Cross Burning, Cockfighting, and Symbolic Meaning: Toward a First Amendment Ethnography

Timothy Zick
William & Mary Law School, tzick@wm.edu
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TIMOTHY ZICK*

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* Assistant Professor of Law, St. John’s University School of Law. B.A., 1989, Indiana University; J.D., 1992, Georgetown University Law Center. I wish to thank Erin Albritton, Paul Kirgis, Rosemary Salamone, Susan Stabile, Brian Tamanaha, Robert Vischer, and Philip Weinberg for their support, and for their helpful comments and suggestions on earlier drafts of this Article. I would also like to thank Meghan Silhan for her diligent research assistance.
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TOWARD A FIRST AMENDMENT ETHNOGRAPHY

INTRODUCTION

We live in a culture of symbols. We speak not only through our words but through symbolic gestures—our acts, our religious symbols, and our associations. What we do, what we wear, how we worship, and with whom we associate are all deeply symbolic aspects of our cultural life. Despite this rich symbolism, what it is that we say when we act, worship, and join has been a topic treated substantially with indifference by courts and scholars. What does it mean to burn a draft card or a cross, to sleep in the park, or to dance in the nude? What does the display of a menorah, or crèche, or the Ten Commandments at the county courthouse signify? What does it mean to join the Jaycees, the Rotary Club, or the Boy Scouts? Although a diverse and complex symbolism inheres in the First Amendment, courts have made little effort to translate or interpret these and other symbolic gestures. Outside the realm of "pure" expression, whose meaning is often self-evident, it seems that judges are loathe to delve too deeply into symbolic meaning. As a result, what we have now is a very thin doctrine of symbolic gestures.

This does not have to be so. Indeed, one recent exception to the general disengagement from symbolic meaning stands out and deserves particular attention. In Virginia v. Black, the Supreme Court held that cross burning could be prohibited, categorically, as a "threat" outside the protection of the First Amendment. The record facts in Black can be stated briefly. One man, leading a Ku Klux Klan rally, burned a cross on private property some 300 feet from the nearest public road and in view of his neighbors, while two

1. See, e.g., Sanford Levinson, They Whisper: Reflections on Flags, Monuments, and State Holidays, and the Construction of Social Meaning in a Multicultural Society, 70 CHI.-KENT L. REV. 1079, 1107 (1995) ("Symbols are an important part of the cultural exchange system that, among other things, establishes relationships of hierarchy and domination.").
2. The usual labels—"symbolic conduct" or "symbolic expression"—are too limited for my project, which includes, in addition to an analysis of symbolic conduct, the symbolism of religion (sacred symbols) and symbolic membership. I use "symbolic gestures" to indicate this more expansive coverage.
4. Id. at 1547-49.
other men, on a separate occasion, attempted to burn a cross in an African American neighbor’s yard. This conduct was said to violate a Virginia criminal statute regulating cross burning undertaken with the “intent of intimidating any person or group of persons.” Although the Court concluded that the government could prohibit cross burning as a form of threatening symbolism, it held that the Virginia statute was procedurally flawed.

The narrow holding is not significant. What is significant, or at least potentially so, is how the Court was able to determine that burning a cross could be interpreted as a constitutionally unprotected symbolic threat. In order to educate itself, and the rest of us, with regard to the symbolic meaning of burning a cross, the Court had to go beyond the narrow conception of “the record.” In order to recover the most plausible meaning of cross burning, the Court had to ascertain what potential meanings such an act might have, and then choose the meaning most consistent with, among other things, participant behavior. The conclusion surely seems self-evident, at least for those with even a rudimentary awareness of the historic struggle for civil rights, and of the ideology and operations of the Ku Klux Klan. But where meaning and interpretation are concerned, courts ought not simply pronounce their own sense of the matter. This is as true of interpretation of symbolic gestures as it is of interpretation of constitutional text. Courts must state reasons for their interpretations.

Drawing on a wealth of sociological, historical, and anecdotal data, therefore, the Black Court produced a detailed account, a monograph of sorts, of the practice of cross burning, from the origins of the ritual in fourteenth-century Scotland, through the violence and racism of the civil rights struggle, up to the present. The Black Court sought to recover the most plausible meaning of cross burning by placing it in cultural context, consulting public sources of meaning, and providing a detailed description of the practice. What resulted was a translation of the gesture of cross

5. Id. at 1542-43.
6. Id. at 1541.
7. Id. at 1541, 1551-52.
8. See id. at 1544-47.
9. See id.
burning into recognizable, if not ultimately incontestable, cultural
terms.

Black demonstrates that interpretation of symbolic gestures can
be demanding, and risky, work for judges. Courts have generally
avoided interpreting the meaning of symbolic gestures for two
reasons. First, they have failed to appreciate the importance of
symbolism to cultural expression. Indeed, normative bias against
unusual or unconventional forms of speech—symbolic protests and
nude dancing, for example—has led over time to a doctrine of
interpretive indifference. Second, courts tend to view symbolic
meaning as hopelessly indeterminate. They do not believe that, as
judges, they are capable of choosing from among the various
available meanings for polysemous symbols. Thus, concerns
regarding institutional competency have led, with respect to some
symbolic gestures, to a doctrine of interpretive avoidance.

It is precisely because of the indeterminacy of meaning that
Black will have detractors. For if the Court can denounce the
burning cross as symbolically threatening, what then of the Nazi
swastika and the Confederate flag? What Black portends need not
be viewed with trepidation or dread of slippery slopes. The ap-
proach taken can lead to a better understanding of symbolic
gestures across the range of First Amendment concerns—not only
symbolic action, but also sacred symbols and the meaning of
membership in associations. If properly pursued, an interpretive
turn for symbolic gestures will enable a discourse of symbols to take
place which has been silenced for too long. It will permit courts to
untangle and decipher the often ambiguous symbolic communica-
tions of cultures they do not inhabit.

This assumes much. It assumes, for one thing, that courts can
avoid acting as undisciplined, unprincipled arbiters of symbolic
meaning. Judicial interpreters simply cannot be permitted to rely
upon their own normative biases, for that is one of the troubles with
the current doctrine of symbolic gestures. There must be discipline
and principled interpretation; at the least, there must be a system-
atic method for recovering symbolic meaning.

This Article proposes that interpretive ethnography provides an
appropriate model for the interpretation of symbolic gestures in
First Amendment cases. Ethnographers are anthropologists who
systematically record the particulars of human cultures, usually by conducting lengthy field observations. Interpretive or hermeneutic ethnography is a branch, or school, of anthropological thought which emphasizes the cultural significance of signs and symbols. The approach, popularized by its leading proponent, Clifford Geertz, is semiotic in orientation; it focuses on the interpretation of symbols and symbol systems within a culture. As Geertz himself summarizes the agenda, interpretive ethnographers are "mostly engaged in trying to determine what this people or that take to be the point of what they are doing."

This Article suggests that courts adopt a systematic, interpretive orientation with respect to symbolic gestures. To be clear from the outset, the Article does not suggest that courts actually "do" ethnography in the sense of physically entering the field and studying a culture over time. Institutional and other limitations obviously preclude judges from becoming field scientists. As a perspective, a process, and a method, however, interpretive ethnography has much to offer a judicial approach to symbolic gestures. Given its solicitude for symbols and symbolic meaning, the interpretive model offers a lens, a perspective, through which to view symbolic gestures anew. This perspective can be readily

10. See DAVID M. FETTERMAN, ETHNOGRAPHY STEP BY STEP 11 (1989) ("Ethnography is the art and science of describing a group or culture."); see also THOMAS HYLLAND ERIKSEN, SMALL PLACES, LARGE ISSUES: AN INTRODUCTION TO SOCIAL AND CULTURAL ANTHROPOLOGY 1 (2d ed. 2001) ("Anthropology tries to account for the social and cultural variation in the world ... ").

11. Semiotics is the science of signs. Semioticians are interested chiefly in the study of linguistic signs and sign systems, although the discipline is not limited to verbal signs. For examples of nonlinguistic approaches to semiotics, see generally ARTHUR ASA BERGER, SIGNS IN CONTEMPORARY CULTURE (1984); ON SIGNS (Marshall Blonsky ed., 1985); and SEMIOTICS OF CULTURE (Irene Portis Winner & Donna Jean Umiker-Sebeok eds., 1979).

12. For expressions of Geertz's interpretive view, see CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES (1973) [hereinafter GEERTZ, INTERPRETATION OF CULTURES] and CLIFFORD GEERTZ, LOCAL KNOWLEDGE (1983) [hereinafter GEERTZ, LOCAL KNOWLEDGE]. Geertz has been both widely influential and widely criticized in his field. For specific criticisms, see, for example, ERIKSEN, supra note 10, at 198 (noting that Geertz "has been criticised for exaggerating the importance of culture and symbols at the expense of interaction and social structure, and for exaggerating the degree to which cultures are integrated and coherent"). For specific criticisms of the hermeneutic aspects of Geertz's method, see, for example, JAMES CLIFFORD, THE PREDICAMENT OF CULTURE: TWENTIETH-CENTURY ETHNOGRAPHY, LITERATURE, AND ART (1988).

adapted to combat the First Amendment doctrines of interpretive indifference and avoidance. This Article, thus, utilizes the Geertzian anthropo-semiotic approach as a foundation for reconsidering symbolic gestures.

In pursuing the interpretive model or perspective, the first step is to recognize that when courts encounter First Amendment symbolism, they are, like ethnographers, called upon to consider the cultural meaning of social action. The culture may be large, such as a peace movement or a general public protest against government policies; or it may be small, as where specific clubs, sects, or other associations are concerned. Judges reside in the broad American culture. They need not, therefore, as ethnographers often must, learn a culture from the ground up. Judges are, however, often "outsiders" to the subcultures in which symbolic gesturing takes place. They do not, for example, engage in public protest, attend strip clubs, or burn crosses. The challenge for courts, then, as for ethnographers, is to decipher or translate symbolic meaning within these partially foreign subcultures.

Taking interpretation as the goal, this Article maps the contours of a model that can assist in reorienting the judicial consideration of symbolic gestures. One of the elements ethnography and law share is that they are both steeped in, and in an important sense driven by, detailed factual inquiry. As a method, the ethnographic model begins where any legal process should—with the collection of data concerning the symbolic gesture. This often entails, as in Black, venturing well beyond "the record" in an effort to situate a gesture within a particular culture. Thus, the first convention of the ethnographic model is rigorous factfinding.

Second, after rigorous factfinding, the ethnographic model calls for what Geertz labels "thick description": essentially—although, as will become apparent, it is much more complicated than this—a detailed account of the symbol or gesture.\textsuperscript{14} For ethnographers, thick description can produce anything from a report or memorandum to a monograph of several thousand pages. Of course, we cannot hope for, nor do we desire, thousand-page judicial mono-

\textsuperscript{14} Clifford Geertz, \textit{Thick Description: Toward an Interpretative Theory of Culture}, in \textit{Interpretation of Cultures}, supra note 12, at 3, 6. The notion of "thick description" was first discussed by Gilbert Ryle. \textit{Id.} at 6.
graphs. Judges are, nevertheless, capable of rendering relatively thick descriptions within the space of judicial opinions. *Black* itself is evidence of this.\(^{15}\)

Ethnographers seek an understanding of cultures, and cultural symbols, on their own terms. Sometimes rather carelessly described as “going native,”\(^{16}\) this cultural perspective is the third element of the interpretive model. Although the concept of emic, or insider, perspective is a complex and contested one, the basic idea is that ethnographers should strive as best they can to put aside any bias or prejudgment of a culture’s symbolic practices while they interpret.\(^{17}\) For ethnographers, this may entail living among a people. For judges, the model requires a change in perspective, not geography. Judges must suppress cultural and other biases when approaching the interpretive task as, for example, when they encounter the social protester or exotic dancer. As social scientists have long known, absolute suppression of the interpreter’s own biases is not possible.\(^{18}\) But interpretive bias, once recognized as a complicating factor, can be contained. The basic aim, or aspiration, is to make sense of gestures from the perspective of those who participate in the cultural exchange of symbolic meaning.\(^{19}\) In sum, the ethnographic model aspires to render “emic” (insider) descriptions and interpretations, while acknowledging the influence of the “etic” (outsider/analyst) perspective on the production of social knowledge.\(^{20}\)

What all of this factfinding, description, and attention to perspective is leading up to, of course, is the fourth and final element of the ethnographic model—an interpretation of the meaning of the gesture. The interpretive ethnographer seeks to render an interpretation of a particular symbolic gesture or symbol system.\(^{21}\) Courts have faced similar challenges with respect to the

\(^{15}\) See supra text accompanying notes 8-9.

\(^{16}\) See Clifford Geertz, “From the Native’s Point of View”: On the Nature of Anthropological Understanding, in *Local Knowledge*, supra note 12, at 56-58; Geertz, supra note 14, at 14.

\(^{17}\) See Geertz, supra note 16, at 56-57; Geertz, supra note 14, at 14.

\(^{18}\) See Geertz, supra note 16, at 58-59.

\(^{19}\) See Geertz, supra note 14, at 14-16.

\(^{20}\) See Geertz, supra note 16, at 56-58; Geertz, supra note 14, at 14-16.

\(^{21}\) It should be stressed at the outset that the goal is an interpretation, not the
range of symbolic gestures. Where symbolic acts are concerned, however, the judicial inclination is simply to assume that some message is communicated, without delving into what the specific message, or messages, might be. With regard to sacred symbols, courts typically have concluded that nearby secular symbols have drained them of their sacredness. Finally, the recent trend is to defer entirely to associational leadership on the meaning of group membership.

Each of these treatments of meaning is in error. Meaning is, of course, *unavoidable* where, as in *Black*, categorical speech prohibitions are concerned. No court can define a gesture as an unprotected “threat” without first interpreting its meaning. But meaning should not be treated with indifference or avoided in other First Amendment contexts either. To treat meaning with indifference is to mute the expression of those who are marginalized and must resort to gesturing to make their point. Discounting this speech by treating its specific meaning as irrelevant abates channels of discourse that users of verbal expression typically enjoy. Similarly, the symbolism of religion and of joining with others—two undeniable constitutive cultural phenomena—deserves judicial consideration. Sacred symbols have powerful meanings for those who believe in them. And wholesale deference to leadership with regard to the meaning of membership is inappropriate, as it will leave putative members at the mercy of post-hoc and self-interested associational interpretations. In sum, courts have an obligation to attempt to grasp and render symbolic meaning in all of these contexts.

Postmodernists especially will deny the plausibility of interpretation of symbolic gestures, citing, among other obstacles, the polysemous nature of symbols and interpretive indeterminacy. Indeed, some legal scholars have covered parallel ground in arguing that constitutional interpretation—translation of the Constitution’s language symbols—is hopelessly indeterminate. This Article

interpretation. Interpretive ethnographers readily acknowledge that symbolic meaning is contested; they strive, nevertheless, to render the most accurate, unbiased interpretation that the data and the discipline will permit. Courts can do no more, but should do no less, where symbolic meaning is concerned.

22. This debate was particularly acute in the 1980s, when originalists and non-
acknowledges and examines the indeterminacy argument but is not deterred by it. Here it is important to emphasize that the ultimate goal cannot be to announce the one "true" or "correct" meaning for any symbolic gesture. This plays directly into the postmodernists' indeterminacy argument. The goal must be, first, to recover, for those affected and from the appropriate perspectives, the various available meanings for a gesture and, second, to choose the most plausible meaning. This means, among other things, choosing meanings which are consistent with the actors' own interpretations and behavior and with the overall cultural context. This sort of interpretation is not new to the legal process. Courts interpret actors' intent, for example, all the time. And they interpret constitutional language, which is itself symbolic, as well.

The Article develops and applies the interpretive ethnographic model in Parts I through III. Part I provides a background of commonly encountered symbolic gestures and the current First Amendment doctrines of interpretive indifference and avoidance which have arisen from their consideration. Part II formulates the ethnographic model, which, as suggested, consists of four elements or conventions: (1) factfinding, (2) thick description, (3) perspective, and (4) interpretation. To clarify how this model actually operates for social scientists, the Article will develop and explain it through a concrete example from the field of interpretive ethnography—Geertz's famous monograph on the Balinese cockfight. To a cultural outsider, placing two decorated fowl in a ring to fight to the death, while betting on the outcome, might appear at best comical and at worst barbaric. Geertz, proceeding on the supposition that the Balinese cockfight must, to borrow a phrase from Aristotle, be

originalists clashed over interpretive method. Originalists believe that constitutional meaning can be determinately affixed to constitutional language, either by reference to plain meaning, original intent, or other sources. See Antonin Scalia, Originalism: The Lesser Evil, 57 U. CIN. L. REV. 849, 849-65 (1989) (arguing in favor of interpretation based upon framers' intent). Among skeptics, who focused on the existence of multiple interpretations, see Paul Brest, The Misconceived Quest for the Original Understanding, 60 B.U. L. REV. 204, 224-37 (1980). Owen Fiss, among others, passionately rejected the indeterminacy thesis of the skeptics. See Owen Fiss, Objectivity and Interpretation, 34 STAN. L. REV. 739, 742-62 (1982). As will become clear from my presentation, I reject the position that objective interpretation of symbolic gestures is impossible.

"saying something of something," produced perhaps the best-known ethnographic monograph of its genre. He described and, more importantly, interpreted the Balinese cockfight as a form of expression. This Article pays particular attention to the manner in which Geertz was able to interpret the cockfight as expressing something about Balinese culture.

Part III reviews the doctrine of symbolic gestures through the interpretive ethnographic lens. This Part applies the ethnographic model's core descriptive and interpretive elements to several symbolic gestures which have given rise to legal contests regarding symbolic meaning. The Part responds to anticipated objections to interpretation of symbolic meaning—namely, interpretive incompetence, loss of institutional legitimacy, and the indeterminacy of meaning. Part III is intended to demonstrate that the interpretive ethnographic model is more than a disciplinary analog. The Article urges courts to use the model, or at least the ethnographic perspective, when they encounter symbolic gestures. Application of the interpretive model will alter both the way in which courts perceive symbolic gestures and the constitutional doctrine pertaining to them.

Part IV concludes with a summary of these hoped-for alterations. The current doctrines, interpretive indifference and interpretive avoidance, fail to advance discourses on free speech, religion, and association. They encourage judicial reliance on aesthetic biases, preferences, and presuppositions about the meaning of symbolic gestures. By heightening awareness of the power of symbols to convey meaning, and demonstrating, in short, that meaning matters, the interpretive model will elevate symbolic gestures to a plane commensurate with the most privileged of First Amendment symbols—words. This recalibration of the First Amendment hierarchy will lead to constitutional balancing without any thumb on the scale, will rescue the sacred element of sacred symbols, and will give a more accurate accounting of the meaning of membership. If the Court pursues the interpretive ethnographic model, First

24. Id. at 448.
25. Id. at 444.
26. Id. at 443-53.
Amendment doctrine will be richer, thicker, and, ultimately, more protective of the freedoms of expression, religion, and association.

I. THE FIRST AMENDMENT AND THE CULTURE OF SYMBOLIC GESTURES

Interpretive ethnographers recognize that cultures are laden with symbolism. Some ethnographers, drawing on basic principles of semiotics, view culture as a system of symbols and the mastery of symbolic meaning as a key to personal development and cultural robustness. The Supreme Court has considered symbolic gestures on many occasions. In contrast with interpretive ethnographers, however, the Court has treated symbolic meaning with indifference or has sought to avoid interpretation of symbolic meaning altogether. It has done so, as we shall see, out of aesthetic and other normative biases, and because of an apprehension of the indeterminancy of symbolic meaning. This Part traces the path of symbolic gestures, which the Article will then revisit in Part III, after the interpretive model has been expounded.

A. Early Statements on First Amendment Symbolism

In West Virginia State Board of Education v. Barnette, the Supreme Court, reversing a recent precedent, held that the government could not compel schoolchildren to salute the American flag. Several Jehovah's Witnesses challenged the compulsory flag salute as contrary to their religious teachings, which included a prohibition on the worship of "graven image[s]." The Court held that the symbolism of the national flag, whatever it was, could not be forced upon the unwilling.

With Barnette, the path of First Amendment symbolism was forged at an early moment. As the Court explained:

27. See supra notes 10-12 and accompanying text.
31. Id. at 629.
32. Id. at 642.
There is no doubt that, in connection with the pledges, the flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design. The State announces rank, function, and authority through crowns and maces, uniforms and black robes; the church speaks through the Cross, the Crucifix, the altar and shrine, and clerical raiment. Symbols of State often convey political ideas just as religious symbols come to convey theological ones. Associated with many of these symbols are appropriate gestures of acceptance or respect: a salute, a bowed or bared head, a bended knee. A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn.33

From its earliest encounters with symbolic gestures, the Court has expressed a certain ambivalence with regard to symbols: Symbols are primitive but effective; they are shortcuts, but critical ties which knit causes and even nations together; they are personal, but are used also by the State, political parties, lodges, and churches; and, finally, symbols are powerful, yet ultimately situated and indeterminate—"what is one man's comfort and inspiration is another's jest and scorn."34

The italicized language from the Barnette excerpt above represents the basic framework of the Court's current doctrine of symbolic gestures, which has not changed significantly in six decades. Courts acknowledge that symbols, which have come, by the way, to be viewed more as "primitive" than "effective" signifiers, can sometimes constitute expression. This normative bias in favor of less "primitive" expression, namely verbal expression, accounts for the current low status of symbolic speech. Further, the Court generally shrinks from interpreting symbolic meaning, in part, as suggested, because symbolism seems to be intensely personal and indeterminate. Courts have found it much safer simply to assume,

33. Id. at 632-33 (emphasis added).
34. Id.
as did the Barnette Court, that a symbolic gesture expresses something, without inquiring specifically as to the "said" of the symbol. \(^{35}\) Let us examine the development of the doctrines of interpretive indifference and avoidance with reference to the various symbolic gestures which the Court has reviewed under the First Amendment.

**B. Symbols of Protest**

Symbols are often used effectively during times of civil unrest. Conventional means of expression often fail under these circumstances. Protesters, already hampered by their relative smallness of number within the culture, often must reach for more powerful, more emotive forms of expression. Thus, protests of segregationist policies, mostly in the South, and of the Vietnam War everywhere, relied heavily upon symbolism.

1. **Peaceful Sit-Ins**

   Early cases involving sit-ins did not present much of an interpretive challenge. In *Brown v. Louisiana*, \(^{36}\) for example, the Court invalidated the convictions of five African Americans who engaged in a peaceful sit-in at a Louisiana public library to protest their exclusion from the library and the library's other segregationist policies. \(^{37}\) The Court was by then quite familiar with the cultural

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35. In *Barnette*, the Court avoided interpretation of the flag by relying on the fundamental tenet that the government cannot compel expression or belief. The Court found that such coerced orthodoxy simply has no place under our Constitution. *Id.* at 642. The Court similarly avoided interpretation of symbolic meaning in *Stromberg v. California*, 283 U.S. 359 (1931). In *Stromberg*, the Court held that the government was not empowered to prohibit the display of a symbol in order to protect itself from criticism. *Id.* at 369-70. Stromberg "supervised and directed the children" at a summer camp to raise "a red flag, 'a ... reproduction of the flag of Soviet Russia ....'" *Id.* at 362. She was convicted of violating a statute which criminalized the display of "a red flag, banner, or badge, or any flag, badge, banner, or device of any color or form whatever in any public place," *inter alia*, "as a sign, symbol or emblem of opposition to organized government ...." *Id.* at 363. Given the cultural anticommunist sentiment and Stromberg's rather obvious defiance of that sentiment, the Court was not called upon to interpret the meaning of Stromberg's conduct. Moreover, regardless of the specific message, it was settled that the government could not shield itself from political criticism. *Id.* at 369-70.


37. *Id.* at 136-37, 143.
mieu in Louisiana; in four of its previous five terms, the Court reviewed a breach of peace conviction arising from peaceful sit-ins and like protests in the state. Brown exhibited the cultural symbolism of the segregated 1960s. Two bookmobiles, one red and one blue, served whites and blacks, respectively. Registration cards issued to blacks were stamped "Negro," and borrowing privileges for these cardholders were restricted.

Judges, like ethnographers, bring this sort of cultural background to their work. So the context in Brown was not lost on the Court. It took no leap of interpretive faith to conclude that the protesters, who sat "quietly, as monuments of protest against the segregation of the library," were conveying a message of protest against segregation. When the government sought to use the protesters' silence, or the peace of their protest, against them by arguing that there was no "speech," the Court readily rebuffed the argument. The rights of speech and assembly, the Court replied, "are not confined to verbal expression." Brown and other protest cases established that symbolic acts could be deemed protected speech.

The "said" of the peaceful sit-in was not difficult to discover; it required no digging on the Court's part. One can take two things from Brown that bear on the development of the doctrine of symbolic gestures: First, courts can and do rely upon background cultural knowledge in interpreting symbolic gestures; and, second, whatever the scope of the guarantee of free "speech," it cannot be narrowly confined to verbal expression.

40. Id.
41. Id. at 139.
42. Id. at 142. As the Court acknowledged, First Amendment rights "embrace appropriate types of action which certainly include the right in a peaceable and orderly manner to protest by silent and reproachful presence, in a place where the protestant has every right to be, the unconstitutional segregation of public facilities." Id. (footnote omitted).
43. The Court had recognized prior to Brown that symbolic protests were protected under the First Amendment. See, e.g., Edwards v. South Carolina, 372 U.S. 229 (1963) (finding the arrest of South Carolina students, peacefully protesting the state's discrimination, to be violative of the First Amendment); Thornhill v. Alabama, 310 U.S. 88 (1940) (protecting the right to picket).
2. Symbolic Protests of Hostilities

As our society's recent experience with Iraq demonstrates, wars often breed protests and symbolic acts of defiance. Here, again, protesters have been challenged to convey the depth of their resolve by means other than verbal expression. United States v. O'Brien is perhaps the best-known of the symbolic antiwar protest cases, in no small part because it spawned a new judicial test for regulation of "symbolic speech." O'Brien publicly burned his draft card, as he explained to the jury at his trial, "to influence others to adopt his antiwar beliefs," and "so that other people would reevaluate their positions with Selective Service, with the armed forces, and reevaluate their place in the culture of today, to hopefully consider [his] position." He was convicted under a federal statute that prohibited the willful and knowing alteration, mutilation, or destruction of a registration certificate.

Whereas Brown settled that "speech" can be more than verbal expression, O'Brien suggested that the Court was wary of placing symbols on a par with verbal or written expression. Chief Justice Warren stated: "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the

44. Some of these acts can seem rather silly, especially with the benefit of hindsight. Government efforts to regulate them can seem even more bizarre to those who are cultural outsiders. Schacht v. United States, 398 U.S. 58 (1970), is a fine example. In Schacht, the Court reversed the convictions of several actors which were based upon a statute prohibiting the wearing of American military uniforms where the wearing "tend[s] to discredit' the military." Id. at 62. The statute had been applied to actors who wore the uniforms in a dramatic presentation criticizing the country's involvement in Vietnam. Id. at 60-61. The Court concluded that whatever interest the government may have had in honoring the uniform did not support these convictions.


46. Id. at 376. As the Court framed the newly announced standard, the government's regulation of symbolic speech

is sufficiently justified if [1] it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 377.

47. Id. at 370.

48. Id.
person engaging in the conduct intends thereby to express an idea."\textsuperscript{49} In what would become a common convention, the Court proposed to bypass the problem by simply assuming that burning a draft card was expressive of \textit{something}, but adding that the "said" of the gesture, whatever it was, resided at the \textit{outer reaches} of the First Amendment.\textsuperscript{50} The Court had little trouble finding that the government's interest in the effective and efficient conduct of the draft, an interest it found to be unrelated to the suppression of expression, readily outweighed O'Brien's interest in symbolic expression. Indeed, in the Court's view, O'Brien had been punished solely for the "noncommunicative impact" of his conduct.\textsuperscript{51}

In \textit{Tinker v. Des Moines Independent Community School District},\textsuperscript{52} protest of the Vietnam War went from the steps of the public courthouse to the public school classroom. Nothing so dramatic as burning government forms was at stake. A group of students had met and decided to wear black armbands to school during the holiday season to protest the conflict in Vietnam.\textsuperscript{53} The school district, upon learning of this plan, adopted a policy to prohibit the wearing of armbands to school with the ultimate penalty of suspension for refusing to remove the emblem.\textsuperscript{54} When the students refused to remove the armbands, they were, predictably, suspended.\textsuperscript{55}

The Court agreed with the district court that, under the circumstances, wearing an armband "is the type of symbolic act that is within the Free Speech Clause of the First Amendment."\textsuperscript{56} Indeed, the Court concluded that this particular symbolic act "was closely akin to 'pure speech' which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment."\textsuperscript{57} The Court held that under the circumstances, which entailed no violence or disruption of classroom or other school activities, authorities lacked

\begin{itemize}
\item \textsuperscript{49} \textit{Id.} at 376.
\item \textsuperscript{50} \textit{See id.} (noting that "a sufficiently important governmental interest in regulating \textit{a} nonspeech element can justify incidental limitations on First Amendment freedoms").
\item \textsuperscript{51} \textit{Id.} at 382.
\item \textsuperscript{52} 393 U.S. 503 (1969).
\item \textsuperscript{53} \textit{Id.} at 504.
\item \textsuperscript{54} \textit{Id.}
\item \textsuperscript{55} \textit{Id.}
\item \textsuperscript{56} \textit{Id.} at 505.
\item \textsuperscript{57} \textit{Id.} at 505-06.
\end{itemize}
the power to punish students “for a silent, passive expression of opinion.”

The cases resulting from the protest of hostilities thus added two further elements to Brown's early recognition that “speech” could expand beyond the verbal and that judges bring background knowledge to bear when confronted with symbolic gestures. These developments had a tendency to shrink the constitutional protection awarded to symbolic cuts. First, O'Brien established that the Court was wary of too much flexibility in defining the parameters of the “speech” guarantee. Not every symbol would be deemed worthy of First Amendment protection. Indeed, the Court expressed a wariness of interpreting such “primitive” gestures as draft card burning. Better, the Court apparently thought, to simply assume a message of some sort and proceed from there to balance. Second, Tinker hinted at a hierarchy of speech, with “pure” expression being entitled to the greatest solicitude, and symbolic expression entitled to something less, perhaps much less, than that.


There are many ways one might express disapproval of social conditions and government policies. One might write a letter or make a phone call to a government official. But particularly for marginalized groups with little government support or beneficence, and no access to media, symbolism is often the only effective means of protest.

In Clark v. Community for Creative Non-Violence, for example, demonstrators protesting the plight of the homeless sought permission to sleep overnight in Lafayette Park and on the National Mall, both located in the District of Columbia. The demonstrators

58. Id. at 508. The Court did not deny that school authorities had some reason to be concerned, especially given the tumultuous cultural debate then occurring concerning American involvement in Vietnam. The Court acknowledged that when the armband prohibition was adopted, “debate over the Viet Nam war had become vehement in many localities.” Id. at 510 n.4 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 258 F. Supp. 971, 972-73 (S.D. Iowa 1966)). In addition, there had been protest marches on Washington, D.C., and “[a] wave of draft card burning incidents protesting the war had swept the country.” Id.


60. Id. at 292.
intentionally sought the permit for the first day of winter to highlight the effects of inclement weather on the homeless.\textsuperscript{61} The National Park Service denied the permit application based upon a regulation that prohibited camping in certain parks, including Lafayette Park and the Mall.\textsuperscript{62} The Park Service did allow, however, the erection of two “tent cities,” consisting of twenty tents in Lafayette Park and forty tents on the Mall, which accommodated a total of 150 demonstrators.\textsuperscript{63} The demonstrators, fearing that their message would be lost in this compromise, filed suit alleging a violation of their First Amendment rights.

