

Glory—Old, New, and Changing: What Nationalism and the American Flag Can Teach Lawyers About Citizenship and Justice

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INTRODUCTION

On January 6, 2021, during the mostly ceremonial joint session of the Senate and House of Representatives,¹ violent insurrectionists attacked the United State Capitol in a scene of violent mayhem and seditious domestic terrorism.² Starting immediately in the hours that followed, most lawmakers continued to perform their constitutional duties while some expressed muted sympathy with the aims of the rioters even while condemning their violence.³ Commentators wrote opinion pieces, law enforcement made arrests, and citizens across the country watched in combinations of shock, sadness, and well-worn resignation.⁴ Just over one month after the attack—and despite a thorough presentation by the House Impeachment Managers—Donald Trump was acquitted by the United States Senate for his role in inciting this insurrection.⁵ In the months and years to come, much must be done to address this event, and to tackle the deep underlying civic rot that led to this moment’s possibility. Lawyers have a role to play in that endeavor. Not only those in specific career paths nor only those with particular interests, but every lawyer who would live up to the requirements of the profession.

The Preamble to the *Model Rules of Professional Conduct* (“*Model Rules*”) states that a lawyer is to be a “public citizen having special responsibility for the quality of justice” and must “further the public’s understanding of and confidence in the rule of law and the justice system.”⁶ Taking these professional responsibilities seriously could transform the legal profession and begin the repair necessary

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1. See U.S. CONST. amend. XII; 3 U.S.C.A. § 15.

2. *Today’s Rampage at the Capitol, as It Happened*, N.Y. TIMES (Jan. 6, 2021), <https://www.nytimes.com/live/2021/01/06/us/washington-dc-protests> [https://perma.cc/JL7G-BKCQ].

3. See Danielle Abril, *Congress members under siege in Capitol tweet their shock and frustration*, FORTUNE (Jan. 6, 2021) <https://fortune.com/2021/01/06/dc-riots-tweets-congress-senators-representatives-reactions-capitol-mob-2020-election-trump-supporters/> [https://perma.cc/S9AG-7HLX].

4. See Peter Grier, et. al., *Whither democracy? Americans weigh in on siege of the Capitol*, CHRISTIAN SCI. MONITOR (Jan. 7, 2021), <https://www.csmonitor.com/USA/Politics/2021/0107/Whither-democracy-Americans-weigh-in-on-siege-of-the-Capitol> [https://perma.cc/83GB-EUE6].

5. Karoun Demirjian & Tom Hamburger, *‘One down, 44 to go’: Inside the House impeachment teams’ uphill battle*, WASH. POST (Feb. 17, 2021), <https://www.washingtonpost.com/politics/interactive/2021/impeachment-managers-trump-trial/> [https://perma.cc/M7SY-LRH3].

6. MODEL RULES OF PROF’L CONDUCT pmbl. (2018) [hereinafter MODEL RULES].

to address the events of January 6, 2021, and the conditions that made possible such an event. Even before the attack on the Capitol, our present moment was one of both rising nationalism and deep concern over declining national unity.⁷ In this moment, the responsibilities enumerated in the Preamble to the *Model Rules* take on new urgency and deserve greater exploration.

According to the Preamble, lawyers should strive to “improve the law” and are tasked with “a vital role in the preservation of society.”⁸ In this moment of crisis, such a role should be welcomed—and better understood. But the language of the Preamble deals in abstract notions, and the meaning of such concepts as “public citizen” go unaddressed in the individual rules that follow. To give meaning to the aspirational language of the Preamble—and to understand the crosscurrents of ideology that erupted in the riot at the Capitol—requires an investigation of American nationalism, which in turn compels a focus on national symbols.

“Symbolism,” the Supreme Court said in 1943, “is a short cut from mind to mind.”⁹ In the sprawling, multi-faceted project of putting texture to the aspirational words of the Preamble, this Note takes that “shortcut.” By analyzing divergent understandings of national symbols, this Note takes a shortcut to understanding the ideas beneath the symbols. It is an insight into the country’s 350 million minds and a guide to how lawyers might live up to the requirements of the profession.

Different views of the country’s most cherished symbols reflect different embodiments of American national identity. One view frames American symbols as powerful, unquestionably positive, and largely unchallengeable. A second approach acknowledges the power of symbols, but sees their power utilized in harmful ways and responds by undermining and repurposing symbols to critique their conventional message. A third approach embraces and co-opts the symbols and their underlying principles to subversively and dynamically manifest something new. Whether upholding traditional notions of American identity or dissenting from them, criticizing venerated ideals or extoling the country to more fully embody them, the country’s symbols are indeed shortcuts—and understanding their meaning provides an insight into distinct notions of American national identity.

This Note uses different conceptions of the American flag as illustrations of distinct approaches to American national identity. These different versions of national identity provide texture to the nebulous concepts of “public citizen,” “quality of justice,” and “confidence in the rule of law” that appear in the Preamble, and they provide a pathway to repairing the fundamental problems facing American democracy. In Part I, this Note outlines the urgency for every lawyer to act in protection of our democratic system, and the precedent and obligation to do so. Part II explores the meaning of American

7. See Sapna Kumar, *Innovation Nationalism*, 51 CONN. L. REV. 205, 207 (2019); Lydia Saad, *Americans’ Concern Grows About Government, National Discord*, GALLUP (Jan. 25, 2021), <https://news.gallup.com/poll/328754/americans-concern-grows-government-national-discord.aspx> [<https://perma.cc/LJ2X-AATB>].

8. MODEL RULES pmb1.

9. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943).

identity and the bearing of that abstract concept on an interpretation of the Preamble to the *Model Rules*. In Part III, this Note analyzes views of the American flag in law and beyond and how these views illustrate three distinct visions of American identity. This Part also provides illustrations of what each conception of American identity might look like when put into practice to address the January 6 insurrection and other pressing issues of democracy. Part IV describes the power of American symbols in legal argument, in general, and the way that lawyers seeking to strengthen American democracy should make use of such arguments under the *Model Rules*.¹⁰

I. WHY LAWYERS MUST ACT TO PROTECT DEMOCRACY

The most fundamental precepts of American democracy are under threat, through a combination of long-simmering structural inequities and newly explosive threats of the moment.¹¹ This section first enumerates some of the most pressing concerns, and second explains the basis for the unique responsibility of those in the legal profession to respond to them—and the transformation that could occur if they did.

