkin draws the most criticism is from his claim that law has integrity. While this statement may not seem problematic on its face, Dworkin uses the notion of integrity to ground the valid interpretation, "Law as integrity asks judges to assume, so far as this is possible, that the law is structured by a coherent set of principles about justice and fairness and procedural due process, and it asks them to enforce these in the fresh cases that come before them, so that each person's situation is fair and just according to the same standards" (1986: 239). Integrity in law accounts in some measure for the constraints placed on the judge. There is an expectation that judges will justify their opinion by relating it to other cases; i.e. use precedent. If the finding of the case is different than other cases like it, the judge must distinguish the present case from those that came before it.

Dworkin's search for the grounds of legal argument illuminates both the constraints which inhibit the author of a Supreme Court opinion and the moments of freedom in the interpretive process.

There are two major constraints which emerge from Dworkin's theory.

First, judges are constrained during the pre-interpretive stage when they select the materials which will serve as the grounds. These materials are defined by the community and are expected to be used as support in the legal argument.

Secondly, the finding of an individual case should resonate with similar cases which have been decided previous to the instant case. This is the idea that law has integrity, law will treat individuals in the same situation in the same way.

During the interpretive stage, however, judges are able to shape the application of these materials by linking them to a value hierarchy. Different interpretations of the same case occur because judges establish different value hierarchies to support their reading of prior cases. The interpretive stage allows judges to frame the particular case.

Fish and Dworkin introduce two important concepts to a theory of legal interpretation. First, interpretation takes place against the expectations of a community. This community functions to provide the material for interpretation, as well as constrains how that interpretation is judged. Second, there is a sense of the political inherent in the community. Institutions are created by human beings

and they reflect the concerns of humanity. Dworkin provides a mechanism by which the political concerns of the judge can be inserted into a free speech opinion.

Often, cases which invoke first amendment precedent are conflicts between the government and an individual. Jurists are asked to interpret the Constitution or to decide if a state or federal statute conflicts with their interpretation of first amendment protections. These cases invoke classic questions of hermeneutic theory – how do justices read precedent in relation to the complexities of speech rights in the present? Dworkin notes, “Contemporary lawyers and judges must try to find a political justification of the First Amendment that fits most past constitutional practice, including past decisions of the Supreme Court, and also provides a compelling reason why we should grant freedom of speech such a special and privileged place among our liberties” (1996: 199). The Supreme Court, when faced with a free speech case, must balance the needs of the community with its decision in a particular case.

The legal community expects that certain materials, most notably similar cases, will be used to justify the decision a judge is making in a particular case. Yet these cases alone cannot establish a conclusion in a particular case. Drucilla Cornell points out, “no line of precedent can fully determine a particular outcome in a particular case because the rule itself is always in the process of reinterpretation as it is applied. It is interpretation that gives us the rule, not the other way around” (1992: 157).

Non-legal concepts allow judges a moment of freedom in interpretation. During the first stage of the decision making process, a judge must determine the relevant facts. Although these determinations are bounded by the issue at hand, this step allows a judge to choose the raw materials of a case. These facts are not nearly as constrained as the precedent used in the decision. In the case I have chosen to illustrate this argument, *Texas v Johnson*, each opinion uses the construct of audience to shape its application of precedent**(i)**.

Two types of audiences occur in this opinion. The first, which I call the constructed actual audience, is a description of the audience present at the time of the speech event. In this case, both Brennan and Rehnquist give presence to different persons present during the burning of the flag. The second type of audience which occurs in this case I call the event’s attributed audience. Unlike the constructed actual audience, this description is not based on empirical data. Instead, this is an idealized audience, one based on values. Both of these audiences are rhetorical constructions; neither is an exact representation of the

audience present during the speech event.

2. Texas v. Johnson

During the 1984 Republican National Convention in Dallas, Gregory Johnson participated in a march to protest the policies of the Reagan administration. At the end of the march, in front of Dallas City Hall, Johnson was handed a flag, which he burned while other protesters chanted. Johnson was the only one of the protesters to be arrested for the demonstration. He was charged with desecration of a venerated object.

In a 5-4 decision, the Supreme Court held that the Texas Statute infringed on Johnson's speech rights. The majority opinion, written by Brennan, isolated two major issues; 1) is flag burning expressive and 2) because flag burning is conduct, does the government have a legitimate interest in regulating the nonspeech elements related to the conduct? The majority found that flag burning was expressive and that Texas did not have a legitimate state interest to ban the activity because no harm was likely to result from this expression.

Brennan's majority opinion uses an interpretation of the audience in order to argue that flag burning is expressive conduct and as such deserves first amendment protection. He notes, "anyone who observed appellant's act would have understood the message that appellant intended to convey" (400). This construction allows Brennan to argue the factual claim that flag burning is expression because its message could be clearly understood.