Following the approach it had adopted in \textit{O'Brien}, the Court concluded “that overnight sleeping in connection with the demonstration is expressive conduct protected to some extent by the First Amendment. We assume for present purposes, but do not decide, that such is the case.”\textsuperscript{64} Following an earlier precedent,\textsuperscript{65} the Court articulated a test for determining whether symbolic conduct was in fact expressive. A symbol is expressive, the Court stated, if it is “intended to be communicative and ... would reasonably be understood by the viewer to be communicative.”\textsuperscript{66}

Even assuming these elements were present, however, the Court was convinced that the “major value” of symbolic sleeping was “facilitative”—without it, an insufficient number of demonstrators would participate.\textsuperscript{67} This sort of interest paled in comparison to the government’s interest in maintaining Lafayette Park and the Mall, “which are unique resources that the Federal Government holds in trust for the American people.”\textsuperscript{68} Besides, the Court noted, the demonstrators had ample alternate channels, including the media, for conveying their message, and sufficient symbolism remained in

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  \item \textsuperscript{61} Cmty. for Creative Non-Violence v. Watt, 703 F.2d 586, 587 (D.C. Cir. 1983).
  \item \textsuperscript{62} Clark, 468 U.S. at 290.
  \item \textsuperscript{63} Id. at 292.
  \item \textsuperscript{64} Id. at 293 (footnote and citation omitted). Chief Justice Burger, in his concurrence, was not willing to make this assumption. He would have held that “[t]he actions here claimed as speech entitled to the protections of the First Amendment simply are not speech; rather, they constitute conduct.” Id. at 300.
  \item \textsuperscript{65} Spence v. Washington, 418 U.S. 405, 410-11 (1974) (per curiam) (holding that the display of a U.S. flag upside down with a peace symbol attached to it was a protected form of expression).
  \item \textsuperscript{66} Clark, 468 U.S. at 294.
  \item \textsuperscript{67} Id. at 296.
  \item \textsuperscript{68} Id. at 290.
\end{itemize}
the tents, signs, and the demonstrators themselves to convey whatever message was intended.69

In Clark, then, the doctrine of symbolic indifference began to take firmer shape. There was the familiar assumption that a message of some undetermined content was being conveyed through the gesture. There was, in addition, a bit of added guidance, in the form of a test for determining whether symbolism was, in fact, expressive and, hence, deserving of constitutional protection. The test focused on the gesturer's intent and the recipients' understanding. In Clark, however, the Court made little effort to ascertain either the gesturer's intent or the possible meanings the protest might have had for viewers. Instead, the Court rather summarily concluded that the protesters' choice of symbol was mostly facilitative or functional rather than expressive. And, lastly, the Court opined that these symbolic speakers had alternate channels by which to convey the same message.

4. The Symbolism of the U.S. Flag

Symbolic protests have often focused on the U.S. flag, a symbol, as the Court has acknowledged, which is "[p]regnant with expressive content."70 Protesters have often defaced the flag in protest of government policies and actions. The issue, however, is not what message the protesters intended to convey by their defacement, a matter generally apparent from the immediate context and from their testimony.71 The more interesting, and challenging, semiotic issue is the message the flag itself conveys.

69. Id. at 295.
71. In Spence v. Washington, 418 U.S. 405 (1974) (per curiam), for example, a college student was convicted under a Washington flag misuse statute for hanging a U.S. flag, upside down and with a peace symbol (made of removable black tape) affixed, out of his window. The student testified that he displayed the flag in this manner "as a protest against the invasion of Cambodia and the killings at Kent State University." Id. at 408. He "wanted people to know that [he] thought America stood for peace." Id. The Court noted the significance of the context in which the communicative act had occurred, "for the context may give meaning to the symbol." Id. at 410. As the Court observed: "A flag bearing a peace symbol and displayed upside down by a student today might be interpreted as nothing more than bizarre behavior, but it would have been difficult for the great majority of citizens to miss the drift of appellant's point at the time that he made it." Id.
Barnette acknowledged the symbolic power of the flag—its power to unite a nation—without seeking to render an interpretation of its meaning.\(^2\) The proposition was that whatever the flag conveyed, the government could not coerce respect for its message. This is not to say that the government is powerless to protect the flag's symbolic value. The Court has held, for example, that a state could prohibit commercial interests from using the flag, "a symbol of [the] country's power and prestige" and "an emblem of National power and National honor," to sell beer or other products.\(^3\) As the flag unites a nation, so it would appear it belongs to a nation, and cannot be cheapened or defaced by commercial appropriation.

Six decades after Barnette, symbolic protests involving defacement and mutilation of the national flag made their way to the Court.\(^4\) The government asserted an interest in shielding the flag's symbolism from such defacement. This brought the Court to the cusp of interpreting the national flag. But the Court consistently has avoided embracing this interpretive task. The Court has offered only the most rudimentary observations regarding the flag's meaning. As the Court said in Spence v. Washington:

> For the great majority of us, the flag is a symbol of patriotism, of pride in the history of our country, and of the service, sacrifice, and valor of the millions of Americans who in peace and war have joined together to build and to defend a Nation in which self-government and personal liberty endure. It evidences both the unity and diversity which are America.\(^5\)

In light of this symbolic value, the government presumably has some interest in protecting the flag from harm or defacement, as it has in protecting it from commercial appropriation.

That interest, however, has not been deemed sufficiently weighty to support prohibitions of physical defacement and mutilation of the

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\(^2\) See supra notes 28-35 and accompanying text.

\(^3\) Halter v. Nebraska, 205 U.S. 34, 42 (1907) (upholding Nebraska statute prohibiting commercial use of flag).


\(^5\) Spence, 418 U.S. at 413.
The Court has issued two recent holdings to this effect. In *Texas v. Johnson*, the Court invalidated a Texas statute which prohibited the desecration of the American flag and various other "[v]enerated [o]bject[s]." Although the Court, making reference to the speech hierarchy, was willing to grant that the government "has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word," it required that the government have an interest unrelated to the suppression of Johnson's message. Neither of the interests advanced by the state—preventing a breach of the peace and "preserving the flag as a symbol of nationhood and national unity"—sufficed.

As the record contained no evidence of a breach of peace, the government was forced to rely solely upon its interest in preservation of the flag's symbolic meaning. The Court did not question the importance of the flag as a national cultural symbol, declaring that "[p]regnant with expressive content, the flag as readily signifies this Nation as does the combination of letters found in 'America.'" But this did not permit the government to protect the flag's symbolic meaning by allowing the symbolic use of the flag "only in one direction." Mere offense at desecration was not sufficient, the Court held, to prefer the government's message to that of Johnson.

The dissenters in *Johnson* were of the view that the majority was too dismissive of the flag's cultural meaning. To make their point,

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77. *Id.* at 400 n.1. Johnson had burned the flag as a means of political protest during the 1984 Republican National Convention in Dallas. *Id.* at 399. The flag burning followed a demonstration protesting the policies of the Reagan administration and some Dallas-based companies. *Id.* There was marching, chanting of political slogans, and "die-ins" staged to call attention to the dangers of nuclear war. *Id.* The flag Johnson burned at the conclusion of the rally, in front of Dallas City Hall, had been handed to him by a fellow protester. *Id.* Relying on *Spence*, the Court concluded that Johnson's conduct was "sufficiently imbued with elements of communication" to fall within the scope of the First and Fourteenth Amendments. *Id.* at 406 (quoting *Spence*, 418 U.S. at 409). According to the Court, Johnson had intended to convey "a particularized message" and that "the likelihood was great that the message would be understood by those who viewed it." *Id.* at 404 (quoting *Spence*, 418 U.S. at 410-11). In any event, Texas had conceded at oral argument that Johnson's symbolic conduct was expressive. *Id.* at 405.
78. *Id.* at 406.
79. *Id.* at 407.
80. *Id.* at 405.
81. *Id.* at 417.
82. *Id.* at 420.
the dissenters provided a detailed history of the flag, through war, in peace, in poetry, song, and other arts, and, finally, in law. But to take this route, the majority responded, would require that courts “decide which symbols were sufficiently special to warrant this unique status.” To interpret meaning in this context, the Court warned, would force judges “to consult [their] own political preferences, and impose them on the citizenry, in the very way that the First Amendment forbids [them] to do.” For the majority, then, interpretive avoidance was a constitutional necessity.

Undaunted, Congress, which had been considering flag protection legislation for some time, enacted the Flag Protection Act of 1989, which subjected to criminal penalties anyone who “knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States.” In United States v. Eichman, the Court invalidated the statute, holding that it was indistinguishable from the statute invalidated a year earlier in Johnson.

In sum, the Court has rejected the government’s efforts to preserve the flag’s status as a symbol of the nation and of certain national ideals. While acknowledging the flag’s power to convey such ideals, and even to unite a nation, the Court steadfastly has declined to protect this symbol based upon its message. The flag cases add important insight into the doctrine of symbolic gestures. Here, interpretation is avoided not because of a lack of respect for the symbol or some normative bias, but because of the specter of interpretive indeterminacy. How, the Court asks, are judges to choose from among the many available meanings for this symbol? The Court fears that interpreting meaning will force judges to consult and rely upon their personal biases and prejudices.

84. Id. at 417.
85. Id.
89. Id. at 317. Protesters had set fire to U.S. flags “on the steps of the United States Capitol while protesting various aspects of the Government’s domestic and foreign policies,” including racial discrimination and the plight of the homeless, and “in Seattle while protesting the Act’s passage.” Id. at 312.
C. Symbolic Eroticism: The Act of Dancing Nude

In a word, nudity has bedeviled the Rehnquist Court. There are some on the Court who, quite simply, cannot accept that the state of being nude is sufficiently expressive to warrant First Amendment protection. Indeed, for some, the notion that constitutional protection extends to nudity trivializes the First Amendment. The Court has allowed various restrictions on nudity, including zoning and dispersion of “adult” businesses based upon their supposed negative “secondary effects” in the community. Beyond this, however, the Court has been unable to speak with a clear voice so far as nonobscene nudity is concerned.

The Court has been particularly wary of interpreting any message nude dancing—the striptease—may communicate. The Court has held that dance itself, even where it occurs in a dance hall, is not necessarily protected speech. In *Dallas v. Stanglin*, the Court held that recreational dancing was not sufficiently expressive to warrant First Amendment protection. Echoing the slippery slope skepticism of *O'Brien*, the Court reasoned as follows:

> It is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one’s friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment. We think the activity of these dance-hall patrons—coming together to engage in recreational dancing—is not protected by the First Amendment.

Whatever message dancing, under these particular circumstances, conveyed to patrons or to onlookers, the Court was unwilling to expand the First Amendment to cover it.

What, if anything, does the state of being nude add to the equation? Not much, at least according to a consistently divided Supreme Court. In *Barnes v. Glen Theatre, Inc.*, for example, the

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91. *Id.* at 25.
92. *Id.*
Court noted that it had already held that barroom nude dancing involved "the barest minimum of protected expression." Beyond this, the plurality, invoking the O'Brien convention, was willing to do no more than assume that the striptease was expressive of something, although what it "said" was not specifically determined. The plurality held that Indiana's statute was "justified despite its incidental limitations on some expressive activity." For the plurality, prohibiting public nudity was properly aimed at "protecting societal order and morality," an important governmental interest unrelated to the suppression of expression. Even if nude dancing conveyed an "erotic message," the plurality was of the view that requiring dancers to "don pasties and G-strings" merely "makes the message slightly less graphic."

As mentioned, the Court could not come to any consensus either with respect to the rationale for upholding the statute or as to the symbolic importance of nude dancing. Justice Scalia viewed the enactment "as a general law," which he would not subject to any First Amendment scrutiny at all. The state was perfectly within its powers, Scalia argued, in upholding cultural morality through a ban on all public nudity. It could treat public nudity as contrary to societal norms and values just as it could prohibit "sadomasochism, cockfighting, bestiality, suicide, drug use, prostitution, and sodomy." Justice Scalia made clear that his position was affected, at least in part, by the opinion that the First Amendment does not explicitly extend to expressive conduct, but in his view only "oral and written speech." Justice Souter, by contrast, started from the proposition that nude dancing, unlike ballroom dancing or aerobic dancing, was expressive conduct. He reasoned that "dancing as a performance directed to an actual or hypothetical audience gives

94. Id. at 565 (quoting Doran v. Salem Inn, Inc., 422 U.S. 922, 932 (1975)).
95. Id. at 565-66.
96. Id. at 567.
97. Id. at 568.
98. Id. at 569.
99. Id. at 570-71.
100. Id. at 572 (Scalia, J., concurring).
101. Id. at 575.
102. Id. at 576.
103. Id. at 581 (Souter, J., concurring).
expression at least to generalized emotion or feeling.”

Where the dancer happens to be nude, Justice Souter continued, “the feeling expressed” can be interpreted to be “eroticism, carrying an endorsement of erotic experience.” In any event, Justice Souter would have upheld the Indiana statute on the ground that it targeted the harmful “secondary effects,” such as prostitution and sexual assault, purportedly associated with nude dance performances and the establishments that offered them to the public.

In City of Erie v. Pap’s A.M., the Court examined Pennsylvania’s public nudity prohibition. The Court was unable to come to the consensus that had escaped it in Barnes. A plurality was of the opinion that Barnes was controlling. As for the “message” of nude dancing, the Court noted that being nude itself “is not an inherently expressive condition.” Nevertheless, the plurality was satisfied that nude dancing was “within the outer ambit of the First Amendment’s protection.” Even so, the plurality held that, like Indiana, Pennsylvania was entitled to protect public morality by prohibiting public nudity under all circumstances, without regard to message.

Pennsylvania had not, according to the plurality, banned eroticism in its entirety. The ban on public nudity, they stated, merely “has the effect of limiting one particular means of expressing the kind of erotic message being disseminated at Kandyland.” This was nothing more than a “de minimis” restriction; the dancers were “free to perform wearing pasties and G-strings.” Besides, the plurality intoned, “society’s interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate.” In the view of the plurality, the right to view “specified anatomical

104. Id.
105. Id.
106. Id. at 582-84.
108. Id. at 289.
109. Id.
110. Id. at 289-94.
111. Id. at 292-93.
112. Id. at 294.
113. Id.
114. Id. (quoting Young v. American Mini Theatres, Inc., 427 U.S. 50, 70 (1976)).
areas exhibited at establishments like Kandyland" was hardly a right worth fighting to preserve.\textsuperscript{115}

In sum, the Court's treatment of nudity manifests three elements of the doctrine of interpretive indifference. First, the Court embraced the speech hierarchy it had announced in earlier cases; the state of being nude is held to lie somewhere near the periphery of the zone of First Amendment protection. Second, and related to this hierarchical conception of expression, the Court embraced an aesthetic and normative bias against the striptease—a form of communication that is considered base, and not "worth" fighting to protect. Finally, the Court treated the striptease, like the sleeping protest, as merely one means of expressing a particular message, not the conveyance of a message unto itself. Thus, the Court opined, the dancers can express themselves in the same fashion without in fact being nude.

\textbf{D. Parades and Other Symbolic Gatherings}

People often join together to communicate a common message. They often do so out of strategic necessity, trying to make their message stronger, louder, and hence more attractive to the media. Protesters may benefit from the power inherent in sheer numbers.\textsuperscript{116} It may indeed be part of the message that others have joined in the common cause. Picketing is a good example of such strategic gathering.\textsuperscript{117}

Although parades can be an effective means of symbolic expression, sometimes their message can be difficult to ascertain. This was certainly the case in \textit{Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston,}\textsuperscript{118} which involved a gathering and parade in South Boston, an enclave of the city populated by Irish-Americans. The case arose when parade organizers denied GLIB's request to participate in the parade.

The celebration for which the parade was intended was twofold: since 1737 residents had celebrated the feast of the apostle to

\textsuperscript{115} \textit{Id.}
\textsuperscript{116} See \textit{Gregory v. City of Chicago,} 394 U.S. 111 (1969) (involving a peaceful protest at which the bystanders threatened the marchers).
\textsuperscript{117} See, \textit{e.g.,} \textit{Cox v. Louisiana,} 379 U.S. 536 (1965).
\textsuperscript{118} 515 U.S. 557 (1995).
Ireland, and since 1776 they had commemorated Evacuation Day, the day royal troops were evacuated from Boston. The Court made clear that parades are expressive events. "If there were no reason for a group of people to march from here to there except to reach a destination," the Court reasoned, "they could make the trip without expressing any message beyond the fact of the march itself." The Court noted that "[r]eal 'parades are public dramas of social relations, and in them performers define who can be a social actor and what subjects and ideas are available for communication and consideration." To the Court, then, a "parade" meant something specific—"marchers who are making some sort of collective point, not just to each other but to bystanders along the way."

So parades are expression, not merely motion. As indicated, however, deciphering the message of a parade can prove to be difficult. What did this parade mean to its participants? The parade was, in fact, a hodgepodge of "all sorts of messages (e.g., 'England get out of Ireland,' 'Say no to drugs')." It was this hodgepodge which GLIB wished to join, to add its message that some Irish descendants were gay, lesbian, or bisexual. Was part of the parade's message expressly homophobic? Perhaps, although the Court was not willing to venture such an interpretation.

Indeed, the Court was not willing to interpret the symbolic meaning of the parade at all. Here it used an assumption that some message was intended to favor the speaker. Thus, the Court held that for purposes of the First Amendment, parade participants need not have a "narrow, succinctly articulable message" in order to come within the protection of the First Amendment. The Court concluded that so long as there is some message being conveyed—a near certainty given the Court’s view of the parade—the organizers

119. Id. at 560. The record indicates that for many years the city itself sponsored these celebrations, until in 1947 it granted this authority to the South Boston Allied War Veterans Council. Id. at 560-61.
120. Id. at 568.
121. Id. (quoting S. DAVIS, PARADES AND POWER: STREET THEATRE IN NINETEENTH-CENTURY PHILADELPHIA 6 (1986)).
122. Id.
123. Id.
124. Id. at 569.
125. Id.
could not be forced to accept a message they did not wish to include as part of the parade.\textsuperscript{126}

Thus, in light of the inherent difficulty of interpreting the symbolic meaning of the parade, the Court created doctrine that avoids the interpretive task altogether. This approach mirrors that taken in cases like \textit{Barnette}, \textit{Barnes}, \textit{Johnson}, and \textit{Eichman}. Current constitutional doctrine thus reflects interpretive biases and uncertainties. Normative preferences and concerns regarding the indeterminacy of meaning have profoundly affected the contours of the doctrine of symbolic gestures. Sometimes, as in \textit{Hurley}, the result is judicial avoidance of meaning altogether.

\textbf{E. Symbols of Fear, Hate, and Violence}

As the discussion of the national flag and nude dancing indicates, symbols and symbolic acts are often intended to, and do in fact, evoke a range of emotional responses. Symbols are often utilized for their communicative impact. As a picture might be said to “say a thousand words,” symbols like the burning cross, the swastika, and the Confederate flag speak volumes. What they say is assuredly of interest to many cultural observers—to those who are threatened, for instance, and those who police threatening occurrences. The peace and tranquility of the larger culture thus depends on interpretation of, and reaction to, these sorts of symbolic gestures.

The cross, as a symbol, carries a panoply of meanings. It is, of course, a symbol of many religions, indeed a foundational one for Christianity. But context matters, and the cross can be used in a manner that calls forth other interpretations. In \textit{Capitol Square Review & Advisory Board v. Pinette},\textsuperscript{127} the Ku Klux Klan desired to erect an unadorned cross in a plaza next to the state capitol. A splintered Court, interpreting the cross as a religious symbol,\textsuperscript{128} held that the state could not prohibit its display in a forum where other content was permitted.\textsuperscript{129} Justice Thomas disagreed that the

\textsuperscript{126} Id. at 580-81. The Court noted that the Council “disclaim[ed] any intent to exclude homosexuals as such, and no individual member of GLIB claims to have been excluded from parading as a member of any group that the Council ha[d] approved to march.” Id. at 572.

\textsuperscript{127} 515 U.S. 753 (1995).

\textsuperscript{128} Id. at 757.

\textsuperscript{129} Id. at 770.
cross was a religious symbol in this context. To him, the erection of a cross by the Klan was “a political act, not a Christian one.”130 As support for this interpretation, Justice Thomas relied upon his understanding that the “Klan’s main objective [was] to establish a racist white government in the United States.”131 He went on to interpret the cross in light of Klan ceremony, specifically the Klan’s symbolic burning of the cross. This burning, Thomas explained, was “an instrument of intimidation” used by the Klan to advance its political goal of white supremacy.132 For Thomas, then, “[t]he Klan simply ha[d] appropriated one of the most sacred of religious symbols as a symbol of hate.”133

Cross burning was not at issue in Pinette, although Justice Thomas felt that this practice undercut any Klan message of religious symbolism. Burning crosses as a symbolic act came before the Court recently, in Virginia v. Black.134 This Article will make an example of Black in Part III, which turns to an application of the interpretive model which is elaborated in Part II. In Black, the Court invalidated a Virginia statute which made it a felony to burn a cross with the intent to intimidate another.135 The Court overturned the statute because it contained a procedural flaw.136 But the Court made it plain that cross burning with the intent to intimidate another could be prohibited as a threat to peace and safety.137 The Court based its holding upon a detailed consideration of the social, cultural, and historical significance of cross burning, which Justice Thomas had merely alluded to in his Pinette concurrence.138 What makes Black potentially attractive is that the Court did not eschew

130. Id. (Thomas, J., concurring).
131. Id. (Thomas, J., concurring).
132. Id. at 771 (Thomas, J., concurring).
133. Id. (Thomas, J., concurring).
134. 123 S. Ct. 1536 (2003). In R.A.V. v. City of St. Paul, 505 U.S. 377 (1992), the Court invalidated a city ordinance targeting hate crimes, as applied to a cross burning, on the ground that the law was an impermissible content-based regulation of speech.
135. Id. at 1552 (agreeing with the Virginia Supreme Court in overturning Black's conviction).
136. The Court invalidated the statute on the ground that it provided that the prosecution could make out a prima facie case under the statute, including the defendant's intent, by proving that a cross had in fact been burned. The Court held that the intent to intimidate could not be inferred from the act itself. Id. at 1550-51.
137. Id. at 1549-50.
138. See id. at 1544-47 (describing the cultural history of the cross burning ritual).
interpretation, but embraced it. In construing the ritual of cross burning, the Court concluded: "The person who burns a cross directed at a particular person often is making a serious threat, meant to coerce the victim to comply with the Klan's wishes unless the victim is willing to risk the wrath of the Klan." The Court noted that although burning a cross does not always or "inevitably convey a message of intimidation, often the cross burner intends that the recipients of the message fear for their lives. And when a cross burning is used to intimidate, few if any messages are more powerful." The Court concluded, based upon this interpretation, that Virginia was permitted to single out this "particularly virulent form of intimidation."

Black raises some interesting questions concerning other "particularly virulent" symbols of hatred and intimidation. Although the Supreme Court has never directly addressed the symbolism of the swastika, for example, it and other courts have been protective of the right to display the symbol, even in circumstances likely to cause fear of physical violence. Thus, Nazi sympathizers were permitted to march with their flags and swastika insignia through the predominantly Jewish town of Skokie, Illinois. There can be little doubt that the swastika is as intimidating to some as the burning cross. Yet this symbol has not been deemed beyond the protection of the First Amendment.

"Dixie," the Confederate flag, also evokes strong emotions, particularly among African Americans. The perennial battles in some southern states concerning the place of the Confederate flag in our modern culture are a testament to the power of symbols to convey deep and often disturbing messages. The courts thus far have kept their interpretive distance. If the burning cross can be

139. Id. at 1546.
140. Id. at 1546-47.
141. Id. at 1549.
142. See Nat'l Socialist Party of Am. v. Village of Skokie, 432 U.S. 43 (1977) (reversing injunction entered to prevent members of a political party from, inter alia, displaying swastika).
143. In NAACP v. Hunt, 891 F.2d 1555 (11th Cir. 1990), the court held that a state does not violate the Equal Protection Clause or the First Amendment by flying the Confederate flag over the state capitol building. The state's message, the court reasoned, is equally offensive to an array of people and is not based solely upon their race. Id. at 1562. Nor, according to the court, did the display of the flag unconstitutionally "chill" the expression of
interpreted and perhaps prohibited based upon judicial interpretation, however, then perhaps the Confederate flag will be subject to similar treatment.

Black and its implications are addressed in Part III. For now, it suffices to point out that the burning cross appears to have given rise to at least a limited exception to interpretive indifference. Black is unique for three reasons. First, the Court acknowledged the inherent power of the symbol to convey messages. Second, the Court sought access to competing available meanings of cross burning. Finally, the Court appeared to avoid any aesthetic or other bias toward the symbol in rendering its interpretation. Black thus may suggest a promising way forward where symbolic gestures are concerned.

F. Sacred Symbols

Perhaps nowhere is interpretation more challenging, or more charged, than where courts confront sacred symbolism. The display of religious symbols such as crucifixes, crèches, and menorahs is hotly debated, especially, but not exclusively, each holiday season. The reaction to the recent decision in Alabama to require the removal of a display of the Ten Commandments in a state court building is only the most recent evidence that sacred symbols touch some very deeply.144

The constitutional issues that the display of sacred symbols on public property raise have been addressed under the First Amendment’s Establishment Clause.145 Under the Establishment Clause,

African Americans in the state. Id. at 1565.


145. I will limit my discussion of sacred symbols to the Establishment Clause issues sacred symbols raise. The Court has addressed religious rituals under a set of free exercise rules that permits government to burden religion, at least so long as there is no intent to adversely affect religious practice and observance. See Employment Div. v. Smith, 494 U.S. 872 (1990) (addressing the use of peyote); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (addressing animal sacrifices). Where “neutral” laws of general applicability are at issue, the symbolic meaning of religious rituals is more or less irrelevant to the
the constitutional "sweet spot" resides somewhere between governmental acknowledgment of our religious culture and the establishment of an official, state-sponsored religion. The Court has tried to locate this sweet spot in two cases involving sacred symbols—Lynch v. Donnelly and County of Allegheny v. ACLU. Given the task at hand, it is perhaps no surprise that the Court's efforts to resolve the constitutional issues have pleased no one.

In Lynch, the city of Pawtucket, Rhode Island erected an annual Christmas display, and included in the display a crèche, or Nativity scene. As the Court noted, Pawtucket's display "is essentially like those to be found in hundreds of towns or cities across the Nation—often on public grounds—during the Christmas season." This particular eclectic display contained, among other items: "a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cut-out figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, a large banner that reads 'SEASONS GREETINGS,' and the crèche." The crèche itself included the usual, traditional figures—"the Infant Jesus, Mary and Joseph, angels, shepherds, kings, and animals, all ranging in height from 5" to 5".

The Court held that the display comported with the test it had articulated in Lemon v. Kurtzman. The Court failed to find any constitutional question. See Smith, 494 U.S. at 878-80 (holding that a state may require compliance with neutral laws of general applicability). Prior to Smith, the Court had not shied from delving into certain religious cultures. For example, in Wisconsin v. Yoder, 406 U.S. 205 (1972), the Court provided a detailed account of the Amish religion, an effort intended to demonstrate the significance to the Amish of freedom from compulsory education laws.

See Lemon v. Kurtzman, 403 U.S. 602, 614 (1971) (stating that religion clauses of the First Amendment are designed "to prevent, as far as possible, the intrusion of either [the church or the state] into the precincts of the other," but recognizing that "total separation is not possible in an absolute sense").

146. See Lemon v. Kurtzman, 403 U.S. 602, 614 (1971) (stating that religion clauses of the First Amendment are designed "to prevent, as far as possible, the intrusion of either [the church or the state] into the precincts of the other," but recognizing that "total separation is not possible in an absolute sense").


150. Id.

151. Id.

152. Id.

153. Id. at 685. The Court held in Lemon that in order for a law challenged as a violation of the Establishment Clause to survive scrutiny, it must: (1) have a secular purpose; (2) not have the "principal or primary effect" of advancing or inhibiting religion, and (3) not foster or create excessive entanglement of government with religion. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).
sectarian purpose in placing a crèche in the center of a holiday display. Nor did display of the crèche, according to the Court, have the effect of establishing religion. Critical to these holdings was the Court’s interpretive perspective, which elided any consideration of the sacred origins of the symbol. The Court referred to the crèche as a “passive symbol” commemorating an historic event, comparing it to, among other things, a painting and the use of a chaplain for legislative ceremonies. This “passive symbol” was readily desacralized by its local context—reindeer, elephants, and the like. The Court found that the display, viewed as a whole, merely, and harmlessly, “engender[ed] a friendly community spirit of goodwill in keeping with the season.” Any aid to religion was, therefore, “indirect, remote, and incidental.”

Justice O'Connor's concurrence in Lynch has gained some traction as an alternative approach to Lemon in sacred symbol cases. Although she reached the same result as the Court, her approach bears brief consideration. In her concurrence, Justice O'Connor set forth the “endorsement” approach to sacred symbols, the core of which is the following principle: “The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community.” Endorsement of religion is prohibited, according to Justice O'Connor, because it “sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.” “Disapproval,” of course, “sends the opposite message.”

The endorsement test expressly requires consideration of meaning, which includes both an examination of the government’s

155. Id.
156. Id. at 686.
157. Id. at 685-86.
158. Id. at 685.
159. Id. at 683.
160. Id. at 688 (O'Connor, J., concurring).
161. Id. at 687 (O'Connor, J., concurring).
162. Id. at 688 (O'Connor, J., concurring).
163. Id. (O'Connor, J., concurring).
intent in displaying the symbol and the “‘objective’ meaning of the statement within the community.”164 Under the endorsement test, meaning is “in large part a legal question to be answered on the basis of judicial interpretation of social facts.”165 As said, Justice O’Connor, despite offering a new approach that called on courts to interpret meaning, reached the same result as the majority.166 Like the majority, she avoided the crèche’s sacred, theological origins, focusing instead on the “overall holiday setting.”167

In County of Allegheny, the Court invalidated a stand-alone crèche display sponsored by the Holy Name Society, a Catholic group, on the grand staircase of the county courthouse.168 Relying in large part on the approach articulated by Justice O’Connor in her Lynch concurrence, the Court held that the unadorned display of the crèche violated the Establishment Clause.169 Here, the Court noted, “nothing in the context of the display detracts from the crèche’s religious message.”170

In addition to the crèche, however, there was a second display at issue in County of Allegheny. The City-County Building, located a block from the county courthouse, had its own holiday display.171 A forty-five-foot tree decorated with lights and ornaments was placed outside, at one of the building entrances.172 In addition, the city placed, at the same entrance, an eighteen-foot Chanukah menorah.173 The menorah, which was owned by a Jewish group, was placed next to the tree.174 A sign near the display entitled “Salute to Liberty,” which bore the mayor’s name, encouraged city residents to recall that they were “the keepers of the flame of liberty and our legacy of freedom.”175

164. Id. at 690. The two inquiries are essentially the “purpose” and “effect” prongs of the Lemon test. See id.
165. Id. at 694.
166. Id.
167. Id. at 692.
169. Id. at 598-601.
170. Id. at 598.
171. Id. at 581-82.
172. Id.
173. Id. at 587.
174. Id.
175. Id. at 582.
The Court held that the tree-and-menorah display did not offend the Establishment Clause. This time the plurality, through Justice Blackmun, did not shy from examining sacred origins. It conducted an extensive review of the Talmudic origins of the menorah and the cultural and historical background of the Chanukah holiday. Justice Kennedy dissented, arguing that in doing so, the Court had set itself up as a “national theology board.”

The plurality was unapologetic, stressing that a review of the “factual record” regarding the religious object was imperative, and that secondary sources could be consulted as well in pursuit of an interpretation of the object. To proceed otherwise, the Court noted, would be a “prescription of ignorance” which would serve only to “bias this Court according to the religious and cultural backgrounds of its Members.” The plurality reminded Justice Kennedy that under the endorsement test, whether a religious object communicates an endorsement of religion is “in large part a legal question to be answered on the basis of judicial interpretation of social facts.”

The plurality answered this question as it had in Lynch. Like the crèche in Lynch, the menorah was held to have been desacralized by its surroundings. The Court held that a symbol with obvious, and acknowledged, sacred origins and meaning, when placed next to a forty-five-foot tree and a hortatory sign, became a passive, desacralized acknowledgment of the holiday season. What was being communicated with the menorah and the tree, according to the Court, was “a secular celebration of Christmas coupled with an acknowledgment of Chanukah as a contemporaneous alternative tradition.”

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176. Id. at 615, 620-21.
177. Id. at 582-87.
178. Id. at 678 (Kennedy, J., dissenting).
179. Id. at 614 n.60.
180. Id.
182. Id. at 616-21.
183. Id. at 620.
184. Id. at 618.
The sacred symbol cases manifest both the doctrine of interpretive avoidance and the doctrine of interpretive indifference. In *Lynch*, the Court avoided the theology of the crèche altogether. In *County of Allegheny*, by contrast, the Court delved into the sacred origins of the menorah only to hold that the symbol was cleansed of sacred meaning by the presence of the tree and the sign. What both approaches share in common is an interpretive indifference to the sacred aspect of symbolic meaning. The Court's Establishment Clause semiotics holds that elephants, reindeer, and trees can negate any favoritism to religious insiders and remove the sting or stigma of sacred symbols for religious outsiders. What is left uninterpreted, and hence ultimately unappreciated, is the constitutive meaning sacred symbols have for those who truly believe in them.