A. DEFINING THE THREAT

In the immediate aftermath of the attack on the United States Capitol on January 6, it was not obvious what exactly to call the event.¹² But it was clear that the attack contained within its shambolic amalgamation of violent grievance, numerous of the most pressing issues of our time: the strength of democracy,¹³ racial justice,¹⁴ police conduct,¹⁵ health and healthcare,¹⁶ and the intermingled

10. An analysis simply of the symbolism on display during the January 6 attack on the Capitol could be an entire article unto itself. Thin Blue Line flags, Gadsden flags, images of Donald Trump superimposed on the American flag, rioters donning pseudo-Native American costumes, throngs of white men chasing a Black police officer up the stairs in the Capitol, a rioter dangling by one hand from the gallery and partially obscuring the engraved words *ANNUIT COEPTIS* as he drops to the floor of the Senate chamber, a gallows erected on the National Mall: these are semiotic bullhorns that both demand and transcend analysis.

11. See *Weatherhead Research Cluster on Challenges to Democracy*, HARVARD UNIVERSITY, <https://populism.wcfia.harvard.edu/about> [<https://perma.cc/Q892-P988>] (last visited Feb. 26, 2021).

12. See Jill Lapore, *What Should We Call the Sixth of January?* NEW YORKER (Jan. 8, 2021), <https://www.newyorker.com/news/daily-comment/what-should-we-call-the-sixth-of-january> [<https://perma.cc/T587-HD2Y>].

13. See Michael Brenner, *Pre-Nazi Germany tells us the fight to save American democracy is just beginning*, WASH. POST (Jan. 9, 2021), <https://www.washingtonpost.com/outlook/2021/01/09/pre-nazi-germany-tells-us-fight-save-american-democracy-is-just-beginning/> [<https://perma.cc/7JT8-9ULX>].

14. See Ellen McGirt & Aric Jenkins, *Don't talk about the Capitol siege without mentioning white privilege*, FORTUNE (Jan. 8, 2021), <https://fortune.com/2021/01/08/capitol-riot-protest-white-privilege> [<https://perma.cc/BY6C-3YB3>].

15. Leah Donella, *How The Storming Of The Capitol Was — And Wasn't — About Police*, NPR (Jan. 7, 2021), <https://www.npr.org/sections/codeswitch/2021/01/07/613802462/how-the-storming-of-the-capitol-was-and-wasnt-about-police> [<https://perma.cc/6CVW-TT3K>]; Neil MacFarquhar, *Police officers who traveled to Washington are being investigated for connection to the Capitol melee*, N.Y. TIMES (Jan. 9, 2021), <https://www.nytimes.com/2021/01/09/us/politics/capitol-police.html> [<https://perma.cc/27YZ-3PYA>].

16. Daniella Diaz & Phil Mattingly, *Capitol attending physician warns lawmakers and staffers of potential Covid-19 exposure following riot*, CNN (Jan. 10, 2021), <https://www.cnn.com/2021/01/10/politics/capitol-covid-19-exposure-lawmakers/index.html> [<https://perma.cc/TQ2V-6K93>]; Carla K. Johnson & Lisa Marie Pane, *On day*

issues of false information and election security,¹⁷ to name a few. The events of that day must also be taken in context of a summer of COVID-19 lockdowns and racial justice uprisings, a fall dominated by a bitterly contested Presidential campaign, and a winter of disputed election outcomes and increasing polarization and dissent.

Of particular relevance to this Note are the issues of democracy and justice that the attack on the Capitol brought into stark relief but which have been bubbling closer to the surface of mainstream discourse for years. In a recent op-ed in the *New York Times*, Sherrilyn Ifill, the president of the NAACP Legal Defense Fund, cited the *Model Rules*' prohibition on abusing the legal system in arguing that lawyers who filed lawsuits to delay the certification of the 2020 election should face professional consequence.¹⁸ This should be a bare minimum. A more expansive view of the obligations set forth in the *Model Rules* would require lawyers to affirmatively address the inequality constitutionally baked into the electoral college system and the United States Senate, rampant Congressional gerrymandering, intentional voter suppression, and a justice system lacking fundamental justice, particularly for Black Americans. These varied but intertwined issues pose a grave threat to American democracy, and lawyers should not duck their responsibility to address them head-on.

B. THE LAWYER'S RESPONSIBILITY

The *Model Rules* provide extensive guidance for how lawyers should interact with and represent their individual clients but focus little on broader responsibilities to the legal profession or the country.¹⁹ The Preamble however, is an exception, setting forth both tone and purpose.²⁰ It states that a lawyer is a "public citizen having special responsibility for the quality of justice," and must "further the public's understanding of and confidence in the rule of law and the justice system."²¹ This role is an addition to the other roles a lawyer fills as a member of the legal profession: that of client representative, and officer of the legal system.²²

These other roles were included in the *1908 Canons* that preceded the current *Model Rules*; additional requirements were included when the Preamble was

Capitol was stormed, the US recorded its highest daily COVID-19 death toll to that point, CHI. TRIB. (Jan. 8, 2021), <https://www.chicagotribune.com/coronavirus/ct-nw-covid-19-deaths-january-6-20210107-a3d3nn4tvfdwhnpyb2tqjyqqq-story.html> [https://perma.cc/PV2U-J3ZK].

17. See Davey Alba & Sheera Frenkel, *Watch out for this misinformation when Congress meets to certify the election*, N.Y. TIMES (Jan. 6, 2021), <https://www.nytimes.com/2021/01/06/business/election-fraud.html> [https://perma.cc/CT6F-NJU3].

18. Sherrilyn A. Ifill, *Lawyers Enabled Trump's Worst Abuses*, N.Y. TIMES (Feb. 12, 2021), <https://www.nytimes.com/2021/02/12/opinion/politics/trump-lawyers.html> [https://perma.cc/9LSE-ZU83].

19. See generally MODEL RULES.

20. Andrew Olson, *Authoring a Code of Ethics: Observations on Process and Organization*, <http://ethics.iit.edu/ecodes/authoring-code> [https://perma.cc/7BZX-K29N].

21. MODEL RULES pmb1.

22. *Id.*

rewritten in 1969 in the wake of the civil rights movement, incorporating something of the spirit of that time,²³ and again with the addition of the “public citizen” language in 1983.²⁴ While the inclusion of this public-interest focused phrasing in the Preamble was largely focused on addressing socio-economic disparities and lack of adequate legal representation,²⁵ the potential ramifications are even broader.

The Preamble’s command of furthering public understanding and confidence and filling the role of public citizen goes far beyond minimalist civics education like memorizing the names of current Supreme Court Justices.²⁶ Indeed, according to the Preamble, lawyers should strive to “improve the law” and are tasked with “a vital role in the preservation of society.”²⁷ If taken seriously, the Preamble provides an imperative for lawyers to take proactive steps in the service of democracy and justice.

