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## The Great 1989-1990 Flag Flap: An Historical, Political, and Legal Analysis

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# HISTORICAL ESSAY

## The Great 1989-1990 Flag Flap: An Historical, Political, and Legal Analysis

ROBERT JUSTIN GOLDSTEIN\*

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### PROLOGUE

In May 1990, while doing research connected with this Essay, I chanced upon a McDonald's Restaurant on the north side of Chicago which advertised itself as the "rock and roll" McDonald's. Various memorabilia from the 1950's and 1960's, including a small American flag with its field of stars replaced by a peace symbol, festooned the walls of the restaurant. Such altered flags were common during the Vietnam era, and many dissenters were prosecuted under flag desecration laws for displaying them. Yet this flag on the wall of McDon-

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ald's, although arguably illegal in May 1990 under the once valid Flag Protection Act of 1989,<sup>1</sup> attracted no attention from customers who seemed far more interested in Big Macs than in desecrated flags or constitutional debates over the meaning of the Bill of Rights. While it seems unlikely that in another twenty years the neighborhood McDonald's will be burning flags, this incident suggests the reasonable possibility that, within a few years, the American public's interest in the heatedly controversial flag burning issue will become little more than an historical footnote, and that future generations of Americans will have difficulty understanding the basis for this controversy. Like the peace symbol flag displayed on the wall of McDonald's, the flag burning cause, which was dear to many Americans during 1989 and 1990, ultimately may well become an arcane issue significant only to those interested in history. Thus, I have termed the recent controversy The Great 1989-1990 Flag Flap.

### I. INTRODUCTION

During the past two years, the issue of whether flag burning is legal as a form of political protest spurred massive controversy across the United States.<sup>2</sup> The flag burning controversy attracted enormous public, political, and legal attention, which especially centered around two notable Supreme Court cases upholding the legality of flag burning,<sup>3</sup> two failed attempts to pass a constitutional amendment outlawing flag burning,<sup>4</sup> and the passage of a law to accomplish the same end.<sup>5</sup> Although the crux of the legal debate primarily focused on how correctly to interpret the Bill of Rights, the public and political debate was perhaps even more dominated by the historically recent iconization of the American flag as a symbol of the nation. As a result, flag burning quickly became a highly political controversy in which many officials found it easy both to demonstrate their purported love for the flag and to use this issue for self-interested gain.

Because any attempt to isolate the legal aspects of this controversy from its historical and political components would be both misleading and futile, this Essay will analyze all three elements within one construct. In a broader context, this Essay argues that flag desecration, interpreted both from a constitutional law perspective and

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1. Flag Protection Act of 1989, Pub. L. No. 101-131, 103 Stat. 777 (amending 18 U.S.C. § 700).

2. See *infra* notes 58-65 & 419-37 and accompanying text.

3. See, e.g., *United States v. Eichman*, 110 S. Ct. 2404 (1990); *Texas v. Johnson*, 109 S. Ct. 2533 (1989); see also *infra* notes 28-57, 438-522 & 636-84 and accompanying text.

4. See *infra* notes 524-58 & 685-706 and accompanying text.

5. See *infra* notes 560-621 and accompanying text.

from the common sense meaning of political freedom in a democracy, is a form of peaceful political dissent which causes no concrete harm and deserves full constitutional protection. Section II of this Essay provides a concise legal history of *Texas v. Johnson*,<sup>6</sup> recounts the corresponding public uproar following that decision, and briefly discusses in a broader context whether flag burning is essentially a trivial matter or one of fundamental importance to democratic principles. Section III traces both the historical development of Americans' attitude toward the flag and the development of flag desecration laws. This Section also provides a case background leading to *Johnson* by discussing earlier court decisions interpreting symbolic speech and the use of flags. Section IV discusses the popular, political, and legal debate over the *Johnson* decision. Section V pertains to the aftermath of *Johnson* and focuses on the 1989 Congressional debate over whether to overturn *Johnson* by statute or constitutional amendment, and the eventual product of this debate, The Flag Protection Act of 1989. Section V also discusses two federal district court decisions that declared The Flag Protection Act unconstitutional as applied to political protesters. Section VI discusses *United States v. Eichman*,<sup>7</sup> the decision reaffirming the constitutionality of flag burning, and the subsequent failure to overturn it by constitutional amendment. Section VII provides a basis for understanding why a handful of flag burners, whose only threat was the introduction of a strong message of political dissent into the marketplace of ideas, could cause such an explosive reaction amongst legal scholars, politicians, and the public. This Section suggests that the explanations for this reaction, or overreaction, reflect poorly upon the current state of American politics and its citizens' and leaders' understanding of the role of civil liberties in a democracy.

## II. *TEXAS V. JOHNSON* IN PERSPECTIVE

### A. *A Short Legal History of Johnson*

On August 22, 1984, while the Republican National Convention met in Dallas to renominate President Ronald Reagan, Gregory Lee "Joey" Johnson and about one hundred other protesters participated in a demonstration that culminated with the burning of an American flag in front of the Dallas city hall.<sup>8</sup> Although no civil disorder occurred during or after the actual flag burning, some of the protesters had earlier spray-painted the walls of several buildings and com-

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6. 109 S. Ct. 2533 (1989).

7. 110 S. Ct. 2404 (1990).

8. *Johnson*, 109 S. Ct. at 2536.

mitted other minor acts of vandalism, including the theft from a bank of what was presumably the subsequently burned flag.<sup>9</sup> Dallas police officers observed the entire demonstration but made no arrests during the actual protest.<sup>10</sup> Subsequently, the police arrested Johnson for a violation of the Texas Venerated Objects Law.<sup>11</sup> This law outlawed "desecration" of "venerated objects," including "intentionally or knowingly" desecrating a "national flag."<sup>12</sup> The law defined "desecrate" as to "deface, damage or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action."<sup>13</sup>

Johnson was convicted in December 1984, and received both a one year prison sentence and a \$2,000 fine.<sup>14</sup> The Court of Appeals for the Fifth Supreme Judicial District of Texas affirmed.<sup>15</sup> Although holding that under the United States Supreme Court test of *Spence v. Washington*,<sup>16</sup> Johnson's action was "symbolic speech" requiring first amendment scrutiny,<sup>17</sup> the court concluded that the Texas law did not violate Johnson's first amendment rights.<sup>18</sup> Relying on *Deeds v. State*,<sup>19</sup> a Texas flag burning case that preceded *Spence*, the court of appeals found that the statute advanced two state interests which would override Johnson's first amendment rights: "prevent[ing] breaches of the public peace" and "protecting the flag as a symbol of national unity."<sup>20</sup>

In April 1988, the Texas Court of Criminal Appeals reversed by a 5-to-4 vote, holding that application of the Texas Venerated Objects law unconstitutionally deprived Johnson of his first amendment

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9. *Id.* at 2536-37; Brief for Petitioner at 2-6, *Texas v. Johnson*, 109 S. Ct. 2533 (1989) (No. 88-155) [hereinafter Brief for Petitioner].

10. *Johnson v. State*, 755 S.W.2d 92, 93-94 (Tex. Crim. App. 1988) ("*Johnson II*"), *aff'd*, 109 S. Ct. 2533 (1989).

11. *Johnson*, 109 S. Ct. at 2537 (citing TEX. PENAL CODE ANN. § 42.09(a)(3) (Vernon 1974)).

12. TEX. PENAL CODE ANN. § 42.09(a)(3) (Vernon 1974).

13. *Id.* § 42.09(b).

14. *Johnson II*, 755 S.W.2d at 93; Joint Appendix at 1, *Texas v. Johnson*, 109 S. Ct. 2533 (1989) (No. 88-155) [hereinafter Joint Appendix].

15. *Johnson v. State*, 706 S.W.2d 120 (Tex. Ct. App. 1986) ("*Johnson I*"), *rev'd*, 755 S.W.2d 92 (Tex. Crim. App. 1988), *aff'd*, 109 S. Ct. 2533 (1989); Joint Appendix, *supra* note 14, at 1.

16. 418 U.S. 405 (1974).

17. *Johnson I*, 706 S.W.2d at 124.

18. *Id.* at 123-24. The court also held that the law was not unconstitutionally vague or overbroad. *Id.*

19. 474 S.W.2d 718 (Tex. Crim. App. 1971).