**G. Symbolic Membership**

As the discussion of the symbolism of parades indicated, we communicate in many ways, including by the company we keep. As the Court has recognized, First Amendment rights to worship, speak, or petition the government “could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed.” The constitutional right of association, at least as the courts have interpreted it, essentially boils down to the right to maintain certain intimate relations (“intimate association”) and, beyond that, the right to communicate some message through our memberships in secondary and tertiary associations (“expressive association”).

This right sometimes comes into conflict with the right to equality. Groups are generally free to discriminate in the selection of members, unless there are “compelling state interests” to prevent their doing so. State public accommodation laws prohibit discrimination on the basis of gender, sexual orientation, and other classifications. Where the state's interest in preventing the

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186. Id. at 618.
187. Id. at 623.
discrimination is compelling, and where the association fails to demonstrate that forcing members upon it will interfere with its expressive rights, the state may compel the admission of members the group wishes to exclude.

Thus, for example, the Court held in Roberts that application of the Minnesota public accommodations law to compel the Jaycees to admit women to full membership status was not a violation of the group's First Amendment rights. There was little in the way of judicial inquiry into the message of the Jaycees—its "expressive interest," in First Amendment parlance. The Court matter-of-factly acknowledged the organization's bylaws, which stated plainly the organization's objective to "promote and foster the growth and development of young men's civic organizations in the United States" and to provide an "opportunity for personal development and achievement and an avenue for intelligent participation by young men in the affairs of their community." Allowing women to join as full members, the Court opined, would not affect the group's ability to engage in expressive activities, and would, in the Court's view, occasion "no change in the Jaycees' creed of promoting the interests of young men." Any argument to the contrary, the Court felt, was rebutted by the fact that women were already permitted to join the Jaycees as nonvoting members.

Perhaps the Jaycees were arguing contrary to their own past practice. But there have been more difficult cases. Boy Scouts of America v. Dale demonstrated once again the difficulty the courts have in avoiding the meaning of symbolic gestures. In Dale, the Boy Scouts expelled an assistant scoutmaster after he announced publicly that he was homosexual. The Court held that application of the state public accommodations law to require the Boy Scouts to
retain a gay scoutmaster violated the association’s expressive rights.\textsuperscript{195}

In order to reach that conclusion, the Court had to interpret the meaning of Scout membership. Although purporting to undertake an independent review of the record for this purpose,\textsuperscript{196} the Court relied almost exclusively on Scout leadership’s assertions and litigation-inspired interpretations. The Court essentially deferred to Scout leadership’s assertion that the Scouts’ “system of values” was wholly incompatible with permitting homosexuals to hold leadership positions.\textsuperscript{197} This was so despite the fact that the association’s foundational documents—the Scout Oath and the Scout Law—made no reference whatsoever to sexual orientation.\textsuperscript{198} The Court stated: “We accept the Boy Scouts’ assertion. We need not inquire further to determine the nature of the Boy Scouts’ expression with respect to homosexuality.”\textsuperscript{199}

Cases like \textit{Roberts} and \textit{Dale} indicate that the Court would like nothing more than to avoid associational meaning. There is little in the way of systematic analysis of the associational messages in these cases. \textit{Dale}, in fact, indicates that the association is free to define the meaning of membership, with little in the way of judicial review. This is so even though the resources needed to examine the meaning of its membership—documents, statements, policies, and the testimony of the rank-and-file—are or could be readily available.

\textbf{H. Summary: Current Doctrine and the Way Forward}

Current First Amendment doctrine regarding symbolic gestures is characterized by doctrines of interpretive indifference and avoidance. Since \textit{Barnette}, symbolic acts have been treated as “primitive shortcuts” for the expression of ideas and information.\textsuperscript{200} This perspective has led, over time, to two judicial conclusions. First, the Court has come to view symbolic conduct as residing at

\begin{footnotes}
\item[195] \textit{Id.} at 644.
\item[196] \textit{See id.} at 648-49.
\item[197] \textit{Id.} at 650.
\item[198] \textit{Id.}
\item[199] \textit{Id.} at 651.
\end{footnotes}
the periphery of the First Amendment.201 Second, in most cases the Court rather grudgingly seems to accept that symbolic conduct conveys something, but generally declines to consider specifically what that something might be.202 These conclusions more or less pre-determine the merits in most symbolic conduct cases. Whatever expressive interest sleeping protesters or nude dancers might have, for example, is readily outweighed by more legitimate and important governmental interests.203 Further, the Court almost always concludes that whatever message these speakers wish to convey can be just as readily and effectively conveyed through available alternative channels of communication.

In other symbolic gesture cases, the Court avoids interpretation of symbolic meaning not because of aesthetic or other normative biases, but out of concern for the indeterminacy of meaning. Thus, the symbolism of sacred symbols, for example, is only superficially examined for fear that the Court will become a national theology board. Even where interpretation of meaning seems unavoidable, as where the expressive interests of associations are concerned, the Court assiduously avoids a detailed examination of the symbolism of membership by deferring to leadership interpretations.204 As a result of this widespread indifference and avoidance, our knowledge concerning symbolic gestures is exceedingly thin and shallow.205

In proposing an interpretive ethnographic perspective or model for symbolic gestures, the remainder of this Article hopes for two results. The first is an elevation of symbolism, and symbolic gestures, in the hierarchy of speech. One of the benefits of the ethnographic perspective is its appreciation for the constitutive nature of symbolic gestures. Courts must recognize that cultures speak as much through symbols and systems of symbols as they do

201. See supra note 51 and accompanying text.
202. See supra notes 94-100 and accompanying text.
203. See supra notes 97-99 and accompanying text.
204. See supra notes 188-98 and accompanying text.
205. Two institutional judgments seem to account for this interpretive void. The first takes the form of a judicial predisposition, sometimes expressly stated, to treat the First Amendment as fully concerned with only verbal—written or oral—"speech," while providing some lesser protection to nonverbal gestures. The second judgment appears to arise from concerns over institutional authority and competence to interpret meaning. I will examine these judgments infra at Part III.
through verbal speech. An appreciation for the utility and power of symbolism is long overdue in First Amendment doctrine.

The second positive effect the Article hopes for is analytically sound judicial interpretation of symbolic meaning. Courts will not be convinced to abandon interpretive indifference and avoidance unless they are confident they can recover the available meanings of symbolic gestures and choose among them. The interpretive ethnographic model provides method and discipline which will lead to sounder and more legitimate judicial interpretations of symbolic gestures.

II. AN ETHNOGRAPHIC MODEL FOR SYMBOLIC GESTURES

Why ethnography? What does the study of cultures, and groups within cultures, have to do with symbolic gestures? The first step in revisiting symbolic gestures, and overcoming interpretive bias, fear, and indifference, is to recognize that courts encounter and interpret cultural meaning all the time. This is especially true in constitutional cases involving individual rights like speech, equality, and privacy. More and more often, it seems, judicial opinions not only comment upon but influence cultural attitudes and social action on subjects as momentous as race relations, the death penalty, and, most recently, sexual orientation. Similarly, when courts encounter symbolic gestures, they are called upon to examine and interpret the symbolic acts, rituals, and associations of particular subcultures. They are called upon to interpret social meaning. Thus, courts are, in a broad sense, engaged in the same

206. This is not to say that things like draft card burning and nude dancing cannot be regulated because they contain expressive elements, that religious symbols necessarily offend the Establishment Clause, or that expressive associations must be prohibited from excluding others. Rather, by rendering an informed interpretation of meaning, courts will be better positioned to determine whether the gesture regulated is being regulated because of the message it conveys; whether a religious symbol, viewed in full context, offends the Constitution; and whether an association is being hampered in its expressive activities.

207. See Lawrence v. Texas, 123 S. Ct. 2472, 2484 (2003) (invalidating a Texas sodomy statute as a violation of the liberty right guaranteed by the Fourteenth Amendment’s Due Process Clause). Lawrence has been credited (or denigrated, depending upon one’s view of the outcome) as spawning a new cultural openness to homosexuality, including increased visibility in areas such as entertainment.
fundamental endeavor in these cases as are ethnographers—
cultural interpretation.\footnote{208}{See CLIFFORD, supra note 12, at 39 ("Ethnography is the interpretation of cultures.").}

To be sure, the perspectives and motivations of ethnographers and courts differ markedly. Ethnographers are anthropologists; they are interested generally in the science of man.\footnote{209}{See FETTERMAN, supra note 10, at 11.}

Ethnographers usually examine foreign—to them and us—cultures for the purpose of offering empirically valid cross-cultural comparisons.\footnote{210}{See MICHAEL H. AGAR, SPEAKING OF ETHNOGRAPHY 12 (1986) (stating that an ethnographer must "encounter[ ] alien worlds and ... make sense of them").}

Courts interpreting the First Amendment or other constitutional provisions, by contrast, already reside in the American culture, and they aim at nothing so grand as the uncovering of cross-cultural similarities and divergences among peoples, or the explication of a general science of man.\footnote{211}{This is not to say that constitutional interpreters are wholly uninterested in, or insensitive to, foreign legal developments and outside cultural mores. In Lawrence, the Supreme Court examined Western attitudes regarding sexual orientation. Lawrence, 123 S. Ct. at 2481, 2483. The Court has done likewise with respect to the administration of the death penalty. See Atkins v. Virginia, 536 U.S. 304, 316-17 n.21 (2002) (noting that many countries prohibit the execution of the mentally retarded).}

They aim, as they do elsewhere, primarily to resolve specific legal disputes—with regard to symbolic gestures, relatively narrow, but significant, constitutional disputes concerning free speech, religion, and association. Still, on some level, courts are asked to participate in a dialogue or discourse with cultures and subcultures about meaning. In order to do so, courts need to find a way to access the meanings of symbolic gestures.

In proposing an alternative to the doctrines of interpretive avoidance and indifference, this Article draws on ethnography generally, and interpretive ethnography in particular.\footnote{212}{As one might imagine where the subject—the study of man and culture—is so vast, anthropologists have engaged an array of ethnographic approaches to seek to understand diverse cultures. The various frameworks or paradigms cover the disciplinary landscape, everything from evolutionary to diffusionist to functional to structural to socio-biological. See ERIKSEN, supra note 10, at 9-23. As these labels imply, few, if any, of these disparate approaches offer an appropriate model for the task at hand—interpreting symbolic meaning. In advancing an interpretive model, I am not suggesting that any of these other approaches are inadequate—only that they are inadequate to the task at hand. If Geertz, as some have suggested, overemphasizes symbols, see id. at 198, the courts, in my view, underemphasize them. The interpretive method offers a means of getting back some of the symbolism the First Amendment has lost. I will focus primarily on Geertz’s work for two reasons. First, he}
proposed here is a model, a perspective, a paradigm—not a blueprint or straitjacket to narrowly constrain judicial recovery of meaning. The appeal of the anthropo-semiotic, or interpretive, model is based upon two considerations relevant to the current dysfunction of the doctrine of symbolic gestures: First, the model appropriately values symbols and symbolic meaning; second, the model does not shy from interpretation, but rather embraces it, although with full awareness of the limitations of the interpretive endeavor.

A. A Semiotic Conception of “Culture”

Since cultural exposition and a dialog of social meaning are the tasks at hand, the perspective proposed must necessarily begin with some conception of “culture.” As ethnographers are all too aware, this is no mean feat, as “culture” is a hotly contested concept. Geertz advanced a concept of an integrated, synthetic culture which can be identified and defined by reference to its constituent parts. See CLIFFORD, supra note 12, at 31 (criticizing portrayal of a “coherent world” in which parts of society are viewed as “microcosms or analogies of wholes”). Postmodern ethnographers like Clifford have raised the specter of ethnocentrism in Western descriptions of “the Other.” See id. at 22 (claiming that “the West can no longer present itself as the unique purveyor of anthropological knowledge about others”).

Geertz defines culture as “an historically transmitted pattern of meanings embodied in symbols, a system of inherited conceptions expressed in symbolic forms by means of which men communicate,
perpetuate, and develop their knowledge about and attitudes toward life.\textsuperscript{214} This is a semiotic\textsuperscript{215} conception of culture which defines social action through the interpretation of meaning.

Geertz's definition of "symbol" is straightforward, and it is broad enough to encompass the symbolic gestures which are the subject of this Article. For Geertz, a symbol is "any object, act, event, quality, or relation which serves as a vehicle for a conception—the conception is the symbol's 'meaning.'\textsuperscript{216} A symbol can be "anything, in fact, that is disengaged from its mere actuality and used to impose meaning upon experience."\textsuperscript{217} In constitutional terms, this is a significant starting point; it means that symbols other than language are used to convey ideas, attitudes, and emotions. When they are used to communicate or express, symbols are not merely objects in themselves; they are "representative of something else."\textsuperscript{218}

Geertz, for example, points to the significance of "gestures, drawings, musical sounds, mechanical devices like clocks, or natural objects like jewels."\textsuperscript{219} These communicative methods and objects are integral, not merely marginal or insignificant, elements of an expressive culture. The Constitution, of course, places no value on things such as clocks or other natural objects, whatever they may signify as objects. But objects that individuals utilize in order to communicate some idea, concept, or emotion are assuredly within the ambit of the speech guarantee. One who waves, or burns, a flag is communicating; as is one who participates in a parade, or erects a sacred symbol, or, perhaps to some lesser extent, joins an association. Symbols thus often serve an "expressive function."\textsuperscript{220}

Symbolic communication takes place through cultural interaction by way of shared understandings of the communicative content of

\begin{itemize}
  \item \textsuperscript{214} Clifford Geertz, \textit{Religion as a Cultural System}, in \textit{Interpretation of Cultures}, \textit{supra} note 12, at 87, 89.
  \item \textsuperscript{215} Semiotics, simply put, is the science of signs. See Jørgen Dines Johansen & Svend Erik Larsen, \textit{Signs in Use: An Introduction to Semiotics 3} (Dinda L. Gorlée & John Irons trans., 2002) ("In its broadest sense, semiotics comprises all forms of formation and exchange of meaning on the basis of phenomena which have been coded as signs.").
  \item \textsuperscript{216} Geertz, \textit{supra} note 214, at 91.
  \item \textsuperscript{217} Clifford Geertz, \textit{The Impact of the Concept of Culture on the Concept of Man}, in \textit{Interpretation of Cultures}, \textit{supra} note 12, at 33, 45.
  \item \textsuperscript{218} See Alfred Schütz, \textit{The Phenomenology of the Social World} 118-19 (George Walsh & Frederick Lehner trans., 1967).
  \item \textsuperscript{219} Geertz, \textit{supra} note 217, at 45.
  \item \textsuperscript{220} Schütz, \textit{supra} note 218, at 119.
\end{itemize}
these objects, acts, events, and institutions.\textsuperscript{221} Geertz conceives of all human behavior as "symbolic action—action which, like phonation in speech, pigment in painting, line in writing, or sonance in music, signifies."\textsuperscript{222} If one accepts Geertz's view that all action, and all gestures, signify something, then the task of the ethnographer is to get at what is being signified or said. This same task—to get at what is "said" by gestures—confronts courts where symbolic acts, symbols, and institutions are concerned. Courts, however, have largely avoided this task or have been indifferent to it.

In explaining the anthropo-semiotic approach, Geertz borrows the example of the rapid contraction of the eyelids. What is this event—an "involuntary twitch," a "conspiratorial signal to a friend," an imitative parody, or perhaps even a rehearsal of the parody itself?\textsuperscript{223} Geertz posits that the winker "is communicating, and indeed communicating in a quite precise and special way: (1) deliberately, (2) to someone in particular, (3) to impart a particular message, (4) according to a socially established code, and (5) without cognizance of the rest of the company."\textsuperscript{224} The wink is experienced by social actors; it is understood by them according to a "socially established code." The "thing to ask" about winks and gestures, Geertz posits, is "not what their ontological status is," but "what their import is: what it is, ridicule or challenge, irony or anger, snobbery or pride, that, in their occurrence and through their agency, is getting said."\textsuperscript{225}

The translation of cultural symbols is a central component of interpretive ethnography.\textsuperscript{226} Indeed, the semiotic conception of

\begin{thebibliography}{9}
\bibitem{221} See id. at 118 ("It is quite immaterial to the understanding of expressive acts whether they consist of gestures, words, or artifacts. Every such act involves the use of signs.").
\bibitem{222} GEERTZ, supra note 14, at 10.
\bibitem{223} Id. at 6-7.
\bibitem{224} Id. at 6. This analysis is similar to the functional and constitutional definitions of "speech." The \textit{Spence} Court's conception of speech involves a speaker purposefully communicating some message, and an audience likely to understand that some message is being conveyed. See\textsuperscript{Spence} v. Washington, 418 U.S. 405, 410-11 (1974) (per curiam).
\bibitem{225} GEERTZ, supra note 14, at 10 (emphasis added); see also SCHUTZ, supra note 218, at 112 (arguing that interpreters should seek "genuine understanding" of the meaning of social action—that is, identifying what the speaker intended to communicate by his actions).
\bibitem{226} See C.K. OGDEN & L.A. RICHARDS, THE MEANING OF MEANING 9 (7th ed. 1945) ("Symbolism is the study of the part played in human affairs by language and symbols of all kinds, and especially of their influence on Thought.").
\end{thebibliography}
culture places symbolism at the heart of culture. One cannot survive in a world that relies on symbolic currency unless one can differentiate among winks, fake-winks, and practice winks. To take a more practical example, one must be able to interpret street signs and other traffic symbols in order to travel safely from place to place. Thus, interpretation and understanding of symbols is essential for cultural formation, discourse, and, sometimes, even survival.

An interpreter of social action cannot understand a culture without attempting to recover the meaning of its symbols and symbol systems. Indeed, Geertz's semiotic approach is based upon the supposition that man, unlike other animals, depends upon knowledge of symbols and symbol systems, the accumulation of which constitute a culture, for his very survival. These gestures are public, and their understanding is based not upon any "genetic sources of information," but rather upon the shared social conventions of the people to whom they are directed. Semiotic "competence" is critical to cultural survival: "Man is so in need of such symbolic sources of illumination to find his bearings in the world because the nonsymbolic sort that are constitutionally ingrained in his body cast so diffused a light." For recipients, gestures are informative, persuasive, derogatory, threatening, etc. Members of a culture must be competent in translating these gestures because, like words, they orient—they help to make sense of the chaos of events which surround us.

For Geertz, a world without "culture patterns—organized systems of significant symbols"—would be bleak. Man's actions would be "virtually ungovernable, a mere chaos of pointless acts and exploding emotions, his experience virtually shapeless." Without symbols and gestures, then, we are "mental basket cases." We are "not merely a talented ape ... a kind of formless monster with neither sense of direction nor power of self-control, a chaos of spasmodic impulses and vague emotions." Or, as Geertz

227. GEERTZ, supra note 217, at 45.
228. Id.
229. Id. at 46.
230. Id.
231. Id. at 49.
232. GEERTZ, supra note 214, at 99.
darkly summarizes his point, "[w]ithout men, no culture, certainly; but equally, and more significantly, without culture, no men."\textsuperscript{233}

In terms of First Amendment symbolism, individual survival generally does not hang in the balance. To be sure, for those who are the targets of threatening gestures like cross burnings, understanding the meaning of a gesture can be a matter of life and death. But in the main, our survival is not threatened by a lack of understanding of symbolic gestures like flag burning, nude dancing, or sacred symbols.

This does not mean, however, that these and other gestures are any less worthy of attention or protection. Culture would survive without some protected verbal speech as well, including many falsehoods and tasteless political parodies. Even such crude verbal signs and symbols, however, are considered worthy of respect and protection. Symbolic communication is no less worthy. Art of all stripes, and music of varying degrees of refinement, are part of the cultural makeup. The use of fire, nudity, crosses, crèches, and memberships also signifies something about our culture. These are sometimes unconventional public manifestations of cultural activity. But along with more conventional signs, like language, they comprise a culture.

Expressive acts are not only culturally significant; they are part of the First Amendment marketplace of ideas. Sit-ins and protests, for example, serve educational and sometimes transformative cultural functions. There is a foundational right not to have one's expression silenced or limited absent weighty governmental reasons.\textsuperscript{234} Before one is silenced, or held to have sufficient alternative modes for the conveyance of a particular message, it is imperative to understand what the message in fact is. As a culture, we ought to know which messages are being silenced or diluted, which are favored by the government, and which are disfavored. With regard to sacred symbols, there is the right not to be treated as a cultural "outsider," and a corresponding limitation on the government granting cultural "insider" status to religious adherents.\textsuperscript{235} In order to police this symbolic boundary, it is necessary to

\textsuperscript{233} Geertz, supra note 217, at 49.
\textsuperscript{234} See supra notes 74-81 and accompanying text.
\textsuperscript{235} See supra notes 154-56 and accompanying text.
understand the messages sacred symbols might be communicating to cultural participants. Rights of association sometimes clash with rights to be free from discrimination, necessitating a consideration of the meaning of associational membership. None of these basic constitutional rights can be properly protected and enforced without a consideration of symbolic meaning.

More broadly, what is at stake, insofar as the First Amendment is concerned, is a cultural discourse of symbols in which courts are routinely asked to participate, as moderators, but for which they have neither the inclination nor the tools to enter the expressive arena. As a result, there are subcultures whose expression is devalued for its apparent primitiveness, but for which there are no meaningful alternative outlets. People of faith are engaged in a discourse with the government to which courts are not privy. Associations may be allowed to discriminate based upon messages and meanings which are in fact inconsistent with their own institutional cultures. This symbolic discourse, which deeply impacts constitutional rights, is currently inaccessible to courts. There is, as a result, a serious gap in cultural discourse and understanding.

One of the most valuable insights from a semiotic approach to culture is that a constitutional doctrine of speech which limits “full” protection to verbal symbols is grossly inadequate. Symbols are centrally, not peripherally, located, whether the interpreter finds them aesthetically agreeable or not. Symbols are what we say; they are how we worship; they are why we join together. Interpretive ethnographers grasp this fundamental point. They want to know what a symbol signifies to its participants and observers. This same inquiry is appropriate, indeed necessary, to the judicial examination of symbolic gestures.

2. “Sacred Symbols”

Geertz has discussed specifically how his anthropo-semiotic framework might advance the study of “sacred symbols”—religious icons and rituals including crèches and other religious displays. This Article proposes to apply the interpretive approach to sacred symbols. Hence it is worthwhile to examine, if very cursorily, Geertz’s approach to religion and religious symbols. Insights from
Geertz’s analysis will be drawn upon in Part III, when First Amendment sacred symbols are reexamined utilizing the ethnographic model.\textsuperscript{236}

For Geertz, “religion” is “(1) a system of symbols which acts to (2) establish powerful, pervasive, and long-lasting moods and motivations in men by (3) formulating conceptions of a general order of existence and (4) clothing these conceptions with such an aura of factuality that (5) the moods and motivations seem uniquely realistic.”\textsuperscript{237} Thus, like his definition of culture, Geertz’s definition of “religion” is grounded in the centrality of symbolism.

The cross, or crucifix, is a paradigmatic sacred symbol. It is obviously more than an object, a thing, to some subset of believers within a culture. The cross stands for, or represents, something else—an idea, a belief or set of beliefs, a roadmap for life. Sacred symbols, according to Geertz, “function to synthesize a people’s ethos—the tone, character, and quality of their life, its moral and aesthetic style and mood—and their world view—the picture they have of the way things in sheer actuality are, their most comprehensive ideas of order.”\textsuperscript{238} Sacred symbols, then, are like others in that they help us to make sense of the culture in which we live.

But Geertz’s definition of “religion” indicates that sacred symbols are even more powerful. These symbols form the basis for an entire “order of existence,” and they legitimate “moods and motivations,” making them seem “real” even if they in fact are not at all an accurate perception of “reality.” The cross and other sacred symbols can, for some believers, literally explain the inexplicable—concepts like suffering, or evil, for example.\textsuperscript{239} They “sum up, for those for whom they are resonant, what is known about the way the world is, the quality of the emotional life it supports, and the way one ought

\textsuperscript{236} See infra Part III.

\textsuperscript{237} GEERTZ, supra note 214, at 90. I do not intend to defend or critique this definition, which is contested in the discipline of anthropology as well as in the discipline of law. I simply wish to draw on insights borne of Geertz’s experience with interpreting the religious aspects of cultures.

\textsuperscript{238} Id. at 89.

\textsuperscript{239} See id. at 103-08 (discussing suffering and evil).
to behave while in it." 240 Sacred gestures speak to believers; what they speak of is faith, divinity, spirituality. 241

We need not simply take Geertz's word for this. The power of sacred symbols is apparent in our culture. It explains why the cross is carried at pro-life rallies. The pull of sacredness accounts, in large part, for the powerful reaction of some faithful to the recent removal of the Ten Commandments display from the Alabama Supreme Court building. 242 The dramatic displays of devotion and spirituality that accompanied the removal of this symbol demonstrate that, for some, the Ten Commandments are more than granite and text. The faithful, who were previously anonymous, reacted in a very public manner to the threat to this symbol. They identified themselves as the "insiders" to whom the commandments spoke.

Geertz posits that it is "the imbuing of a certain specific complex of symbols—of the metaphysic they formulate and the style of life they recommend—with a persuasive authority which, from an analytic point of view, is the essence of religious action." 243 "[C]eremonial form," Geertz notes, even something as simple as the "decoration of a grave," seems to induce belief (what he calls "moods and motivations"). 244 Depending upon the context, a sacred symbol may induce moods and emotions that "range from exultation to melancholy, from self-confidence to self-pity, from an incorrigible

240. CLIFFORD GEERTZ, Ethos, World View, and the Analysis of Sacred Symbols, in INTERPRETATION OF CULTURES, supra note 12, at 127 ("Sacred symbols thus relate an ontology and a cosmology to an aesthetics and a morality: their peculiar power comes from their presumed ability to identify fact with value at the most fundamental level, to give to what is otherwise merely actual, a comprehensive normative import.").

241. Geertz posits that the anthropology of religion, still a thriving subdiscipline, should proceed on a two-front agenda: "[F]irst, an analysis of the system of meanings embodied in the symbols which make up the religion proper, and, second, the relation of these systems to socio-cultural and psychological processes." GEERTZ, supra note 214, at 119. The first prong of analysis, then, proceeds along the same path as the analysis of other cultural symbols and gestures. This is the path I will pursue for symbolic gestures, including sacred symbols. The second prong is far more ambitious, however—literally an analysis of the complex processes whereby sacred symbols induce "belief" in worshipers. Developments in cognitive science and psychology, which may inform this inquiry, are beyond my scope. What I hope to draw upon from Geertz's approach to sacred symbols is, first, the primacy of those symbols, and, second, a legitimate means for interpreting their meaning.

242. See supra note 137.

243. GEERTZ, supra note 214, at 112.

244. Id.
playfulness to a bland listlessness." This power to induce moods is especially pronounced where public rituals or rites—masses, ceremonies, etc.—or what Geertz calls “cultural performances” are enacted. A visitor may appreciate the aesthetics of religious symbolism or ceremony—its music, for example—but “for participants they are in addition enactments, materializations, realizations of [religion]—not only models of what they believe, but also models for the believing of it.” “In these plastic dramas,” Geertz writes, “men attain their faith as they portray it.”

What all of this suggests, even if one is not willing to accept the full force of Geertz’s analysis, is the need for increased attention to the sacredness of symbols and gestures which invoke and shape religious beliefs. An interpretive, semiotic approach to sacred symbols must take into consideration the “moods and motivations” sacred symbols can evoke in the faithful. It is precisely that accounting, or appreciation, which is missing from the current constitutional doctrine of sacred symbols.

B. The Mechanics of the Interpretive Perspective

Thus far, the Article has posited that symbolic gestures lie not on the periphery of culture, but nearer its core. If the reader does not accept a parity of verbal and nonverbal expression, perhaps it has at least been established that gestures cannot be dismissed without making at least some effort to engage their meaning. The judicial object, like the ethnographic, should be “a stratified hierarchy of meaningful structures in terms of which twitches, winks, fake-winks, parodies, rehearsals of parodies are produced, perceived, and interpreted.” Only then can we have an honest airing of the symbolic discourse that permeates our culture.

This raises some substantial pragmatic concerns. For if courts are to alter their longstanding perspective with regard to gestures, they will require systematic methods and tools with which to do the

245. Id. at 97.
246. Id. at 113.
247. Id. at 114.
248. Id.
249. Id. at 119.
250. GEERTZ, supra note 14, at 7 (emphasis added).
necessary interpreting. This section develops the interpretive model which is proposed for symbolic gestures. The development proceeds by way of a concrete example from the ethnographic literature. Geertz's monograph on Balinese cockfighting is perhaps the best known ethnographic description ever rendered. The monograph is well worth reading, if only for its erudition and entertainment value. It is featured here, however, as an example of the perspective that courts should adopt when they encounter symbolic gestures in First Amendment cases.

1. Data Gathering—Building Cultural Context

Law and ethnography unquestionably share one thing in common—an attention to factual detail. The raw data that make up this detail are referred to as “facts,” a term as familiar, and often as contested, for ethnographers as for lawyers. Together the common currency of facts account for a significant portion of the “context” of a legal dispute or a cultural research program. As sciences or, as some would prefer, disciplines, law and ethnography depend upon facts as much as, if not more than, theory. Theory is of little use without some concrete context in which to apply it, something solid from which to build knowledge and test theoretical concepts. So ethnographers, like lawyers, need facts in order to do what they do. In both disciplines, the facts required are tied to some particular perspective or ultimate end—a theory of culture, perhaps, or a legal “theory of the case.”

The first element or convention of the ethnographic model is thus quite familiar to law—an accumulation of facts and data about a gesture. Now, it must be conceded that the manners in which law and ethnography gather facts about cultures, and symbols within cultures, differ in some marked respects. The ethnographer, for example, first looks for an “entry” into the culture of interest, then establishes rapport with the people, or “informants,” and next proceeds to transcribe what occurs over the course of an extended period of time. The convention is generally known as “participant observation,” and it has formed the basis for ethnographic

251. See generally CLIFFORD GEERTZ, Local Knowledge: Fact and Law in Comparative Perspective, in LOCAL KNOWLEDGE, supra note 12, at 167.
professionalization, and, for some, interpretive authority, since at least the end of the nineteenth century. 252

Thus, before observing the ritual of the Balinese cockfight, Geertz had to become, at least in some artificial sense, a “member” of the village community. 253 But whereas the ethnographer typically, though not always, enters the field and literally lives among the “natives,” becomes “embedded” (to use the recently popularized wartime term), lawyers and judges obviously cannot take such a direct route to symbolic meaning. 254 Fortunately, there is more than one way to gather facts and, ultimately, to establish interpretive authority. The law has its own—sometimes archaic, often bewildering—rules and procedures for gathering facts and “local knowledge.” Appropriately enough, we call this process “discovery.” 255 Moreover, unlike ethnographers, who must scratch and claw for interpretive authority, the interpretive authority of judges does not depend on “being there” in the sense of living among

252. See CLIFFORD, supra note 12, at 24 (“Participant observation obliges its practitioners to experience, at a bodily as well as an intellectual level, the vicissitudes of translation.”). For a summary of the origins and practice of participant observation, see id. at 26-32.

253. It happens that Geertz managed this not always easy task in a rather unusual, and serendipitous, fashion. When the police came to raid the cockfight, an event that is illegal in Bali, Geertz scattered and ran from the authorities like the rest of the villagers. GEERTZ, supra note 23, at 413-15. According to Geertz, he became, if only in some artificial sense, Balinese. Thereafter, according to Geertz, he was able to move about in the village culture without attracting undue attention. See id. at 414-15.

254. Some ethnographers maintain that “classical ethnography” requires at least six months and up to two years of field observation. See, e.g., FETTERMAN, supra note 10, at 18. This is neither possible nor necessary in all cases. The classical view applies most strongly to the observation of foreign cultures, and “it may be an overstatement for work conducted in one’s own culture.” Id. at 19.