This expansion of the Preamble requires lawyers to act beyond their own narrow interests or that of their clients, particularly in moments of national crisis.²⁸ In the wake of the terrorist attacks of September 11, 2001 and the tragedy of Hurricane Katrina in 2005, lawyers in New York and New Orleans stepped up to volunteer and fill the need for legal services in each of those seismic moments of American crisis.²⁹ While the January 6 attack bears certain similarities to those previous moments of crisis,³⁰ the need for legal work is less obvious and less direct. It is not the families of victims or persons displaced by flooded streets who need lawyers, it is the country itself. The many problems festering beneath the surface represent no less a crisis and the expanded Preamble compels action. Twenty years ago, after describing a catalogue of societal ills and polarized political reality, Law Professor Kenneth Karst put forth the question, “Where will it all end?”³¹ The events of January 6 suggest, if not an end, an inevitable next step, and one in desperate need of attention.

Courts have had little occasion to interpret the Preamble or the identically worded preambles in the *Model Rules* of various states. A district court noted that a lawyer disbarred for engaging in frivolous litigation had violated the “special responsibility for the quality of justice” in New York’s *Model Rules*,³² and the

23. See Douglas L. Colbert, *Professional Responsibility in Crisis*, 51 *How. L.J.* 677, 699–701, 708 (2008).

24. *Id.* at 708.

25. *Id.* at 685.

26. Mark O’Halloran et. al., *The Importance of Judicial Outreach in Our Time, and Its Connection to A Divided Past*, *JUDGES’ J.* (Fall 2019), at 5.

27. MODEL RULES pmb1.

28. See Colbert, *supra* note 23 at 684.

29. See *id.* at 715, 721–22.

30. See, e.g., Ed Pilkington, *Fears over Biden inauguration security mount after US Capitol attack*, *GUARDIAN* (Jan. 9, 2021), <https://www.theguardian.com/us-news/2021/jan/09/biden-inauguration-security-capitol-trump> [<https://perma.cc/Q6Z2-PS6D>] (quoting former Homeland Security Secretary likening the attack on the Capitol to 9/11).

31. Kenneth L. Karst, *The Bonds of American Nationhood*, 21 *CARDOZO L. REV.* 1141, 1142 (2000).

32. *Sibley v. Watches*, 460 F.Supp.3d 302, 309 (W.D.N.Y. 2020).

Eighth Circuit found that a lawyer who filed a fraudulent insurance claim had likewise not lived up to the expectations of “public citizen” placed on him by Arkansas’ *Model Rules*.³³ The proper interpretation of these phrases in the Preamble however should not be limited to such narrow readings.

To more fully appreciate the scope and contours of what that obligation truly is requires an investigation into the meaning of the terms “public citizen,” “quality of justice,” “improve the law,” and “preserve society.” That investigation requires examination of the entity of which one is a citizen, that purports to ensure that justice, and for which improvement and preservation are undertaken: the United States itself.

II. NATIONAL IDENTITY: WHO “US” IS

In response to the events at the Capitol on January 6, 2021, a common refrain was “this is not who we are.”³⁴ Others responded that to the contrary, it is exactly who we are,³⁵ while still others rejected this essentialist binary.³⁶ To evaluate these claims requires a deep dive into who the “we” is at issue, what we might be instead, and what it means for “us” to be anything at all. These are questions of national identity.

The crux of any exploration of national identity is the question of who gets to be considered part of the “us.”³⁷ In a country of over 350 million people, starkly polarized ideologies, and a tumultuous history of both rejecting oppression and re-entrenching it, it can almost seem folly to try to identify a unified notion of what it means for “us” to want or be anything. However, the nation is the central source for people’s rights and responsibilities as citizens,³⁸ so it makes sense to look to the nation to understand them. And the nation is also something more than its geography or its government,³⁹ so it makes sense to focus on national identity.

33. *United States v. Post*, 25 F.3d 599, 600–01 (8th Cir. 1994).

34. *E.g.*, Joe Biden, “Remarks to the Nation as Prepared for Delivery by President-elect Joe Biden in Wilmington, Delaware,” PRESIDENT-ELECT JOE BIDEN – OFFICIAL TRANSITION WEBSITE (Jan. 6, 2021), <https://buildbackbetter.gov/speeches/remarks-to-the-nation-as-prepared-for-delivery-by-president-elect-joe-biden-in-wilmington-delaware/> [https://perma.cc/87B5-4CM4].

35. *E.g.*, Tim Tai, *These Capitol riot pictures shouldn’t surprise you. They show an American truth*, PHILA. INQUIRER (Jan. 9, 2021), <https://fusion.inquirer.com/opinion/commentary/capitol-breach-not-america-far-right-extremist-rallies-20210109.html> [https://perma.cc/ZH87-97QF] (“When you examine the photographs of Wednesday’s insurrection alongside images of other historical events, you begin to realize, perhaps, that this is America.”).

36. Andrew Marantz, *“That’s Not Who We Are” Is the Wrong Reaction to the Attack on the Capitol*, NEW YORKER (Jan. 9, 2021), <https://www.newyorker.com/video/watch/thats-not-who-we-are-is-the-wrong-reaction-to-the-attack-on-the-capitol> [https://perma.cc/QgLC-DXXL].

37. *See* Ashley Quarcoo & Caroline Hopper, *In America Today, Who Is “Us”?*, ASPEN INSTITUTE (Mar. 3, 2021), <https://www.aspeninstitute.org/blog-posts/in-america-today-who-is-us/> [https://perma.cc/5EYK-W5LR].

38. Martha C. Nussbaum, *Teaching Patriotism: Love and Critical Freedom*, 5 (Univ. of Chi. Pub. L. & Legal Theory Working Paper No. 357, 2011).

39. Karst *supra* note 31 at 1141. (“The nation is not just a sovereign state: it is also a group identification and a shared ideal.”).

National identity is closely tied to two related concepts: nationalism, and patriotism.⁴⁰ Nationalism has a largely negative valence in much of popular discourse.⁴¹ It is (rightly) associated with demagogues, and with much of the rhetoric that drove the attack on the Capitol on January 6.⁴² But political scientist and theorist Benedict Anderson describes nationalism differently: it is simply an “imagined community,” an otherwise disconnected people drawn together into fellow-feeling with their co-nationals.⁴³ In a country as diverse and polarized as the United States currently is,⁴⁴ where citizens share no common bonds of blood or religion, symbols, ideas, and stories are particularly potent.⁴⁵

Some of these elements of the “imagined community” exist largely outside the legal realm, bolstered by cultural practices, artists’ inventions, and interpersonal traditions.⁴⁶ But while some commenters have described a stark separation between cultural nationalism and political nationalism,⁴⁷ the substance and interpretation of symbols, art, and other cultural products has a direct impact on political ideology.⁴⁸ This multi-faceted nationalism weaves together into an American national identity with significant ramifications for the legal and political life of the country.⁴⁹

While Anderson calls this created commonality nationalism, others describe this as “patriotism,” focusing in particular on the emotional attachment to the country and its ideals.⁵⁰ While the meanings of nationalism and patriotism have

40. See Winston P. Nagan & Craig Hammer, *Patriotism, Nationalism, and the War on Terror: A Mild Plea in Avoidance*, 56 FLA. L. REV. 933, 937–38 (2004); Emily Ludmir Aviad, *Towards an Inclusive/Elusive America: A Response to Huntington’s ‘Who Are We? The Challenges to America’s National Identity’*, 19 Berkeley La Raza L.J. 141, 152 (2008).