20. *Johnson I*, 706 S.W.2d at 123-24.

rights.<sup>21</sup> Rejecting *Deeds* in light of subsequent United States Supreme Court decisions,<sup>22</sup> the court held that Johnson had engaged in protected “symbolic speech” and that Texas had not demonstrated any state interests that would override this protection.<sup>23</sup> Relying on *West Virginia Board of Education v. Barnette*,<sup>24</sup> the court considered Texas’ proffered interest in preserving the flag as a symbol of unity to be inadequate in the face of Johnson’s compromised first amendment rights:

Recognizing that the right to differ is the centerpiece of our First Amendment freedoms, a government cannot mandate by fiat a feeling of unity in its citizens. Therefore, that very same government cannot carve out a symbol of unity and prescribe a set of approved messages to be associated with that symbol when it cannot mandate the status or feeling the symbol purports to represent. If the State has a legitimate interest in promoting a State approved symbol of unity, that interest is not so compelling as to essentially license the flag’s use for only the promotion of governmental status quo.<sup>25</sup>

The court explained that for Texas to override Johnson’s first amendment rights, it would have to show that Johnson’s action posed a “grave and immediate danger” that the flag would lose its ability to “rouse feelings of unity or patriotism” and become devalued “into a meaningless piece of cloth.”<sup>26</sup> Concluding that no such danger was present, the court held the Texas Venerated Objects statute unconsti-

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21. *Johnson v. State*, 755 S.W.2d 92, 93 (Tex. Crim. App. 1988), *aff’d*, 109 S. Ct. 2533 (1989).

22. *See, e.g.*, *Boos v. Barry*, 485 U.S. 312, 315 (1988) (holding the emotive impact of speech is not a secondary effect unrelated to the content of the expression itself); *Spence v. Washington*, 418 U.S. 405, 410 (1974) (noting that the Court must first determine whether actions constituted expressive conduct).

23. *Johnson II*, 755 S.W.2d at 95-97. The court held that the Texas law was “too broad for First Amendment purposes” to prevent breaches of the peace in the case at hand because by banning all flag desecration that caused “serious offense,” the law outlawed “protected conduct which has no propensity to result in breaches of the peace.” *Id.* at 95-96. The court specifically noted that the flag burning had caused a “serious offense” to observers, but that no violence had been associated with the actual burning. *Id.* The court remarked that on the same day of Johnson’s arrest, demonstrators in Dallas burned the national flag of a foreign country which led to a “physical brawl,” yet no arrests had occurred under the statute. *Id.* at 94 n.3. The court also noted that Texas had a separate disorderly conduct statute that prohibited intentional, public utterance of words or offensive gestures or displays which tended to “incite an immediate breach of the peace.” *Id.* at 96 (citing TEX. PENAL CODE ANN. § 42.01 (Vernon 1974)). According to the court, this statute adequately proscribed flag desecration which led to violence, without infringing upon protected expression, unlike the Texas Venerated Objects law. *Id.*

24. 319 U.S. 624 (1943).

25. *Johnson II*, 755 S.W.2d at 97.

26. *Id.* (citing *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. at 641-42).

tutional as applied to "acts of flag desecration when such conduct falls within the protections of the First Amendment."<sup>27</sup>

Texas appealed to the United States Supreme Court.<sup>28</sup> On certiorari,<sup>29</sup> the Supreme Court affirmed, ruling in a 5-to-4 decision that application of the Texas statute unconstitutionally deprived Johnson of his first amendment rights to engage in political expression.<sup>30</sup> The Court's decision was fundamentally similar to that of the Texas Court of Criminal Appeals, although it was more fully elaborated and more rigorously based in Supreme Court precedents. Using the *Spence* test<sup>31</sup> for determining whether particular conduct possesses sufficient communicative elements to require first amendment protection, the Court first determined that the "expressive, overtly political nature" [of Johnson's conduct] was "both intentional and overwhelmingly apparent."<sup>32</sup> Next, the Court refused to apply what it termed the "relatively lenient standard" of the *United States v. O'Brien*<sup>33</sup> test to determine whether Texas' claimed interests outweighed Johnson's first amendment rights.<sup>34</sup> First, the Court declared that despite Texas' claim of a legitimate interest in preventing a breach of the peace, "no disturbance of the peace actually occurred or threatened to

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27. *Id.* The court reasoned that because the statute was unconstitutional as applied to Johnson, a facial determination was unnecessary. *Id.* The court specifically declined to address whether Texas could prosecute flag desecrations which did "not constitute speech under the First Amendment," and therefore did not respond to Johnson's contention that the statute was facially invalid on grounds of vagueness. *Id.*

28. Brief for Petitioner, *supra* note 9, at app. 1.

29. See Official Transcript of Proceedings Before the Supreme Court of the United States, *Texas v. Johnson*, 109 S. Ct. 2533 (1989) (No. 88-155) [hereinafter Official Transcript].

30. *Texas v. Johnson*, 109 S. Ct. 2533, 2547 (1989).

31. *Johnson*, 109 S. Ct. at 2538 (citing *Spence v. Washington*, 418 U.S. 405 (1974)) (stating that context may give meaning to a symbol, and is thus important in determining whether symbolic activity is sufficiently imbued with elements of communication to fall within the scope of the first and fourteenth amendments). For a discussion of *Spence*, see *infra* notes 388-97 and accompanying text.

32. *Johnson*, 109 S. Ct. at 2540.

33. 391 U.S. 367 (1968).

34. *Johnson*, 109 S. Ct. at 2540 (citing *United States v. O'Brien*, 391 U.S. 367 (1968)). Under this test, the Court has held that where "important or substantial" governmental interests are involved, the "non-speech" aspects of "conduct" which combine both "speech" and "non-speech" elements can be regulated, so long as the governmental interest is unrelated to the suppression of free expression. *O'Brien*, 391 U.S. at 376-77. In considering Texas' interest in preventing a breach of peace, the Court first held that under the standards propounded in *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (holding the Court must consider whether the expression of a provocative idea is directed to inciting or producing imminent lawless action and is likely to incite or produce such ideas), and *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (holding that "fighting words" or personal insults that by their very nature inflict injury or tend to incite a breach of the peace are not protected under the first amendment), the state's interest in maintaining order is not implicated. *Johnson*, 109 S. Ct. at 2542. For a discussion of *O'Brien*, see *infra* notes 368-72 and accompanying text.

occur because of Johnson's burning of the flag,"<sup>35</sup> and therefore, "the state's interest in maintaining order [was] not implicated."<sup>36</sup>

Addressing Texas' second asserted interest, preserving the flag as a symbol of nationhood and national unity, the Court noted Texas' concern that flag burning would convince people that "the flag does not stand for nationhood and national unity" or that "we do not enjoy unity as a nation."<sup>37</sup> However, consistent with *Spence*,<sup>38</sup> the Court pointed out that such "concerns blossom only when a person's treatment of the flag communicates some message."<sup>39</sup> Because Texas' interest was related "to the suppression of free expression," the *O'Brien* test did not apply.<sup>40</sup> Instead, the Court held the statute "content based" under *Boos v. Barry*,<sup>41</sup> because it restricted Johnson's freedom of expression based on "the content of the message he conveyed."<sup>42</sup> Under this doctrine, the state's interest "in preserving the special symbolic character of the flag" is subject to "the most exacting scrutiny."<sup>43</sup>

Under *Boos*, Texas was required to show that the "regulation [was] necessary to serve a compelling state interest and that it [was] narrowly drawn to achieve that end."<sup>44</sup> Only then could Texas abridge Johnson's first amendment rights.<sup>45</sup> Texas, however, failed to show a compelling state interest because the purpose of the law was to prevent citizens from conveying "harmful" messages that "cast doubt on either the idea that nationhood and national unity are the flag's

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35. *Johnson*, 109 S. Ct. at 2541. The Court stated that Texas' position amounted to a "claim that an audience that takes serious offense at a particular expression is necessarily likely to disturb the peace," and that all flag burnings posed a "potential for breach of peace" which could justify suppression. *Id.* at 2542. Rejecting this claim, the Court determined that such a position would "eviscerate" the *Brandenburg* doctrine and fly in the face of numerous precedents, such as *FCC v. Pacifica Foundation*, 438 U.S. 726, 745 (1978) (holding that the very fact that expression caused offense "is a reason for according it constitutional protection"). *Johnson*, 109 S. Ct. at 2541-42.

36. *Id.* at 2542.

37. *Id.*

38. *See Spence v. Washington*, 418 U.S. 405, 414 n.8 (1974) (concluding that Government's interest in preserving the flag's special symbolic value is directly related to expression in the context of activity).

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

40. *Id.*

41. 485 U.S. 312, 315 (1988) (holding the emotive impact of speech on its audience is not a secondary effect unrelated to the content of the expression itself); *see also infra* notes 411-12 and accompanying text.

42. *Johnson*, 109 S. Ct. at 2543.

43. *Id.* (quoting *Boos*, 485 U.S. at 321).

44. *Boos*, 485 U.S. at 321 (quoting *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 45 (1983)).