255. Unlike ethnographic discovery, legal discovery tends not to be freewheeling, or at least is not intended to be so. Lawyers generally lack the ethnographic luxury of time, and their discovery is much more structured, guided, and even constrained by rules, expense, and other conditions. Factfinding, in the legal sense, is, or at least should be, focused on what the decision maker will need to render a judgment, or an interpretation. Nor, I would point out, is legal fact-gathering first-hand, as judges necessarily depend upon facts which sometimes have been severely filtered, or packaged, by advocates with an interest in the outcome of the dispute. Judges often must choose from among various interpretations presented to them. But ethnographers do not receive “clean” facts either; the facts they gather are often just as situated as those produced by legal process. As Geertz notes from the ethnographer’s perspective: “[W]hat we call our data are really our own constructions of other people’s constructions of what they and their compatriots are up to.” GEERTZ, supra note 14, at 9. Judges and ethnographers deal in the same factual trade—as Geertz sums up the situatedness of facts: “Winks upon winks upon winks.” Id.
protesters, nude dancers, and the like. Interpretive authority comes with the office. In short, ethnographers must justify their basic claim to interpretive authority; courts need not.

What is central is that both disciplines value specifics, contexts, and the accumulation of detail, and that lawyers have their own tools for unearthing the relevant facts—even if courts cannot come as close to local contexts as many ethnographers. The specific recording of events we call "the record" might be analogized to the ethnographer's field notes, the bread and butter of ethnographic participant observation. Geertz, for instance, took copious notes as he observed daily life in the Balinese village. His notes, like those of all ethnographers, are meant to capture the details of the village at a specific point in time—its myths, rituals, gestures, relations, structures, and sacred symbols. The object, as in legal discovery, is to "interrogate" witnesses, collect documents, and take down as much as one can; there will be time enough later to sort through the data in an effort to make some sense of it all.

Ethnographers, like lawyers and judges, handle a variety of sources of information—"observation, conversation, interview, archive, or literary text" all contribute to an understanding of symbolic gestures and other cultural events. The lawyer gathers facts in a similar fashion, and in a multitude of forms, from written statements, to videotapes and recordings, to documentation.

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256. The distance, in time and space, that characterizes legal factfinding has been narrowed substantially by technology. For example, judges who cannot, or choose not to, patronize a nude dancing establishment to see a performance live can view and experience a tape of the performance without losing much in the translation. Nearly everything—demonstrations, rallies, protests, displays, dances, functions, cross burnings—can be readily captured in living color and preserved. Recall, in addition, that these gestures do not take place within wholly foreign cultures, as they often do for ethnographers, but within what we might characterize as subcultures within our larger culture. Judges, unlike ethnographers, do not start from a position of utter ignorance with respect to the gesture under consideration. Unlike Geertz, a court wishing to render an interpretation need not spend time infiltrating a culture, learning its language, customs, myths, and rituals.

257. See, e.g., GEERTZ, supra note 23, at 412-15 (providing a detailed account of some of Geertz's experience in Bali).

258. The juridical analogy was prevalent in some early ethnographic work. Marcel Griaule, for example, "interrogated" his informants and concentrated not only on vigorously interviewing (deposing) them to expose the "truth," but also compiling reams of documents to support his interpretations of their culture. See CLIFFORD, supra note 12, at 67-74 (describing Griaule's methods of observation).

259. AGAR, supra note 210, at 36.
concerning events and circumstances. For example, an ethnographer interested in studying membership in the Boy Scouts would, perhaps in addition to living among the Scouts, consult not only leaders' statements about membership, but also oaths, creeds, membership rituals, and statements by the members themselves about membership in the Scouts. A lawyer or judge studying this same membership presumably would follow roughly the same course without, of course, becoming a Scout or living among them. The judge must rely, to an extent ethnographers sometimes do as well, on others' accounts and studies. In general, the ethnographer usually creates studies; the judge locates studies and resorts to them in rendering an opinion.

It is important to recognize that in building context, ethnographers do not limit themselves to a narrowly empirical version of “the record.” They cannot limit factfinding to the observation and recording of the twitch, the event, that gives no clue of meaning. The history of a gesture, what others have said about it, or felt about it, its general place in the context of the specific culture under examination, and in the larger culture, are all part of the relevant, expanded “record.”

Thus, Geertz did not limit his inquiry into cockfighting to the specific events of the cockfight—the roosters, the bettors, etc.—although these were, of course, part of the record. The context went much deeper than this. It included, among other things, facts about the history of the cockfighting ritual, its influence on everyday expression in the village (imagery and double entendre were common, as one might expect), its connection to commerce, its influence on artistic expression (cockfighting was a popular subject for poetry), and past efforts by authorities to regulate the event.  

Judges, too, may have to go outside the record to locate and consult information about a gesture. Complex gestures require moving somewhat beyond the judicial comfort zone. But judges are not, as a general matter, limited to “the record” assembled by lawyers “in the field.” There are a host of extra-record sources of information for courts to consult and plenty of help as well from

260. Geertz, supra note 23.
interested third parties, like amici, who often provide the details and data the parties overlook or choose not to present.261

Law, then, like ethnography, starts from the premise that “the shapes of knowledge are always ineluctably local, indivisible from their instruments and their encasements.”262 Lawyers and ethnographers alike refer to this local encasement as “context.” Whether ethnographer or judge, the goal of the factfinder is to fill in the contextual blanks so that readers, or viewers, can make the best sense of enigmatic gestures like nude dancing, the burning of draft cards, flags, crosses, the display of a menorah, and membership in a particular association or group. In ethnography, as in law, there “has always [been] a keen sense of the dependence of what is seen upon where it is seen from and what it is seen with.”263

Thus far, the interpretive ethnographic model provides the insight that in order to understand a gesture or symbol, the judge first must find out as much about it, and its surrounding culture, as possible within the parameters of the judicial function. Rigorous factfinding and extra-record context building make up the first element or convention of the interpretive model. The Article turns next to what the ethnographer, and the court, are supposed to do with all of this data, as they progress from gesture toward possible meanings.

2. “Thick Description”

If the goal is to render, to interpret, symbolic meaning, there must be a method by which the interpreter can access or expound upon meaning. Ethnography is not, in Geertz’s view, the “techniques and received procedures” of factfinding and participant observation described above.264 What defines the discipline, he says, “is the kind of intellectual effort it is: an elaborate venture in, to borrow a notion from Gilbert Ryle, ‘thick description.’”265

261. There are limits, of course, no matter what the discipline, as to what information might be available. Where courts make it plain that they expect to find facts on an issue in the record, however, there is some assurance that lawyers in the field will at least attempt to produce this information.
262. GEERTZ, LOCAL KNOWLEDGE, supra note 12, at 4.
263. Id.
264. GEERTZ, supra note 14, at 6.
265. Id.
"Thick description" has been a central concept in ethnography since Geertz popularized the phrase in the early 1970s. Thick description is writing that exhibits an accumulation of detail, a focus upon the material, specific, contingent, and incidental aspects of cultural context. To begin to flesh out this convention, think again of the winking example. A "thin" description would simply note the empirically observable physical properties or constituent elements of the event or motions—a person has contracted her eyelids. A "thick" description, by contrast, includes a description of context, circumstances, apparent motives and purposes, and the history of the gesture itself. It makes use of the whole of an expansive contextual record. Assuming the contraction was not caused by a speck of dust in the eye, what is the winker trying symbolically to communicate? As lawyers build cases and proofs, and judges build arguments and rationales, ethnographers build descriptions. These are the evidentiary particulars that will ultimately be used to support an interpretation of symbolic meaning.

Winks and blinks are one thing. It may take little analysis to find out what is intended by these simple gestures. We might, after all, simply ask the winker what was intended. This same tact may work for some symbolic gestures as well, such as placing a peace symbol on a flag or wearing a black armband to school. With some rudimentary context, meaning can be readily recovered. But what of more complex, contested symbolic gestures? What of burning crosses, nude dancers, or religious displays?

Attention to the specifics of Geertz's cockfight monograph will assist in explicating further the concept of "thick description." Having joined the village, established some rapport with its people, and engaged in rigorous and systematic fact-gathering, Geertz next sets out to describe, in a very detailed fashion, what it is that he has witnessed. He begins, properly enough, with a description of

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266. Id. at 7.
267. Id.
268. Indeed, as far as litigation is concerned, this would be the preferred course—to take testimony concerning intent. As I will posit below, this is probably sufficient for legally uncontested gestures. But it is epistemologically inadequate for rendering interpretations of legally contested gestures, which raise an issue of communicative intent which cannot be resolved except by attention to context. See discussion infra Part III.A.2.
269. It is important to note one of the differences between judicial opinion writing and
place—Tihingan, a small, remote Balinese village of about 500 people. Now it is significant that the cockfight was not the first thing Geertz observed in Tihingan—far from it, in fact. He had a vast knowledge of Balinese village culture before he observed the cockfight and finally prepared the monograph. So Geertz's description is highly informed—it is "deep" as well as "thick."

Part of the underlying context Geertz describes, as he moves, both textually and conceptually speaking, in concentric circles about the cockfight ritual, is the vast influence cockfighting has on village culture. At a general cultural level, as mentioned earlier, cockfights have been celebrated in Balinese art, including poetry. Through thick description, the reader learns, in addition, of the villagers' reverence for roosters; these are valued pets, with special diets and grooming rituals that would make the most indulgent American pet owner feel shamefully inadequate. The reader begins to sense, in the midst of this description, that the cockfight ritual is a significant event in village culture. The ritual seeps into the nooks and crannies of various cultural webs. Cockfights, as symbols, are used to refer to ":[court trials, wars, political contests, inheritance disputes, and street arguments." So, Geertz leads the reader to understand, cocks are themselves symbolic of something—"expressions or magnifications of their owner's self, the narcissistic ethnographic writing. As Geertz notes, for the ethnographer, "[w]anderings into yet smaller sideroads and wider detours does little harm, for progress is not expected to be relentlessly forward anyway, but winding and improvisational, coming out where it comes out." GEERTZ, LOCAL KNOWLEDGE, supra note 12, at 5. Legal writing in general, and opinion writing in particular, must come to the point rather more quickly, and generally comes out where the author intends to head. Still, that is not to say that judges could not learn something from a less directed, improvisational writing technique. Judges might be surprised to find, in symbolic expression cases for example, that they have come to some clearer understanding of a gesture by writing thickly about it, without essentially predetermining its meaning or, what is worse, ignoring meaning altogether.

270. GEERTZ, supra note 23, at 412 (describing Balinese village).
271. For a sampling of Geertz's other writings on Balinese culture, see, e.g., CLIFFORD GEERTZ, "Internal Conversion" in Contemporary Bali, in INTERPRETATION OF CULTURES, supra note 12, at 170; CLIFFORD GEERTZ, Person, Time, and Conduct in Bali, in INTERPRETATION OF CULTURES, supra note 12, at 360.
272. As said, this is the sort of background preparation judges do not need to engage in, since they are not complete strangers to the culture. As do ethnographers, however, judges bring this background information to bear on their interpretations.
273. See GEERTZ, supra note 23, at 419.
274. Id. at 418.
male ego writ out in Aesopian terms." This is the first piece of the cultural puzzle to be filled in through the descriptive convention. The first hint at interpretation is Geertz's statement that "it is only apparently cocks that are fighting there. Actually, it is men."

This last observation is merely an interpretive tease, however, for more must be known and understood about the ritual before it can be interpreted as something other than a duel between animals, conducted for sport, entertainment, or perhaps even sheer cruelty. There must, of course, be a description of the fight itself. Geertz provides this description in characteristically thick detail. The reader is transported, through exacting description, to the village square, where a ring of about fifty square feet has been constructed, interested villagers have gathered, and the participants (man and beast) await the umpire's signal (as it happens, the dropping of a coconut with a hole punched in the middle into a bucket, this to be used also as a timing device for the match). There are several matches, each arranged, we are told, on an ad hoc basis. To add an element of pageantry (for the crowd) and danger (for the birds), spurs (tadji) measuring four to five inches are affixed to the cocks by villagers expert in the fitting of such armaments.

Then, finally, the moment of truth—the matched cocks are placed in the center of the ring. The combatants typically fly at each other within seconds "in a wing-beating, head-thrusting, leg-kicking explosion of animal fury so pure, so absolute, and in its own way so beautiful, as to be almost abstract, a Platonic concept of hate." There is a tragic ending, for one rooster anyway. This gladiatorial death is sanctioned; it occurs pursuant to well-defined rules, "written down in palm-leaf manuscripts ... passed on from generation to generation as part of the general legal and cultural tradition."
of the villages." And, like most sports, it takes place under the supervision of an "umpire," whose authority, Geertz explains, is, quite remarkably from the standpoint of our ultracompetitive American culture, unquestioned.

Although the reader is thus transported to a new level of understanding about the ritual, there still must be a means to separate the cockfight from other sports or social diversions. The violence is not pointless, or sadistic, but what does it signify? To find out, Geertz next embarks on a thick description of cockfight wagering, which, as it turns out, will be central to his interpretation. There is a central wager, made by the handlers and their clans and associates, and, secondarily, a series of "side" bets made by interested villagers and other onlookers. At this point, Geertz describes data, which he collected and recorded, regarding fifty-seven matches. What the data show is that the wagering differs depending upon whether the wager is central or a side bet. Geertz explains that the central wager, arranged quietly and without fanfare, is at even odds and is typically large relative to the villagers' income. The side wagers, by contrast, are chaotically arranged, at various odds, and tend to be much smaller.

The villagers Geertz describes are engaged in serious wagering, sometimes betting as much as several days' wages on a single cockfight. Because Geertz sees the enormity (relative to income) of the central wager as irrational, it becomes a focus of his description. Although these wagering systems appear at first glance to be distinct, even incongruous, Geertz brings the reader, through description of his data, to an understanding that the systems are, in fact, part of a unified system of wagering. Everything is centered upon, and controlled by, the central wager, which the villagers seek to make as interesting, or "deep" to use Geertz's term,

282. Id.
283. Id.
284. Id. at 425.
285. Id. at 426.
286. Id. at 426-28.
287. Id. at 425-26.
288. Id. at 426.
289. Id.
290. Id. at 431.
This, at last, raises the issue of interpretation: Why do the villagers engage in this seemingly irrational wagering behavior? The question brings Geertz, and the reader, to the convention of symbolic interpretation. But it is too soon for our purposes to consider interpretation. The matter will be taken up presently.

As for thick description, the presentation above is obviously only an abbreviation of the art, a snapshot of the convention. The numerous paths and alleys Geertz travels to interpret—to attempt to see the cockfight as the villagers see it—cannot be fully conveyed in this space. In literary terms, Geertz provides a “close reading” of the “text” of the cockfight. His strategy is to “stay ... within a single, more or less bounded form, and circle steadily within it.” This circling is not limited to the gesture itself, but encompasses the general place of the gesture within the culture under examination.

Of course, there is the question how much circling, and how much description, will be enough to generate a defensible interpretation of meaning. Here again, where courts are concerned, institutional limitations obviously preclude the production of hundreds, perhaps thousands, of pages. There is, alas, no magic parameter for thickness. The description of a symbolic gesture must be thick enough to permit the accumulation of “piled-up structures of inference and implication through which an ethnographer is continually trying to pick his way.” It must be enough, in short, to permit the interpreter to recover as many of the available meanings for a particular symbol or gesture as possible.

3. On “Going Native”: Emic and Etic Perspectives

Thus far, the ethnographic model consists of two elements which need not be viewed as foreign to the judicial craft—rigorous factfinding and “thick” description. The model’s third

291. Id. Here Geertz is drawing on JEREMY BENTHAM, THE THEORY OF LEGISLATION (C.K. Ogden ed., 1987). “Depth” in gaming is a concept that has economic, utilitarian import. Jeremy Bentham used the concept to describe play or sport in which “the stakes are so high that it is, from his utilitarian standpoint, irrational for men to engage in it at all.” GEERTZ, supra note 23, at 432.
292. Id. at 453.
293. GEERTZ, supra note 14, at 7.
element—interpretive perspective—will be more difficult to implement. It requires, at a minimum, a transition from entrenched and pervasive judicial indifference to and avoidance of symbolic meaning. More specifically, the element of perspective requires two things of judges: First, psychologically, that they seek on some level to converse and empathize with gesturers, to understand where they are “coming from,” and, second, that judges seek to recover sufficient ethnographic and other knowledge about a gesture so that they can access a cultural understanding of it.

With regard to perspective, the distinction to draw upon, in ethnographic terms, is one between “emic” accounts, or descriptions as they seem to participants, and “etic” accounts, or descriptions as they seem to an outsider. Simply stated, the goal of interpretive and other ethnographic approaches is to render an interpretation of what actions, sacred symbols, institutions, and other gestures mean to those who act, join, worship, or signal. This is sometimes mistakenly referred to as “going native.” Ethnographers do not actually seek to become natives, only to understand them—more specifically, as Geertz points out, “to converse with them.” To achieve an emic, or insider’s, understanding, Geertz writes, “our formulations of other peoples’ symbol systems must be actor-oriented.”

To engage in this fictional discourse, ethnography

294. Alfred Schutz discusses this interpretive dilemma in terms of objective and subjective meaning. An “objective meaning is grasped by the sign-interpreter as a part of his interpretation of his own experience to himself.” SCHUTZ, supra note 218, at 124. Subjective meaning is “an indication of what actually went on in the mind of the communicator.” Id. In the ethnographic disciplines, perspective has been a hotly contested concept. For ethnographers, the principal concern with perspective is whether any analyst can claim to speak for an entire culture. Even the convention of participant-observation, which in classical ethnography was deemed to provide a sufficient degree of ethnographic authority, has been challenged by postmodernists and others as insufficient to provide the authority necessary to deliver viable cultural interpretations. Just “being there,” it turns out, is not enough after all. In particular, the specter of Western ethnographers speaking for non-Western cultures has precipitated charges of ethnocentrism and colonialism. See CLIFFORD, supra note 12, at 22 (arguing that “the West can no longer present itself as the unique purveyor of anthropological knowledge about others”); see also id. (noting the problems associated with cross-cultural interpretations after the “breakup and redistribution of colonial power in the decades after 1950”). Where judicial interpretation of cultural symbols is concerned, we are not faced with issues of cross-cultural comparison, colonialism, and ethnocentrism. And, as already mentioned, the authority to interpret is a given for courts; it is part of the judicial power.

295. GEERTZ, supra note 14, at 13.

296. Id. at 14. As one practitioner summarized this concept:
requires, at a minimum, that the interpreter avoid prejudgments and interpretive biases.\(^{297}\)

Returning once again to the cockfight, Geertz's observation and thick description of the ritual are intended to reach an understanding of the event from the villagers' perspective, through the lens of local knowledge—including, but not limited to, local myths and symbol structures. Geertz seeks to distinguish “between what appears to be going on to us and what is going on for the Balinese.”\(^{298}\) In order to achieve, or at least attempt to achieve, this insider's perspective, the interpretive ethnographic model requires that interpreters thickly describe symbolic gestures in terms of the constructions they imagine communicators, worshipers, and joiners to place upon their own actions.\(^{299}\)

Geertz is not suggesting that ethnographers simply make things up. But as he acknowledges, the ethnographer is in the business of producing “fictitious” accounts—“in the sense that they are ‘something made,’ ‘something fashioned’—the original meaning of fictio—not that they are false, unfactual, or merely ‘as if’ thought experiments.”\(^{300}\) And he concedes that the etic, or outsider’s, perspective is essentially unavoidable as one fashions an account of a culture and its symbols. Thick descriptions, Geertz notes, are

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The ethnographer is interested in understanding and describing a social and cultural scene from the emic, or insider’s, perspective. The ethnographer is both storyteller and scientist; the closer the reader of an ethnography comes to understanding the native’s point of view, the better the story and the better the science.

FETTERMAN, supra note 10, at 12.

297. See FETTERMAN, supra note 10, at 33 (noting that ethnographers must “suspend personal valuation of any given cultural practice”).

298. JAMES BOHMAN, NEW PHILOSOPHY OF SOCIAL SCIENCE: PROBLEMS OF INDETERMINACY 127 (1991). Of course, this is not to contend that the rendered interpretations are, in fact, the interpretations of the “native.” The ability to speak for, or to, cultural rituals and symbols continues to be debated among interpretivists, who purport to access meaning, and postmodernists, who deny the authority of the interpreter to lay claim to meaning. See CLIFFORD, supra note 12, at 10 (arguing that ethnographic texts are “constructed domains of truth, serious fictions”). Geertz would concede that the villagers are free to reject his rendering of their ritual. The interpretation is an attempt to uncover local meaning, not necessarily a definitive account of it.

299. GEERTZ, supra note 14, at 15.

300. Id.
“anthropological because it is, in fact, anthropologists who profess
them.”

Thus, the cockfighting monograph, though it strives for emic
understanding, is, unavoidably, produced by an outsider. The
ethnographer makes sense of the data from his own perspective,
which is unavoidably social scientific. Similarly, judges utilizing
the interpretive model will make sense of the data from their own
perspective, which is, of course, juridical. As discussed below, with
regard to interpretation, neither ethnographic nor judicial inter-
pretation is an exercise in search of “pure” objectivity. As one
practitioner explains: “Ethnography is neither subjective nor
objective. It is interpretive, mediating two worlds through a
third.” Judicial interpretation necessarily must mediate in a
similar fashion. There is, in sum, no use entertaining the false
notion that interpretive bias can be wholly overcome, or that
interpreters can literally become part of the culture they are
interpreting, or see things precisely as the actor or communicator
sees them. But even conceding the unavoidability of the etic
perspective, judicial interpretations, like ethnographic ones, can be
emic in a meaningful sense, and can advance our knowledge of
cultural symbols.

4. Symbolic Meaning and Interpretation

What factfinding, thick description, and the adoption of an emic
perspective ultimately build toward is the final convention or
element of the model, its culmination—the interpretation of
symbolic meaning. Meaning is, of course, a highly complex concept,
one that has confounded, and continues to divide, philosophers,
social scientists, and others. It is beyond the scope and purpose
of this Article to engage fully the intricacies of meaning. But where
symbolic communication is involved, it is imperative to try to reach

301. Id.
302. See FETTERMAN, supra note 10, at 21.
303. See, e.g., AGAR, supra note 210, at 19 (“Ethnography no longer claims to describe a
reality accessible by anyone using the right methods, independent of the historical or cultural
context of the act of describing.”).
304. Id.
305. See generally BOHMAN, supra note 298, 102-45.
an understanding of the meaning of the symbol used. Constitutional doctrine seems tacitly to accept that this is so. Courts seem to accept that the meaning of sacred symbols and associational membership is highly relevant to the First Amendment inquiry. Still, through indifference and avoidance, symbolic meaning in these contexts is not fully explored and developed. The meaning of symbolic conduct although highly relevant to the First Amendment inquiry, is also routinely avoided.

If, however, courts are going to seek an understanding of expressive meaning, it is important to appreciate what this will entail for constitutional decision making, and for constitutional law. With regard to the First Amendment, current doctrine asks only whether an actor intended to communicate some message; it does not inquire as to the substance of the message itself. The interpretive method will require that courts take the leap from simply assuming a message to actually recovering the messages sought to be conveyed by a chosen symbol. For sacred symbols, courts already inquire as to the meaning of the symbols; but their method for doing so allows secular context to trump or diminish religious content. The interpretive method will require a fundamental reconsideration of this perspective and approach. Finally, associational hierarchies currently are permitted to define their own meaning, without consideration of the meaning of membership from the perspective of the rank-and-file. The interpretive model will require closer judicial observation of associational cultures, and interpretation based upon that observation. In sum, the move toward meaning will entail changes in the way courts currently assess symbolic meaning.

Before these doctrinal changes can be implemented, however, courts need a method for approaching meaning systematically. As conceptual background, what courts must be concerned with here is the recovery of meaning where one actor or institution communicates some idea, concept, or emotion to an audience. Specifically, they must be prepared to interpret communications accomplished with symbols or signs. Thus, courts must be prepared to separate, and separately consider, the meaning of the sign or symbol itself, what the actor meant by using the symbol, and the significance of
the fact that the actor used this symbol in this particular context. 306 More importantly, there are complexities of perspective for courts to consider as well. Actors, of course, have their own understanding of the meaning of their gestures. 307 So, too, however, do observers—the audience to whom meaning is communicated. Finally, there is the point of view of the sociological, or, in the present case, judicial observer. Symbols thus “stand in a context of meaning that is on the one hand an expressive scheme for the sign-user and on the other an interpretive scheme for the sign-interpreter.” 308 There are, in short, a range of circulating meanings for any particular communicative gesture.

Recognizing that none of these meanings can be discounted or ignored entirely, which of these meanings is to be the focus of inquiry? The previous section indicated a partial answer: ethnographers seek to render emic, or insider, interpretations. Constitutional doctrine, insofar as it expresses a preference, suggests that it is the actor’s or institution’s perspective which is of greatest moment. Even the law of sacred symbols acknowledges that the Establishment Clause inquiry must at least include a consideration of the effect of any display on religious and cultural insiders. 309 Thus, the ethnographic model and constitutional doctrine seem to suggest a common focal point of inquiry.

But it is folly to think that an observer, whether one in the audience or an even less direct social or judicial observer, can fully comprehend and understand the subjective meaning of the actor/communicator. This sort of “primordial” meaning, which takes place as the actor gestures and reflects on her own gesture, is beyond recovery; it would, in essence, require that the observer become the communicator. 310 The “approximate value” of another’s

306. See SCHUTZ, supra note 218, at 107 (discussing these aspects of the interpretation of signs).
307. This assumes that the gesture had some meaning for the actor in the first place. It may be that the gesture was a wholly absentminded act, or was otherwise meaningless from the actor’s perspective. Although this may be the case in wider cultural exchange, it is unlikely to be true with regard to symbolic gestures which implicate First Amendment concerns. The actors in the cases discussed in this Article generally intended to communicate something.
308. SCHUTZ, supra note 218, at 217.
309. See supra Part I.F.
310. See SCHUTZ, supra note 218; id. at 99 (“The postulate, therefore, that I can observe
meaning is all that can possibly be recovered.\textsuperscript{311} Even the sociological observer, when living among the natives, is not privy to the whole of native culture. The judicial observer is, of course, even further removed from the sort of direct personal observation that permits the ethnographer to note winks, nods, and other expressions. The observation that is possible is too indirect to make any claim to recovery of subjective meaning. Nor, however, as the ethnographic model suggests, can interpreters simply rely upon their own "objective" interpretations of symbolic gestures, affected as these are by the context or background of the interpreter.

As Geertz pointed out, however, meaning is public. People communicate, culturally, by means of shared codes and conventions. As an interpretivist, and a holist, Geertz claimed to render a single interpretation of a cultural symbol, rather than adhering to a multi-meaning, relativistic framework which allowed for multiple interpretations. Thus, Geertz purports in the cockfight monograph to render the meaning of this ritual for the Balinese. Geertz's take on meaning has precipitated a fair amount of controversy. Specifically, Geertz's holism, like others, has been criticized sharply by postmodernists, who deny the authority of the interpreter to render unitary, "correct" interpretations of cultural phenomena.\textsuperscript{312}

This, then, is one place to be especially clear about the implications of the ethnographic approach for judicial interpretations. The model being advanced in this Article does not adopt Geertz's, or anyone else's, holism. Although it advocates interpretation, this Article recognizes that there are various circulating meanings for most gestures. Sometimes these meanings will diverge, and sometimes they will not. But just as the actor's subjective meaning is beyond recovery, no claim to the "correct" interpretation can be sustained. The idea is to recover or expose the most plausible meanings among those for whom the gesture has meaning. This will be done, as suggested, through the conventions of factfinding and "thick" descriptions of participant behavior, participant reports (testimony), and other cultural circumstances.

\textsuperscript{311} Id. at 109.
\textsuperscript{312} See, e.g., CLIFFORD, supra note 12, at 21-54 (analyzing ethnographic authority).
That there are various meanings does not preclude understanding, or lead to a hopeless relativism. Judges can intentionally pursue and grasp genuine understanding because meaning is, ultimately, inter-subjective—it is based upon the shared experiences of the actor and the observers.\(^3\) Again, this is not to suggest that meaning is unitary, that there is a “truth” to be recovered. But meanings can be accessed, recovered, and judged according to intersubjective conventions. Courts can, for instance, “infer, on the basis of indirect evidence, the typical subjective experiences [participants] must be having.”\(^4\) They, like other social observers, can make use of “personal ideal types” to fashion interpretive schemes.\(^5\) Judges can draw upon, among other things, their own knowledge of “protesters,” for example, in seeking access to their symbolic meanings. Insofar as a potential meaning is consistent with the behavior of an ideal type, it is entitled to some weight. Insofar as it is not, there may be reason to question the putative meaning. This does not entail relying exclusively on stereotypes or thin ideal types. But these sorts of interpretive schemes help to make the grasping of meanings possible. They routinely allow for discourse and communication.

In sum, the interpretive method requires that judges recover the range of circulating meanings for each gesture. The goal is to choose the most plausible intersubjective meaning among the available circulating meanings. Thus, the judicial task is first to recover available meanings through the conventions of detail and description, and then to sift, analyze, and weigh them with reference to the behavior and other evidence pertaining to the participants and the culture. The meaning chosen will not be that of the actors themselves, nor solely that of the interpreter, but will be “derived from the shared language and social groups in which [the actors] are

\(^3\) See Schutz, supra note 218, at 119-20 (noting that signs are interpreted with reference to previous, shared experiences).

\(^4\) Id. at 143. As Schutz explains, “subjective experiences can only be known in the form of general types of subjective experience.” Id. at 181. The interpreter, in other words, must make judgments based upon her knowledge of the shared social world.

\(^5\) See id. at 185-94 (discussing ideal types).
socialized.” In this manner, an objective context of meaning will be fashioned from various subjective meaning-contexts.

With these observations concerning meaning, we can turn now to the convention of interpretation itself. For Geertz and interpretive ethnographers, the study of culture is “not an experimental science in search of law but an interpretive one in search of meaning.” Unabashedly, Geertz announced: “It is explication I am after, construing social expressions on their surface enigmatical.” It is, similarly, with reference to the background on and limitations of meaning set forth above, judicial explication and construction that is the proposed goal with regard to symbolic gestures under the First Amendment.

The construction of enigmatic social expressions has both functional and communicative components. On the functional level, Geertz, like other interpretivists, uses the concept of translation of literary texts to flesh out his interpretive agenda. “Doing ethnography,” he wrote, “is like trying to read (in the sense of ‘construct a reading of’) a manuscript—foreign, faded, full of ellipses, incoherencies, suspicious emendations, and tendentious commentaries, but written not in conventionalized graphs of sound but in transient examples of shaped behavior.” Note that the textual metaphor works in more than one direction. All ethnographies are both studies and texts. The ethnographer studies the culture as text, and then produces her own text.

Beyond translation and production of text, interpretive ethnography is a means by which researchers communicate with those whose behavior is enigmatic, as well as communicate with others interested in understanding a culture’s symbolism. Indeed, one of

316. See Brian T. Tamanaha, Realistic Socio-Legal Theory: Pragmatism and a Social Theory of Law 77-78 (1997); see also Schutz, supra note 218, at 218 (“It should here be emphasized that I, the interpreter, do not interpret alone and that your product as a thing in the world belongs not only to my private world but to the one intersubjective world common to us all.”).
317. Schutz, supra note 218, at 223.
318. Geertz, supra note 14, at 5.
319. Id.
320. Id. at 10. For a treatment of constitutional interpretation as “translation,” see Lawrence Lessig, Fidelity in Translation, 71 TEX. L. REV. 1165 (1993).
the overarching goals of interpretive ethnography, particularly an ethnography which focuses on symbols and symbolic gestures, "is the enlargement of the universe of human discourse."\textsuperscript{322} Geertz posits that this is a task "to which a semiotic concept of culture is peculiarly well adapted."\textsuperscript{323} Ethnographic interpretation, thus, is concerned with "tracing the curve of social discourse; fixing it into an inspectable form."\textsuperscript{324} Similarly, this should be one goal of judicial interpretation; that is, to recover social discourses from subcultures generally unfamiliar to judges, and perhaps to the wider culture as well.

In order to fix social discourse into an inspectable form, therefore, it is necessary to translate or interpret enigmatic signs. In order to understand how this is accomplished, a rudimentary understanding of the basics of semiotics, otherwise referred to as the science of signs, is required.\textsuperscript{325} The details of the process by which signs are translated into meanings, or possible meanings, is far too complex for present purposes. A rudimentary understanding of semiotics, however, will assist in further explicating the model's interpretive element.

Charles Sanders Peirce, one of the founders of the semiotic discipline, conceived of a "sign" as "something by knowing which we know something more."\textsuperscript{326} A slanted tree, as \textit{signifier}, signifies wind direction, its \textit{signified}. A red nose signifies drunkenness. Street signs signify such ideas as direction, danger, or instruction. Words signify concepts, and so on. As Geertz emphasizes, we use such signs all the time in our culture. Recall that he maintains that these and other symbols are often necessary for our very survival.