41. See, e.g., George Orwell, *Notes on Nationalism*, THE ORWELL FOUNDATION <https://www.orwellfoundation.com/the-orwell-foundation/orwell/essays-and-other-works/notes-on-nationalism/> [<https://perma.cc/9QMY-GZGV>] (“By ‘nationalism’ I mean . . . identifying oneself with a single nation or other unit, placing it beyond good and evil and recognizing no other duty than that of advancing its interests.”).

42. Emma Rose, *The Many Flags That Flew During the US Capitol’s Storming and What They Represent*, THE WIRE (Jan. 15, 2021), <https://thewire.in/world/us-capitol-storming-flag-india-militia-groups-nationalism> [<https://perma.cc/N279-7A6H>].

43. See BENEDICT ANDERSON, *IMAGINED COMMUNITIES* 6 (1983).

44. See generally EZRA KLEIN, *WHY WE’RE POLARIZED* (2020).

45. See Ernest Renan, “What is a Nation?,” Sorbonne Lecture, 1882 (Ethan Rundell, trans.); Eric Hobsbawm, *The Nation as Invented Tradition*, in NATIONALISM 77–78 (John Hutchinson and Anthony D. Smith eds., 1994); see also, Karst, *supra* note 31 at 1144 (“[I]deology by itself, in the sense of abstract beliefs, would be too flimsy a material to constitute an American identity—too thin a glue to hold a culturally diverse nation together.”).

46. See John Hutchinson, *Cultural Nationalism and Moral Regeneration*, in NATIONALISM 123–24 (John Hutchinson and Anthony D. Smith eds., 1994).

47. See *id.* at 122.

48. See Scott A. Sandage, *A Marble House Divided: The Lincoln Memorial, the Civil Rights Movement, and the Politics of Memory, 1939-1963* J. AM. HIST. (Jun. 1993) at 152 (describing use of performance and ritual in the civil rights movement in the 1940s and 1950s).

49. See, e.g., Sanford Levinson, *They Whisper, Reflections on Flags, Monuments, and State Holidays, and the Construction of Social Meaning in a Multicultural Society*, 10 CHI.-KENT L. REV. 1079, 1082–84 (1995).

50. See Nussbaum, *supra* note 38 at 4 (“I shall understand patriotism as a strong emotion taking the nation as its object.”).

been robustly debated, the distinctions are less important for this Note; both are attempts to capture and create a collective identity, a cohesion among disparate individuals in a country.⁵¹ This sense of national identity will be what this Note uses going forward. The next Part proposes one avenue to understanding national identity by identifying three distinct notions of the concept.

III. THREE NATIONALISMS, ONE FLAG

To understand how different views of the abstract concept of nationalism can lead to different real-world consequences, it can be useful to focus on symbols, themselves a concrete manifestation of the exceedingly abstract concept for which the symbol stands.⁵² And in the context of American nationalism, there can be no more potent symbol than the American flag.⁵³ In the Supreme Court's discussion of the flag, and in the uses and reuses to which the flag has been put by artists, protesters, and politicians throughout history, one sees a tangible instantiation of three distinct modes of American national identity: one focused on preservation and reverence, one focused on critique and subversion, and one focused on revitalization and reinvention.

Similar arguments may be made about other symbols and monuments in American public life, in particular the Confederate flag and Confederate monuments.⁵⁴ Indeed, in light of the events of January 6, the enduring power of the Confederate flag as a galvanizing symbol of opposition inexorably tied to the nation's history and present is inescapable.⁵⁵ But this argument is too easy: a vision of American national identity that rejects Confederate monuments should hardly be controversial; it is (or ought to be) the bare minimum for serious governance.⁵⁶ Instead, the following subsections center on the American flag, with a

51. See *id.* at 8 (“In patriotic emotion, citizens embrace one another as a family of sorts, sharing common purposes.”); ANDERSON, *supra* note 43 at 6 (quoting ERNEST GELLNER, *THOUGHT AND CHANGE* 169 (1964)) (“Nationalism . . . invents nations where they do not exist.”).

52. See, e.g., *Halter v. Nebraska*, 205 U.S. 34, 41 (1907) (“From the earliest periods in the history of the human race, banners, standards, and ensigns have been adopted as symbols of the power and history of the peoples who bore them.”); *United States v. Eichman*, 496 U.S. 310, 316 n.6 (1990) (“[A]t some irreducible level the flag is emblematic of the Nation as a sovereign entity.”).

53. *Texas v. Johnson*, 491 U.S. 397, 405 (1989) (“Pregnant with expressive content, the flag as readily signifies this Nation as does the combination of letters found in ‘America.’”).

54. See Levinson, *supra* note 49 at 1098.

55. See Clint Smith, *The Whole Story in a Single Photo*, *THE ATLANTIC* (Jan. 8, 2021) <https://www.theatlantic.com/ideas/archive/2021/01/confederates-in-the-capitol/617594/> [<https://perma.cc/52D4-E7Y9>] (analyzing a photo of a rioter carrying the Confederate flag through the Capitol past portraits of Charles Sumner and John C. Calhoun).