45. *Johnson*, 109 S. Ct. at 2544.



referents or that national unity actually exists."<sup>46</sup> This interest, the Court determined, violated the "bedrock principle underlying the First Amendment . . . that the Government may not prohibit expression of an idea simply because society finds the idea itself offensive or disagreeable."<sup>47</sup> Therefore, the Court explained that "a state may not criminally punish a person for . . . [expressions] critical of the flag,"<sup>48</sup> whether verbal or nonverbal.<sup>49</sup> Thus, the Court concluded that Texas could not criminally punish a person for burning a flag as a means of political protest,<sup>50</sup> because the "Government may not prohibit expression simply because it disagrees with [the] message" regardless of the "mode one chooses to express [that] idea."<sup>51</sup>

Following the reasoning of the Texas Court of Criminal Appeals, the Court specifically rejected the constitutionality of a law which could mandate that a symbol "be used to express only one view of its referents"<sup>52</sup> and which would allow the government to "foster its own view of the flag by prohibiting expressive conduct relating to it."<sup>53</sup> Further, the Court specifically rejected the creation of a "separate judicial category for the American flag alone"<sup>54</sup> which would exempt the flag from the "joust of principles protected by the First Amendment."<sup>55</sup> The Court concluded that the "principles of freedom and inclusiveness that the flag best reflects"<sup>56</sup> would be reaffirmed by its decision: "We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents."<sup>57</sup>

### B. *The Reaction to Johnson*

The Supreme Court's *Texas v. Johnson* decision touched off what one newspaper termed a "firestorm of indignation"<sup>58</sup> and what *News-*

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46. *Id.*

47. *Id.*

48. *Id.* (citing *Street v. New York*, 394 U.S. 576 (1969)).

49. The Court flatly declared that Texas' attempt to distinguish between "written or spoken words and nonverbal conduct . . . is of no moment where the nonverbal conduct is expressive, as it is here, and where the regulation of that conduct is related to expression, as it is here." *Id.* at 2545.

50. *Id.* at 2546.

51. *Id.* at 2547.

52. *Id.* at 2546.

53. *Id.* at 2545.

54. *Id.* at 2546.

55. *Id.*

56. *Id.* at 2547.

57. *Id.* at 2547-48.

58. D'Antonio & Firstman, *Rallying 'Round the Flag*, *NEWSDAY*, July 2, 1989, at 4.

week termed "stunned outrage"<sup>59</sup> across the United States. Arguably, the American political establishment had denounced no other Supreme Court decision within recent memory with such speed and vigor.<sup>60</sup> Within a week of the *Johnson* decision, President Bush denounced flag burning as "dead wrong"<sup>61</sup> and proposed a constitutional amendment to overturn the decision.<sup>62</sup> Also within a week, the Senate passed a resolution by a 97-to-3 vote expressing "profound disappointment" with the ruling and approved an attempt to legislatively overturn the decision.<sup>63</sup> Similarly, the House of Representatives approved by a 411-to-15 vote an expression of "profound concern" over the Court's action and then held an unusual all-night session devoted to speeches denouncing flag burners and the Court.<sup>64</sup> By July 1, 1989, 172 Representatives and 43 Senators had sponsored 39 separate resolutions calling for a constitutional amendment outlawing desecration of the flag.<sup>65</sup>

By July 4, both legislative houses in at least four states had approved resolutions calling on Congress to pass a flag-protection constitutional amendment,<sup>66</sup> and individual legislative chambers in at least another twelve states had either taken similar action or passed resolutions criticizing the *Johnson* decision.<sup>67</sup> A poll published in the July 3 *Newsweek* indicated that sixty-five percent of the public disagreed with the Court's ruling and that seventy-one percent favored a constitutional amendment to overturn it.<sup>68</sup> By October, 1.5 million people had signed petitions to that effect.<sup>69</sup> The Times Mirror Center for the People and the Press found that the decision attracted more public interest than any Washington news story since the beginning of

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59. *A Fight for Old Glory*, NEWSWEEK, July 3, 1989, at 18.

60. See *infra* notes 61-65 & 438-59 and accompanying text. Other provocative cases for example, *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (declaring public school segregation illegal), received criticism for the most part only in the South, while *Roe v. Wade*, 410 U.S. 113 (1973) (defining and limiting a woman's constitutional right to have an abortion), sparked both support and denunciation.

61. Biskupic, *Flag-Burning, 'Dial-a-Porn' Acts Struck Down by Justices*, 47 CONG. Q. 1547 (1989).

62. Biskupic, *Flag Burning Ruling Sparks Cries for Action on Hill*, 47 CONG. Q. 1622 (1989).

63. Biskupic, *supra* note 61, at 1548.

64. Biskupic, *supra* note 62, at 1622.

65. *Id.* at 1623.

66. *Legislators Supporting Flag Move*, N.Y. Times, July 4, 1989, at A6, col. 1 (Colorado, Louisiana, Maine, and South Carolina).

67. *Id.* (California, Delaware, Illinois, Massachusetts, Nevada, New Hampshire, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, and Texas).

68. *A Fight for Old Glory*, *supra* note 59, at 18.

69. *A Shift in the Winds Swirling Around Old Glory*, U.S. NEWS & WORLD REP., Oct. 30, 1989, at 14.

its surveys in 1986.<sup>70</sup> Several aspiring capitalists even offered to flameproof flags to protect them from roving flag burners.<sup>71</sup>

As passions cooled, the drive for a constitutional amendment failed with the Senate defeating President Bush's proposal in a 51-to-48 vote on October 19, 1989.<sup>72</sup> In the meantime, however, the House and the Senate passed the Flag Protection Act of 1989,<sup>73</sup> which became law without President Bush's signature on October 28.<sup>74</sup>

Those who backed the Flag Protection Act argued that the *Johnson* decision could be circumvented more quickly and with less damage to constitutional rights by passing a statute as opposed to a constitutional amendment.<sup>75</sup> This statute would consist of a "content neutral" law designed to avoid the "most exacting scrutiny"<sup>76</sup> by simply banning outright various forms of desecration, regardless of the motive of the actor or the impact upon the audience. This approach was apparently based on various ambiguous comments made by the *Johnson* Court. First, the Court had pointed out that its decision was "bounded by the particular facts of this case and by the statute under which Johnson was convicted"<sup>77</sup> and that the "prosecution of a [flag desecrator] who had not engaged in expressive conduct would pose a different case."<sup>78</sup> The Court had also noted the Texas law was "not aimed at protecting the physical integrity of the flag in all circumstances, but [was] designed instead to protect it only against impairments that would cause serious offense to others."<sup>79</sup> Thus, proponents of the Flag Protection Act argued that a flat ban on flag

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70. *Zsa Zsa Story Outdraws Washington Scandals*, Ann Arbor News, Oct. 15, 1989, at B4, col. 1. Fifty-one percent of the respondents reported that they closely followed the *Johnson* case. *Id.* For comparison purposes, six percent closely followed the scandals that led to the resignation of Japanese Prime Minister Takeshita in May 1989, while eighty percent followed the trial of actress Zsa Zsa Gabor in October 1989, for slapping a policeman. *Id.*

71. See *The Flag: The Burning Question*, TIME, Aug. 7, 1989, at 23; *Great Moments in Marketing*, FORTUNE, July 31, 1989, at 274.

72. Biskupic, *Anti-Flag Burning Amendment Falls Far Short in Senate*, 47 CONG. Q. 2803 (1989). Passage required a two-thirds vote of those present and voting. *Id.*

73. Flag Protection Act of 1989, Pub. L. No. 101-131, 103 Stat. 777 (amending 18 U.S.C. § 700).

74. See Angle, *Flag-Desecration Legislation Passed by House*, 380-38, 47 CONG. Q. 2400 (1989); Biskupic, *Flag Measure Will Become Law Without Bush's Signature*, 47 CONG. Q. 2720 (1989); Biskupic, *Senate Amends, Then Passes Bill on Flag Desecration*, 47 CONG. Q. 2646 (1989); Dewar & Kenworthy, *Support Lags for Amendment to Prohibit Flag Burning*, Wash. Post, July 25, 1989, at A1, col. 1.

75. For a discussion of the passage of the Flag Protection Act of 1989 and related commentary, see *infra* notes 559-621 and accompanying text.

76. For a discussion of the "content neutral" test, see *supra* notes 41-43 and accompanying text.

77. *Texas v. Johnson*, 109 S. Ct. 2533, 2544 n.8 (1989).

78. *Id.* at 2538 n.3.