Peirce recognized that there are various levels and depths of understanding of signs and symbols. In simple terms, a burning cross, for example, is processed through three levels of understanding. There is an initial recognition of the event ("firstness"),

\begin{itemize}
\item \textsuperscript{322} GEERTZ, supra note 14, at 14.
\item \textsuperscript{323} Id.
\item \textsuperscript{324} Id. at 19.
\item \textsuperscript{325} In this analysis, I am using "semiotics" in its broadest sense: "all forms of formation and exchange of meaning on the basis of phenomena which have been coded as signs." JOHANSEN & LARSEN, supra note 215, at 3.
\item \textsuperscript{326} Id. at 25 (quoting 8 CHARLES SANDERS PEIRCE, COLLECTED WORKS OF CHARLES SANDERS PEIRCE 227 (Arthur W. Burks ed., 1958)). For a detailed examination of Peirce's semiotics, see generally FLOYD MERRELL, PEIRCE, SIGNS, AND MEANING (1997).\end{itemize}
followed by the formation of some rudimentary thought about the event ("secondness"), and, finally, an interpretation ("thirdness").\textsuperscript{327} Peirce is perhaps best known for the triadic relationship he described to both illustrate and analyze the progression from sign (firstness) to meaning (thirdness). He posited three elements on the path to interpretation: (1) the sign is the \textit{representamen}, which represents something else, (2) the \textit{object} is what the sign stands for, and (3) the \textit{interpretant} is the possible or potential meaning for which the sign allows.\textsuperscript{328} The interpreter accesses meaning, or potential meaning, by moving in the triadic relationship from representamen to interpretant.\textsuperscript{329}

A few examples from the doctrine of symbolic gestures will help illustrate the triadic relationship. Sleeping in the park, as the protesters did in Clark,\textsuperscript{330} is a sign or representamen. On one reading, the object for which this particular sign or symbol\textsuperscript{331} stands is homelessness.\textsuperscript{332} The \textit{interpretant}, or possible meaning, is the plight of the homeless and governmental inaction in the face of that plight. In another example, the burning cross in Black\textsuperscript{333} is a sign or representamen, its \textit{object} is racial antagonism, and its possible meaning is a specific offer or threat of violence.\textsuperscript{334} Similarly, the striptease is a sign, the \textit{object} of which is female sexuality, and one possible meaning of this gesture is an offer of sexual intercourse. This simplified conception of semiotic interpretation suffices to illustrate the task at hand, namely, to turn signs or signifiers into possible meanings. The goal or purpose of the interpretive model is

\textsuperscript{327} See Merrell, supra note 324, at 25.
\textsuperscript{328} Johansen & Larsen, supra note 213, at 26-27.
\textsuperscript{329} Peirce and other semioticians have focused principally on linguistic signs and concepts, but the triadic relationship also can be applied to symbolic gestures.
\textsuperscript{331} Peirce used "symbol" in a precise manner as part of a detailed typology of signs. I mean to use it in this analysis to stand in for my concept of symbolic gestures. This concept roughly corresponds to Peirce's concept of symbolic signs, which he conceived as gaining meaning through social convention, as opposed to similarity to the object (what he called "iconic" signs) or some cause-effect relationship ("indexical" signs). See Johansen & Larsen, supra note 211, at 32. Of course, as Peirce noted, signs can be a combination of all three of these basic types. Id. at 52.
\textsuperscript{332} Clark, 468 U.S. at 291-92.
\textsuperscript{333} Virginia v. Black, 123 S. Ct. 1536 (2003).
\textsuperscript{334} See id. at 1541-42 (noting language in Virginia cross-burning statute that "[a]ny such burning of a cross shall be prima facie evidence to intimidate a person or group of persons").
to improve the interpreter's ability to read signs. In other words, to provide for at least a rudimentary "semiotic competence." 335

Without delving too deeply into the distractions and complications of semiotic terminology, however, it is imperative to recall the basic goal of the anthropo-semiotic method. Judges should act "to reduce the puzzlement ... to which unfamiliar acts emerging out of unknown backgrounds naturally give rise." 336 Consulting all available forms of cultural evidence, the judge should seek to turn the gesture "from a passing event, which exists only in its own moment of occurrence, into an account, which exists in its inscriptions and can be reconsulted." 337 Again, it is important to emphasize that judges are not expected to create the sort of interpretive monograph an ethnographer would produce after having devoted months or years of field research and observation. The "account" the judge gives is what appears in the judicial opinion and is based largely upon other accounts given by ethnographers, historians, or other observers.

With regard to the ends sought, namely, the reduction of puzzlement and the recording of accounts, Geertz notes: "A good interpretation of anything—a poem, a person, a history, a ritual, an institution, a society—takes us into the heart of that of which it is the interpretation." 338 This explains why the other elements of the interpretive model, that is, accumulation of detail, thick description, and emic understanding, are so critical to the interpretive task. An interpretive explanation of a symbolic gesture "trains its attention on what institutions, actions, images, utterances, events, customs, all the usual objects of social-scientific interest, mean to those whose institutions, actions, customs, and so on they are." 339

To summarize the Geertzian concept of descriptive interpretation: "[T]here are three characteristics of ethnographic description: it is interpretive; what it is interpretive of is the flow of social discourse; and the interpreting involved consists in trying to rescue the 'said'

335. See JOHANSEN & LARSEN, supra note 213, at 30 (defining "semiotic competence").
336. GEERTZ, supra note 14, at 16.
337. Id. at 19.
338. Id. at 18.
339. GEERTZ, LOCAL KNOWLEDGE, supra note 12, at 22.
of such discourse from its perishing occasions and fix it in perusable terms.\textsuperscript{340}

With this understanding of the interpretive function and some appreciation for the notion of semiotic competence, let us consult one last time, before moving on to more concrete First Amendment problems, Geertz’s cockfight monograph. As said earlier in the discussion of thick description, Geertz hints early in the monograph that what is seen when one observes the Balinese cockfight only appears to be roosters fighting; it is, he posits, actually men.\textsuperscript{341} The earlier mentioned description of cultural myths, customs, history, and behavior is offered to support this interpretation. But the interpretation does not end with men engaged in a show of masculinity, that is, men being men, as it were. The cockfight, as the richness of detail suggests, is a far more nuanced and complex ritual. Geertz ultimately comes to the anthropo-semiotic point:

An image, fiction, a model, a metaphor, the cockfight is a means of expression; its function is neither to assuage social passions nor to heighten them (though, in its playing-with-fire way it does a bit of both), but, in a medium of feathers, blood, crowds, and money, to display them.\textsuperscript{342}

Recall Geertz’s puzzlement over Balinese wagering, which seemed all out of proportion to villagers’ income.\textsuperscript{343} The explanation for such substantial, center-focused wagering, he says, “lies in the fact that in such play, money is less a measure of utility, had or expected, than it is a symbol of moral import, perceived or imposed.”\textsuperscript{344} Geertz then proceeds to offer a list of “facts,” or what might better be labeled “observed conventions,” which he has recorded and which he claims support his thesis regarding the symbolism of both the wager specifically and the cockfight generally.\textsuperscript{345} In other words, having been brought to this central aspect of the cockfight ritual by the descriptive convention, Geertz

\textsuperscript{340} GEERTZ, supra note 14, at 20.
\textsuperscript{341} GEERTZ, supra note 23, at 417.
\textsuperscript{342} Id. at 444 (emphasis added).
\textsuperscript{343} See id. at 426.
\textsuperscript{344} Id. at 433.
\textsuperscript{345} See id. at 437-41.
proceeds to interpret the wagering itself in the same fashion, that is, with still more descriptive detail.

What the detailed descriptions of the ritual itself, its context, and the seemingly out-of-proportion central bet signify, Geertz claims, is the Balinese status system or hierarchy. The cockfight is, as Geertz notes, a form of expression.\textsuperscript{346} According to Geertz, what it "talks most forcibly about is status relationships, and what it says about them is that they are matters of life and death."\textsuperscript{347} In Peircian terms, the cockfight (representamen) indicates status (its object), which leads to the possible interpretation that status is a matter of life and death in Balinese culture (the interpretant). For Geertz, the importance of status, then, at last solves the mystery of the seemingly irrational "deep play" the villagers exhibit in their wagering. To be sure, as Geertz points out, no one's status actually changes as a result of the cockfight.\textsuperscript{348} The villagers wager much because much is (symbolically) at stake.\textsuperscript{349}

One further observation about Geertz's interpretation of the cockfight is in order. It did not escape Geertz's notice that the cockfight, like other symbolic gestures, speaks through emotion and drama. What the cockfight, as "collective text" and social structure, "says it says in a vocabulary of sentiment—the thrill of risk, the despair of loss, the pleasure of triumph."\textsuperscript{350} Because of this, the ritual is nothing less than a form of "sentimental education" for the villagers.\textsuperscript{351} Geertz thus has captured not only one interpretation of what is being said, but at the same time has exhibited an appreciation of how meaning is actually being conveyed. This is precisely the sort of appreciation that thus far has eluded courts in their treatment of symbolic gestures.

As indicated, no summary of Geertz's monograph can convey its thickness, or its interpretive rigor. The monograph provides an example of the use of factfinding, description, emic perspective, and, ultimately, interpretation to access enigmatic symbolism. The

\textsuperscript{346} See id. at 424 (describing the cockfight gathering as an "articulate" form which focuses on, and brings into being, "the celebration of status rivalry").
\textsuperscript{347} Id. at 447.
\textsuperscript{348} Id. at 434.
\textsuperscript{349} See id.
\textsuperscript{350} Id. at 449.
\textsuperscript{351} Id.
reader may be convinced that the cockfight is expressive in the sense Geertz posits, or the reader may remain unconvinced that the cockfight is anything beyond bloodsport. The interpretation must be judged with reference to the accumulation of detail and emic description which Geertz provides. The reader must determine whether the behavior of the participants and the "piled-up structures of inference" support Geertz's interpretation, just as readers and commentators must determine whether a court's rationale and factual exposition support its legal interpretation.

Even if the interpretive model provides a basis for interpretation of enigmatic cultural rituals and symbols, there likely will be skepticism with regard to the model's adaptability to judicial interpretation and First Amendment concerns. Part III seeks to demonstrate that courts can indeed make an interpretive turn with regard to symbolic gestures. It does so by revisiting the gestures first described in Part I and applying the interpretive ethnographic model to them.

III. SYMBOLIC GESTURES REVISITED: TOWARD A FIRST AMENDMENT ETHNOGRAPHY

The interpretive approach or model emphasizes the following: (1) the primacy of symbols and systems of symbols in cultural analysis and discourse, (2) the similarity of tasks facing ethnographers and judicial interpreters when faced with enigmatic cultural symbols, and (3) the plausibility of ethnographic and judicial interpretation of symbolic meaning. Drawing on ethnographic lessons, methods, and principles, this Part applies the interpretive model to First Amendment symbolic gestures. After first delineating the appropriate scope of the model's application, the Part turns to the heart of the ethnographic model, namely, thick description and interpretation, as applied to First Amendment symbolic gestures. The Part concludes with an examination of some anticipated objections to judicial interpretation of symbolic meaning. These objections, while

352. GEERTZ, supra note 14, at 7.
353. My discussion of factfinding and emic perspective, the other two elements of the model, are incorporated within the examination of what I view as the core elements of description and interpretation.
not without merit, should not deter courts from addressing and engaging symbolic meaning.

A. Legally Uncontested and Contested Meanings

Although this Article proposes to alter the doctrine of symbolic gestures to a degree, the interpretive model is not intended to apply each time a symbolic gesture raises First Amendment concerns. There is no need to throw common sense out the window, nor to engage in unnecessary descriptive or interpretive work, every time a nonverbal gesture is implicated. Some symbols more or less speak for themselves; they are "uncontested" in the legal sense of the term. The ethnographic model should be used only when courts confront legally contested symbolic meaning.\textsuperscript{354}

1. Legally Uncontested Symbolic Meaning

There are some symbolic gestures that require little or no description, elaboration, or judicial interpretation. For these gestures, the symbolic meaning is inherent; it is readily accessible to courts from the most basic of facts. More importantly, there is usually no legal contest as to the substance of the message being conveyed by means of these gestures.

Certain pickets or parades, for example, speak clearly through the display of posters or signs. Whatever message the assemblage is intended to convey is, most likely, represented in the written content on the posters. Even without written confirmation, the immediate context, such as a labor dispute or a holiday procession, will often suffice to convey the symbolic meaning for purposes of the legal proceedings.\textsuperscript{355}

\textsuperscript{354} Of course, from a hermeneutical perspective, meaning is always contested. See Geertz, \textit{Local Knowledge}, supra note 12, at 5 (stating hermeneutics is "the understanding of understanding"). Here I am using "meaning" and "contest" in a manner which makes these terms accessible to, and useful for, constitutional analysis, not philosophical or hermeneutic debate.

\textsuperscript{355} This will not always be the case, however, as the \textit{GLIB} case demonstrates. See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557 (1995). In \textit{GLIB}, the narrow record was insufficient to render an interpretation of the meaning of the parade. \textit{Id.} at 561 (stating the facts in the case). The Court held that no interpretation was required; so long as the parade had some message, the government could not force organizers to carry
Similarly, civil rights protests, such as the sit-ins which took place during the height of the civil rights contest in the South, speak rather clearly on their own. The contexts, both immediate and, more broadly, cultural, provide courts with sufficient information to recover the most, if not only, plausible symbolic meaning of such gestures. In *Brown v. Louisiana*, for example, black library patrons refused to leave the reading room, an obvious objection to segregationist library policies. Insofar as the Court harbored any doubts as to the meaning of this gesture of protest, the participants themselves testified that the sit-in was intended specifically to communicate a message of protest against the library's segregationist policies.

Other symbolic gestures similarly convey rather obvious meanings. Gestures of protest which have been utilized in times of war and other cultural unrest generally fall into this category. For example, there was no legal contest concerning the symbolic meaning of the wearing of black armbands in *Tinker* or the attachment of a peace symbol to the U.S. flag in *Spence*. In both cases, the symbols were inherently expressive within their social, cultural, and historical contexts. Moreover, the speakers testified messages they did not desire to support. *Id.* at 575.


357. See *id.* at 160-61 (Black, J., dissenting). As *Brown* demonstrates, the ethnographic model should not obscure more direct forms of proof concerning communicative intent, where these are available and more or less resolve the matter of symbolic meaning. In *O'Brien*, as in *Brown* and other cases involving inherently expressive gestures, symbolic meaning was itself legally uncontested. See *United States v. O'Brien*, 391 U.S. 367 (1968). The Court knew what O'Brien, the draft card burner, was communicating in part because he explained his own subjective meaning in his testimony. See *id.* at 370. This testimony, along with the historical context, cleared up any mystery concerning the symbolic meaning of burning a draft card, making a thick or elaborate description of context and symbol entirely unnecessary. This is not, however, to concede that *O'Brien* was rightly decided. For one thing, the Court may be faulted for ignoring or shading a significant portion of the context, namely, Congress' motivation for acting against the specific gesture of draft card "desecrations." There is, however, little doubt that O'Brien got his message across and that the Court took it into consideration, even if the message was ultimately given little weight. There is little doubt, too, that the Court was unimpressed with O'Brien's symbolic gesture, and that its perspective, or bias, undoubtedly had something to do with the outcome in the case. Although the Court might be accused of semiotic insensitivity, it remains doubtful whether thick description and emic interpretation would have had any effect on the outcome in *O'Brien*.


with respect to their intended messages, thus removing any remaining symbolic uncertainty. Everything that was needed to understand the symbolic meaning of these gestures could be found within the record of proceedings.

2. Legally Contested Symbolic Meaning

With regard to symbolic meaning, the foregoing are the "easy" cases. Not necessarily easy to decide, but hardly challenging in their semiotics. Most gestures do not, however, essentially speak for themselves. It often may be clear that communication or expression is intended, but in many symbolic gesture cases the content of the communication is a matter of dispute. For this set of gestures, the interpretive model is implicated. To resolve the legal contest, there must, or at least should be, an interpretation of symbolic meaning.

There are various types of legal contests concerning meaning. The dispute might be a disagreement regarding the specific message at issue, as with cross burning or the symbolism of a flag. There may be a contest regarding whether the gesture is intended to be expressive at all, as with nude dancing. In the case of the Establishment Clause, there is nearly always a dispute regarding what message a sacred symbol conveys to "insiders" and "outsiders." With regard to associations, there is a contest over the expressive message the group wishes to convey, or a dispute as to whether allowing one to join is inconsistent with the general meaning of membership.

For gestures involving legally contested meaning, a simple empirical examination and description of the event, in the form of a casual perusal of "the record," cannot lead to a recovery of symbolic meaning. Gestures cannot, for example, be categorized as "threats" this easily. Even noncategorical First Amendment treatment requires that courts more systematically assess meaning. In order to both avoid sanctioning restrictions based solely on aesthetic bias and engage in honest balancing, courts should at least consider the notion that the act of dancing in the nude

360. See id. at 408; Tinker, 393 U.S. at 506.
361. See supra Part I.
expresses something,\textsuperscript{362} or that the sleeping protest in \textit{Clark} was something other than a matter of function or convenience.\textsuperscript{363} Even gestures which on their face do not appear to signify anything profound can be packed with symbolic meaning.\textsuperscript{364} Courts simply cannot access the "said" of these contested gestures without interpreting meaning.

Nor can the courts do so in areas other than expressive conduct. Sacred symbols cannot be interpreted based solely on their appearances. There is, as the Court seems sometimes to recognize, no avoiding interpretation of their cultural meaning. Similarly, the meaning of membership must be accessed in order to resolve the legal contest over exclusion. As categories, therefore, sacred symbols and membership decisions require an interpretive effort. Their symbolic meaning is usually legally contested.

All of these actions, symbols, and icons speak, but what they say is legally contested, in a way that armbands, peace symbols, and civil rights sit-ins are not. All of these symbolic gestures require interpretation in order to resolve the legal contest over meaning. It is this group of gestures for which the interpretive model is intended, and for which it holds the greatest promise.\textsuperscript{365}


\textsuperscript{364} For example, what message, if any, does a panhandler convey by the act of begging? Does a gay man or woman convey something beyond simple affection by displaying affection toward a partner? See David Cole & William N. Eskridge, Jr., \textit{From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct}, 29 HARV. C.R.-C.L. REV. 319 (1994) (arguing that displays of affection by homosexuals signify more than mere affection in some contexts). Do inner city minorities who run from the police convey something other than their possible guilt? See Lenese C. Herbert, \textit{Can't You See What I'm Saying? Making Expressive Conduct a Crime in High Crime Areas}, 9 GEO. J. ON POVERTY L. & POL'Y 135 (2002) (arguing that flight signifies fear of authorities).

\textsuperscript{365} There is an exception which applies to a discrete subset of contested gestures. I have already mentioned \textit{West Virginia Board of Education v. Barnette}, 319 U.S. 624 (1943), which demonstrates that the fundamental constitutional principle of noncoercion can render interpretation unnecessary. In \textit{Barnette}, the principle that the government cannot coerce \textit{any} message or belief rendered the specific meaning of the flag irrelevant. See \textit{id.} at 642. The treatment of parades rests upon a similar principle. In \textit{GLIB}, the Court held that the meaning or the "collective point" of the parade did not matter, and that the parade did not have to speak with a single voice in order for its message to receive First Amendment protection. See \textit{Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston}, 515 U.S. 557, 569-70 (1995). The fundamental principle which trumped interpretation in \textit{GLIB} was that a parade organizer, not the government, chooses the collective message. \textit{Id.} at 574.
B. Symbols of Violence and Hatred

The discussion which follows applies the interpretive model to symbolic gestures, beginning, immediately below, with various forms of expressive conduct, proceeding to sacred symbols and, finally, the meaning of membership. The aim, broadly speaking, in revisiting symbolic gestures is to demonstrate that interpretation of symbolic meaning is within the grasp, the competence, of the judiciary. Nothing radical is being proposed, as all of the conventions of the interpretive model are familiar to courts. The doctrinal and discursive benefits of the interpretive model will be discussed in Part IV.

1. Ritual Cross Burning

This Section begins with a consideration of symbols which are often understood to convey messages of hatred and violence. Cross burnings, the use of Nazi paraphernalia, and, for some, the confederate flag are deeply disturbing symbols. As mentioned, understanding these symbols can be literally a matter of life and death for those threatened. As far as the Constitution is concerned, these symbols test the limits of the First Amendment's guarantee of untrammeled expression. Courts thus must be sensitive to the symbolic meaning of these gestures. If they are to be placed beyond the First Amendment's protection, there must be a close examination of their meaning. The interpretive model offers a means for undertaking this examination.

As mentioned, Black, in which the Court held that the act of burning a cross could be prohibited as a "true threat," stands out as an exception to the general doctrines of interpretive indifference and avoidance. Insofar as Black demonstrates semiotic sensitivity and competence, it holds out the possibility that symbolic meaning can be recovered judicially. If the Court's interpretation is plausible, the opinion represents evidence that an interpretive perspective is a viable alternative to interpretive indifference and avoidance. There is, of course, no guarantee that courts will duplicate Black's method in future cases. In fact, chances are quite good that they

will not do so. Because the issue in Black was categorical prohibition under the First Amendment, the Court was unable to avoid meaning. In many other speech contexts, meaning can be, and indeed continues to be, avoided or treated carelessly. The Court's approach may, it is hoped, inspire a new judicial attention to symbolic meaning.

Let us now examine the Court's interpretation of the meaning of cross burning. As noted, Justice Thomas put the Court on the path to interpretation of ritual cross burning in Pinette, which held that the Klan could not be prohibited from erecting and maintaining a cross on public property. The Court treated the matter as involving the cross as a sacred symbol, an icon which implicated the Establishment Clause. Recall, however, that Justice Thomas was not satisfied with that approach, as he did not view Pinette as an Establishment Clause case at all. In his concurrence, Justice Thomas started from this premise: “The cross is associated with the Klan not because of religious worship, but because of the Klan's practice of cross burning.” From this premise, Justice Thomas went on to describe very briefly both the origins of cross burning, starting in the reconstruction South, and how the practice of cross burning has been utilized by the Klan “as a symbol of hate.”

The Court took up Justice Thomas' approach in earnest in Black, where the expressive act of cross burning was implicated directly. Virginia enacted a statute which prohibited cross burning with “an intent to intimidate a person or group of persons.” The Court held that the First Amendment does not prohibit states from banning the act of burning a cross. To reach this conclusion, the Court could not rely on ipse dixit or the mere observed act itself. The symbolic meaning of ritual cross burning thus became the focal point of the case.

367. See id. at 1541.
369. See id. at 761 (noting the State's interest in declining to endorse a particular religion for the Establishment Clause).
370. Id. at 770 (Thomas, J., concurring).
371. Id. at 771 (Thomas, J., concurring).
372. Black, 123 S. Ct. at 1542. The statute ultimately foundered on a procedural issue, specifically the treatment of cross burning as itself prima facie evidence of an intent to intimidate. Id. at 1544.
373. Id. at 1549.
Despite the obvious disparity of the objects under consideration, there is a marked similarity between the Court's description of cross burning and Geertz's cockfight monograph. The Court began with the local context—the circumstances which gave rise to the dispute—and moved, as Geertz did in his description, in concentric circles. The goal, in each instance, was to translate a seemingly enigmatic occurrence.

With regard to immediate context, Black led a Klan rally of twenty-five to thirty people, in an open field on private property and with the owner's permission. A few curious motorists stopped to ask the sheriff, who had been called to the scene and was observing from a distance, what was happening on the property. There were several houses in the immediate area, and there was testimony from at least one neighbor who heard the Klan members making racist statements and criticizing President and Hillary Clinton.

Beyond this basic record, the Court had only a description of the cross burning itself:

374. With regard to description, legal opinions obviously are limited in ways ethnographies are not. For example, no court can provide a 1000-page monograph concerning any particular symbol. This level of thickness is not required in order to effectively apply the interpretive model to symbolic gestures. What is required is something resembling the "reasoned elaboration" legal process scholars once touted as an antidote to legal realist claims that rules and judicial opinions are not, in themselves, significant. See Stephen M. Feldman, American Legal Thought from Premodernism to Postmodernism: An Intellectual Voyage 121 (2000) (noting that "the central message of legal process theory is opposed to legal realism: legal rules and judicial opinions matter"). Elaboration, according to process theorists, could provide an objective foundation for constitutional interpretation. See, e.g., Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1, 26-35 (1959) (criticizing the Brown v. Board of Education opinion for lack of reasoned elaboration). It is in the spirit of the legal process school of thought, and specifically its emphasis on transparency and elaboration, that I will be proposing a judicial version of thick description. It is, ultimately, reasoned interpretation that I am pursuing. I have no desire to enter the debate between process theorists, realists, and postmodern schools of thought. One thing seems certain after decades of argument and counterargument—none of these schools has laid to rest fundamental concerns about constitutional indeterminacy, judicial activism, or neutral principles of adjudication and interpretation. We should, in my view, choose from each of them what seem to be their strongest concepts and prescriptions, for example, skepticism from realists and postmodernists, and methods from process theorists. Elaboration works well here as a methodological analog to thick description.

375. See Black, 123 S. Ct. at 1541-43.
376. Id. at 1542.
377. Id.
378. Id.
At the conclusion of the rally, the crowd circled around a 25- to 30-foot cross. The cross was between 300 and 350 yards away from the road. According to the sheriff, the cross "then all of a sudden ... went up in a flame." As the cross burned, the Klan played Amazing Grace over the loudspeakers. Ultimately, the sheriff, who had been watching from a distance, entered the property and arrested Black under the Virginia cross-burning statute. After a trial, Black was found guilty and fined $2500.

Thus far, then, the Court's description indicates that people have been engaged in cross burning for apparently illicit reasons, but little else about the ritual itself. One can readily imagine that racism is present, perhaps there is even the threat of violence, but from the limited facts of record we do not have a deep understanding of the symbolism which inheres in the act of burning a cross. Something more plainly was required if states were to be granted the authority to proscribe an admittedly expressive act categorically.

That something more is Part II of the Black opinion, which is in the nature of a brief judicial monograph on ritual cross burning. Having described only the readily observable, empirical facts, the Court began not where Justice Thomas did in Pinette—the reconstruction South—but in the fourteenth century, where Scottish tribes used burning crosses as signals. Further, as Geertz did with the cockfight, the Court noted that cross burning has been a subject of artistic expression; for example, the ritual was put to dramatic and effective use in Sir Walter Scott's Lady of the Lake.
The Court began, in other words, to place this symbol in cultural context, beginning with distant cultures. There, to participants, ritual cross burning was an object of some aesthetic value and significance. It did not, for these cultures at least, involve racial or tribal animus, nor the threat of violence.

Of course, the Court was not asked to interpret the meaning of cross burning to fourteenth-century Scots. In this country, in American culture, cross burning, as the Court noted, is “inextricably intertwined with the history of the Ku Klux Klan.” This is a critical link; it provides what for the Court would be the critical perspective from which to examine ritual cross burning. The question thus became: What did cross burning mean to members of the Klan? This link or premise drew the Court into a description of the history of the Klan and, ultimately, of its “reign of terror.” Thus did the Court proceed, by a variant of “thick” description, from fourteenth-century Scotland to turn of the twentieth-century America.

As the Court noted, the “first Klan,” which, according to historians, operated roughly between 1866 and 1915, did not engage in cross burnings. The “second Klan,” however, commonly integrated cross burning into its terror repertoire, initially burning crosses “to celebrate the execution of former slaves.” The association between the Klan and cross burning appears to have been solidified in our culture, the Court observed, in artistic expression—with the release in 1915 of the film “The Birth of a Nation,” which showed Klan cross burnings and incorporated the image of the burning cross into advertising for the film. So as for cockfights, so too for cross burnings—the observations and descriptions of the interpreters navigate, among other things, cultural myths, imagery, even entertainment.

The Court proceeded to note that the second Klan, which shared the racist ideology of the first, added cross burning to its ritualistic program. The first cross burning, the Court reported, took place

385. Id.
386. Id. (quoting STETSON KENNEDY, SOUTHERN EXPOSURE 31 (1991)) (internal quotation marks omitted).
387. Id. at 1544.
388. Id.
389. Id. at 1544-45.
“when a Georgia mob celebrated the lynching of Leo Frank by burning a ‘gigantic cross’ on Stone Mountain that was ‘visible throughout’ Atlanta.” Stone Mountain was also, the Court pointed out, the site of the first Klan initiation ceremony, where Klan members took the oath while a cross burned. Beyond ceremony, the Court noted that the second Klan’s penchant for violence was well-documented, and cross burnings were often used “as a tool of intimidation and a threat of impending violence.” Drawing on anecdotal and other sources, the Court offered several dramatic examples of cross burnings which targeted churches, synagogues, housing projects, a union hall, and the home of a union leader.

The Black Court next proceeded to a description of cross burnings during the post-World War II period. These burnings, the Court established, whether expressly tied to the Klan or not, were also directed toward black targets, and they too carried at least an implicit threat of harm. Indeed, it was this rash of incidents which prompted Virginia to enact its first cross-burning ban.

Placing cross burning in wider perspective still, this time jurisprudential and historical, the Court observed that after Brown v. Board of Education and the inception of the civil rights movement, Klan violence in general, and cross burnings in particular, increased dramatically. “Members of the Klan,” the Court wrote, “burned crosses on the lawns of those associated with the civil rights movement, assaulted the Freedom Riders, bombed churches, and murdered blacks as well as whites whom the Klan viewed as sympathetic toward the civil rights movement.

Thus, from one perspective, ritual cross burning has been a cultural symbol of hatred, racial animus, and violence. But cross burning was not, the Court noted, expressive only of violence. For some, its meaning was primarily ideological. Cross burnings united
Klan members in thought, as well as deed. "Throughout the history of the Klan," the Court noted, "cross burnings have also remained potent symbols of shared group identity and ideology."\(^{399}\)

For still others, cross burning was expressive of spirituality. It was a ritual of faith, a familiar symbol often used in Klan ceremonies: "Typically, a cross burning would start with a prayer by the 'Klavern' minister, followed by the singing of Onward Christian Soldiers. The Klan would then light the cross on fire, as the members raised their left arm toward the burning cross and sang The Old Rugged Cross."\(^{400}\) According to the Court, the burning cross ultimately became "a symbol of the Klan itself and a central feature of Klan gatherings."\(^{401}\) The cross burning ritual, an advertised event in some communities, became, in the Court's words, "the climax of the rally or the initiation."\(^{402}\)

"For its own members," the Court observed, "the cross was a sign of celebration and ceremony."\(^{403}\) Delving deeper still into Klan ideology and practice, the Court noted that the Klan constitution (the "kloran") describes the "fiery cross" as the "emblem of that sincere, unselfish devotedness of all klansmen to the sacred purpose and principles we have espoused."\(^{404}\) The Court looked to other Klan documents as well, including newsletters and magazines, which it noted have been published under the name "The Fiery Cross."\(^{405}\)

As the Klan's power began to wane, the Court explained, cross burning became a symbol of political protest for its members.\(^{406}\) Klan members burned crosses to protest state anti-masking bills after World War II, and during the civil rights struggle cross burnings were a beacon of membership, an invitation to join the effort to fight desegregation.\(^{407}\) For example, the Court noted in its

\(^{399}\) *Id.* at 1546.

\(^{400}\) *Id.*

\(^{401}\) *Id.*

\(^{402}\) *Id.*

\(^{403}\) *Id.* (emphasis added).

\(^{404}\) *Id.* (quoting *The Ku Klux Klan Hearings Before the House Committee on Rules*, 67th Cong., 1st Sess. 114, Exh. G (1921)) (internal quotation marks omitted).

\(^{405}\) *Id.*

\(^{406}\) *Id.* at 1544-46.

\(^{407}\) *Id.* at 1546.
description that crosses were burned after the Nixon-Kennedy debate as a sign of support for Nixon.  

After it accumulated the details of the ritual, and described its place in American culture, the Court then came finally to interpret the “said” of the burning cross. The Court ultimately interpreted this gesture as Justice Thomas did in Pinette—as a powerful “symbol of hate.” It recognized that “cross burnings have been used to communicate both threats of violence and messages of shared ideology.” The Court concluded, however, that at their core cross burnings have predominantly “embodied threats” to those targeted; threats with, as the Court noted, “special force given the long history of Klan violence.” On the basis of this interpretation, the Court held that the states may ban cross burning as a symbolic act intended to threaten.