Brennan uses the constructed actual audience in order to dismiss Texas's claim that it was trying to prevent a breach of the peace. He begins by recounting the scene which culminated with Johnson's burning of the flag, highlighting only the aftermath of the demonstration, "After the demonstrators dispersed, a witness to the flag burning collected the flag's remains and buried them in his backyard" (399). Brennan continues his interpretation of the constructed actual audience, "No one was physically injured or threatened with injury, though several witnesses testified that they had been seriously offended by the flag burning" (399). This interpretation establishes two of the arguments that Brennan will later rely on; first that because there was no threat to the audience, Johnson's speech rights should be paramount. Second, the interpretation of a message as offensive is not sufficient justification for abridging speech rights because no breach of the peace was likely from Johnson's action. These constructed audiences are presented before Brennan actually makes the argument that there was no

likelihood of a breach of the peace, thus setting the stage for his later conclusion. When Brennan does tackle the question of whether flag burning was likely to lead to a breach of the peace, he privileges the use of the constructed actual audience. Brennan lays out Texas's event's attributed audience, "The State's position, therefore, amounts to a claim that an audience that takes serious offense at particular expression is necessarily likely to disturb the peace and that the expression may be prohibited on this basis" (408). He rejects the use of an event's attributed audience for determining the likelihood of breach of the peace, "we have not permitted the government to assume that every expression of a provocative idea will incite a riot, but have instead required careful consideration of the actual circumstances surrounding such expression..." (409). This dovetails nicely with his own use of the collective to argue that Texas did not have a legitimate interest in preventing a breach of the peace in this particular case.

Brennan then uses the lower court's constructed actual audience to reinforce his argument, "the flag burning in this particular case did not threaten such a reaction. 'Serious offense occurred,' the court admitted, 'but there was no breach of peace nor does the record reflect that the situation was potentially explosive'" (401).

The opinion stays consistent by developing the constructed actual audience as support for the argument that no breach of the peace was likely as a result of Johnson's burning of the flag.

Brennan does, however, offer an event's attributed audience to argue that restrictions on flag burning could not be justified by classifying the action as fighting words. "No reasonable onlooker would have regarded Johnson's generalized expression of dissatisfaction with the policies of the Federal Government as a direct personal insult or an invitation to exchange fisticuffs" (409). This event's attributed audience does not hold the flag as a personal symbol, but is rather able to distinguish a critique of the government from their own emotions concerning the importance of the flag.

Brennan primarily uses the event's attributed audience to argue that Texas's second stated interest, to protect the flag as a national symbol, is a violation of the first amendment because it is a restriction of a particular point of view. He presents his version of Texas's event's attributed audience in order to show the Texas law would stifle expression critical of the flag, "The State apparently is concerned that such 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 exist, that is, that we do not enjoy unity as a Nation" (410).

The opinion ends with Brennan's event's attributed audience, one which is expressly contrasted with Texas's version, "We can imagine no more appropriate response to burning a flag than waving one's own, no better way to counter a flag burner's message than by saluting the flag that burns, no surer means of preserving the dignity even of the flag that burned then by - as one witness here did - according its remains a respectful burial. We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom this cherished emblem represents" (420). Brennan thus presents a collective who uses expression to counteract the message of flag burning rather than taking serious offense and resorting to violence.

Rehnquist authored a powerful dissenting opinion, on which he is joined by White and O'Connor. Rehnquist's opinion is based primarily on the importance of respect for the flag, "For more than 200 years, the American flag has occupied a unique position as the symbol of our nation, a uniqueness that justifies a governmental prohibition against flag burning in the way respondent Johnson did here" (422). This statement is followed by a long exposition on this history of the flag, both in war and in peace.

Once the value of the flag has been established, Rehnquist refutes the primary contentions of the majority opinion. He argues that flag burning is not expression; it is likely to cause a breach of the peace; and the state has a legitimate interest in protecting the integrity of the symbol. Rehnquist uses conceptions of the collective as evidence for each of his arguments.

After a lengthy exposition on the history of the flag in American life, Rehnquist argues explicitly with the majority's finding that flag burning should be considered expression protected by the first amendment. He begins by equating flag burning with fighting words, "his act, like Chaplinsky's provocative words, conveyed nothing that could not have been conveyed and was not conveyed just as forcefully in a dozen different ways" (431). After this analogy is made, he uses an event's attributed audience to justify the restriction of flag burning, "The highest source of several States have upheld state statutes prohibiting the public burning of the flag on the grounds that it is so inherently inflammatory that it may cause a breach of public order" (431). Interestingly, Rehnquist does not take up Brennan's challenge to provide specific instances where flag burning has

provoked violence; instead he offers an interpretation of a collective overcome by the emotional drama of watching a flag burn.