79. *Id.* at 2543.

desecration would be a "content neutral" statute, having the "non-speech" related interest of preserving the physical integrity of the flag under all circumstances, and therefore constitutional under the more lenient *O'Brien* standard.<sup>80</sup>

Flag burners quickly tested the law in Seattle and Washington, D.C. in October 1989.<sup>81</sup> Two separate federal district courts held the new law unconstitutional as applied to political protesters.<sup>82</sup> Both courts based their decisions on *Johnson*, coupled with a finding that the Flag Protection Act was not "content neutral" either in its text or in the underlying governmental interests which motivated its enactment.<sup>83</sup> Under a mandatory expedited review process required by the Flag Protection Act,<sup>84</sup> the Supreme Court, in *United States v. Eichman*, accepted jurisdiction in March 1990, met in special session to hear oral arguments in May, and on June 11, affirmed the district courts' findings.<sup>85</sup> Although the *Eichman* decision spurred a new move, backed by President Bush, for the passage of a constitutional amendment to outlaw flag desecration, the general political atmosphere on the flag burning issue in the late spring of 1990 was considerably less hysterical than it had been the previous year.<sup>86</sup> Thus, the proposed amendment, which required a two-thirds majority, was soundly defeated by a 254-to-177 vote in the House of Representatives on June 21, and a 58-to-42 vote in the Senate on June 26.<sup>87</sup> Although Republicans, who overwhelmingly voted for the amendment, promised to make opposing the amendment a major campaign issue in the 1990 election,<sup>88</sup> by September 1990, flag burning had largely disappeared as a subject of news or discussion, especially with threats of war in the Middle East and of an economic recession capturing the public's attention.

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80. For a discussion of the justifications for the Flag Protection Act of 1989, see *infra* notes 583-91 and accompanying text.

81. See *infra* notes 622-26 and accompanying text.

82. See, e.g., *United States v. Eichman*, 731 F. Supp. 1123 (D.D.C.), *aff'd*, 110 S. Ct. 2404 (1990); *United States v. Haggerty*, 731 F. Supp. 415 (W.D. Wash.), *aff'd sub nom. United States v. Eichman*, 110 S. Ct. 2404 (1990).

83. See *Eichman*, 731 F. Supp. at 1125; *Haggerty*, 731 F. Supp. at 418.

84. See Flag Protection Act of 1989, Pub. L. No. 101-131, § 2(d)(2), 103 Stat. 777 (amending 18 U.S.C. § 700).

85. See *Eichman*, 110 S. Ct. at 2408.

86. See *infra* notes 688-706 and accompanying text.

87. Biskupic, *Critics of Measure Win Fight, But Battle Scars Run Deep*, 48 CONG. Q. 2063 (1990).

88. See Dillin, *Republicans Say They'll Take Flag Issue Directly to American Voters*, *Christian Sci. Monitor*, June 25, 1990, at 1, col. 1.

### C. *Much Ado About Nothing?*

From one perspective, The Great 1989-1990 Flag Flap was an excellent example of "much ado about nothing" in American history. To put it mildly, the United States was not overrun with mobs of flag burners in the 1980's; indeed, the *Johnson* case was the only flag burning reported in the *New York Times* from 1983 to 1988.<sup>89</sup> As the *Tampa Tribune* pointed out on June 28, 1989, "You are likely to live a lifetime and never see a 'dissident' burn a flag, except on television where such events are greatly welcomed. All we know about flag-burners is that they are microscopically few and seriously deficient in public-relations skills."<sup>90</sup> Further, as the Texas Court of Criminal Appeals noted, there is no evidence to support the contention that desecrating the flag weakens its symbolic value.<sup>91</sup> Rather, the evidence suggests that from the standpoint of promoting patriotism in general and both verbal and actual flag waving in particular, Johnson's contribution was virtually unprecedented and certainly unheralded.<sup>92</sup>

It is unclear how the prohibition of flag burning as a means of peaceful political protest could increase the symbolic patriotic value of the flag to those who favor such a ban. It is clear, however, that such a law or constitutional amendment will diminish the flag's ability symbolically to represent political freedom to those Americans who believe that the flag should be burned as a means of protest or that the right symbolically to use the flag as a means of dissent should be constitutionally protected. As Professor Arnold Loewy wrote, "Perhaps the ultimate irony is that *Johnson* has done more to preserve the flag as a symbol of liberty than any prior decision, while the decision's detractors would allow real desecration of the flag by making it a symbol of political oppression."<sup>93</sup> Justice Brennan, writing for the *Johnson* majority, made the same point:

[T]he flag's deservedly cherished place in our community will be strengthened, not weakened, by our holding today. Our decision is a reaffirmation of the principles of freedom and inclusiveness that the flag best reflects, and of the conviction that our toleration of criticism such as Johnson's is a sign and source of our strength. . . . We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem

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89. This conclusion is based on an examination of the *New York Times*' annual indexes.

90. *Tampa Tribune* (June 28, 1989), reprinted in 20 EDITORIALS ON FILE 715 (1989).

91. See *supra* notes 26-27 and accompanying text.

92. See *supra* notes 58-71 and accompanying text.

93. Loewy, *The Flag Burning Case: Freedom of Speech when We Need It Most*, 68 N.C.L. REV. 165, 174 (1989).

represents.<sup>94</sup>

As these quotations suggest, although the facts of *Johnson* were isolated and ultimately insignificant, the Court's decision represents a principle fundamental to the core values of a political democracy: the right to vigorous, vehement, and even highly offensive and upsetting dissent from governmental policy. Justice Brennan summed up this key point in his opinion: "[I]f there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."<sup>95</sup> Similarly, Justice Jackson stated in *West Virginia State Board of Education v. Barnette*<sup>96</sup> one of the most eloquent and apposite paeans to democratic principles ever penned by the Court:

Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard. It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. . . . The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own. Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. . . . [F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order. If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion. . . .<sup>97</sup>

### III. THE DEVELOPMENT OF FLAG DESECRATION LAW

#### A. *Americans and Their Flag*

In analogizing Justice Jackson's remarks to the present, it seems that the controversy surrounding *Johnson* arose not from the general principles concerning the right to dissent at issue in the case, but instead, from the emotional response involved with desecrating a flag that is "our own."<sup>98</sup> For instance, if an opponent of the December

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94. *Texas v. Johnson*, 109 S. Ct. 2533, 2547-48 (1989).

95. *Id.* at 2544.

96. 319 U.S. 624 (1943) (holding unconstitutional compulsory flag salutes and compulsory recitals of the Pledge of Allegiance in public schools).

97. *Id.* at 641-42; see also *infra* note 472.

98. *Barnette*, 319 U.S. at 641.

1989 American invasion of Panama were to burn a newspaper copy of President Bush's explanation for this adventure, or even were to toss an ax through his television set while the President was speaking, neither action would likely merit a serious claim of illegality.<sup>99</sup> Although ultimately any flag is simply a piece of cloth or other substance with colors or designs imprinted on it, many Americans have clearly invested this cloth with emotionally high-charged values. As Justice Jackson wrote in *Barnette*, "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."<sup>100</sup>

The attempt to ban desecration of the American flag arises not only from the fact that many Americans, including apparently most of the elected political leadership, believe that the flag represents a certain concept of liberty, nationalism, and patriotism which translates into political support for the country (whatever that means), but also that those who disagree cannot use the flag to express other views. But, again to quote Justice Jackson: "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."<sup>101</sup> Joey Johnson views the flag as a "symbol of oppression, international murder and plunder."<sup>102</sup> If there is to be any meaning to freedom of expression in the United States, it can only be that if President Bush can wave the flag as he invades Panama, then Joey Johnson can burn the flag in protest. As Alexander Meiklejohn has written, the true meaning of freedom of expression is that:

[If] on any occasion in the United States it is allowable to say that the Constitution is a good document it is equally allowable . . . to say that the Constitution is a bad document. If a public building may be used in which to say, in time of war, that the war is justified, then the same building may be used in which to say that it is not justified. If it be publicly argued that conscription for armed service is moral and necessary, it may likewise be publicly argued that it is immoral and unnecessary. If it may be said that American political institutions are superior to those of England or Russia or Germany, it may, with equal freedom, be said that those of England or Russia or Germany are superior to ours. . . . When a question of policy is "before the house," free men choose it not with

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99. If the television set belonged to someone else, of course, the attack would involve an invasion of property rights, but this issue does not arise in the hypothetical as constructed.

100. *Barnette*, 319 U.S. at 632.

101. *Id.* at 632-33.

102. Grogan, Demaret & Stewart, *Unimpressed by the Freedom to Burn Old Glory*, *Joey Johnson Still Wants a Revolution*, PEOPLE, July 10, 1989, at 99.

their eyes shut, but with their eyes open. To be afraid of ideas, any idea, is to be unfit for self-government.<sup>103</sup>

In the context of Meiklejohn's argument, it cannot make any difference that Johnson spoke symbolically rather than verbally. Every court which heard the case concluded that Johnson's actions amounted to political expression.<sup>104</sup> Common sense suggests that the motive for banning flag desecration is not that the burning of one flag inflicts any concrete damage, but rather that people dislike the message flag burning conveys. As Justice Brennan wrote, "The Government has no aesthetic property interest in protecting a mere aggregation of stripes and stars for its own sake."<sup>105</sup> Supreme Court decisions dating back to *Stromberg v. California*<sup>106</sup> and *Barnette*<sup>107</sup> (both flag cases) have concluded that many symbolic acts qualify for first amendment protection.<sup>108</sup>

Because flag desecration is a form of expression presumptively entitled to first amendment protection, the nature of the strong American attachment to the flag would appear to be irrelevant from a legal standpoint. Nonetheless, to understand The Great 1989-1990 Flag Flap requires a discussion of this subject at some length. In his dissenting opinion in *Johnson*,<sup>109</sup> Chief Justice Rehnquist quoted patriotic poetry to bolster his statement that "millions and millions of Americans regard [the flag] with an almost mystical reverence."<sup>110</sup> Fundamentally, his legal argument boils down to the proposition that the flag occupies a "unique position as a symbol of our Nation, a uniqueness that justifies a governmental prohibition against flag burning in the way respondent Johnson did here."<sup>111</sup> Justice Stevens, in a separate dissent, adopted virtually the same position, declaring that the question raised by desecration laws concerning the American flag was "unique" and that therefore "rules that apply to a host of other symbols, such as state flags, armbands, or various privately promoted

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103. A. MEIKLEJOHN, FREEDOM OF SPEECH AND ITS RELATION TO SELF-GOVERNMENT 27 (1948).