56. This is not to negate the power of Confederate monuments as objects of terror, the ongoing support among large portions of the country for some version of what they stand for, the support for their presence by current members of Congress, nor the importance of efforts to remove them and reckon with the ideologies that erected and protect them. While there is thoughtful debate about exactly what should be done with remaining Confederate monuments, see e.g., Jennifer Schuessler, *Mellon Foundation to Spend \$250 Million to Reimagine Monuments*, *N.Y. TIMES* (Oct. 5, 2020), <https://www.nytimes.com/2020/10/05/arts/mellon-foundation-monuments.html> [<https://perma.cc/BHB7-ARAL>], there is little such good-faith debate with regard to what exactly the monuments stand for. On the contrary, the American flag offers fertile ground for such discussion.

particular focus on the divergent views embodied by the Court when it has opined on what the flag represents. The controversies and varied viewpoints here cut to the core of American nationalism, as the flag “signifies the ideas that characterize the society that has chosen that emblem” and the “growth and power of those ideas.”⁵⁷

The analysis below focuses in large part on the collection of opinions in two seminal flag cases: *West Virginia State Board of Education v. Barnette*, which found that states were constitutionally prohibited from requiring students to salute the flag,⁵⁸ and *Texas v. Johnson*, which ruled that state statutes banning destruction of the flag were unconstitutional.⁵⁹ *Barnette* addressed a situation where Jehovah’s Witness children in public school were required to stand and recite the pledge in violation of their religious beliefs.⁶⁰ The *Barnette* Court found for the students and their families, overturning its decision in *Minersville School District v. Gobitis*, in which the Court had ruled the opposite way on the same issue just three years previously.⁶¹

Johnson concerned a protester who had burned the flag in protest of Ronald Reagan and the 1980 Republican Convention, and who was prosecuted under a Texas statute that made it a crime to destroy venerated objects including the national flag.⁶² The constellation of concurring and dissenting opinions in each of these cases (as well as others that address similar flag-related issues), illustrate three distinct approaches to American national identity: a) preservation and reverence, b) criticism and critique, and c) reinvention and revitalization. Each approach provides a guide for a distinct version of living out one’s obligations as a lawyer and a citizen.

A. PRESERVATION AND REVERENCE

The view of the American flag as representative of an unchanging and unquestionable American power is foundational.⁶³ This is the view represented by states enacting laws criminalizing the destruction or disrespect of the flag,⁶⁴ and the view that recognizes a state’s interests in such prohibitions.⁶⁵ This view correlates with an American national identity focused on celebrating and revering past triumphs and continuing a legacy of success and growth.

While acknowledging diversity of opinion about everyday policy issues, this view of national identity sees these differences as minor compared to the

57. *Johnson*, 491 U.S. at 436 (Stevens, J., dissenting).

58. 319 U.S. 624 (1943).

59. 491 U.S. 397 (1989).

60. 319 U.S. at 629–30.

61. 310 U.S. 586 (1936).

62. *Johnson*, 491 U.S. at 400, 406.

63. *Id.* at 418 (“It cannot be gainsaid that there is a special place reserved for the flag in this Nation . . . as an unalloyed symbol of our country.”).

64. *E.g.*, Tex. Penal Code Ann. § 42.09(a)(3) (1989) (the statute at issue in the *Johnson* case).

65. *Johnson*, 491 U.S. at 437.

overarching and unifying power of the flag. This is an approach of absolutes, one where “the flag is not simply another ‘idea’ or ‘point of view’ competing for recognition in the marketplace of ideas.”⁶⁶ Rather, it is regarded with “almost mystical reverence” that supersedes any other differences in belief or ideology.⁶⁷ This view of the flag—and thereby of the country—is one of “simple truths” unburdened by “unneeded apologetics.”⁶⁸

In the paradigm used by cultural historian Scott Sandage, this is the “official” version of the flag.⁶⁹ The unsophisticated version of this view of American nationalism ignores or justifies unsavory or unwelcome chapters of history, while the more nuanced version simply chooses to focus on celebrating victories and honoring sacrifices. This nationalism animates the efforts to ban destruction of the flag, just as it abhors criticism of the country.

This view of what the flag represents is embodied in the calls by the January 6 rioters and insurrectionists to “take back our country” and is implicitly communicated when the American flag is brandished by those who argue that the current reality is wrong and requires the work of patriots to save or restore it.⁷⁰

But an approach of preserving and revering can be harnessed by those on the other side as well. Much of the response to the attack on the Capitol was framed in terms of the preservation and reverence paradigm: the rioters’ actions cut against the core of who we are by attacking the “citadel of liberty,”⁷¹ and the appropriate response was to patch things back up and restore them to how they were before the violent interruption.⁷²

For a lawyer engaged in the larger project of building trust in the justice system and living up to the role of “public citizen,” a use of the “preservation and reverence” approach to American identity can be a useful and powerful guide.⁷³ A lawyer operating in this paradigm should abhor restrictions on the sacred right to vote, work tirelessly to uphold the rule of law, and actively counter subversions of justice in policing or sentencing. While there is much to celebrate about the ideals that undergird the American justice system, an overemphasis on revering

66. *Id.* at 429 (Rehnquist, C.J., dissenting).

67. *Id.*

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

69. See Sandage, *supra* note 48 at 137.

70. See Dan Barry, Mike McIntire, & Matthew Rosenberg, ‘Our President Wants Us Here’: The Mob That Stormed the Capitol, N.Y. TIMES (Jan. 09, 2021), <https://www.nytimes.com/2021/01/09/us/capitol-rioters.html> [<https://perma.cc/AN3J-Y5YA>].

71. Jordan Fabian, *Biden Rips Capitol Mob as ‘Domestic Terrorists’ and Blames Trump*, BLOOMBERG (Jan. 7, 2021), <https://www.bloomberg.com/news/articles/2021-01-07/biden-calls-capitol-riots-an-assault-on-citadel-of-liberty?> [<https://perma.cc/2BBP-N6B7>].

72. See, e.g., Joey Garrison & Deirdre Shesgreen, *A rattled Congress affirms Joe Biden’s Electoral College victory after pro-Trump riot at Capitol*, USA TODAY (Jan. 6, 2021), <https://www.usatoday.com/story/news/politics/elections/2021/01/06/electoral-college-vote-stopped-unclear-when-resume-after-riot/6572441002/> [<https://perma.cc/LA43-GNBK>] (“Pence ended his comments saying, ‘Let’s get back to work.’”).

73. Cf. Julius Cohen, *The Value of Value Symbols in Law*, 52 COLUM. L. REV. 893, 893 (1952) (calling the general concept of “value symbols” “the lawyer’s major fighting weapons”).

and preserving it can further entrench an unjust status quo or lead to resistance to needed reforms.⁷⁴

While the law no longer requires preservation or reverence of the flag,⁷⁵ this mindset remains dominant, communicated in both the concurring and dissenting opinions in the *Johnson* decision, discussed *infra*.