This may seem a tremendous expenditure of energy for a ritual which many would immediately interpret as racist and threatening. But note that the Court recovered several plausible meanings for the gesture of cross burning. If courts are to interpret polysemous symbols, especially where their interpretations may result in the categorical denial of constitutional protection for a gesture, they must rely upon something more than presuppositions or gut feelings. It is the accumulation of detail and description which ensures that there is a basis, grounded in evidence, for the Court’s interpretation of symbolic meaning.

Judged by the conventions of the interpretive model, Black is largely a methodological success. The opinion offers detailed context, going well beyond the record in the case. The Court consulted historical, anecdotal, institutional, and other sources in building context for its ultimate interpretation. It did not create its own study of the symbolic gesture; rather, the Court located others’ studies of the symbolic gesture in order to render an

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408. Id.
409. Id.
411. Id. at 1545.
412. Id.
413. Id. at 1547-49.
414. See id. at 1544-47.
415. Id. at 1544-47.
As Geertz did with respect to the cockfight, the Court gained an understanding of the specifics of the gesture itself, its history, its appearance in literary references and film, government attempts to regulate it, and, finally, a broader cultural picture into which the gesture "fits." Within the limitations of judicial opinion writing, there is "thick" description of the gesture of cross burning.

So the Court's methodology appears to be sound. But what about its interpretation of the meaning of ritual cross burning? Does it comport with what the ethnographic model suggests are sound interpretive principles?

The first thing to note is the Court's sensitivity to the polysemous nature of the symbol. The Court is able to recover various circulating meanings for cross burning—violence, ideology, spirituality, and political protest. Thus, the Court has not avoided any particular meaning, or treated any plausible meaning with bias or indifference.

Having recovered several available meanings, the Court next had to choose the most plausible meaning from among these. Generally speaking, in order to make this choice the examiner must consider some or all of the following: the symbol itself, the use of the symbol by the particular actor, and the use of the symbol in a particular context. Each of these perspectives might yield differing interpretations.

The Court, although it was asked to determine only whether the symbol itself could be categorically proscribed, examined each of these perspectives. The Court reviewed the symbol itself and the contexts in which it had been used. Most importantly, however, the Court made meaning more concrete by examining the use of this symbol by a particular actor. The Court sought to link the symbol with the Klan, and then proceeded to assess the burning cross as a symbol of Klan membership, ideology, politics, and violence. This, then, is the specific perspective from which the Court chose to examine the symbol: What did cross burning mean to the Klansman? Much turned, then, on the strength of the connection between

416. Id.
417. Id. at 1547-49.
418. Id.
the Klan and the symbol. The Court made a strong case that throughout American history and experience, the burning cross has been linked with the Klan.\footnote{Id. at 1544-47.} It is for members of this group that the symbol carries meaning. As the Court acknowledged, actors other than Klan members have used the burning cross.\footnote{See id. at 1544.} But, as the Court pointed out, their use of the symbol generally has coincided with the Klan’s use, rendering their meaning similar to, if not identical with, Klan meaning.\footnote{Id. at 1544-47.} Thus, the Court proceeded to use Klan meaning as a proxy for others’ meaning.

Having made this connection, the Court next relied, in part, upon ideal types: What experience would the typical Klansman have had with this symbol?\footnote{Id.} But the Court did not rely solely upon ideal types. The culture has experienced cross burnings for more than a century. This is, thus, a shared, intersubjective experience. The Court was able to rely upon this common cultural experience in rendering its ultimate interpretation of cross burning. To its credit, the Court appeared to exhibit no bias, aesthetic or otherwise, toward this ritual, in keeping with the conventions of the ethnographic model. It examined the ritual in all of its various contexts, and extracted a number of circulating meanings.

This raises the issue of the Court’s ultimate choice of meaning. In the end, the Court agreed with Justice Thomas’s conclusion in \textit{Pinette} that cross burning is a symbol of hate and violence; specifically, it is a symbol of racial hatred and race-motivated violence.\footnote{Id. at 1546.} To be sure, cross burning does not have this particular meaning for all who use the symbol. There is no means, however, for recovering a unitary meaning for this or any other symbol. The question is whether, as among the available meanings the Court has recovered, a race-motivated threat of violence is the most plausible meaning which can be ascribed to this gesture both for the “speaker” and, ultimately, for the “listener” as well. Has the Court offered sufficiently thick description to support the piled up inferences which lead to an understanding of this particular meaning? Assuming one accepts the Court’s linkage of the symbol
with the Klan, it would seem so. The meaning the Court chose is also generally consistent not only with ideal types, but also with the behavior of the participants and the expected effect of this symbolic act on targeted listeners. That cross burning is a “true threat” thus seems to be the most plausible meaning, even if not the only meaning, for this symbol.\(^\text{424}\)

### 2. The Confederate Flag

For many, “Dixie,” the Confederate flag, is similarly situated to ritual cross burning as a racially divisive and threatening symbol. Flags are powerful, emotive, and often provocative symbols. Especially for many African Americans, “Dixie” signifies hate, racism, division, and perhaps even the threat of personal violence. To others, however, the flag is an historical artifact, a symbol of patriotism and ancestry. Thus, like ritual cross burning, display of the Confederate flag raises difficult interpretive issues.\(^\text{425}\)

\(^{424}\) Id. at 1548.

\(^{425}\) For those who are skeptical of the judicial capacity to render an interpretation of something as politically and ideologically charged as a flag, the dissenting opinions in Eichman and Johnson, the flag burning cases, are well worth considering. See United States v. Eichman, 496 U.S. 310, 319-24 (1990) (Stevens, J., dissenting); Texas v. Johnson, 491 U.S. 397, 421-39 (1989) (Rehnquist, C.J., and Stevens, J., dissenting). In Johnson, Chief Justice Rehnquist and Justice Stevens rendered interpretations of the national flag which, so far as is apparent, were not contested by their colleagues. Their opinions emphasized the flag’s cultural significance from the Revolution to the present, describing its function in times of war and peace, and its power to convey, in literature, song, and other cultural forms, the concept and ideals of an entire nation. Id. at 421-29 (Rehnquist, C.J., dissenting) (describing role of national flag in Revolutionary, Civil, and World Wars, and in peacetime); see also id. at 436 (Stevens, J., dissenting) (stating that the flag “signifies the ideas that characterize the society that has chosen that emblem as well as the special history that has animated the growth and power of those ideas”). The concept of insider perspective can be difficult to assimilate where some flags are concerned. With regard to the Confederate flag, we might want to know whether the flag, like the cross, has been effectively co-opted by those with violent or other evil intentions. With regard to the national flag, the matter is somewhat more complicated—the emic, or insider, perspective would seem to require consideration of the whole of society; it is the nation which speaks through this symbol. As noted, the majority did not contest the flag’s symbolism, or offer its own interpretation. See id. at 397-420. The majority feared that if it were to render an interpretation and rely upon it to prohibit flag burning, the justices would be “forced to consult [their] own political preferences.” Id. at 417. But no more so than in Black; there the Court demonstrated the possibility of interpreting without reference solely to “political preferences.” See Black, 123 S. Ct. at 1547-49. And no more so than in Judge Posner’s concurrence in Miller v. Civil City of South Bend, which is discussed infra and which demonstrated how thick description might allow courts to
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No court has ever attempted to describe or interpret this symbol, and no one, at least to date, has been prohibited from displaying it in any context. James Forman, Jr. has argued that any state government that displays the Confederate flag is constitutionally required, under the First Amendment and the Fourteenth Amendment’s Equal Protection Clause, to remove it. His argument against display of the Confederate flag is in one sense narrowly contextual; the specific flag he is objecting to was displayed over the Alabama capitol at the direction of segregationist Governor George C. Wallace, who at the time was anticipating a visit from Robert F. Kennedy, then the U.S. Attorney General. The flag was raised on the morning of Kennedy’s arrival, about the same time that a floral wreath was placed over the Jefferson Davis gold star memorial. In this instance, the message of defiance was difficult to misunderstand.

Forman does not appear, however, to be limiting his argument solely to this narrow context, but rather to be advancing an interpretation of the Confederate flag which would preclude its display, at least by the government, under any circumstances. To that end, Forman provides a relatively brief description of the flag’s cultural context. He describes the Confederate flag as a “rallying symbol for Confederate troops,” and the flag’s representation of “a history of resistance to change in the twentieth century.”8 Like the burning cross in Black, the Confederate flag is linked by Forman to “the Klan, skinheads, and other white supremacists opposed to

overcome raw preferences and biases. 904 F.2d 1081, 1089-1105 (7th Cir. 1990) (Posner, J., concurring). This is not to say that the government should be permitted to prohibit flag burning; the reason it may not do so, however, cannot be that the Court lacks a systematic means of interpreting this symbol. The interpretive model can be used to access meaning, even of symbols as charged as the national flag. What one does with that meaning, how one treats it, is, as Johnson and Eichman demonstrate, a matter of constitutional principle.

426. One court has held, without delving into the socio-historical context of the flag as symbol, that flying “Dixie” above the state capitol dome is not a violation of the First or Fourteenth Amendments. NAACP v. Hunt, 891 F.2d 1555, 1562-66 (11th Cir. 1990).


428. Id. at 507-09.

429. Id. at 508.

430. Id. at 513-14.

431. Id. at 513.
black demands for equality and constitutional protection. Forman seems to suggest that, like the cross, the Confederate flag has been coopted by those with evil intent. It is threatening, evocative of racism and, perhaps, of racial violence.

Forman suggests that “Dixie” can be understood in the manner in which the Supreme Court came to terms with the symbolism of racial segregation in Brown v. Board of Education—by paying close attention to the historical and societal context of the symbol. Viewed in this manner, Forman argues that the flag, as a symbol, offends the Constitution’s equality principle. The societal and cultural reality, he says, makes it “impossible to view the Confederate flag as a symbol that affects all races equally or as one that creates problems only for those incapable of handling their own emotions.”

But ultimately Alabama’s flag, the one which prompted Forman’s analysis, is linked to Wallace, and his unique message of defiance. Forman’s description is compelling enough, perhaps, in this specific context, to support his interpretation. What Wallace himself meant by the display was unmistakable. But what of the symbolism of the Confederate flag in broader cultural contexts? Might it, like the burning cross, be prohibited as a display, perhaps as a “true threat” to the safety of African Americans? This seems to be one logical extension of Black, or at least we can imagine that there will be those who see it that way.

One response might be that cross burning is monosemous, while the Confederate flag, which has an historical origin, is polysemous. But recall that the Black Court interpreted the burning cross not only as a threat, but also as an expression of ideology, spirituality, and political opposition. The key to the Court’s interpretation of cross burning as a threat, what tipped the balance, was the whole of its description, the place and use of cross burning in our culture as a signifier of threats of violence. Analysis of the Confederate flag

432. Id.

433. Charles Black popularized this view of Brown in his famous defense of the decision, which focused specifically on the societal realities of segregation. See generally Charles L. Black, Jr., The Lawfulness of the Segregation Decisions, 69 YALE L.J. 421 (1960).

434. Forman, supra note 427, at 513. One commentator similarly has suggested that cultural anthropology can access the social reality of “unconscious” racial discrimination under the Equal Protection Clause. Charles R. Lawrence III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 STAN. L. REV. 317, 322-23 (1987).
must, if it is to result in a defensible interpretation, proceed in the same fashion.

Forman's description is, thus, too limited, conclusory, and argumentative to suffice as thick description. It is not "thick" enough to provide us with the "piled-up structures of inference and implication" required to render an interpretation of symbolic meaning. As mentioned in the discussion of thick description, there is not a priori an amount of thickness which is required to support a chosen meaning. At the least, however, there must be answers to the questions that were examined in detail in Black. A court should not examine the symbol in the abstract. Who has used, and is using, the symbol? For what purpose(s)? In what rituals or contexts? Can it be linked firmly to the Klan, or skinheads, such that it is their perspective from which a court should be interpreting meaning? As Black demonstrates, the choice of perspective and the use of ideal types often will dictate the choice of meaning. Because of its centrality, there must be thick description to support the choice of perspective as well.

In addition to details to support a choice of perspective, the court would also need to provide the remaining context for the symbol. How, if at all, has the symbol been treated in the larger culture—in the arts, for example, or in entertainment? What did the Confederate flag represent in 1865? In 1965? What is the history of efforts to regulate this symbol? Most importantly, perhaps, what does it mean, from the perspective of those for whom it expresses, today? In all likelihood, this symbol, like others, has various meanings. What are they?

It may well be, as Forman suggests, that the Confederate flag has been coopted as the ritual cross burning was—by racists, Klansmen, and others with evil, perhaps threatening, intent. Indeed, the paths of these symbols may cross in a considerable number of contexts. But to be valid, an interpretation which is based upon this particular perspective must first make the necessary link or connection, as the Court did in Black, between actors and symbol.

435. GEERTZ, supra note 14, at 7.
436. See supra Part II.B.2.
438. Forman, supra note 427, at 513-16.
Further, any description of the Confederate flag must be balanced—a telling of both, or all, sides of the flag’s story, not just the one that suits the interpreter’s ends or biases. An exegesis of the Confederate flag must at least acknowledge that this symbol, however repulsive to most, is not one of hate or division for all viewers or “speakers.” It carries a variety of meanings. One of the advantages of the interpretive model is that it lessens the temptation to rely on aesthetic and other biases. If a court, after rigorous factfinding and emic description, cannot find a basis for rendering an interpretation of the Confederate flag as a threat, then those who wish to display this symbol must be permitted to do so. But at least the interpretive effort will help to explain why the symbol has been used and by whom, and perhaps why it cannot be simply removed from public discourse.

3. Symbols of Nazism

In the wake of Black, there will likely be increased attention given to the status of the swastika, another potential symbol of hate, evil, and violence. The symbol undoubtedly is representative of hatred and violence to many. Again, as with cross burning and “Dixie,” however, this symbol has various meanings which must be considered.

This is not to suggest, of course, that interpretation is not possible. The swastika, as symbol, can be understood. But again, courts must distinguish among the meaning of the symbol itself, its use by a particular actor, and its use by an actor in a particular context. Within these gradations, a true understanding of the symbol is most likely in the latter circumstance, where actor and context are clearest. As Black demonstrates, perspective is controlled to a large degree by the relevant constitutional doctrine. If the matter is one of incitement, a court must know what the particular user of the symbol meant in the particular context. If it is one of categorical threat, as in Black, then the relevant perspec-

440. I am thinking here mostly in terms of private displays of the Confederate flag, rather than governmental displays. Obviously, as Forman’s account suggests, the government can display the flag with evil intent. But the Wallace debacle, let us hope, is a special case.
tive might be broader, perhaps linking the symbol with a particular group or groups.\footnote{441}

The challenge for courts, who, like the rest of us, are assuredly not strangers to this symbol or its history, would be to access the meaning of the swastika, and to do so without invoking interpretive biases. The interpretive model suggests one means for doing this. It requires decryption, elaboration, and explanation of why this symbol threatens like a burning cross (if it does) or otherwise carries a prohibited meaning within a relevant context.

\section*{C. The "Said" of the Striptease}

In contrast to \textit{Black}, the Court's treatment of symbolic nude dancing exhibits the far more typical judicial interpretive indifference. Here the constitutional rule is not categorical, but rather requires a balancing of speech interests with governmental interests.\footnote{442} Following this standard approach the Court in both \textit{Barnes} and \textit{Pap's} was sharply divided as to whether a state may ban nude dancing under a general prohibition on public nudity.\footnote{443}

The disagreement had everything to do with whether this genre of dance conveyed a distinct message and whether the state had targeted the dancing because of its message or for some other reason. The plurality in both cases was unwilling to ascribe any specific message to nude dancing, preferring instead to suppose, as is customary in most expressive conduct cases, that nude dancing expresses something, and to balance from that supposition.\footnote{444} This supposition was followed by the predictable determination that the

\begin{footnotesize}
\begin{enumerate}
\item\footnote{441} See \textit{Black}, 123 S. Ct. at 1544-48.
\item\footnote{443} See \textit{Pap's A.M.}, 529 U.S. at 281. Justice O'Connor wrote the plurality opinion in which Chief Justice Rehnquist and Justices Kennedy, Souter, and Burger joined with respects to Parts I and II and in which Chief Justice Rehnquist, and Justices Kennedy and Breyer joined with respect to Parts III and IV. Justice Scalia filed an opinion concurring in the judgment in which Justice Thomas joined. Justice Souter filed an opinion concurring in part and dissenting in part. Justice Stevens filed a dissenting opinion in which Justice Ginsburg joined. \textit{Id.} In \textit{Barnes}, Chief Justice Rehnquist wrote the opinion of the Court in which Justices O'Connor and Kennedy joined. Justices Scalia and Souter filed concurring opinions while Justice White wrote a dissenting opinion in which Justices Marshall, Blackmun, and Stevens joined. \textit{See Barnes}, 501 U.S. at 560-62.
\item\footnote{444} See \textit{Pap's A.M.}, 529 U.S. at 289; \textit{Barnes}, 501 U.S. at 565.
\end{enumerate}
\end{footnotesize}
regulation of the gesture was unrelated to the suppression of expression and, what is more, that the regulation posed only an indirect, even trivial, burden on expressive interests.\textsuperscript{445} The dissenters argued, thinly and in summary fashion, that the state sought to regulate nude dancing's expression of some amorphous aspects of "eroticism" or "sensuality."\textsuperscript{446}

This Article suggests that there is a third way available to courts to resolve the interpretive dilemma in cases where the conduct is plainly expressive, but the message uncertain. The interpretive model enables courts to engage meaning, rather than default to the doctrine of interpretive indifference. Fortunately, where nude dancing is concerned, there is a good, if rather unusual, example from judicial work product to draw upon. In his concurrence in \textit{Miller v. Civil City of South Bend}, the lower court decision in \textit{Barnes}, Judge Posner attempted to recover the meaning of the striptease.\textsuperscript{447} His approach offers some insights into the plausibility of an ethnographic model for symbolic gestures.

What animated the interpretive approach for Judge Posner was the district court's conclusion that nude dancing is not expressive activity at all, but merely conduct, and crude conduct at that, which is unprotected by the First Amendment.\textsuperscript{448} Judge Posner found this conclusion "indefensible and a threat to artistic freedom."\textsuperscript{449} As with Geertz's cockfighting monograph, a summary cannot do justice to the thickness of the description in Judge Posner's \textit{Miller} concurrence, which runs approximately ten pages and is packed with extra-record data, argument, rhetoric, observations, and asides. A summary will, however, provide a sense of the descriptive and other conventions being advocated in this Article.

Judge Posner's "thin" description of the striptease, apparently based upon a videotape of the performances, was characteristically straightforward:

The dancers were presentable although not striking young women. They danced on a stage, with vigor but without accom-

\textsuperscript{445} See \textit{Pap's A.M.}, 529 U.S. at 292-93; \textit{Barnes}, 501 U.S. at 570-71.
\textsuperscript{446} See \textit{Barnes}, 501 U.S. at 592-93 (White, J., dissenting).
\textsuperscript{447} 904 F.2d 1081, 1089-1105 (7th Cir. 1990) (Posner, J., concurring).
\textsuperscript{448} \textit{Id.} at 1090.
\textsuperscript{449} \textit{Id.}
plishment, to the sound of a jukebox, and while dancing they
removed articles of clothing (beginning, for example, with a
glove) until nothing was left.450

The dancers’ compensation, the record indicated, was tied to the
number of drinks they induced customers to purchase.451 Judge
Posner conceded at the outset that if the district court “had said
that the dances in issue are not classy, [it] would have been on
sound ground.”452 Neither the name of the venue (the “Kitty Kat
Lounge”) nor the context in which the dancing occurred, he admitted,
“promise[d] high culture.”453 But in contrast to the plurality in
Barnes, which stopped cold its analysis of the “said” of the strip-
sease at this aesthetic boundary,454 Judge Posner was only begin-
ning his interpretive journey.

Judge Posner’s thick description began not with the striptease
itself, but by standing back to take in the cultural significance of
the more general aspect of nudity. In our culture, Judge Posner
submitted, a striptease which ended in complete nudity would have
been deemed obscene as recently as thirty years ago.455 He di-
gressed briefly into a description of our changing cultural mores
regarding nudity, including a description of the changing states of
dress, and undress, from the repressed Victorian England to the
present condition.456 He colorfully stated, “today many decent
women appear in public in states of undress (mini-skirts, hot pants,
slit skirts, body stockings, see-through blouses, decolletage
becoming outright topless evening wear) that would have been
considered nakedness, or the garb of prostitutes, thirty years
ago.”457 Thus, Judge Posner concluded—based, it appears, upon his
own observations of cultural mores—that a striptease which ended
only in partial nudity “might lack erotic punch today.”458

450. Id. at 1091.
451. Id.
452. Id. at 1090.
453. Id. at 1090-91.
454. See Barnes, 501 U.S. at 568-70.
455. Miller, 904 F.2d at 1091 (Posner, J., concurring).
456. Id.
457. Id.
458. Id.
One gathers from the tone of his description that Judge Posner might object personally to this decline in cultural modesty, but he never said so in his opinion. Indeed, he took his task to be the description of a cultural phenomenon from the perspective of those who disrobe, not the rendering of a personal judgment on their state of undress. Like it or not, Judge Posner seemed to be saying, nudity, or lack of modesty, has gained a cultural foothold. Whatever "class" or lack of it inheres in nude dance performances, Judge Posner felt obliged to examine the striptease as an art form, not a cultural calamity.459

Indeed, this is precisely what Judge Posner's thick description accomplished—an interpretation of nude dancing, purportedly from the perspective of the dancers, as a form of artistic expression. Putting nudity to the side, at least for a moment, he began his description of dance with the debut of erotic dances as public performances "in the satyr plays of the ancient Greeks."460 After a period of Christian suppression, Judge Posner noted, these dances "reappeared in the late nineteenth and early twentieth centuries."461 Judge Posner described some early precursors to the striptease, like "fan dancing" and ballet dancing—both of which were characterized, he notes, by scanty dress.462 He briefly described erotic dances in non-Western cultures as well, such as belly and fertility dances.463

So the reader is informed that we are talking about not only nudity, but dance as well, and artful dance at that. Judge Posner was building toward an interpretation. He proceeded to consider the artistic elements of dance, which he described, not incidentally, as "a medium of expression, of communication."464 With regard to the "said" of dance, he stated: "What it expresses, what it communicates, is, like most art—particularly but not only nonverbal art—emotion, or more precisely an ordering of sights and sounds that arouses emotion."465 So he too, like the Black Court, grasped

459. Id. at 1091-93.
460. Id. at 1089.
461. Id.
462. Id. at 1089-90.
463. Id. at 1090.
464. Id. at 1091.
465. Id.
the inherent emotive element of symbolism. To support this semiotic-emotive perspective, Judge Posner cited authorities on ballet which claimed that this form of dance communicates “formal fantasy” and evokes emotion through precise movement.\textsuperscript{466}

Through description, Judge Posner linked the elements of nudity and dance, in the process linking the striptease to other genres of mainstream artistic dance. The product of this descriptive and interpretive combination of dance and nudity is the “erotic dance.” Judge Posner offered this descriptive explanation of the genre:

Erotic dances express erotic emotions, such as sexual excitement and longing. Nudity is the usual state in which sexual intercourse is conducted in our culture, and disrobing is preliminary to nudity. But of course nudity and disrobing are not invariably associated with sex. The goal of the striptease—a goal to which the dancing is indispensable—is to enforce the association: to make plain that the performer is not removing her clothes because she is about to take a bath or change into another set of clothes or undergo a medical examination; to insinuate that she is removing them because she is preparing for, thinking about, and desiring sex. The dance ends when the presentations are complete. The sequel is left to the viewer’s imagination.\textsuperscript{467}

Although, as Judge Posner noted, it is tempting to dismiss the music and the dancing of the striptease as mere window dressing—“figleaves to conceal the absence of figleaves”—“they are what make a given female body expressive of a specifically sexual emotion.”\textsuperscript{468} The dance, he said, is “the ensemble of the music, the dance, the disrobing, and the nude end state; it is more erotic than any of its components; and what makes it more erotic than the body itself, or the disrobing itself, is, precisely, that it is expressive of erotic emotion.”\textsuperscript{469}

Judge Posner’s description thus explicated the “tease’ in striptease.”\textsuperscript{470} The tease, it turns out, was the message of the erotic dance, or at least one possible message. In basic semiotic terms,
then, the striptease was the sign, female sexuality was the object, and an emotive—if fictitious—offer of sex was the interpretant, or possible meaning. As for the constitutional issue before him, Judge Posner readily concluded that in no sense could nude dancing be considered merely unexpressive conduct outside the protection of the First Amendment.\textsuperscript{471} He had used the conventions of thick description and interpretation to expose the fallacy of that position; he claimed to have accessed the “said,” the message, of the striptease.\textsuperscript{472}

The \textit{Miller} concurrence demonstrates how description, and the other elements of the interpretive model, fight aesthetic and other biases which persist in the doctrine of interpretive indifference. On the one hand, Judge Posner noted, we are, as a culture, highly anxious about nudity, an anxiety with deep roots in Christian thought.\textsuperscript{473} On the other hand, most in our broad culture can accept that the nude form, particularly the female form, is an appropriate subject of artistic expression. Judge Posner spent some time, for example, discussing “Venus with a Mirror,” which, he said, communicates and expresses “a complex of feelings”—“of voluptuousness, sensuality, beauty, harmony, sumptuousness, sexual allure (we know what Venus is the goddess of).”\textsuperscript{474} If “Venus” communicates, Judge Posner reasoned, then so too does nude dancing—and, perhaps surprisingly to many, in a like manner. As the judge reads the canvas, so too does he read the striptease—as canvas, or text, or whatever convention is most comfortable. The point is that this judge read it, interpreted it, and translated it.

By describing and interpreting, Judge Posner quite forcefully made the point that there is no place for judicial biases with regard to the “classiness” of a gesture, or its relative aesthetic value to a supposed artistic culture. The judicial art of judgment and interpretation is not the same in character, nor significance, as that of the art critic or social commentator. There is simply no principled way,

\textsuperscript{471} \textit{Id.} at 1093.

\textsuperscript{472} This is not to say, of course, that the government necessarily has prohibited the striptease based upon its message. But recovering that message is antecedent to a full consideration of the interests being balanced. In other words, we ought to at least know what message is in play in making the constitutional assessment.

\textsuperscript{473} \textit{Miller}, 904 F.2d at 1104 (Posner, J., concurring).

\textsuperscript{474} \textit{Id.} at 1094.
Judge Posner argued, to distinguish between “upper-class and lower class nonobscene erotica.” The practical effect of letting judges play art critic and censor,” Posner argued, “would be to enforce conventional notions of 'educated taste,’ and thus to allow highly educated people to consume erotica but forbid hoi polloi to do the same.

Now, to say that Posner engaged some of the conventions of the interpretive model is not to say that there are no flaws in his interpretation. For one thing, the link between the striptease and other forms of dancing, such as ballet, seems far more tenuous than the Black Court’s connection of Klansmen to ritual cross burnings. Insofar as Judge Posner used that purported link to establish the perspective from which to derive symbolic meaning, his ultimate interpretation is open to some criticism. Perhaps more seriously, Judge Posner's examination of meaning seems myopic and channeled; he seems more interested in debunking the notion that the striptease is not a form of expression than in uncovering all of this symbol's available meanings. This, of course, was a function of the narrow issue which had prompted Judge Posner's description, namely the district court's insistence that nude dancing is not “speech.” For some—dancers and observers alike—the performance may have no meaning at all, or at least likely will not have the artistic meaning Judge Posner settled upon. How, for instance, does Judge Posner square the fact that the dancers' compensation is linked to induced drink purchases with his interpretation of symbolic meaning?

More troubling still, there was some evidence that the dancers themselves had no expressive intent; indeed, they appeared to concede as much in the lower court. This raises the sticky question of whether actors “have epistemological authority with regard to meaning for them.” Can an interpreter/judge essentially reject the interpretation of the actors themselves as “incorrect” or “mistaken”? Posner's zeal to take the striptease to new heights of meaning raises this fundamental methodological question. It highlights the importance, again, of perspective. Again, perhaps

475. Id. at 1098.
476. Id.
477. TAMANAH, supra note 314, at 79.
Judge Posner did not feel it necessary to consider the perspective of the dancers themselves, inasmuch as the district court seemed to suggest that the striptease could never be expressive.

It is imperative that courts recognize that the grasping of an understanding of meaning requires that courts recover as many available meanings as are plausible within a given context. Interpretation is the choice of one such meaning as the most plausible. With the striptease, Judge Posner ignored the fact that for many dancers, the striptease either means nothing or is a functional means to a financial end. To undertake the interpretive effort validly, a judge would need to contend with all of the available meanings. He would need to explain why the meaning he has chosen is the most plausible, in light of the testimony of the dancers themselves, the financial bartering of nudity for drinks, and the overall context and behavior involved. Judge Posner made a solid, thick case for expression with respect to the symbol in the abstract, but he made a much weaker case for meaning by these dancers, or to these patrons, in this particular context.

Even with these flaws, Judge Posner's efforts point in the right direction. First, he exhibits a lack of interpretive bias, or at least a suppression of the interpreter effect. We know a great deal more about the possibilities of meaning as a result of his thick description of nude dancing. And we now have a record to assess in order to judge the plausibility of his ultimate interpretation of meaning. At the least, then, it is far more difficult to simply dismiss the striptease as an artless behavior with no expressive content whatsoever.

D. Other Symbolic Expressive Activity

The interpretive model may strike some as overly labor-intensive. After all, we all know that cross burnings are inherently threatening. But the point is precisely that interpreters cannot rely solely on their own self-interpretations. Meaning is public; thus, interpreters should consult public sources of knowledge in order to understand the meaning of a symbol. Meaning is intersubjective; thus judges can render interpretations based upon shared cultural experiences. Further, this labor ought to be expended, because what we are talking about is suppressing symbolism, and, with it, symbolic
discourse. Before that occurs, courts, like ethnographers, should engage in symbolic discourse to discover what it is that is being said, and why. There should be no eliding meaning where symbols are utilized to convey ideas.

To be effectual, however, description need not always be so thick or intensive as in the examples I have cited thus far. The thickness of any description obviously will depend upon the complexity of the symbol and its contexts, both immediate and more general. Sometimes what is most needed is not a full-blown judicial monograph, akin to Black or Judge Posner's Miller concurrence, so much as a filling in of discrete contextual blanks and ellipses, or even just a slight change of perspective.

In Clark, for example, the semiotic dispute was rather straightforward: Did sleeping on the National Mall represent a functional protest strategy or a specific expressive message? Interpreting sleep as merely a functional element of the protest essentially would guarantee that the protesters would come up short in the balancing calculus. This is, in fact, essentially what occurred. The Court balanced a seemingly weak interest in the form or function of the symbolic protest against governmental interests relating to preservation of the national parks, and, quite predictably, the government prevailed.

Whether a thicker description would have altered the outcome is debatable. But the decision to deny the protesters their symbolic protest would have been more legitimate if the Court had bothered to balance with a more complete understanding of symbolic meaning. The Court failed even to mention one important aspect of the context—the history of litigation surrounding the Mall itself, which included several prior lawsuits by homeless advocates. What this says, or should have said, to the Court was that this was no ordinary park, but was sacred ground to the protesters. The reason, of course, that the place was considered so special involves a consideration of the Mall and its place at the seat of government. As the D.C. Circuit stated, the Mall "is the symbolic locus of the

479. See Women Strike for Peace v. Morton, 472 F.2d 1273, 1287 (D.C. Cir. 1972) (Wright, J., concurring) ("There is an unmistakable symbolic significance in demonstrating close to the White House or on the Capitol grounds which, while not easily quantifiable, is of undoubted importance in the constitutional balance.")
The Supreme Court failed even to acknowledge the significance of place, much less to describe it with any thickness of detail.

This descriptive failing turned out to be significant. There is, of course, a vast communicative difference between sleeping on the Mall and sleeping in a vacant lot or a backyard. The meaning, or at least one of the meanings, of this specific mode of demonstration was that the government, and not some other party, had neglected homelessness issues and the homeless themselves. This was a political protest, in other words, that depended heavily upon place to carry an effective message. It was not so much the sleeping that was significant, but the actors who were doing the sleeping and the reasons why they chose this particular symbol for this particular context.

This was not the only interpretive failing in *Clark*. Also missing in *Clark* was a description of the broader cultural context in which this symbolic vigil was to take place. There was no description of the homelessness problem in the city, or the country, no description of the societal effects of this problem, nothing to indicate in any tangible way that the Court understood the specific plight of these protesters. All of this descriptive omission and normative bias, of course, made it all too easy for the Court to declare summarily that the homeless were not entitled to the *most effective* means of communicating their message, as if they were seeking some privileged position among speakers.