104. See *Johnson*, 109 S. Ct. at 2540 (decision of the United States Supreme Court); *Johnson II*, 755 S.W.2d at 95-97 (decision of the Texas Court of Criminal Appeals); *Johnson I*, 706 S.W.2d at 123-24 (decision of the Texas Criminal Court of Appeals for the Fifth Supreme Judicial District of Texas).

105. *Kime v. United States*, 459 U.S. 949, 953 (1982) (Brennan, J., dissenting).

106. 283 U.S. 359 (1931) (holding that it is unconstitutional to prohibit use of a red flag to signify peaceful opposition to government).

107. *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (holding that flag salute and recital of Pledge of Allegiance cannot be compelled in public schools).

108. See *infra* notes 352-71 & 388-96 and accompanying text.

109. *Texas v. Johnson*, 109 S. Ct. 2533, 2552 (1989) (Rehnquist, C.J., dissenting).

110. *Id.*

111. *Id.* at 2548.



emblems of political or commercial identity, are not necessarily controlling."<sup>112</sup>

Both dissents emphasize the role of the flag in American history, referring to "the soldiers who scaled the bluff at Omaha Beach"<sup>113</sup> or those who raised American flags at Iwo Jima and Inchon.<sup>114</sup> Chief Justice Rehnquist even noted that "the flag has appeared as the principal symbol on approximately 33 United States postal stamps and in the design of at least 43 more, more times than any other symbol."<sup>115</sup> In short, the dissenting judges adopted the position that Texas had suggested in oral argument: There is a flag exception in the first amendment.<sup>116</sup>

Similarly, President Bush, in his first public remark about the decision, declared that the American flag is "very, very special" and burning it is "wrong, dead wrong."<sup>117</sup> The President subsequently declared that he felt "viscerally"<sup>118</sup> and "very, very strongly"<sup>119</sup> about the subject and that "what that flag embodies is too sacred to be abused."<sup>120</sup> Like many other defenders of the flag, President Bush stressed that the flag was above all a "banner of freedom,"<sup>121</sup> without apparently sensing any irony in the fact that his position in support of a constitutional amendment forbidding flag desecration amounted to an attempt to preserve a symbol of freedom by destroying the crucial substantive freedom that he wished symbolically to honor.

Bush's publicly expressed sentiments that the flag was too important as a symbol of freedom to tolerate its desecration were typical of those voiced by many others during The Great 1989-1990 Flag Flap. This belief, and also the belief that flag desecration would seriously pose a risk to the American system, are equally characteristic of pre-

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112. *Id.* at 2556 (Stevens, J., dissenting).

113. *Id.* at 2557.

114. *Id.* at 2550 (Rehnquist, C.J., dissenting).

115. *Id.* at 2551.

116. Official Transcript, *supra* note 29, at 9. Justice Kennedy asked Dallas County District Attorney Kathi Drew, "What is the juridical category you're asking us to adopt in order to say we can punish this kind of speech? Just an exception for flags? It's just a—there's just a flag exception of the First Amendment?" *Id.* In response, Drew noted that "[t]o a certain extent, we have made that argument in our brief." *Id.*

117. Toner, *Bush and Many in Congress Denounce Flag Ruling*, N.Y. Times, June 23, 1989, at A8, col. 2.

118. Remarks of President George Bush (June 27, 1989), *reprinted in* The White House, Office of the Press Secretary, Press Conference by the President 4 (June 27, 1989).

119. *Id.* at 3.

120. Remarks of President George Bush (June 30, 1989), *reprinted in* The White House, Office of the Press Secretary, Remarks by the President for a Constitutional Amendment to Protect the Flag 2 (June 30, 1989).

121. *Id.* at 1.

vious, similar disputes.<sup>122</sup> Thus, in 1947, Senator Alexander Wiley declared that “subversives” had always targeted the flag “because they recognize that if they can besmirch the symbol of the American constitutional system they will have gone a long way in undermining the republic.”<sup>123</sup> Following an incident in Georgia in 1966 during which American and state flags were ripped during a civil rights march, Governor Carl Sanders declared, “In my judgment, there is no greater outrage that can be perpetrated against our nation and our state.”<sup>124</sup> During 1967 hearings before a House Judiciary subcommittee which eventually led to passage of the first federal flag desecration law in 1968,<sup>125</sup> Congressman James Quillen declared that the flag “has always been the symbol of freedom and liberty,” that “we could not have any penalty too strict” for flag desecration, and that “anything short of a firing squad, even though it be severe, would be agreeable.”<sup>126</sup> During a March 1989 protest against a Chicago art exhibit that invited visitors to step on a flag, one veteran declared that “the flag to me is a living thing and they don’t have any right to do that to it,”<sup>127</sup> while another stated that when “[y]ou step on the flag, the whole nation feels something.”<sup>128</sup> Following the *Johnson* decision, one New York man declared, “If someone burned a flag in front of me, I’d kill them, shoot them right down. I got a flag on my motorcycle, my car and my camper and I’m putting one on my boat. . . . From now on, whatever I’m driving, there’s going to be a flag on it—that’s my protest.”<sup>129</sup>

The Texas legislature, in petitioning Congress to pass a constitutional amendment overturning the *Johnson* decision, declared:

[W]hatever legal arguments may be offered to support [the *Johnson* decision], the incineration or other mutilation of the flag . . . is repugnant to all those who have saluted it, paraded beneath it on

122. See generally Prosser, *Desecration of the American Flag*, 3 IND. LEGAL F. 159 (1962).

123. 93 CONG. REC. 165 (1947).

124. See *Georgia Governor Orders Protection of Flag at Cordele*, N.Y. Times, Apr. 2, 1966, at A13, col. 4.

125. 18 U.S.C. § 700 (1988).

126. *Hearings Before Subcommittee No. 4 of the Comm. on the Judiciary, House of Representatives on H.R. 271 and Similar Proposals to Prohibit Desecration of the Flag*, 90th Cong., 1st Sess. 29, 40 (1967) [hereinafter *Hearings*].

127. *Flag-on-Floor Exhibit Can Stay, Judge Rules*, Ann Arbor News, Mar. 3, 1989, at C3, col. 1.

128. Shryer, *3,000 Protest Chicago Exhibit of Flag on Floor*, L.A. Times, Mar. 13, 1989, at 20, col. 1; see also Ayers, *Keepers of the Flame Stake Freedom’s Fire*, N.Y. Times, Oct. 16, 1989, at A14, col. 5 (reporting 1989 Convention of Sons of the American Revolution in which members passed a resolution declaring that “[o]ur flag, in essence, is considered a living person in our society”).

129. D’Antonio & Firstman, *supra* note 58, at 4.

the Fourth of July, been saluted by its half-mast configuration, or raised it inspirationally in remote corners of the globe where they have defended the ideals of which it is representative; this legislature concurs with the court minority that the Stars and Stripes is deserving of a unique sanctity, free to wave in perpetuity over the spacious skies where our bald eagles fly, the fruited plain above which our mountain majesties soar, and the venerable heights to which our melting pot of peoples and their posterity aspire.<sup>130</sup>

The American veneration of the flag is so extreme that leading flag expert Whitney Smith has declared that "we have created something unique in the world: the flag as a religion, a civil religion."<sup>131</sup> Smith added that "[t]he United States goes to the greatest extreme. The flag has become our substitute for a royal family or religion. We have made an icon out of it."<sup>132</sup>

In the United States, what one law professor has termed "vexillatry" or the exaltation of the flag "into a kind of mystical reification of the nation,"<sup>133</sup> is a relatively recent development clearly associated with the growth of American nationalism in the post-Civil War era. Apparently, great patriots of the past committed acts that qualify as flag desecration under modern standards: for example, one photograph which survives from the Civil War shows President Lincoln and General McClellan eating at a table covered with a flag.<sup>134</sup> Furthermore, the law has only recently recognized national respect for the flag. Congress declared the "Star Spangled Banner" to be the national anthem only in 1931,<sup>135</sup> and it declared "The Stars and Stripes Forever" to be the national march in 1987.<sup>136</sup> Congress did not establish Flag Day until 1949,<sup>137</sup> and expanded the observance

130. 135 CONG. REC. S10,825 (daily ed. Sept. 7, 1989). Not surprisingly, Texas did not mention its role in attempting to overthrow the Union and the flag during the Civil War.