B. CRITICISM AND CRITIQUE

If the previous section discussed what Sandage refers to as the “official” version of American identity and symbolism, this section covers what he calls the “vernacular.”⁷⁶ Whereas the official versus vernacular framework creates a binary choice, where any utilization of symbols not forwarding the mainstream view receives the alternative designation,⁷⁷ this Note proposes two “non-official” categories. This first category is simply about critique. It views the American flag as representative of oppression, to which the only proper response is dissent.⁷⁸

The “criticism and critique” paradigm is widely seen as incompatible with the “order and reverence” one, particularly when the criticism takes a form considered outside the mainstream.⁷⁹ Even while joining “without reservation” in the majority opinion in *Johnson*, Justice Kennedy wrote separately to discuss the “personal toll” such a decision exacts.⁸⁰ Kennedy’s concurrence is an illustration of the power contained in a symbolic critique of American nationalism. Even while fully supportive of the constitutional right to make such a critique, Kennedy nevertheless felt compelled to share the emotional effect of the ruling: “It is poignant but fundamental that the flag protects those who hold it in contempt,” he noted.⁸¹

Justice Harlan included a similar personal note that “disrespect for our flag is to be deplored” in his opinion for the Court in a similar case some twenty years earlier.⁸² Like Kennedy in the *Johnson* case, Harlan included personal language

74. Cf. Sanford Levinson, *Celebrating the Founders or Celebrating the Constitution: Reflections on Constitution Day, 2019*, 12 NE. U.L. REV. 375, 387 (2020) (discussing the need to acknowledge the defects in the Constitution, and the fact that it was “designed to privilege the status quo”).

75. See *Johnson*, 491 U.S. at 397–98.

76. See Sandage, *supra* note 48 at 137.

77. See, e.g., Stu Rosenberg, *Twitter’s reaction to 49ers quarterback Colin Kaepernick’s sitting out the national anthem*, Sacramento Bee (Aug. 31, 2016), <https://www.sacbee.com/sports/nfl/san-francisco-49ers/article98409007.html> [<https://perma.cc/TXE5-4JXZ>].

78. See Kiese Laymon, *What I Pledge Allegiance To*, FADER, Winter 2019, <https://www.thefader.com/2016/09/19/my-mississippi-pledge-kiese-laymon> [<https://perma.cc/P6E8-3TQ5>] (“It [the American flag] reminds me of what we black folk have survived and witnessed at the hands of white folk hiding behind the American flag for centuries.”).

79. See, e.g., Jacob Rosenberg, *“Love It or Leave It” Has a Racist History. A Lot of America’s Language Does.*, MOTHER JONES (Jul. 20, 2019), <https://www.motherjones.com/politics/2019/07/love-it-or-leave-it-has-a-racist-history-a-lot-of-americas-language-does/> [<https://perma.cc/2HA3-7U8P>].

80. *Johnson*, 491 U.S. at 420 (Kennedy, J., concurring).

81. *Id.* at 421.

82. *Street v. New York*, 394 U.S. 576, 594 (1969).

critical of “disrespect” toward the flag even while ruling such disrespect constitutional.⁸³ These views from the bench illustrate the efficacy of the critique: even as they affirm the constitutional right for citizens to disrespect the flag or speak ill of the country it represents, justices feel the sting of the criticism. Another example of the concern for the power of dissent was expressed by Justice Frankfurter in his opinion for the Court in the *Gobitis* case.⁸⁴ While recognizing that some students might have a legitimate religious interest in declining to participate in the Pledge, he worried that allowing such dissention might “cast doubts in the minds of the other children” which would in turn “weaken the effect of the exercise.”⁸⁵

While the first layer of “criticism and critique” is reactionary by definition, the second step can vary. One option is to use the flag for a subversive critique of American nationalism and then discard it and what it represents in service of creating something better. That was the sentiment expressed by the petitioner in *Street v. New York* when he shouted, in regard to a murdered civil rights leader, “If they did that to Meredith, we don’t need an American Flag.”⁸⁶ Dissenting in another flag-burning case, Justice Stevens provided an apt interpretation of this type of critical action, saying that “[b]y burning the embodiment of America’s collective commitment to freedom and equality, the flag burner charges that the majority has forsaken that commitment—that continued respect for the flag is nothing more than hypocrisy.”⁸⁷ In a discussion of Confederate monuments, Philip Kennicott suggests abandoning such symbols: “Let’s shed the whole carapace of national symbolism,” he argues, “including the flag and the anthem . . . and get on with the real work of democracy.”⁸⁸ This view treats symbols as barriers not pathways toward a goal, and suggests real change will come once the artifice and distraction of symbols and nationalism are transcended.

Considering once again the insurrection of January 6, and the myriad issues it raised, the “criticism and critique” framework suggests multiple approaches for understanding and response. The rioters demonstrated little deference to the grandeur or solemnity of the Capitol they were attacking to challenge the outcome of an election, so it might be tempting to view them as engaged in crass and violent criticism. Indeed many commenters quickly condemned them as such.⁸⁹ But the

83. *Id.*

84. *Gobitis*, 310 U.S. at 600.

85. *Id.*

86. 394 U.S. at 589.

87. *Eichman*, 496 U.S. at 320 (Stevens, J., dissenting).

88. Philip Kennicott, *What to do when the Confederate statues come down? Leave the pedestals empty*, WASH. POST (Jun. 16, 2020), https://www.washingtonpost.com/lifestyle/what-to-do-when-the-confederate-statues-come-down-leave-the-pedestals-empty/2020/06/15/2302a068-af3b-11ea-8f56-63f38c990077_story.html [https://perma.cc/E96K-MFT3].

89. *See, e.g.*, Marco Rubio (@marcorubio), TWITTER (Jan. 6, 2021, 3:01 PM), <https://twitter.com/marcorubio/status/1346909901478522880> (“There is nothing patriotic about what is occurring on Capitol Hill. This is 3rd world style anti-American anarchy.”).

American flags the rioters carried were never intended to display criticism or critique; they saw themselves on the side of the nation, not against it.⁹⁰

The rioters do embody a core and enduring strand of America,⁹¹ and one response to them might take the form of criticism and critique of the country that fostered them. Likewise, given the disparate police treatment of the mostly white crowd on January 6 from the crowds of Black Live Matter protesters just months before,⁹² criticism and critique might be a rational and expected reaction.

An alternative option for a step two after “criticism and critique” is to repurpose rather than dispose of the American flag. Or, in the context nationalism and national identity, to remake rather than to abandon something of the underlying substance of American nationalism. That second “non-official” path is the third category of nationalism.