Rehnquist's second main argument is that the state has a legitimate interest in protecting the flag. Rehnquist argues that the reaction of the collective is the most important factor in determining whether to protect flag burning, "The concept of 'desecration' does not turn on the substance of the message the actor intends to convey, but rather on whether those who view the act will take serious offense" (438).

Early in his opinion, Rehnquist notes the importance of the flag to the nation, "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" (429). The attributed audience created by Rehnquist is enamored with the power of the symbol. Such a collective would be so overcome by their emotional response that they would not recognize the value of the dissent it was witnessing. Thus, Rehnquist comes to the conclusion, "sanctioning the public desecration of the flag will tarnish its value - both for those who cherish the ideas for which it waves and for those who desire to don the robes of martyrdom by burning it" (437). This event's attributed audience is typical of the strategy Rehnquist employs to counter Brennan's majority opinion; he uses his collective to support his value hierarchy which would place the protection of the symbol of the flag over the expression of dissent.

Texas v Johnson is an excellent example of the power the concept of audience has in shaping the law. Brennan and Rehnquist present very different visions of the audience, which leads to different conclusions about the legal status of flag burning.

3. Implications and conclusion

Justices must balance their interpretations of the law with the expectations of their audience. The audience constrains the interpretations that justices may impose on the law. Yet the judicial opinion is more than just the mechanical application of precedent to the current case; justices have the ability to interpret the law by manipulating the materials which they use to justify their opinion. The extent to which materials may be manipulated in the decision is also determined by the audience. Some materials are highly constrained: the constitution, statutes, and precedent. The legal community has developed expectations about the meaning of these materials and a justice cannot recreate these materials to

suit his or her needs. When the author of an opinion uses legal materials as justification for a decision, these materials must be used in ways consistent with their past use. For example, a judge may not alter the findings of past cases; he or she must use a previous case without changing its content. Many areas of first amendment law have a long history of case law which follows a specific trajectory. The audience expects that when one of these cases is cited in an opinion it will be consistent with the way in which it has been cited in the past. However, the judge can frame the instant case in such a way as to call upon prior cases that support his or her conclusion. The art of using precedent is not in how it is used once it is called forth in the opinion, but in how it is called into the opinion in the first place.

Interpretations of the collective are one possible frame the author of the opinion imposes on these cases; these interpretations lead the reader to the set of precedent which the author wants to apply to the present case. Stanley Fish argues that a line of precedent does not simply announce itself to a reader, a judge must make an argument that the cases being cited are similar to the case being decided, "Similarity...is not a property of texts (similarities do not announce themselves), but a property conferred by a relational argument..." (1989: 94). In other words, the justice who is writing an opinion is able to create the relationship between the extant case and the line of precedent which he or she believes is most relevant to the decision. Interpretations of the collective are one way that authors of opinions can justify their application of precedent. In this way the rhetorical construction of the collective serves as a focal point for the decision.

One way interpretations of the collective are strategically employed is to create an analogy between the case being decided and the body of law which the author of an opinion wants to associate this case with. However, this was not the only use of the collective in Supreme Court opinions. Interpretations of the collective were also used to ground arguments about the nature of the law. Constructed actual audiences and event's attributed audiences are used to support claims made in the opinion.

The Court primarily functions as an epideictic speaker. It establishes value hierarchies as a precursor to action. In free speech cases, the Court must balance the needs of speakers with the interests of the collective. Implicit in balancing is the creation of a value hierarchy; when the Court rules that one interest is more

important than another it is declaring a specific ordering of values. Some of the values called upon in free speech cases – the promotion of a marketplace of ideas, the protection of individual self expression, and the promotion of democratic self government – are what Ronald Dworkin labels as concepts (1986: 70-1). Concepts are universalized values which serve as starting points in legal argument. The audience accepts these values in the abstract; the role of the author of an opinion is to connect these values to the extant case. This is what Dworkin calls the creation of a paradigm.

Interpretation of the collective is one way that judges create paradigms. These interpretations create links between the case under review and the values that the Court holds. Justices use their interpretations of the collective to argue that the case they are deciding is the embodiment of an already accepted value.

Paradigms are exceptionally persuasive arguments, but they are not static. Each time a judge encounters a new case he or she has the opportunity to create a new paradigm. Dworkin writes, “Paradigms anchor interpretations, but no paradigm is secure from challenge by a new interpretation that accounts for other paradigms better and leaves that one isolated as a mistake” (Empire 72). In order for a justice to create these new interpretations he or she must explain how the case being decided is distinguished from prior case law. Interpretations of the collective allow judges to make these types of arguments. *Texas v. Johnson* illustrates the power the collective has in forming these paradigms. Brennan was able to successfully argue that the audience values expression over the symbolism of the flag. Rehnquist reverses this hierarchy in the hope that it may some day become a new paradigm.

NOTE

i. William Lewis has written an outstanding piece on the rhetoricity of this case.

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