131. Alters, *Historical Dilemma Colors the Debate over Old Glory*, Boston Globe, July 2, 1989, at 1, col. 1 (quoting Whitney Smith, director of the Flag Research Center in Winchester, Massachusetts).

132. Horn, *Passions that Stir in the Breeze*, U.S. NEWS & WORLD REP., May 29, 1989, at 54. Many democratic countries such as West Germany, Belgium, and Denmark have banned flag desecration, while many others, including Japan, Great Britain, Canada, Australia, France, Switzerland, Sweden, and the Netherlands have not. See Prosser, *supra* note 122, at 213 n.292; see also Brief of the Christic Institute and 20 other organizations as amici curiae in Support of Respondent at 27, Texas v. Johnson, 109 S. Ct. 2533 (1989) (No. 88-155). In the Soviet Union, flag desecration is punishable by a fine and up to two years in jail. Meisler, *Why Flag Case Stirred Such a Flap*, L.A. Times, July 4, 1989, § 1, at 1, col. 1.

133. Mittlebeeler, *Flag Profanation and the Law*, 60 KY. L.J. 886 (1972).

134. *Flag Laws Still Wave*, Civil Liberties, Sept. 1970, at 1, col. 1.

135. Rogers, *Flying the Flag*, Ann Arbor News, July 3, 1989, at D1, col. 2.

136. 36 U.S.C. § 188 (1988).

137. 36 U.S.C. § 157 (1988). See generally Cain, *Stars and Stripes Forever*, COMMONWEAL, Mar. 27, 1970, at 62.

into Flag Week only in 1966.<sup>138</sup> Although a magazine first published the Pledge of Allegiance in 1892,<sup>139</sup> the government did not endorse the Pledge until 1942,<sup>140</sup> when Congress codified flag etiquette for the first time.<sup>141</sup> Most significantly, while the first state laws prohibiting flag desecration date only from 1897, no federal flag desecration law was passed until 1968.<sup>142</sup>

### B. *American Flag Desecration and the Law: A Pre-1968 History*

Although a scattering of flag desecration incidents speckled American history prior to the twentieth century, none of them aroused any form of institutionalized legal response until shortly before 1900.<sup>143</sup> Perhaps the earliest case occurred in 1634, when Captain John Endicott, the commander of a military company in Massachusetts Bay Colony, defaced part of the red cross of the King's colors in protest of its alleged connection with the papacy.<sup>144</sup> In a 1783 incident during the American Revolutionary War, a British flag was torn to pieces in New York.<sup>145</sup> The birth of the new nation provided new flags for potential desecration. In one incident near Philadelphia in 1844, a young man named George Shifler was killed while trying to protect the American flag from desecration.<sup>146</sup> On the verge of the Civil War in January 1861, President Buchanan's Treasury Secretary telegraphed orders that "if any one attempts to haul down the American flag, shoot him on the spot."<sup>147</sup> Shortly thereafter, however, protesters burned American flags with apparent impunity before a cheering crowd in Liberty, Mississippi, and buried a flag in Memphis, Tennessee.<sup>148</sup> However, in New Orleans, when an American flag was stolen, dragged in the mud, and torn to shreds following the Union re-occupation, one of the alleged perpetrators was executed after his conviction of treason in a military court.<sup>149</sup>

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138. 36 U.S.C. § 157a (1988).

139. See Pollak, *The Republic for Which It Stands*, 24 LAND & WATER L. REV. 567 (1989).

140. See *id.* at 567 n.8 (citing Act of June 22, 1942, ch. 435, § 7, 56 Stat. 380 (codified as amended at 36 U.S.C. § 172 (1988))).

141. National Flag Code, ch. 435, § 1-5, 56 Stat. 377 (1942) (codified as amended at 36 U.S.C. § 173-177 (1988)); see also Cain, *supra* note 137, at 62.

142. See *infra* notes 250-88 and accompanying text.

143. See *infra* notes 144-61 and accompanying text.

144. Mittlebeeler, *supra* note 133, at 902.

145. *Id.*

146. B. MASTAI & M. MASTAI, *THE STARS AND THE STRIPES* 27 (1973).

147. Brief of the Washington Legal Foundation and five other organizations as amici curiae at 7-8, *Texas v. Johnson*, 109 S. Ct. 2533 (1989) (No. 88-155) [hereinafter Brief of Washington Legal Foundation].

148. Mittlebeeler, *supra* note 133, at 902.

149. Fleming, *Hail to the Flag*, READERS DIGEST, Apr. 1969, at 190-91.

Although widespread concern over flag desecration developed shortly before the turn of the century, the primary focus was not upon symbolic protests, but rather upon the increasing commercialization of the flag and its use in political campaigns such that accidental desecration occurred during political scuffles.<sup>150</sup> With regard to the growing commercial abuse of the flag, the American Flag Association complained to a Senate Committee in 1902 that the flag appeared on paper which wrapped food, cigars, and other items, adorned pillow covers, door mats, and other household goods, and advertised such items as bicycles, whisky, pool rooms, and variety shows.<sup>151</sup> Concern over the desecration of the flag during political campaigns especially grew following the widespread use of political advertisements attached to the flag by both parties in 1896, with the result that "[i]n the excitement and anger generated at that time the flag so used was torn down and torn in pieces and trampled in the dust"<sup>152</sup> during incidents which "occurred in all sections of the country."<sup>153</sup> In one such example in Council Bluffs, Iowa, a mounted assailant fired a shotgun at a partisan banner attached to a flag, whereupon a soldier shot back, killing the assailant's horse.<sup>154</sup>

As the result of such incidents, groups such as the Patriotic Order of Sons of America began pressing for federal and state legislation to ban flag desecration.<sup>155</sup> Although flag protection legislation passed the House of Representatives in 1890, and the Senate in 1904 and again in 1908,<sup>156</sup> no pervasive federal bill became law until 1968.<sup>157</sup> However, several states passed such measures beginning in 1897, and by 1905, thirty-four states had passed flag desecration laws.<sup>158</sup> By 1915, thirty-nine states had flag desecration laws and almost all of the remaining states passed such laws during World War I or during the 1919 "red scare."<sup>159</sup> Many of these laws were similar because they had been patterned after New York's 1905 law, which also served as the model for the 1917 Uniform Flag Law,<sup>160</sup> subse-

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150. Prosser, *supra* note 122, at 194-96.

151. *Id.* at 195 (citing S. REP. NO. 506, 58th Cong., 2d Sess. 53 (1904)).

152. *See id.* at 196 (quoting 9B U.L.A. 48 (1966)).

153. *Id.*

154. *Id.*

155. *Id.* at 199.

156. *Id.*

157. *Id.* at 202.

158. *Id.*

159. *See Note, Flag Burning, Flag Waving and the Law*, 4 VAL. U.L. REV. 345, 362 (1970).

160. NAT'L CONF. OF COMM'RS ON UNIF. STATE L., PROCEEDINGS OF THE TWENTY-SEVENTH ANNUAL MEETING 323-24 (1917).

quently enacted by many states.<sup>161</sup> Amidst World War I in 1918, the American Bar Association endorsed the Uniform Flag Law as essential for the United States to maintain "its power and prestige" around the world and at home, and to strike at the "insidious encroachments of treason which strike at the symbol and the sovereignty symbolized."<sup>162</sup>

Regarding both the national and state flags, desecration laws generally prohibited two types of activities: (1) improper use, which generally involved using the flag for commercial advertising purposes;<sup>163</sup> and (2) desecration, which according to a 1966 New York Statute, was to "publicly mutilate, deface, defile, or defy, trample upon, or cast contempt upon by words or act."<sup>164</sup> Like many of the flag laws in other states, the 1966 New York law broadly defined what constituted a flag:

The words flag, standard, color, shield or ensign, as used in this section, shall include any flag, standard, color, shield or ensign, or any picture or representation, of either thereof, made of any substance, or represented on any substance, and of any size, evidently purporting to be, either of, said flag, standard, color, shield or ensign, of the United States of America, or of the state of New York, or a picture or a representation, of either thereof, upon which shall be shown the colors, the stars, and the stripes, in any number of either thereof, or by which the person seeing the same, without deliberation may believe the same to represent the flag, colors, standard, shield or ensign of the United States of America or of the state of New York.<sup>165</sup>

Although in 1970 a handful of states punished desecration as an otherwise unspecified misdemeanor, penalties in about fifteen states were fines of \$100 and/or thirty days imprisonment, and in most states were fines of \$500 to \$1,000 and prison terms of six to twelve months.<sup>166</sup> In Texas, the maximum jail term was twenty-five years.<sup>167</sup>

The first two reported cases prosecuted under the state flag laws

161. See Rosenblatt, *Flag Desecration Statutes: History and Analysis*, 1972 WASH. U.L.Q. 193, 195-97.

162. *Id.* at 210 (quoting *Report of the Commission on Uniform State Laws*, 4 A.B.A. J. 527, 528 (1918)).