C. REVITALIZATION AND REINVENTION

Whereas actions animated by the principles of the second category above use American symbols to point out the hypocrisy and failings of the American idea, actions in this third category celebrate an underlying core element with a rallying cry to better live up to it. A simplistic approach would view this third category as simply the best of both worlds, the appropriate balance of the previous two. If the first is too respectable, and the second too radical, perhaps this third approach is just right.⁹³ But this third category is more than a happy medium. It is its own distinct view of nationalism, focused neither on preservation of the status quo, nor on wholesale rejection.⁹⁴ This conception of American nationalism centers on imagining and creating a new paradigm by building intentionally on what has come before.⁹⁵

National identity, however, is frequently in the eye of the beholder. What the proponents of this version see as a positive attempt to remix and reinvent American symbols toward a more positive future, others see as a crude attempt to critique or degrade, an action of the second category. Take for example a college student in 1974 who affixed a peace sign made of removable black tape onto an American flag which he displayed in his bedroom window in a case that was ultimately decided by the Supreme Court.⁹⁶ He said that his purpose was to associate

90. See Barry, *supra* note 70 (“Chants of ‘Hell No, Never Joe’ and ‘Stop the Steal’ broke out [among the rioters], as did strains of ‘God Bless America’ and ‘The Star-Spangled Banner.’”).

91. See Tai *supra* note 35.

92. Rachel Chason & Samantha Schmidt, *Lafayette Square, Capitol rallies met starkly different policing response*, WASH. POST (Jan. 14, 2021), <https://www.washingtonpost.com/dc-md-va/interactive/2021/blm-protest-capitol-riot-police-comparison/> [<https://perma.cc/9E7R-CM2A>].

93. Cf. Sandage, *supra* note 48 at 157. (“Those who thought in the beginning that [the March on Washington] was too respectable, and those who thought it was too radical . . . for a moment in time they were one.”).

94. See generally ERIC LIU & NICK HANAUER, *THE TRUE PATRIOT* (2007).

95. See, e.g., *Our Story*, NEW AMERICA, <https://www.newamerica.org/our-story/> [<http://perma.cc/YW9Y-PUH4>] (last visited Feb. 25, 2021).

96. *Spence v. Washington*, 418 U.S. 405, 406 (1974).

the American flag with peace instead of war and violence, but he was arrested and prosecuted under a statute banning desecration of the flag.⁹⁷ His intention thus fell in the category of “reinvention” but was seen as such a threat to the “reverence” paradigm, it was viewed as “criticism.”

While the ultimate impact of actions in this third category may depend on how they are perceived by others, clarity on the part of the actor is paramount as a starting place.⁹⁸ This view of national identity takes the spirit or the underlying principle as the constant. “It is in that freedom [of conscience] and the example of persuasion, not in force and compulsion, that the real unity of America lies.”⁹⁹ This is a notion of American identity that rejects rigidity, instead celebrating concepts like resilience and growth.¹⁰⁰

An approach to the law that follows the revitalization and reinvention path focuses on the best of the underlying principles and applies them in a way that is more inclusive and more true. This is an approach to national identity employed by the likes of suffragettes writing the Declaration of Sentiments in the style of the Declaration of Independence,¹⁰¹ or of Langston Hughes writing “O, let America be America again—/The land that never has been yet—.”¹⁰² This is likewise the same approach embodied by a new generation of young leaders who are asking for new promises from the country, and demanding it fully live up to its old ones.

Conceptions of national identity are bound up in conceptions of personal identity, and the notion of a nation in flux can thus cause deep anxiety and fear.¹⁰³ That fear can lead to a re-entrenchment of a “preserve and revere” mentality, or to a different kind of revitalization, for the promise of reinvention is available to all. Those attacking the Capitol on January 6, if they did not think they were simply upholding the country as it was, likely thought of themselves as engaging in reinvention of their own. Anyone may identify their own desirable aspects of American identity and remix it to serve their own ends. Thus, even while embracing revitalization and reinvention of American national identity as a tool to address the country’s most pressing legal issues, lawyers must remember that those with an alternate view may do the same. And since the view of the flag is a view

97. *Id.* at 407–08.

98. There are a host of contemporary efforts to expand traditional American projects in an inclusive and progressive way. *See, e.g.*, Eric Liu, *How to Be American*, 38 DEMOCRACY 52 (2015). This project of reinvention is also the project of numerous artists and organizers. *See, e.g.*, “Citizen Artist Fellows: About the Program,” THE KENNEDY CENTER, <https://www.kennedy-center.org/education/networks-conferences-and-research/networks-and-strategic-leadership/citizen-artist-fellows/> [<https://perma.cc/22UM-TUZZ>] (last visited Jan. 10, 2021).

99. *Barnette*, 319 U.S. at 646 (1943) (Murphy, J., concurring).

100. *See Johnson*, 491 U.S. at 419.

101. *See* Elizabeth Cady Stanton, et. al., *Declaration of Sentiments and Resolutions – Seneca Falls* (1848), https://liberalarts.utexas.edu/coretexts/_files/resources/texts/1848DeclarationofSentiments.pdf [<https://perma.cc/VU7X-UD4M>].

102. LANGSTON HUGHES, *Let America Be America Again*, in THE COLLECTED POEMS OF LANGSTON HUGHES 191 (Arnold Rampersad, ed., 1994).

103. *See Karst, supra* note 31 at 1181.

into American identity, Justice Jackson's opinion for the Court in *Barnette* applies to American identity also: "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."¹⁰⁴

As illustrated by the discussion above, no one approach leads to the "right" outcome, and the arguments implicit in each could be marshalled by those attacking the Capitol and those who would stand against them alike. The utility of this framework then is not that it provides answers. Rather, it offers a structure for lawyers to evaluate for themselves how they might live up to the Preamble's requirements of being a "public citizen [with] special responsibility for the quality of justice," playing "a vital role in the preservation of society" and the "improve[ment of] the law."

But which path one takes as a solution says something about the perception of what the problem is. If the answer to violent insurrectionists taking over the Capitol is only to preserve and revere, it is an assertion that the status quo—as long as it is not disturbed—is acceptable. If the response to this moment is only to critique and criticize the system that allowed this moment to arrive, it is an assertion that such violence is inevitable and requires the drawing of clear distinctions: is it the tactics or the intention of the January 6 rioters that is most objectionable? If the response is the final category of reinvention and revitalization, fewer guardrails are offered, and one is forced to identify what ought to be preserved, what critiqued, and what should come in its place. As varied as all these questions remain, the American flag and the Court's approaches to understanding it provide a framework to understand these three distinct choices.

IV. THE SUPERPOWER OF SYMBOLS

The previous section used attitudes about the flag to explain three distinct notions of American national identity in the project of providing explanation for how a lawyer might take action under the Preamble to the *Model Rules*. This section focuses on the power of the symbol itself to influence American national identity and law, and why a lawyer concerned about the meaningful endurance of democracy in the United States might embrace the use of symbols. The intangible power of symbols is revealed in the way that normally applicable legal precepts seem to be suspended in certain instances. "In my judgment," Justice Stevens wrote in his *Johnson* dissent, "Rules that apply to a host of other symbols . . . are not necessarily controlling" with regard to the American flag.¹⁰⁵ The flag being evaluated under a different legal standard because of the emotional force of what it represents¹⁰⁶ is a striking example of a symbol influencing the law. In such instances, law in turn makes arguments in a

104. *Barnette*, 319 U.S. at 632–33.