If all of this sounds like a call to contextual sensitivity, that is because in large measure this is precisely what is advocated. The context includes not only the physical context of the protest, or parade, for example, but also the meaning-contexts implicated. Courts must be able to separate the subjective meaning-context of the gesturer, which is unavailable to them, from their own self-interpretations, which also represent incomplete understandings of symbolic meaning. It is, again, intersubjective understanding courts ought to be pursuing. The available meanings of the sleeping protest were mainly two—an expression merely of functional necessity, or an expression of civil protest. Choosing the

most plausible from these two available meanings should not be difficult. Not only do we have the testimony of the protesters themselves, but there is also a history of past behavior, a history of place (the Mall), and a context which indicates that these ideal types (the homeless and their advocates) wished to use a symbolic gesture to make a political point.

In sum, the aim of this Section has been to demonstrate that a First Amendment ethnography for “expressive conduct” is viable. Whether the product is a full-blown monograph, as in Black, or simply a fuller, more empathic, description, as might have occurred in Clark, the interpretive model offers a path to the recovery of symbolic meaning. Translation of these gestures leads to discourse, and discourse, in turn, leads to an understanding of cultures and cultural symbolism heretofore treated by courts with indifference.

E. The Semiotics of Sacred Symbols

This Article does not limit the interpretive model to symbolic conduct. Ethnographers have extensive experience interpreting sacred symbols and rituals as well, and judges can learn from their efforts and perspectives. Anthropological approaches to religion, and religious symbolism, are as varied as they are with respect to other cultural phenomena. It is beyond the scope of this Article to examine these approaches, or their findings, in any detail. Since it is still symbols—in this instance, crucifixes, créches, menorahs, and the like—that are being considered, no broad change of focus or methodology is required. This Section considers the application of the interpretive model to sacred symbols.

Interpreting sacred symbols is a messy—and risky—business for courts for two principal reasons. First, Establishment Clause doctrine is notoriously indeterminate. The Supreme Court continues to pluck its way toward the core values of the Establishment Clause, but it has not yet satisfactorily come to grips with the tensions created by public displays of religious symbolism. Second, judicial interpretation of sacred symbols is, not surprisingly, hardly

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481. For a recent treatment of the various approaches, see generally A READER IN THE ANTHROPOLOGY OF RELIGION (Michael Lambek ed., 2002).
an accepted convention. Courts understandably do not wish to become national theology boards, issuing purportedly definitive accounts of religious symbols and events. Notwithstanding these challenges and concerns, this Section seeks to establish that the interpretive model can lead courts toward a viable ethnography of sacred symbols.

As noted, among the many approaches that have been suggested to capture the essence of the Establishment Clause, Justice O'Connor's "endorsement" test seems to have the greatest support on the current Court. The crux of the test is found in Justice O'Connor's observation in *Lynch v. Donnelly* that the Establishment Clause "prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community." Endorsement of religion, in Justice O'Connor's formulation, is an explicitly semiotic concept—it sends a "message to nonadherents that they are outsiders, not full members of the political community," and sends the reverse message to religious adherents—"that they are insiders, favored members of the political community."

The endorsement test focuses on both governmental purpose and effects, or, as the doctrine has developed, perceptions, but it has been utilized mainly to examine the latter. This is hardly surprising, as any inquiry regarding the government's purpose is likely to result in indeterminacy. Thus, as the test has developed, what has become of greatest concern is the symbolic message received, and its effects on political status in the community. Further, although the effects test initially appeared to call for an examination of the perceptions of actual people, Justice O'Connor later clarified that the endorsement test takes into account only the perceptions of the fictional "objective observer," who is apparently endowed with some limited local knowledge, along with a passing appreciation for the values inherent in the Free Exercise Clause.


484. *Id.* at 688 (O'Connor, J., concurring) (emphasis added).

In sum, as things now stand, whether a creche like the one in *Lynch* has a forbidden meaning, or sends a prohibited message, nominally requires an examination of both the government's purpose in using a sacred symbol, rather than a secular one, and an examination of the message an "objective observer" would perceive is being communicated. As the description in Part I demonstrated, both the purpose and effect inquiries are influenced substantially by the notion, now unfortunately enshrined as establishment doctrine, that local context—trees, reindeer, elephants, clowns, and the like—can, in effect, desacralize sacred symbols. The upshot, where some secular purpose, as is generally the case, can be ascertained or judicially imagined, is that judges (who, in effect, act as the fictional "objective observers") will only in the rarest of circumstances perceive an unconstitutional establishment from the display of sacred symbols. We scarcely can hope to find an authoritative means of resolving the meaning of sacred symbols. What we can hope for, however, and what the interpretive model requires, is a rigorous examination of sacred symbols which seeks recovery of all plausible, available meanings for such symbols and an interpretation which judges these meanings with reference to behavior, context, and intersubjective knowledge. This necessarily will mean acknowledg-

(concurring in judgment invalidating statute permitting moment of silence for private prayer in public schools and announcing the "objective observer" test). In addition to having some understanding of the Free Exercise Clause, the objective observer supposedly is acquainted with the "text, legislative history, and implementation of the statute." *Id.; see also* *Sante Fe Indep. Sch. Dist. v. Doe,* 530 U.S. 290, 308 (2000) (quoting O'Connor's "endorsement" and "objective observer" tests with approval). This constitutional fiction was deemed necessary so that the observer would not view all religious acknowledgment and accommodation as an unconstitutional establishment of religion. *See Jaffree,* 472 U.S. at 76, 83.

486. See *Lynch,* 465 U.S. at 671 (describing the display).

487. The opposite conclusion will be reached only where a sacred symbol appears unadorned or unaccompanied by plainly secular objects as, for example, where a crucifix is displayed at a courthouse on its own. This is a testament to the religious power of the sacred symbol, and to the secularizing power, under current doctrine, of objects like elephants, reindeer, and talking wishing wells. *See id.* (providing a description of secular elements surrounding the creche).

ing, rather than diminishing and disregarding, sacredness. Still, the interpretive approach need not result in courts assuming the functions of a judicial theology board. But it must, if we are to move beyond raw judicial preferences, presuppositions about religion, and desacralizing fictions, offer a means of knowledgeably adjudicating the semiotics of sacred symbols.

A reexamination of *Lynch* will demonstrate how the conventions of the interpretive model will assist courts in assessing both purposes and effects, within current establishment doctrine. A thick description of the crèche and the display context likely would have altered the result in *Lynch*. Chief Justice Burger’s description of the crèche in *Lynch* was as thin as one can possibly render, short of ignoring the presence of the crèche altogether. The crèche was described repeatedly as a “passive” secular symbol, by which the Court apparently meant to suggest that the symbol does not “speak” to anyone about religion, but is rather something of an inert historical depiction. The symbol was, in addition, according to the Court, a small part of the larger cultural celebration of Christmas, a traditional and largely secular holiday season. So there were two contexts to be examined when assessing the government’s purpose in utilizing the crèche—the larger holiday “season” and the local display, which purportedly represented that season.

To begin with the larger canvas first, Justice Brennan’s dissent cast serious doubt upon the majority’s historiographical conclusion that Christmas is a traditional, and traditionally celebrated and accepted, secular holiday. Chief Justice Burger’s interpretation, which was based upon shoddy cultural and historical research, lacked descriptive clarity and rigor. It seemed to be based upon little more than the interpreter’s own preconceptions and biases. A thick description of the Christmas holiday would have demonstrated that the holiday lacks the tradition, the universal acceptance, the majority ascribed to it. This casts the first hint of doubt

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490. *Id.*
491. See *id.* at 710-12 (Brennan, J., dissenting).
492. *Id.* at 676-78.
493. For an account of the history and symbolism of Christmas, see WILLIAM SANSOM, A BOOK OF CHRISTMAS (1968).
upon the government's argument that the purpose of using a crèche was simply to celebrate an accepted cultural tradition.

What is more, however, is that there was no description of the crèche beyond its immediate context.\(^494\) It is important to recognize that the majority in fact rendered an interpretation of the crèche display. But again, the Court's interpretation does not appear to be supported by anything other than the religious preconceptions of the interpreter. There is no accounting for the sacredness of the symbol. At a minimum, a description of the crèche must account for the fact that this symbol depicts the birth of Jesus Christ, an event which has sacred meaning for all Christians. As Justice Brennan explained in his \textit{Lynch} dissent, "[i]t is the chief symbol of the characteristically Christian belief that a divine Savior was brought into the world and that the purpose of this miraculous birth was to illuminate a path toward salvation and redemption. For Christians, that path is exclusive, precious, and holy."\(^495\) This aspect of sacred meaning is wholly missing from the majority's interpretation.

This is not to suggest that the Court was obligated to, or could, discover precisely what the crèche means, or to render a unitary interpretation of meaning. It was not necessary to go quite so far, however, in order to consider the possibility that the crèche is more accurately characterized as a religious, not an historical, symbol. As evidence for this possible meaning, Justice Brennan noted that the crèche is a sign that, for Christians, has a well-recognized interpretation or possible meaning—the "path toward salvation and

\(^{494}\) A word about semiotic methodology in this context is necessary. The Court's description of the crèche pretended to be holistic, but was remarkably thin. Chief Justice Burger's description, in addition to relying upon questionable historiography concerning Christmas, conveyed only the nature, number, and size of the figures which constitute the display. \textit{See Lynch}, 465 U.S. at 671 (describing the crèche). The \textit{Lynch} Court gave undue weight, in describing the crèche, to its immediate context, while offering no description at all of the origins or sacred context of the symbol. \textit{See Jamin B. Raskin, Polling Establishment: Judicial Review, Democracy, and the Endorsement Theory of the Establishment Clause—Commentary on Measured Endorsement}, 60 Md. L. Rev. 761, 770 (2001) (“What counts for Establishment Clause scrutiny is not the semiotics of the whole scene, but the semiotic meaning of adding particular religious elements to it.”). The crèche became, through the Court's description, not only passive, but neutral as well. What neutralized the crèche's sacredness, according to the Court, was the presence of reindeer, clowns, elephants, and other secular symbols which have been placed near it. \textit{See Lynch}, 465 U.S. at 691 (O'Connor, J., concurring). This is dilution by descriptive association, not holistic analysis.

\(^{495}\) \textit{Lynch}, 465 U.S. at 708 (Brennan, J., dissenting) (footnote omitted).
redemption.” Even a rather thin description would have revealed that the crèche itself is not merely a traditional symbol, but a “recognizably religious element” of the display. This further rebuts, if it does not altogether defeat, the town’s assertion that it chose the crèche merely to celebrate history or acknowledge tradition. Its purpose plausibly might have been something else; one plausible interpretation is that the town sought to celebrate the Christian faith—precisely what the endorsement test would appear to forbid.

Even more fundamentally, however, since it is effects, rather than purposes, which usually dominate the establishment inquiry, the perspective from which the symbol is viewed is of paramount importance. The effects inquiry requires that the interpreter shift focus, from the purpose of the government as speaker to the effect the symbol has on the perceiver or viewer. Thus, there are two symbolic meanings in play—the meaning to a potential insider and the meaning to a potential outsider. But this is where the endorsement test’s inquiry concerning meaning takes a wrong turn. Both insiders and outsiders apparently are endowed with only the fictional makeup of the objective observer, which, while it may include some local and constitutional knowledge, does not include any appreciation for the sacredness of religious symbols, nor any capacity for transcendental belief. Of course, as noted, courts cannot access the “primordial” understanding of either insiders or outsiders. But by objectifying the observer completely, the Court has ensured that sacred meaning will be ignored. It has removed an important set of meanings from the interpretive calculus.

This removal necessarily biases the interpretive endeavor in favor of secularization of sacred symbols. For believers, the “message” of the crèche, as Justice Brennan stated in his Lynch dissent, “begins and ends with reverence for a particular image of the

496. Id.
497. See Raskin, supra note 494, at 770 (arguing that so long as there is a “recognizably religious element in such a display, it constitutes an impermissible endorsement”).
498. See Lynch, 465 U.S. at 693-94 (O’Connor, J., concurring) (articulating endorsement test subsequently applied by majority of Court). I recognize that religious insiders are not necessarily the ones who control the display or send the message. But sacred symbols communicate to, and thus have meaning for, principally those who can decipher and appreciate the message being sent. It is their perspective which should control the “effects” inquiry.
The concept of sacredness is what distinguishes crèches from Santas, reindeer, and garland. As Justice Brennan explained the distinction:

Unlike such secular figures as Santa Claus, reindeer, and carolers, a nativity scene represents far more than a mere "traditional" symbol of Christmas. The essence of the crèche's symbolic purpose and effect is to prompt the observer to experience a sense of simple awe and wonder appropriate to the contemplation of one of the central elements of Christian dogma—that God sent His Son into the world to be a Messiah.

It is difficult to know for certain whether Justice Brennan was justified in the strength of his convictions, whether in fact this was "the essence" of the crèche. But his description finds support in the works of those, like Geertz, who have studied sacred symbols; it at least begins to capture the power sacred symbols have been shown to have for believers.

Reexamined from the perspective of the insider-believer, the crèche is neither mere passive history nor neutral heritage, but an active, sacred symbol representing a particular set of divine, transcendental beliefs. The message believers might be said to decipher from the display of such a holy icon is that the state views their faith not with indifference or hostility, but with something more akin to approval. It should come as no surprise then, that, as the district court found in Lynch, "most observers understood the crèche as both a symbol of Christian beliefs and a symbol of the city's support for those beliefs."

A realistic examination of effects must take into consideration that sacred symbols like crosses and crèches are hardly passive to those who believe in them. When state officials recently threatened

499. Id. at 717 (Brennan, J., dissenting).
500. Id. at 711 (Brennan, J., dissenting) (footnote omitted).
501. See A READER IN THE ANTHROPOLOGY OF RELIGION, supra note 481, at 4 ("Good anthropology understands that religious worlds are real, vivid, and significant to those who construct and inhabit them and it tries, as artfully as it can, to render those realities for others, in their sensory richness, philosophic depth, emotional range, and moral complexity."); see also GEERTZ, supra note 236, at 132-40 (describing emotions evoked by the wajang, or puppet show, a Balinese religious ritual).
to remove the Ten Commandments display from an Alabama courthouse, the faithful reacted with fervent emotions, as if their very faith was under attack.\textsuperscript{503} Courts must seek to recover the meaning of these symbols to the religious. As explained, Geertz's study of religious symbols and rituals indicates that sacred symbols literally order the personal worlds of the faithful.\textsuperscript{504} Sacred symbols explain the inexplicable; they motivate action and generate emotion.

Sacred symbols are, thus, fundamentally different from the symbols to which the Court routinely compares them—paid chaplains, currency inscriptions ("In God We Trust"), public expenditures for textbooks and other benefits, and proclamations of Thanksgiving and Christmas holidays. These gestures, which merely recognize a religious heritage, do not pack any emotional or motivational punch. They are truly passive, incapable of generating emotions, influencing moods, or providing transcendental explanations of the grand mysteries of life. The crèche and the Commandments, whatever they ultimately signify, do not belong to this category of symbols. The benefits that their display confers upon religious believers cannot legitimately be dismissed as merely "incidental."\textsuperscript{505}

In sum, although the \textit{Lynch} Court worried aloud that focusing solely on the crèche would "inevitab[ly] lead to its invalidation under the Establishment Clause,"\textsuperscript{506} it chose a path of interpretive avoidance which, equally inevitably, allows the display of sacred symbols. In the process, the Court simultaneously favored and insulted believers by embracing the fiction that sacred symbols are so powerless, so passive, that they can easily be muted by clowns, trees, reindeer, and other secular symbols. In utilizing this approach, the Court avoided the sticky issue of sacred meaning, but at the cost of a defensible interpretation of the symbolism of the crèche.

\textit{County of Allegheny v. ACLU}, the Court's other major sacred symbol case, demonstrated that the interpretive model is a bundle

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\textsuperscript{503} See supra note 138 (describing recent controversy over the Ten Commandments display).
\textsuperscript{504} See \textit{GEERTZ}, supra note 238, at 127.
\textsuperscript{505} See \textit{Lynch}, 465 U.S. at 683.
\textsuperscript{506} \textit{Id.} at 680.
of conventions, and must be applied as a whole. 507 In Allegheny, the Court examined separate crèche and menorah displays. 508 The plurality simply followed Lynch's approach to the crèche, which this time was displayed all on its own, without the secular cover the Court relied upon in Lynch to drain the symbol of religious meaning. 509 The unmistakable message to government: If you are going to display a sacred symbol, a determination of secular meaning follows only from the display of clowns, trees, and other secular symbols. By contrast, the Court painstakingly described the menorah's sacred origins and nature, including references to the symbol in the Talmud, a description of Jewish law, and the menorah's place within the holiday of Chanukah, which also was described in some detail. 510 But the plurality, following Lynch, once again purported to desacralize the symbol with a secular fig leaf—a forty-five foot Christmas tree, to be precise. 511 Thus, although the plurality provided the very sort of thick description of the menorah which the Lynch Court avoided with respect to the crèche, it once again avoided the semiotic meaning, to believers, of adding the menorah to the display, opting instead to focus solely upon the semiotic meaning of the entire display.

The interpretive model offers a corrective to this form of interpretive avoidance. The model begins from the premise that meaning matters and, more importantly, that meaning is not unitary. The government's purpose, its meaning, in choosing the crèche as a display, varies. Either the government sought to celebrate Christmas generally, or it sought to say something in particular about religion. To even begin to resolve this dispute, courts must access not only the secular history of the holiday, but also the possible meaning of using a sacred symbol in the particular context of the holiday display. Insofar as sources cast doubt upon the government's assertions regarding the place of the Christmas holiday in our culture, there is reason for skepticism. Insofar as an examination of the crèche reveals that it is more than a symbol of tradition, this evidence tends to rebut the government's explanation. Insofar

508. Id. at 578-87.
509. Id. at 598-602.
510. Id. at 582-87.
511. Id. at 614.
as the crèche has characteristics that distinguish it from other symbols which are purportedly similar, there is more reason still to doubt the government's stated purpose. In this way, inference piles upon inference until the most plausible meaning for the sacred symbols is recovered.

In addition to purpose meaning, however, courts also must examine effects meaning. This meaning is, by definition, varied. The endorsement test requires that courts consider the possible meaning of the display to both potential outsiders and potential insiders. At the same time, however, the effects test effectively merges the two by miscasting the inquiry as one regarding the meaning of the symbol to the reasonable observer. This underemphasizes one significant available meaning—that taken from the display of sacred symbols by those who are believers. It is imperative that this meaning not be ignored. Although it is true that courts cannot know the literal meaning of sacred symbols for believers, they can factor this meaning into the inquiry by means of ideal types, as well as anthropological and other knowledge. Courts can achieve intersubjective meanings in this fashion, as they can for symbolic gestures like cross burning and nude dancing. But first they must consider all available circulating meanings, a task currently made impossible under the endorsement test.

Application of the interpretive model does not place courts in the untenable position of acting as theology boards. Rather, it merely requires that they apply the endorsement test from a vantage point which is most likely to reveal governmental purposes in displaying sacred symbols, and offers meaningful access to the effects meanings associated with such displays. In sum, the interpretive model will not lead to definitive accounts of sacred symbols, but it will lead to more defensible interpretations of those symbols than does the current doctrine of interpretive avoidance.

512. This is not a prescription for some sort of reverse minority veto of religion in the public square, where the presence of a few insiders or believers dooms the display. It is likely that menorahs tend to be displayed in or near Jewish communities, and crèches in or near Christian communities. Indeed, looking to outsider stigma, as the Court typically does, is far more likely to result in a sort of heckler's veto of religion, where a few outsiders would control the display of religion in the public square. The emic perspective results, as the Establishment Clause contemplates, in the protection of minorities.
Finally, this Section briefly revisits the expressive association cases by applying the interpretive model to the symbolism of membership. The First Amendment protects a freedom of association, which the Court has held includes the right to exclude certain would-be members from an association or organization. As it was for symbolic conduct and sacred symbols, symbolic meaning is important to an appreciation and understanding of this constitutional right.

Whether an association has a right to exclude depends, in large part, on its ability to demonstrate that inclusion will adversely affect its expressive message. Thus, what it means to be a member of the Boy Scouts, for example, or a Jaycee matters for purposes of the First Amendment. This is a critical inquiry in association cases like Boy Scouts of America v. Dale and Roberts v. United States Jaycees, where the association argues that admission of a certain person or group of persons would adversely affect the group’s function and articulation of a coherent association message. The state, on the other hand, has an important interest in preventing illicit discrimination against groups like women and homosexuals. So courts again are faced with the question of how to access the symbolic meaning of a gesture, here the act of joining an organization.

As in other symbolic gesture contexts, however, the Court has treated meaning here with indifference and avoidance. Specifically, it has not sought to discover what membership means to those who join, but rather to leave the meaning of membership up to associational hierarchies. The interpretive model can assist courts in making difficult decisions about the symbolic meaning of membership. Specifically, the interpretive model directs courts in this and other contexts to first consider the various possible meanings of membership and then to choose the most plausible meaning from among these. Once again, it must be emphasized that there is no claim that membership means one and only one thing to all

513. See infra notes 514-21 and accompanying text (discussing Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000)).
concerned. Rather, what is sought is the most plausible meaning from among the available circulating meanings.

Among the recent association cases, *Dale* brought associational tensions, and the significance of meaning, into sharpest relief.515 The Boy Scouts wanted to exclude Dale, an avowed homosexual, from the organization on the ground that homosexuality is incompatible with Scout membership.516 There are two principal perspectives from which the Court might have approached meaning. The first, and the one chosen by the Court, is the management or corporate governance perspective. The other principal perspective is that of the rank-and-file members, who presumably joined the institution based, in part, on the values and other things that membership represents.

The Court essentially permitted Scout leadership, with virtually no judicial review, to define its own meaning. In concluding that discrimination against homosexuals was integral to the Scouts’ message, the Court repeatedly relied upon organizational leadership’s assertions, most of which were made at or near the time of the litigation, that Scout membership entailed moral cleanliness, a condition the leadership held to be incompatible with homosexuality.517 Thus, the Court accepted one available meaning of Scout membership—“moral cleanliness.”518

Of course, Scout leaders represent the organization, and their beliefs concerning the symbolism of Scout membership should not be ignored entirely.519 From an interpretive perspective, however,

515. *Roberts* and the other association cases which focused on gender raised the same interpretive issue—what does membership in the Jaycees, or the Rotary Club, mean to those who join? See *Roberts*, 468 U.S. at 632-33 (O’Connor, J., concurring in part and concurring in judgment).
516. *Dale*, 530 U.S. at 643-44.
517. Id. at 650.
518. Id.
519. The claim to interpretive legitimacy might be stronger where leaders are elected to their positions. This was apparently not the case with respect to the Scouts. One might object that if leaders are not permitted to define meaning as circumstances require, they will be forced to take positions on all manner of issues in anticipation that their right to exclude might someday be challenged. I fail to see the danger in this; an association ought not be allowed to assert a constitutional right to exclude classes of putative members where they have given the matter no thought whatsoever prior to having their supposed right challenged. Insofar as the leadership is forced to define the meaning of membership in advance, perhaps members will be clearer as to what sort of association it is that they have joined; to the extent that members object to the meaning the leadership has adopted, they
deriving the meaning of membership solely from the self-serving statements of institutional leadership would be tantamount to studying a tribe or village solely by interviewing its elders or officials, who, in addition, have been provided with advance notice of the subjects of inquiry and their significance to the examiner's research agenda. This is a prescription for bias or, at least, an interpretive method which is unlikely to recover the most plausible meaning of membership. It is, after all, the meaning of an institutional culture that is the focus of inquiry. Skimming, and relying upon, the assertions of the leadership, without even checking those assertions against the various contextual facts of membership, falls well short of an appropriate analysis of meaning. In sum, Dale's "corporate governance" model recovers only one possible meaning of Scout membership, and not a very plausible one at that.

Using the interpretive approach, what is needed is a recovery of as many plausible meanings as are available. This necessarily means that in addition to the management perspective, the Court should have inquired as to the rank-and-file perspective as well. This would entail the same sort of examination of meaning as that undertaken with respect to symbolic acts and sacred symbols. Primarily, the convention of thick description would call for an accumulation of the details of membership and, ultimately, an interpretation of meaning from the perspective of the members themselves. This meaning could then be compared to and contrasted with the meaning articulated by management. The most plausible meaning, again, would be the one that is consistent with participant behavior, documentary evidence, and intersubjective understanding.

can seek a change of meaning, or leadership—or they can simply exit the organization.

520. The Court's concern that inquiry into the meaning of membership will impermissibly interfere with organizational autonomy was misplaced. The meaning of membership is a contested issue; there is no basis for simply deferring to the organization under these circumstances. Wholesale deference of the sort utilized in Dale leaves the state at the mercy of associational claims of meaning which threaten to undermine legitimate interests in combating discrimination.


522. See id. at 607-13 (arguing in favor of a member-centric interpretation of associational speech interests).
There is ample evidence available for courts to recover the symbolic meaning of membership from the participant's perspective. There are the facts with respect to the members themselves: Who are they? Why do they join? How do they become members? There are the many details of membership itself—the goals, beliefs, oaths, rituals, publications, and ceremonies, which together comprise the symbolism of membership in the association.523 Recall in this regard the attention the Black Court paid to the rituals, publications, and ideologies of Klan membership.524 There must be testimony from the "field" concerning how the members themselves perceive the mission or message of the organization; what sort of organization did they believe they were joining? There must be an examination concerning what the members in fact do, as members, to further the goals of the association. Finally, there must be an effort to situate the association culturally. As with the Klan, what is the public face and message of this organization? What is its history? How does it portray itself, and how does that portrayal square with the meaning of membership?

This sort of thick analysis may require more labor than courts are perhaps accustomed to, but to approach the matter as the Dale Court did fails to engage seriously the social discourse of associations—what they are saying to putative members, and the rest of us as well. Justice Stevens' Dale dissent was far more sensitive to the complexity of meaning than the majority's approach.525 Although his description lacked certain details—evidence relating to the views of the members themselves, for example—Justice Stevens demonstrated the plausibility of applying something like the interpretive model to the symbolism of membership. Rather than rely, as the majority did, on the assertions of Scout leadership, Justice Stevens examined data—oaths, mission statements, handbooks, testimony, and other sources.526 He did so holistically, with a view to the larger "text" of membership, rather than through a partial selection shaded to coincide with leadership views on the meaning of membership.

523. This is the approach the Court took in Roberts v. United States Jaycees, 468 U.S. 609 (1984), where it found no evidence in the record that inclusion of women as full voting members was incompatible with membership in the Jaycees. See id. at 627.
524. See supra notes 382-98 and accompanying text.
526. See id. at 663-70 (Stevens, J., dissenting).
Based upon his holistic analysis of Scout membership, Justice Stevens concluded that there was no support for the assertion that the Scouts seek to convey any message with regard to sexual orientation, much less one which requires the exclusion of homosexuals. The evidence, the data, led him to an interpretant, or possible meaning, of membership far different from the one the Court ultimately credited—one, perhaps, of “service to the community, leadership, self-reliance, and the appreciation of nature.”

This semiotic conclusion, which is based upon observation, fact-finding, and description, is epistemologically preferable to the majority’s unsupported interpretant, an expression of homophobia based upon supposition, conjecture, and leaders’ assertions.

The Court need not have written an exhaustive monograph of Scout membership in order to have more accurately accessed its meaning. It might have discovered the most plausible meaning among those available simply by reviewing the materials Justice Stevens described in his dissent. In any event, there was little, if any, evidence to support management’s purported meaning. The behavior of the members, their oaths, and the other context was inconsistent with an exclusionary message, particularly one based upon sexuality. By treating the meaning of Scout membership with indifference, and by avoiding other, more plausible meanings, the Court was able to wrench the admonition that Scouts be “morally straight” from its context. This approach exhibits precisely the sort of defects which led to the desacralization of religious symbols. By taking an interpretive, ethnographic approach to membership, courts can correct for this sort of skewing and muffling of the discourse of membership. They can help us to understand what it means to join. And they can more accurately and legitimately adjudicate the constitutional rights to join and to exclude.

527. Id. at 670-71 (Stevens, J., dissenting). Appropriately, Justice Stevens did not refuse to credit the assertions of the Scout leadership altogether, but, rather, analyzed those assertions in light of his overall description of membership. Id. The assertions were laid side-by-side with the facts of membership; they were, in the end, hypotheses discounted by the facts of membership. Id.

528. Chemerinsky & Fisk, supra note 521, at 608.

529. Dale, 350 U.S. at 650.
To this point, this Article has made clear that the interpretive approach does not lead to unitary, "correct" interpretations of meaning. Meaning is far too variant and complex for claims of this sort. Still, ethnographers and judges can seek to better understand, with respect to enigmatic gestures, what the devil is going on. They can render interpretations based upon the various available plausible meanings for a gesture. Because this is the most likely aspect of the foregoing analysis as to which objections will be raised, this Section offers some final thoughts on interpretation and meaning. Specifically, it addresses what are likely to be the two most likely objections to judicial interpretation of the sort I have proposed—that courts lack the institutional competence and authority to interpret symbolic meaning, and that symbolic meaning is hopelessly indeterminate.

1. Semiotic Competence and Interpretive Authority

Interpretation is enormously complicated for social scientists, as well as for natural scientists, who are trained in interpretive techniques and labor under standard conventions and, to some extent, shared languages. It can present even greater difficulties for interpreters who may lack such training and evaluative constraints. Judicial interpretation is certainly less constrained than scientific interpretation. This does not mean, however, that judges lack semiotic competence, a shared interpretive language, or evaluative constraints. Indeed, judicial interpretation has all of these things, which, although different in both kind and degree from their scientific counterparts, suffice to provide a basis for the interpretation of symbolic meaning.

Interpretation lies at the core of the judicial function. Every statute, provision, and rule—not to mention the myriad acts, intentions, documents, instruments, and other ambiguous signs which courts routinely interpret—has a range of possible meanings. Despite interpretive, semiotic, socio-psychological, and other points of indeterminacy, courts interpret these signs and symbols because they are called upon to do so, even if imperfectly. Things could

530. On the complexity of meaning, see generally OGDEN & RICHARDS, supra note 224.
scarcely be otherwise. To avoid the interpretive task on so large a scale is, in effect, to avoid judging altogether.

The centrality of interpretation is as pronounced in constitutional law as in other areas, such as statutory interpretation. On one view, constitutional law is the collective interpretations of courts. The meaning of “liberty,” for example, or “due process,” or “equal protection,” results from an iterative process of judicial interpretation, as well as an ongoing constitutional discourse among courts, governments, and citizens. Of course, some would suggest that the difficulties in interpreting open-ended, amorphous constitutional guarantees are insurmountable, and that courts should abandon the interpretive function. This Article, of course, does not embrace such defeatism. Nor should such objections deter courts from interpreting enigmatic symbolic gestures, which give rise to their own discourse.

To a large degree, interpretation and meaning are constitutionally unavoidable when it comes to symbolic gestures. Black demonstrates this. So do the Court’s decisions respecting sacred symbols and the meaning of membership. What is missing is a systematic method for recovering symbolic meaning, one which requires the consideration of a range of possible meanings, rather than one which permits courts to pick and choose which meanings to consider. The interpretive model provides this sort of discipline.

No special training is required for courts to engage the semiotics of gestures in the manner here proposed. Interpreting symbolic meaning through application of the interpretive model requires only that courts utilize skills and conventions with which they are intimately familiar—fact gathering, detailed description, logic, analysis, and persuasion. Thus, the interpretive ethnographic model does not stretch institutional competence. Indeed, it is much closer to the traditional functions of judging than are natural science concepts like causal reasoning, falsifiability, ratios, and equations, which, as I have suggested elsewhere, have begun to eclipse qualitative methods like description in constitutional interpretation. 532

531. This is not to ignore that the other branches of government, as well as myriad governmental officials, are responsible for making constitutional law. However, the conventional conception of this body of law is rooted in judicial decisions and, hence, judicial interpretations.

532. See Timothy Zick, Constitutional Empiricism: Quasi-Neutral Principles and...
Perhaps, however, the objection might not be to interpretation \textit{per se}, but to interpretation specifically of \textit{cultural} meaning. Sanford Levinson, addressing the example of the Confederate flag, asserts that courts should avoid "the politics of cultural meaning."\footnote{Levinson, \textit{supra} note 1, at 1106.} The concern seems to be that courts will find themselves routinely engaged in the interpretation of highly charged, culturally situated symbols. The underlying fear seems to be for judicial legitimacy; courts, thus, ought to avoid the controversy of cultural meaning for their own preservation.