163. See, e.g., N.Y. GEN. BUS. LAW § 136(b) (Consol. 1966).

164. *Id.* § 136(d); see *Hearings, supra* note 126, at 324-46 (compiling flag desecration laws in effect in 1967); Recent Development, *Constitutional Law—Flag Misuse and the First Amendment*, 50 WASH. L. REV. 169, 169 n.2 (1974) (categorizing state laws).

165. N.Y. GEN. BUS. LAW § 136(g) (Consol. 1966).

166. See Tushla, *Flag Desecration—The Unsettled Issue*, 46 NOTRE DAME L. REV. 201, 218-20 (1970); Note, *supra* note 159, at 362-67.

167. See Note, *supra* note 159, at 366.

involved the selling of cigar boxes with flags imprinted upon them.<sup>168</sup> In each case, the court declared the relevant statute unconstitutional as a violation of property rights, either facially<sup>169</sup> or as applied to a particular defendant.<sup>170</sup> The first apparent use of a flag desecration law to suppress political dissent came amidst a bitter strike in Colorado in 1904, when two leaders of the radical Western Federation of Miners, including "Big Bill" Haywood of subsequent fame as leader of the Industrial Workers of the World, were arrested for printing a flyer captioned "Is Colorado in America?"<sup>171</sup> Against the backdrop of a drawing of an American flag, the flyer protested repression of the strike by martial law and arbitrary arrests.<sup>172</sup> Authorities subsequently dropped the charges when Haywood produced scores of unprosecuted advertisements and circulars bearing the flag.<sup>173</sup>

These three early cases suggested that flag desecration laws would be rendered nugatory. The United States Supreme Court, however, aborted such a prospect in *Halter v. Nebraska*,<sup>174</sup> which upheld a decision of the Nebraska Supreme Court convicting a businessman accused of selling "a bottle of beer [brand named Stars and Stripes], upon which, for purposes of advertisement, was printed and painted a representation of the flag of the United States."<sup>175</sup> Although the case involved only the "improper use" and not the "desecration" provision of the Nebraska law, and *Halter* involved no claim of free speech, neither the Nebraska Supreme Court nor the United States Supreme Court gave any indication that any challenge to the "desecration" provisions would be any more successful. Nebraska argued before the state supreme court that "[p]atriotic sentiment for the flag and for the noble motivations it symbolizes is outraged by the appearance of the national emblem on a bottle of beer," and that "[t]o permit this lawlessness to continue is to weaken respect for law and order, and to impair the efficiency of government."<sup>176</sup> The Nebraska Supreme Court agreed, declaring:

Patriotism has ever been regarded as the highest civic virtue, and

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168. See *Ruhstrat v. People*, 185 Ill. 133, 57 N.E. 41 (1900); *People ex. rel. McPike v. Van de Carr*, 178 N.Y. 425, 70 N.E. 965 (1904).

169. See, e.g., *Ruhstrat*, 185 Ill. at 138, 57 N.E. at 46.

170. See, e.g., *McPike*, 178 N.Y. at 429, 70 N.E. at 966.

171. P. CARLSON, *ROUGHNECK: THE LIFE AND TIMES OF BIG BILL HAYWOOD* 70-71 (1983).

172. *Id.*

173. *Id.* at 74-75.

174. 205 U.S. 34 (1907).

175. *Id.* at 38.

176. Knapp, *Old Nebraska Case Cited in Flag Burning Decision*, *Lincoln (Neb.) J.*, July 9, 1989, at A1, col. 1.

whatever tends to foster that virtue certainly makes for the common good. . . . The flag is the emblem of national authority. To the citizen it is an object of patriotic adoration, emblematic of all for which his country stands . . . and it is not fitting that it should become associated in his mind with anything less exalted, nor that it should be put to any mean or ignoble use.<sup>177</sup>

The United States Supreme Court's decision contained similar oratory:

For that flag every true American has not simply an appreciation but a deep affection. No American . . . ever looks upon it without taking pride in the fact that he lives under this free Government . . . . [A] State may exert its power to strengthen the bonds of the Union and therefore, to that end, may encourage patriotism and love of country among its people. . . . [L]ove both of the common country and of the State will diminish in proportion as respect for the flag is weakened. . . . As the statute in question evidently had its origin in a purpose to cultivate a feeling of patriotism among the people of Nebraska, we are unwilling to adjudge that . . . the State erred in its duty or has infringed the constitutional right of anyone. On the contrary, it may reasonably be affirmed that a duty rests upon each State in every legal way to encourage its people to love the Union with which the State is indissolubly connected.<sup>178</sup>

As the last Supreme Court decision dealing with flag misuse until the 1969 case of *Street v. New York*,<sup>179</sup> *Halter* served as a major authority until recently, and was cited by Chief Justice Rehnquist in his *Johnson* dissent.<sup>180</sup> *Halter*, however, has virtually no practical relevance today. Justice Brennan noted in *Johnson* that *Halter* dealt explicitly and exclusively with commercial speech and was decided before the Court held the first amendment applicable to the states.<sup>181</sup> Moreover, *Halter* preceded the modern development of first amendment interpretation. Nonetheless, virtually all of the reported cases involving flag desecration between 1907 and 1968 led to convictions, and often cited *Halter* as an authority.<sup>182</sup> Almost all of these cases clustered around World Wars I and II, just as the next batch was to center around Vietnam, presumably because a wartime atmosphere is likely to elicit both impassioned protest and heightened patriotic sur-

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177. *Halter v. State*, 74 Neb. 757, 762, 105 N.W. 298, 300 (1905), *aff'd*, 205 U.S. 34 (1907).

178. *Halter*, 205 U.S. at 41-43.

179. 394 U.S. 576 (1969); see *infra* notes 374-83 and accompanying text.

180. *Texas v. Johnson*, 109 S. Ct. 2533, 2552 (1989) (Rehnquist, C.J., dissenting).

181. *Id.* at 2545 n.10 (citing *Spence v. Washington*, 418 U.S. 405, 413 n.7 (1974)). The Supreme Court held the first amendment applicable to the states in *Gitlow v. New York*, 286 U.S. 652, 657 (1925).

182. See *infra* notes 194-202, 210, 223 & 225-30 and accompanying text.



veillance and repression.<sup>183</sup>

Shortly before American entry into World War I, Congress passed a flag desecration law applicable to Washington, D.C. only,<sup>184</sup> and in the so-called Sedition Act of 1918,<sup>185</sup> language was included which outlawed "disloyal, profane, scurrilous or abusive language" about the "form of government," the Constitution, the military or its uniforms, the "flag of the United States," or any language intended to bring such into "contempt, scorn, contumely or disrepute."<sup>186</sup> On April 9, 1917, three days after the United States entered the war, Attorney General Gregory told federal attorneys and marshals to protect the public peace by "subject[ing] to summary arrest and confinement" any alien enemy involved in flag desecration.<sup>187</sup> Although there were few prosecutions or arrests for flag abuse under these federal statutes and pronouncements, a considerable amount of repressive activity related to the flag occurred in the states during the period leading up to American entry into the war as well as during the war itself.<sup>188</sup> In mostly unreported cases, a number of people were arrested for allegedly abusing the flag physically or orally.<sup>189</sup> For example, a New York City minister was fined \$100 and jailed thirty days for each of two separate offenses in 1916 and 1917, resulting from depicting the flag in an allegedly insulting way in an advertisement for a lecture, and then burning a flag on the eve of his trial.<sup>190</sup> At trial, the judge asked the minister why he didn't "go and live in some other country?"<sup>191</sup> Another example involved an Indiana baker who was fined five dollars in 1917 for saying "to hell with the flag" in a local bar.<sup>192</sup> A New York City woman was jailed for six months in 1918 for displaying a German flag, hauling in an American flag which a neighbor had placed in her window, and declaring, "To hell with the American flag. I want my own flag."<sup>193</sup>

In *State v. Shumaker*,<sup>194</sup> a Kansas man was convicted for contemptuous verbal abuse of the flag uttered in a blacksmith shop while

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183. See Prosser, *supra* note 122, at 160 ("The incidence of flag-desecration appears to be greatest in the United States during times of national stress.").