105. See *Johnson*, 491 U.S. at 436 (Stevens, J., dissenting).

106. See, e.g., *id.*

register rife with symbolism. For example, in his dissent in the *Johnson* case, Chief Justice Rehnquist turned first to lines of poetry by Emerson to support his assertion about the American flag's symbolic power.¹⁰⁷ He then quoted the entirety of the first verse of the National Anthem,¹⁰⁸ then a further sixty lines of poetry.¹⁰⁹ Rehnquist's reasons for dissenting appear to be rooted in emotion as much as law, and through the extensive use of poetry in his dissent, Rehnquist invites the reader to share his emotional reverence for the flag and the country it represents.

Cases involving the flag affect not only the mode of argumentation, but also notions of private property. It is frequently implied (though not stated explicitly) that one's personal flag is not quite one's personal property: owning a flag entails responsibility to the broader concept represented by the fabric image.¹¹⁰ So potent is the power of symbols that destruction of the flag can be compared to vandalism of the Washington Monument or desecration of a gravesite.¹¹¹ So accepted is the symbolic power of the flag, that Justice Stevens appears not even to have felt it necessary to explain how prohibitions on the physical defacement of a particular monument are analogous to the destruction of *any* flag.¹¹² In this analysis, the idea of the flag has transcended its physical form to such a degree that this logical jump is simply accepted. The flag itself becomes a monument.¹¹³

Though the constitutional right to burn the flag is unlikely to be relitigated in the near future, the issue maintains its relevance. Senator Steve Daines of Montana introduced a constitutional amendment allowing Congress to legislate against flag burning as recently as 2019,¹¹⁴ and President Trump repeatedly suggested jailing, fining, or revoking the citizenship of people who burn the American flag.¹¹⁵ While these proposals are themselves as much symbolism as substance, their utility as such exists only because of the continued power of the stars and stripes.

In living out the imperative of the *Model Rules*, lawyers should be mindful of how to utilize the flag and its attendant symbolism in legal argument while

107. *Id.* at 422 (Rehnquist, C.J., dissenting).

108. *Id.* at 423.

109. *Id.* at 424–25.

110. *See Street*, 394 U.S. at 616–17 (Fortas, J., dissenting).

111. *See Johnson*, 491 U.S. at 437, 39 (Stevens, J., dissenting); *see also* *Smith v. Goguen*, 415 U.S. 566, 587 (1974) (White, J., concurring). (“There would seem to be little question about the power of Congress to forbid the mutilation of the Lincoln Memorial.”)

112. *Johnson*, 491 U.S. at 437, 439 (Stevens, J., dissenting).

113. *See Smith*, 415 U.S. at 587 (White, J., concurring) (“The flag is itself a monument, subject to . . . protection.”).

114. A joint resolution proposing an amendment to the Constitution of the United States authorizing the Congress to prohibit the physical desecration of the flag of the United States, S.J. Res. 49, 116th Congress (2019).

115. John Wagner, *Trump suggests loss of citizenship or jail for those who burn U.S. flags*, WASH. POST (Nov. 29, 2016), <https://www.washingtonpost.com/news/post-politics/wp/2016/11/29/trump-suggests-loss-of-citizenship-or-jail-for-those-who-burn-u-s-flags/> [https://perma.cc/9HB8-AR5P]; Andrew Solender, *Trump Says He Wants To Punish Flag Burning With A Year In Prison*, FORBES (Jun. 20, 2020), <https://www.forbes.com/sites/andrewsolender/2020/06/20/trump-says-he-wants-to-punish-flag-burning-with-a-year-in-prison/?sh=25177d503404> [https://perma.cc/FH82-Z8XS].

remaining cognizant of the potential power in doing so. Lori D. Johnson and Melissa Love Koenig support the powerful use of story in advocating for a client but also stress the necessity of not straying from the truth in the service of zealous advocacy.¹¹⁶ Lawyers should likewise be attentive to the possibilities and limitations of the stories contained in symbols such as the flag. Passionate use of symbolic associations of the American flag can be effective but can also elide more careful legal analysis or facts,¹¹⁷ as some of the opinions in the Court's flag cases demonstrate. Symbolism is indeed powerful and inescapable.¹¹⁸

CONCLUSION

In the current moment of political and cultural turmoil, divergent views of American nationalism promise different ways forward for the country's future, and distinct understandings of American symbolism—in particular surrounding the flag—offer illustrations of these diverse paths. An impulse to maintain and revere is in tension with one to criticize and critique. A project to revitalize and reinvent is challenged by a move to replace altogether. Symbols like the flag do more than illustrate these different nationalisms: they fortify them.

While Anderson recognizes the strong political power of nationalism, he argues that its philosophical power is weak.¹¹⁹ The emotional and almost spiritual power of the flag is in part an answer to that philosophical poverty, imbuing any nationalism with an elevated purpose and ineffable power.

The language of the Preamble to the *Model Rules* is far from explicit in its meaning, so it is imperative that the meaning of citizenship and notions of justice be explored freely for oneself. No single required interpretation would be possible or efficacious.¹²⁰ But to assist in that project, the three different visions of the flag and the country explored in this Note provide concrete paths to follow. When properly imbued with meaning, the language of the *Model Rules* provides an opportunity for lawyers to make a lasting impact at a moment of great crisis by living out the requirements of the profession. There is much promise in this moment, but if American history from pre-Founding to January 6, 2021 and beyond teaches us anything, a better country is far from guaranteed.¹²¹ It is up to every citizen—lawyers included—to work to make a better future possible.

116. Lori D. Johnson & Melissa Love Koenig, *Walk the Line: Aristotle and the Ethics of Narrative*, 20 NEV. L.J. 1037, 1040–41 (2020).

117. See Cohen, *supra* note 73 at 894 (“[Symbols] are made to appear so self-evident that no proof is required.”).

118. See *Barnette*, 319 U.S. at 662 (Frankfurter, J., dissenting).

119. ANDERSON, *supra* note 43 at 5.

120. *Barnette*, 319 U.S. at 644 (Black, J., concurring) (“Words uttered under coercion are proof of loyalty to nothing but self-interest. Love of country must spring from willing hearts and free minds, inspired by a fair administration of wise laws . . .”).

121. See Richard Primus, *The Republic in Long-Term Perspective*, 117 MICH. L. REV. ONLINE 1, 2 (2018) (“[I]t would be a mistake to assume that what comes next will be better.”).