We need only consult the products of the Supreme Court's most recent term to reject any judicial boundary which is drawn at "the politics of cultural meaning."\footnote{Lawrence v. Texas, \textit{supra} note 344, which overruled Bowers v. Hardwick, \textit{supra} note 355, interpreted the "liberty" guarantee in the Due Process Clause to preclude the government from interfering with private, consensual sex.\footnote{478 U.S. 186 (1986).} In a pair of highly anticipated affirmative action cases—\textit{Grutter v. Bollinger}\footnote{123 S. Ct. at 2411; \textit{Grutter}, 123 S. Ct. at 2325.} and \textit{Gratz v. Bollinger}\footnote{123 S. Ct. 2472 (2003).}—the Court interpreted the Equal Protection Clause to permit taking race into account as one factor in university admissions decisions.\footnote{539. \textit{Gratz}, 123 S. Ct. at 2411; \textit{Grutter}, 123 S. Ct. at 2325.} These decisions are every bit as controversial, perhaps even more so, as an interpretation that the Confederate flag is the "semiotic signifier of an entire system of racial oppression,"\footnote{Levinson, \textit{supra} note 1, at 1100.} that cross burning is the semiotic signifier of a true threat, or that the striptease is the semiotic signifier of a fictitious offer of sex. "Liberty" and "equality" are \textit{symbolic} guarantees which directly implicate the "politics of cultural meaning."

Whether or not decisions like \textit{Lawrence}, \textit{Grutter}, and \textit{Gratz} are characterized as salvos in the ongoing "culture wars," there is no question that they represent \textit{interpretations} of hotly contested...
cultural meanings. Nor are these decisions aberrations; cultural
and political interpretations are common in constitutional law, as
lightning rods like Roe v. Wade541 attest. Far from avoiding “the
politics of cultural meaning,” modern courts regularly embrace,
interpret, and even define it, and they do so utilizing a variety of
intrepretive methods. Historiography accounts in large measure for
the interpretation in Lawrence,542 and Roe is grounded (precariously
for some) upon a hybrid of medical and legal research.543 These
interpretive methods and analyses are subject to criticism—the
historical claims can be checked, even falsified, for example—but
judicial authority to interpret the Constitution is still largely,
although of course not uniformly, accepted.

There will surely be room, as noted below, to contest judicial
interpretations of symbolic meaning, just as there will be contests
regarding the Court’s interpretation of liberty and equality. But
properly utilized, the interpretive model presents no cause for a
strong interpretive skepticism. Even Professor Levinson, who
apparently rejects judicial interpretation of symbolic gestures, is
forced to concede that “good facts” exist from which a court might
interpret Alabama’s display of the Confederate flag as the “signi-
fied” of racial oppression.544 More generally, he refuses, in the end,
to embrace a “universal skepticism” with regard to judicial interpre-
tation of symbolic meaning.545

Professor Levinson is correct to resist a universal skepticism with
regard to symbolic meaning, although this Article ventures further
to reject this sort of skepticism entirely. We cannot avoid the fact
that courts are already interpreting constitutional meaning
generally, and symbolic gestures specifically. What we should seek
is the best interpretation, and what we should be focusing on is not
whether courts should interpret, but how they should do so. As has
been urged throughout this Article, the interpretive model will
improve upon judicial understanding of meaning; it will not make
it unitary, foolproof, or definitive.

541. 410 U.S. 113 (1973).
542. Lawrence, 123 S. Ct. at 2478-80.
543. Roe, 410 U.S. at 141-47.
544. Levinson, supra note 1, at 1104 (internal quotation marks omitted).
545. Id.
2. Judging Meanings

Postmodernists have done much to cast doubt upon the interpretation of meaning in a variety of disciplines, including the interpretive ethnography upon which the suggested model is based. James Clifford and other postmodernists have been unsparing in their critique of interpretive ethnography, arguing that it is undermined by interpretive bias, produces a false sense of cultural stability and universality, and is constituted by, and ultimately supportive of, an ethnocentrism which corrupts cross-cultural comparisons. The entirety of this debate between interpretive and postmodern ethnographers is beyond the scope of this Article. But the claim, often made, that no interpretation of a symbol can be favored over any other aims at the heart of the interpretive model. It therefore must be addressed.

Professor Levinson raises the hermeneutic indeterminacy objection in his discussion of the Confederate flag: "If, though, multiple interpretations are genuinely possible, if the flag is truly polysemous, then how precisely can a federal court (or anyone else) justify in effect negating all other interpretive possibilities save the particular one that it chooses to privilege?" Professor Levinson thus places courts (and the rest of us) within the "hermeneutic circle," the convention typically invoked to represent the indeterminacy and circularity of interpretation. Courts which choose a

546. See Clifford, supra note 12, at 37-41.
547. Levinson, supra note 1, at 1102.
548. For a detailed consideration of the hermeneutic circle, see Bohman, supra note 298, at 113. Briefly, the circle posits as follows: "Everything is interpretation, and interpretation is itself indeterminate, perspectival, and circular." Id.; see also, e.g., Hans-Georg Gadamer, Truth and Method 265-91 (Joel Weinsheimer & Donald G. Marshall trans., 2d ed. 1989). To flesh out this concept just a bit, the hermeneutic circle, according to one contemporary philosopher, consists of three basic elements, or theses: (1) incompleteness; (2) background; and (3) justification. Bohman, supra note 298, at 105-06. Incompleteness refers to the fact that all interpretations are partial, given that an interpretation of each of the parts depends upon an interpretation of the whole, and vice versa. Id. The element or thesis of background holds that all interpretations take place against a background of unspecifiable assumptions and presuppositions, "a network of beliefs and practices not always fully available to the agent." Id. at 105. Or, to borrow a Geertzian turn of phrase once again, the ethnographer interprets "winks upon winks upon winks." Geertz, supra note 15, at 9. Finally, to bring us to Levinson's specific question, there is the element or thesis of justification. How can we justify an interpretation made within the hermeneutic circle if "there is no metalanguage outside of it in which neutral justification is possible!?" Bohman, supra note 298, at 106; see also 2 Charles Taylor, Interpretation and the Sciences of Man, in Philosophy and the
meaning from among possible meanings, he suggests, necessarily have “negated” all other meanings.

The flaw is both in the framing of the question and its implications. First, I will discuss the implications. If meaning is to be jettisoned as indeterminate, what remains of a discipline, what content does it have? The question is particularly germane to constitutional law which, again on one view, consists of a collection of interpretations of constitutional meaning rendered by courts over time. Without interpretation of meaning, then, there would be no constitutional doctrine. Similarly, the doctrine of symbolic gestures is empty, or nearly so, precisely because meaning has been consistently avoided, belittled, or treated with indifference. As I argue below, courts cannot, or at least should not, “balance” without a sense of the content, or weight, they are placing on the expressive end of the scale. Nor should they permit associations to skirt governmental prohibitions on discrimination by deferring to institutional leaders on the meaning of membership. Nor should they desacralize sacred symbols for fear of becoming theology boards.

But what of the question: How can courts “privilege” and “negate” meanings? This Article has accepted, indeed embraced, the concept of various meanings. Every symbolic gesture exhibits, in essence, a “democracy of meaning.” The process of judging meanings does not involve the “negation” and “privileging” of meanings. These terms imply finality and the prospect of unitary meaning. These results already have been rejected as unattainable. As one considers symbolic meaning, there are, as Geertz put it, “methodological pitfalls to make a Freudian quake.” From the beginning, with Peirce, semiotics has similarly acknowledged the inherent indeterminacy of meaning; the interpretant represents only a possible or potential meaning of a sign. As Geertz summarized the interpretive task: “Cultural analysis is (or should be) guessing at meanings, assessing the guesses, and drawing explanatory conclusions from the better guesses, not discovering the Continent of Meaning and

549. James Bohman singles out rational choice and ethnomethodology as disciplines of thought which, while attempting to remove meaning from their programs, simultaneously empty them of all content. See BOHMAN, supra note 298, at 108-09.
550. TAMANHA, supra note 314, at 81.
551. GEERTZ, supra note 23, at 452.
mapping out its bodiless landscape."\textsuperscript{552} Judicial opinions, too, are guesses at meanings. A court which makes an educated guess from socially situated and constructed data makes no pretense to rendering the one “true” meaning of any gesture any more than the same court can purport to finally settle the meaning of “liberty” or “privacy.”\textsuperscript{553}

In sum, this Article has parted company with ethnographic method insofar as it makes any claims to unitary meaning. Possible meanings must be recovered and tested in comparison to other plausible meanings. There are more or less plausible meanings, not “privileged” and “negated” ones. This is true for the symbolic meaning of constitutional provisions as well; there are more or less plausible meanings of “liberty,” not meanings which are entirely negated as a matter of law. Fundamentally, the goal is not to render the meaning, but the most plausible meaning among the available alternatives.

The question, then, assuming the available circulating meanings can be recovered, is whether there is a sound basis for choosing the most plausible meaning from among them. Examples from both law and ethnography demonstrate that such a basis exists, that interpretations can be “evaluated as right or wrong, or better or worse.”\textsuperscript{554} Much depends on the context which is provided through the convention of thick description. This is the evidence against which any interpretation will be judged.

“Interpretations which are inconsistent with the behaviour observed are highly suspect; this includes interpretations which arbitrarily fail to consider integral aspects of the behaviour, or which point to aberrational or unusual behaviour as support for a thesis which purports to describe the meaning of the whole.”\textsuperscript{555} Ethnographers engage in such judgments all the time. Laura Nader, for instance, claimed that the “consensual orientation” of the Zapotec symbolized “a Christian-based, ‘anti-hegemonic’ strategy to

\footnotesize{\textsuperscript{552} GEERTZ, supra note 14, at 20 (emphasis added).}
\footnotesize{\textsuperscript{553} As Geertz wrote in WORKS AND LIVES, in which he examines the history of ethnographic writing: “The moral asymmetries across which ethnography works and the discursive complexity within which it works make any attempt to portray it as anything more than the representation of one sort of life in the categories of another impossible to defend.” CLIFFORD GEERTZ, WORKS AND LIVES: THE ANTHROPOLOGIST AS AUTHOR 144 (1988).}
\footnotesize{\textsuperscript{554} TAMANAH, supra note 314, at 82.}
\footnotesize{\textsuperscript{555} Id.}
keep the colonial legal system at bay.\textsuperscript{556} A later observer, examining the same data, concluded that Nader's interpretation was inconsistent with the actors' behavior, and "was instead a projection by Nader of her own concerns."\textsuperscript{557}

Courts can rely on similar methods and standards. Thus, for example, an interpretation of a sacred symbol which fails even to consider the sacred aspects of its meaning is suspect. Judge Posner's interpretation of the striptease, which failed to consider, or at least minimized, the financial quid pro quo—an integral aspect of the behavior under observation—is suspect to some degree. His interpretation may be suspect as well because it purports to ignore evidence that the actors themselves had a different meaning, or none at all; thus, Posner's interpretation of symbolic meaning may have "little or no connection to the meanings for the actors involved."\textsuperscript{558} An interpretation of cross burning which is inconsistent with other, previous, interpretations may be suspect for that reason.\textsuperscript{559} There are standards by which to judge these, as other, interpretations of meaning.

What the interpreter is (or should be) after is a reading or translation that is epistemologically and otherwise defensible. What the interpretive model aims for are defensible interpretations which can, if necessary, be falsified, or revised, through a process of public adjudication. In the end, a judicial interpretation, like an ethnographic one, is only as valid as the compilation of evidence, description, and reasoning that supports it.\textsuperscript{560} The object is to persuade observers, readers, and participants that meaning has

\textsuperscript{556} Id. at 22; see also Laura Nader, The Anthropological Study of Law, AM. ANTHROPOLOGIST, Dec. 1965, at 3-32.
\textsuperscript{557} TAMANHA, supra note 314, at 82; see also Peter Just, History, Power, Ideology, and Culture: Current Directions in the Anthropology of Law, 28 LAW & SOC'Y REV. 373, 373-411 (1992) (critiquing Nader's interpretation).
\textsuperscript{558} TAMANHA, supra note 314, at 83.
\textsuperscript{559} See id. (suggesting that "the best way to evaluate interpretations is to compare them against other interpretations on various criteria, such as which has better explanatory power and predictive capacity").
\textsuperscript{560} This is not to diminish or discount the power of rhetoric or authorship. As Geertz notes in his analysis of ethnographic writing, rhetoric, style, and personality often have as much to do with the persuasiveness of an interpretation as participant-observation, or the mass of evidence or power of logic which accompanies the interpretation. See GEERTZ, supra note 559, at 138-40. In this regard, Judge Posner's erudite "monograph" on the striptease comes to mind.
been accessed in this case, based upon this evidence—not to deliver interpretive edicts which settle meaning once and for all.

What this means, of course, is that judicial interpretations are falsifiable, and hence revisable. The fact that interpretations are revisable no more undermines or scuttles the interpretive model than the tenuousness of construction of concepts like "liberty" or "commerce" undermines the entire enterprise of constitutional interpretation. Even precedents, as to which there is presumably a strong interest in interpretive stability, are—thankfully—revisable and falsifiable. Bowers, for example, was contested and revised in Lawrence, through a public process of adjudication of its historiographic and other claims. Similarly, the meaning of the striptease is contested, but until someone offers a more valid interpretation of the striptease than that rendered in Judge Posner's Miller concurrence, this interpretation should be considered valid. So too with the Black Court's interpretation of the burning cross, which is subject to revision precisely because it is thickly articulated and elaborated. The crèche and the menorah may validly be deemed deeply religious symbols to believers unless and until contrary interpretations cast doubt upon that meaning. The Boy Scouts might ultimately prevail in convincing a court that their organization represents a certain sexual ideal, but that meaning is certainly not apparent from even a thin, much less a thick, description of current membership.

The important point is that these interpretations can be contested because they are the product of thick description and elaboration, rather than unstated background premises and aesthetic biases. Like other valid legal and constitutional interpretations, they are elaborated, transparent analyses which can be examined for their evidentiary and interpretive soundness. They either convince and persuade, or they do not. The law lacks neither the common language nor the processes for analyzing the rigor and soundness of such interpretations. To be sure, the analysis is hardly scientific—but it is not meant to be. It is, like analysis of ethnographic writing, more in the nature of literary critique, the

analysis of the persuasiveness of a text, opinion, or argument.\textsuperscript{562}

This is familiar judicial and scholarly ground.

The preceding is sufficient to rebut the assertion that judges are trapped within the hermeneutic circle. Interpretations, whether of constitutional phrases and provisions, symbolic acts, sacred symbols, or membership, will always remain contested to a degree. What Geertz has said of the science of anthropology is undoubtedly true with respect to the decidedly unscientific enterprise of constitutional interpretation: "[A]nthropology is a science whose progress is marked less by a perfection of consensus than by a refinement of debate. What gets better is the precision with which we vex each other."\textsuperscript{563} The most ethnographers and judges can hope for is that "revisable, well-warranted interpretive claims may be put forward and criticized."\textsuperscript{564} We have the tools for establishing which interpretations are better, and which are worse. The price of whatever imprecision inheres in interpreting is small relative to the cost of continuing on a course, with regard to symbolic gestures, of interpretive avoidance and indifference.

IV. CONCLUSION: THE BENEFITS OF AN ETHNOGRAPHY OF GESTURES

To this point, the Article has focused mostly on the plausibility of applying the interpretive model to symbolic gestures. It concludes with a summary of the hoped-for benefits from that application.

A. Rejecting Avoidance and Indifference—Recalibrating the First Amendment Hierarchy

Recognizing the centrality of symbols in cultural discourse is a significant first step in redesigning the doctrine of symbolic gestures. Straight away, the interpretive model presents an agenda which differs in significant respects from the current doctrines of interpretive avoidance and indifference. The interpretive model is semiotically sensitive; it embraces meaning, rather than avoiding it or treating it with carelessness or indifference. The first thing the

\textsuperscript{562}. For a discussion of this point, see GEERTZ, supra note 553, at 140.
\textsuperscript{563}. GEERTZ, supra note 14, at 29.
\textsuperscript{564}. Id.
interpretive model accomplishes, thus, is to bring symbols into a position more commensurate with their expressive and cultural significance.

Judicial indifference toward and avoidance of meaning denigrates symbols in ways which are not immediately apparent. Diminishing symbols and symbolic meaning leaves us with a very "thin" conception of what it means to communicate through gestures. By avoiding a finding of meaning, courts silence important discourses and speakers. Thus, one of the appeals of the interpretive model is that it gives courts the tools, and perhaps the fortitude, to participate in a discourse which they have largely avoided. It allows courts to communicate with, or at least to conceptualize communicating with, "the other"—those who reside in cultures that are unknown, foreign, and often marginalized under the First Amendment.

It bears considering what accounts for the current second-class status of symbols under the First Amendment. This hierarchy, which originated in the free speech area, has over time been extended to sacred symbols and symbolic association. The hierarchy was flawed when it originated, and it remains so. Words, of course, are nothing other than verbal symbols—they stand for or represent something, to paraphrase Peirce. Yet words are treated as core First Amendment concerns, while symbols are denigrated or treated with indifference. What accounts for the differential treatment of oral symbols (words) and nonverbal symbolic gestures?

There appear to be three primary obstacles to a full appreciation of symbolic gestures. The first, addressed above, is the unfounded leap from the indeterminacy of meaning to a universal skepticism with regard to interpretation of all symbolic gestures. Once courts recognize that they are not being called upon to "privilege" or "negate" meanings, nor to settle meaning for all time, but only to choose the most plausible meaning among those currently available, perhaps this obstacle will be removed. This objection should not deter courts from interpreting symbolic gestures, whether they consist of conduct, the display of sacred objects, or something else.

The second thing which tends to drag symbols down is the unfounded judicial fear that full recognition of symbolic expression

would somehow leave much harmful conduct outside the reach of legitimate regulatory concerns. This is a particular concern where symbolic conduct is at issue. The Court made clear in O'Brien its discomfort with conceding that all conduct communicates, even if this is so. For then, even socially harmful conduct, such as violent crime, would be entitled to constitutional protection. This would make it practically impossible for the judiciary to administer claims of expressive conduct.

Why these arguments maintain any hold either on doctrine or the judicial imagination is an utter mystery. The Court itself suggested a means of closing the feared floodgates in Spence, where it required as a preliminary matter that symbolic gestures be intended to communicate something and that an audience would likely understand what was being communicated. Most violent crimes would fail either one or both elements of this definition of "speech." Further, as a matter of now settled First Amendment doctrine, not even verbal speech is entitled to absolute First Amendment protection. As Professor Nimmer argued in one of the earliest defenses of symbolic expression, all symbols which communicate—whether words or gestures—are subject to regulation if the state's interest is strong enough. So long as the state

566. See supra note 49 and accompanying text.
567. See supra note 65 and accompanying text.
568. See Nimmer, supra note 565, at 44-46. Thus, by merely acknowledging the communicative aspect of gestures, courts do not necessarily commit themselves to protecting all forms of expression. I have presented cockfighting as an interpretive act, for example, but I would not suggest that the state has only an anti-speech interest in regulating this symbolic ritual. The prohibition, in the United States and elsewhere, is based upon, among other things, an aversion to animal cruelty and interests in public health and safety. See, e.g., Miller v. Civil City of South Bend, 904 F.2d 1081, 1097 (7th Cir. 1990) (Posner, J., concurring) (arguing that bullfighting, which conveys "grace, courage, suffering, fear, beauty, cruelty, splendor, and machismo," is plainly expressive, yet just as plainly proscribable by the state based upon health and safety concerns). Consider as well the argument that when urban youths flee the police, they are communicating something other than guilt, or potential guilt. See Herbert, supra note 364. This is precisely the sort of argument that most concerns courts. The interpretive model must be applied with some common sense and judgment. It does not jettison basic First Amendment principles; it works within them. With regard to flight, as an initial matter it is doubtful that the youths can meet the Spence standard—that they intended to communicate something to an audience that was likely to understand the message. Let us assume this hurdle is cleared. Perhaps an emic, thick description of the plight, and flight, of urban youths would yield an interpretation of meaning beyond guilt—perhaps, as the commentator suggests, a (well-founded) fear of the police. This would make the balancing calculus fairer, if only because it places something on the youths' end of
demonstrates that it has a “non-speech” interest in regulating, the regulation, whether of verbal or nonverbal expression, will likely be upheld.\footnote{569}

The third obstacle to an appreciation of the communicative substance of symbolic gestures is judicial bias against “unconventional” cultures and their methods of communication. This, again, is of particular concern where speakers use conduct, rather than words, to express themselves. It seems safe to assume that those who conceived the First Amendment did not have sleeping or nude dancing foremost in their minds. To purists or skeptics, the very notion that nude dancing, for example, is constitutionally protected speech is difficult enough to accept. But to say that the striptease expresses something concrete and specific is, no doubt, odder still to those who want to preserve expressive protection for some formal category of conventional “speech.”

As Judge Posner explained, the notion that nude dancing is art strikes judges as ridiculous in part because most of us are either middle aged or elderly men, in part because we tend to be snooty about popular culture, in part because as public officials we have a natural tendency to think political expression more important than artistic expression, in part because we are Americans—which means that we have been raised in a culture in which puritanism, philistinism, and promiscuity are complexly and often incongruously interwoven—and in part because like all lawyers we are formalists who believe deep down that the words in statutes and the Constitutions \emph{sic} mean what they say, and a striptease is not a speech.\footnote{570}

the scale, if it indeed belongs there. Even so, we must still ask whether the government’s interest in approaching these youths is content neutral, or, in Nimmer’s parlance, is associated with a “non-speech” interest. \emph{See} Nimmer, \emph{supra} note 565, at 38. The interest in law enforcement would appear to meet that standard. Now, even if the youths are expressing their fear, I suspect most courts still would conclude that the government’s interest in law enforcement outweighs the expressive interest of those who fled the scene. Although we are better off acknowledging that a message is being conveyed, the First Amendment is not so hopelessly inflexible that it constrains government simply because a message can be perceived.

\footnote{569. \emph{See} Nimmer, \emph{supra} note 565, at 38 (defining “non-speech” interest in regulating expression as “an interest by the state in suppressing or regulating a nonmeaning effect”).

\footnote{570. \emph{Miller}, 904 F.2d at 1100 (Posner, J., concurring).}
But neither were the Framers, in all likelihood, thinking of art, music (which can be verbal or nonverbal), and non-nude dancing, if they in fact narrowly conceptualized "speech." Yet, as Judge Posner persuasively argued in his *Miller* concurrence, no one seriously contends that these cultural symbols are entitled to less than full First Amendment protection. All of the traditional rationales that have been generated to defend expression—for example, the generation of a marketplace of ideas, self-fulfillment, and self-governance—apply with at least equal weight to symbolic gestures. Perhaps, then, judicial acceptance of gestures like nude dancing is withheld, as Judge Posner suggested, because judges, drawn from a cultural elite, do not see the value, aesthetic or otherwise, in them.

The interpretive model is offered, in part, as a prescription for such raw bias. Ethnographers can teach something by their willingness to understand foreign cultures and their symbolic gestures. By requiring detached observation and thick, emic description of symbolic gestures, the interpretive model will force courts to confront symbolic meaning, and to do so, one hopes, not based solely upon self-interpretation but in part from the perspective of those for whom the gestures have meaning. This is, necessarily, challenging work. Judges should confront their biases, and seek to overcome them, by engaging in rigorous analysis of the gestures which appear most enigmatic to them, and often to us. As ethnographers have struggled with the "other" in their discourse, so too must judges, and for much the same reasons. As ethnographers seek to transcend the ethnocentrism which threatens their discourses, courts should seek to transcend this verbal-centrism, which invariably results in a fractional First Amendment discourse.

It is hoped that the interpretive model will result in greater appreciation and understanding not only of the substance of gestured communication, but also of the emotive power of symbols. More than "mere" words, symbolic actions especially, but also sacred symbols and, to a lesser extent, even membership, pack

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571. *Id.* at 1096, 1098 (Posner, J., concurring).

572. See Nimmer, *supra* note 565, at 33-34 ("Most would agree that it is the freedom to express ideas and feelings, not merely the freedom to engage in verbal locutions, which constitutes the core meaning of the first amendment.").
emotive content which, as Professor Nimmer noted, "can be fully as important as the intellectual, or cognitive, content in the competition of ideas for acceptance in the marketplace." In this regard, Black is something of an improvement on Barnette and other symbolic gesture precedents, which failed, it seems, to fully appreciate the emotive element of symbolism. Unconventional modes of expression generally are utilized because conventional modes fail to carry messages effectively, not to strain governmental resources or place property or people in harm's way. Sacred symbols evoke emotions in the faithful. They are sometimes used for this very reason. Even membership can be infused with an emotive significance which arises from common goals, comradery, and esprit de corps.

A failure to appreciate symbols, and symbolic power, has wrongly pushed symbolic gestures to the bottom of the speech hierarchy. Symbolic gestures are treated as unworthy, inaccessible, and nearly valueless forms of expression. Yet to those who use them, symbolic gestures are critical, fundamental, sometimes even world-ordering vehicles of communication and meaning. Courts should ask, as Geertz and interpretive ethnographers have: What is the “said” of this gesture? What does the symbol mean to those who are gesturing, or observing, to believers in the sacredness of sacred symbols, to joiners of associations?

B. Constitutional Balancing and Semiotic Precision

Interpretation and meaning are often unavoidable where symbolic gestures are concerned. This is undeniably true where a gesture is alleged to be categorically proscribable as was true of cross burning in Black. But it is also true with regard to other symbolic acts, which should not be dismissed or "balanced" without some effort being made at translation. Meaning is already at the heart of the Establishment Clause, even if the Court treats it

573. Id. at 34.
574. This is so not in the same life-or-death sense Geertz stresses in his consideration of symbol systems, but gestures nevertheless enhance communication in significant ways. See supra notes 227-31 and accompanying text. Sometimes verbal symbols do not suffice to carry, or fall short of encapsulating, a message or expression. So speakers turn to other means—they gesture, order their lives by sacred icons, and join together with others to make a collective point.
carelessly or seeks to avoid it entirely. And it resides near the core of the associational right as well, at least in instances where groups seek to exclude others.

Placing symbolism where it belongs has implications for constitutional decision making. Right now, speech gestures are balanced away rather easily. In most gesture cases involving symbolic conduct, for example, the interests of the state are arrayed against unknown and undifferentiated “messages” delivered via unconventional and, thus, largely underappreciated channels of expression. There is, of course, the typical acknowledgment that the gesture speaks, without any concern for what it is saying, or why it is being said in this manner. As the course of adjudication has demonstrated, a judicial approach which is reluctant, to say the least, to ascribe specific messages to symbolic gestures cannot but end in a determination that the state has not targeted any particular message.

Courts need to remove the thumb from the constitutional scale. Fundamentally, how can we know whether the government is pursuing, to use Nimmer’s phraseology, a “non-speech” or an “anti-speech” interest if we remain wholly ignorant of the message, or “meaning effect,” that is intended? It is easy to conclude that no message is targeted where none is translated. This explains, in part, why nude dancing has been such a vexing issue for the Court. On one side are those justices who, while willing to “count” nude dancing as speech, refuse to interpret it as conveying a specific message, and thus invariably conclude that only a non-speech interest is implicated. On the other side are those justices who see a specific message and conclude that it is this message, not the mere state of nudity, which the state seeks to prohibit. Both sides may be faulted—the message avoiders for avoiding the critical issue of meaning, and the message perceivers for failing to support their interpretation with sufficient evidence. But as between these positions, at least the perceivers attempted an honest balancing of interests. Judge Posner, who delivered an imperfect interpretation of his own, at least demonstrated in Miller how balancing might be more honestly and effectively pursued where meaning is more systematically and carefully engaged.

576. See supra Part III.C.
The same sort of skewed, warped balancing occurs in membership cases. The First Amendment protects the right of association, but the right is not absolute. Expressive rights must be balanced against state interests in, for example, the prohibition of discrimination, whether based on race, gender, sexual orientation, or some other trait. Where an association claims that such state interests infringe its freedom of expressive association, the symbolic meaning of membership is implicated directly. If courts are to balance expressive and state interests, they should inquire as to what membership means to those who join, not only to those for whom winning the litigation is paramount. The corporate governance model improperly places a thumb on the organization's side of the scale. This does not suggest that courts ignore governance meanings, but only that those meanings are only some of the available circulating meanings which must be assessed and placed in the constitutional balance.

As mentioned, the interpretive model is also likely to provide a better understanding of the emotive significance of symbolic gestures. This has important implications for balancing as well. In the usual case, as in Clark, symbolic gestures packed with emotion and feeling are drained entirely of their emotive content.\textsuperscript{577} Gestures are calibrated at the level of a whisper, even if they may be shouting something important. Without any effort to access meaning, these gestures are readily reduced to conventional pleas which may be made elsewhere, even if they are desperate cries for help made in the only outlet, and in the only manner truly available to the speaker for a particular message. Regulations, almost by definition, become "incidental" burdens on expression (again, of what?), outweighed by substantial governmental interests which the Court is sometimes quite willing, as in Barnes, to simply guess at.\textsuperscript{578}

Further, a consideration of context is supposed to be part of the basic inquiry under Spence.\textsuperscript{579} As they sidestep meaning, however,

\textsuperscript{577} See supra notes 485-86 and accompanying text.
\textsuperscript{578} See Barnes v. Glen Theatre, Inc., 501 U.S. 560, 567-68 (1991) ("It is impossible to discern, other than from the text of the statute, exactly what governmental interest the Indiana legislatures had in mind when they enacted this statute, for Indiana does not record legislative history, and the State's highest court has not shed additional light on the statute's purpose.").
\textsuperscript{579} See supra note 71.
courts paint context out of the picture. What little context remains is limited to the barest of particulars and the thinnest of descriptions. The homeless want to sleep in a park, but which park, and why? The Boy Scouts want to exclude homosexuals, but why and according to which precepts of membership? Dancers strip, but is there anything to how they do so? In each case, the expressive interest cannot be adequately described or weighed without this critical contextual information. We have a notion (a "firstness") of sleep, dancing, and scouting, but we cannot come close to reaching its meaning ("thirdness") without context, without description.

The same problems with emptying symbols of their emotive and contextual aspects have arisen with respect to sacred symbols, like crèches and menorahs. Under current doctrine, whether these symbols offend the Establishment Clause depends almost entirely on the immediate context of their display, and the effect of the display on rational or reasonable outsiders. This is so despite the fact that the Court's own "endorsement" test contemplates a consideration of the insider's perspective. That, as demonstrated, is precisely what is left out of the "objective observer" formulation. These are, after all, religious and cultural symbols; they have significance beyond their proximity to reindeer and clowns. Sacred symbols may convey nothing to all but the most offended "reasonable" nonbelievers. But they convey deep emotions and transcendental beliefs to the faithful. Without an appreciation of their meaning to believers, sacred symbols have been thinned to near nothingness, and denigrated in the eyes of those, as Geertz explains, for whom these symbols provide meaning for life experiences and explain the otherwise inexplicable. Courts have all but ignored the "said" of sacred symbols, their sacredness, under the endorsement test.

In sum, by recognizing that meaning matters, the interpretive model simultaneously reduces the influence of judicial biases and presuppositions, evens out the process of constitutional balancing, and puts the sacred back in sacred symbols. It does so by providing a method for accessing meaning, the missing link in symbolic gesture cases.

We must, of course, have realistic expectations about what the model can produce. Judges, like ethnographers, cannot render

580. See supra notes 226-28 and accompanying text.
definitive or unitary accounts of meaning. But neither are they bound to indeterminacy within the hermeneutic circle. Constitutional interpretation must be more flexible than that if constitutional law is to survive. We do not, because we cannot, insist upon a definitive account of "liberty" under the Due Process Clause. Similarly, we do not, because we cannot, insist upon a definitive account of the meaning of cross burning, or nude dancing, or the crèche, or Scout membership. What we can insist upon is a reasoned explication of meaning, based on evidence, which can be inspected according to the usual conventions of judicial persuasiveness and legitimacy. If need be, these overt explications could then be revised or reversed.

The alternative to conscientious interpretation of meaning is presently before us—a general disrespect for symbolism and careless interpretation which elides sacred influence and cheapens the message of membership. Judges who refuse to study, to describe, and to face up to the interpretive challenge are left only with the compass of their own biases and preferences. Even if the interpretive model will merely serve to rescue us from this course, it is well worth considering.