184. Act of Feb. 8, 1917, ch. 34, 39 Stat. 900 (codified at 4 U.S.C. § 3 (1970)).

185. Sedition Act of 1918, ch. 75, 40 Stat. 553 (repealed 1921).

186. *Id.*

187. See Prosser, *supra* note 122, at 166.

188. *Id.* at 164.

189. *Id.*

190. *Id.* at 161.

191. *Id.* at 162.

192. *Id.* at 163-64.

193. *Id.* at 164-65.

194. 103 Kan. 741, 175 P. 978 (1918).

others were present.<sup>195</sup> In affirming the conviction, the Kansas Supreme Court held that the remarks were sufficiently public in nature to bring them within the Kansas law, and declared that anyone who used such language about the flag lacked the "respect for it that should be found in the breast of every citizen of the United States."<sup>196</sup> In *Ex parte Starr*,<sup>197</sup> a Montana man was arrested under the state's war-time sedition act, which he allegedly violated by using language "calculated to bring the flag into contempt and disrepute."<sup>198</sup> He allegedly refused a mob's demands that he kiss the flag (a favorite wartime vigilante punishment for the allegedly disloyal)<sup>199</sup> and termed it "nothing but a piece of cotton with a little paint" which "might be covered with microbes."<sup>200</sup> Starr was given a ten-to-twenty year jail sentence, a penalty that an appellate judge, who declared he was powerless to overturn, termed "horrifying."<sup>201</sup> The judge declared that the sentence justified George Bernard Shaw's comment that war hysteria had made the French courts "severe," the English courts "grossly unjust," and the American courts "stark, staring, raving mad."<sup>202</sup>

Immediately after World War I during the "red scare" of 1919 to 1920, thirty-two states passed laws which forbade the display of red flags, regarded as the symbol of communism and revolution in the aftermath of the 1917 Bolshevik Revolution.<sup>203</sup> Most of these laws were as vague as the New York statute, which outlawed displaying red flags in any public gathering as a symbol of "any organization" or in furtherance of "any political, social, or economic principle, doctrine or propaganda."<sup>204</sup> In the 1931 *Stromberg v. California*<sup>205</sup> decision, the United States Supreme Court declared California's red flag law unconstitutionally vague under the first and fourteenth amendments.<sup>206</sup> The Court emphasized that the statutory language could be improperly used to outlaw the use of red flags even to foster "peaceful and orderly opposition to government by legal means and within con-

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195. *Id.*

196. *Id.* at 741-42, 175 P. at 979.

197. 263 F. 145 (D. Mont. 1920).

198. *Id.*

199. See H. PETERSON & G. FITE, *OPPONENTS OF WAR: 1917-1918*, at 46, 84, 127, 152-53 & 196-97 (1957).

200. *Ex parte Starr*, 263 F. at 145.

201. *Id.* at 146-47.

202. *Id.* at 147.

203. See R. MURRAY, *RED SCARE: A STUDY IN NATIONAL HYSTERIA, 1919-1920*, at 233-34 (1955).

204. See *id.* at 234.

205. 283 U.S. 359 (1931).

206. *Id.*

stitutional limitations."<sup>207</sup> While not directly relevant to flag desecration per se, *Stromberg* was significant for the Court's recognition, for the first time, that symbolic speech was protected by the first amendment. It was also the first decision declaring a state law facially unconstitutional on the basis of the first amendment.<sup>208</sup>

Between World War I and 1940, there were only a handful of flag desecration prosecutions, of which few have political significance. In 1930, two young women who ran a communist children's camp in Van Etten, New York, served jail terms of three months each for allegedly "desecrating" the American flag by refusing to hoist one at the order of a mob.<sup>209</sup> In 1933, a radical speaker in Monticello, New York, was charged with defiling the flag by allegedly blowing his nose with it and wiping his face and clothing on it.<sup>210</sup> The period of growing tension leading up to World War II and the American entry into that struggle, however, triggered a wave of flag hysteria somewhat comparable to the *Johnson* hysteria of 1989, although considerably more violent. The background to this outbreak can be traced back to the 1919 red scare and the 100% Americanism mentality of the 1920's. Support was provided by business organizations and patriotic groups such as the American Legion, which frequently centered their programs around reverence for the flag.<sup>211</sup> Specifically, the Legion unceasingly complained about "abuse, misuses and desecration"<sup>212</sup> of the flag, such as the "draping of unmounted flags over greasy, grimy, dirty hoods, sides or tops of autos,"<sup>213</sup> sponsored a conference of sixty-eight patriotic organizations which met in 1923 to draft a uniform flag code (which eventually was codified by Congress in 1942),<sup>214</sup> and circulated within a single year about 6.5 million copies of a leaflet on flag etiquette.<sup>215</sup> Although New York state had required a daily flag salute in schools as early as 1898,<sup>216</sup> the patriotic propaganda of the 1920's coupled with fears over Bolshevism and the suspect loyalties of immigrants greatly increased the spread of such

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207. *Id.* at 369.

208. *Id.*

209. See AMERICAN CIVIL LIBERTIES UNION, *THE FIGHT FOR CIVIL LIBERTY*, 1930-31, at 14 (1931).

210. *People v. Katzowitz*, 150 Misc. 63, 267 N.Y.S. 748 (N.Y. Co. Ct. 1933).

211. See R. GOLDSTEIN, *supra* note \*, at 167-68.

212. W. PENCAK, *FOR GOD & COUNTRY: THE AMERICAN LEGION, 1919-1941*, at 289-90 (1989).

213. *Id.*

214. National Flag Code, 36 U.S.C. §§ 173-177 (1988); see W. PENCAK, *supra* note 212, at 290.

215. See D. MANWARING, *RENDER UNTO CAESAR: THE FLAG SALUTE CONTROVERSY* 6 (1962); W. PENCAK, *supra* note 212, at 290.

216. D. MANWARING, *supra* note 215, at 5.

patriotic rituals. By 1940, “[t]he salute and pledge [of allegiance] probably were in at least sporadic local use in every state” and patriotic flag rituals were required or encouraged by law in at least eighteen states.<sup>217</sup> Even before 1940, there were a scattering of cases in which children were expelled from school, and in some cases, parents were prosecuted for refusing on religious grounds to participate in such rituals.<sup>218</sup> In the most bizarre case, a Washington state father was jailed in 1926 and his nine-year old son was taken away from him and placed in state custody for over a year when the child refused to salute the flag.<sup>219</sup>

The outbreak of World War II in 1939 Europe and the growing likelihood of American involvement increased the emotion, animosity, and publicity surrounding incidents of alleged flag desecration, especially regarding Jehovah’s Witnesses who refused to salute the flag in following the Biblical command to forswear the worship of “graven images.”<sup>220</sup> Thus, in 1940 and 1941, before American entry into the war, there were as many flag desecration prosecutions as during the previous two decades.<sup>221</sup> For example, an Italian alien in New York was fined fifty dollars for flying a flag from an outhouse;<sup>222</sup> a German-born New Jersey woman received a one-to-two year sentence in a reformatory for tearing a small flag from her motorcycle and throwing it to the ground while reportedly proclaiming her Nazi sympathies;<sup>223</sup> and another alleged Nazi sympathizer was fined thirty dollars for spitting on a flag.<sup>224</sup> A Maine man was convicted in 1940 for the bizarre “crime” of desecrating a non-existent flag: he allegedly stated in a private home that the flag was “nothing more than a piece of rag” which he would “strip” up and “trample” if he had one, and accompanied these remarks by pantomime gestures of tearing and stomping on an object.<sup>225</sup> The Maine Supreme Court reversed on the grounds that the offense had not occurred publicly as the law required.<sup>226</sup> In 1941, an Arkansas man received a one day jail sentence and fifty dollar fine for refusing to salute the flag, and for

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217. *Id.* at 4-5.

218. *See generally id.* at 11-16 (discussing cases dealing with children who refused to salute the flag during school).

219. *Id.* at 13-14.

220. *Exodus* 20:3.

221. *See Prosser, supra* note 122, at 169.

222. *Id.*

223. *State v. Schlueter*, 127 N.J.L. 496, 23 A.2d 249 (Sup. Ct. 1941); *see Prosser, supra* note 122, at 169-70.

224. *See Prosser, supra* note 122, at 170.

225. *State v. Peacock*, 138 Me. 339, 341, 25 A.2d 491, 491 (1942).

226. *Id.* at 343, 25 A.2d at 493.

calling it "a rag" without eyes, ears or a mouth.<sup>227</sup> His conviction was upheld on appeal on the grounds that he had publicly exhibited "contempt for the United States flag."<sup>228</sup> In Connersville, Indiana, seven Jehovah's Witnesses were prosecuted in 1940 for flag desecration, because they had circulated literature opposing compulsory school flag saluting.<sup>229</sup> Five pled guilty and received light sentences while the two who pled not guilty faced new charges of "riotous conspiracy" which resulted in two-to-ten year jail terms.<sup>230</sup> The Indiana Supreme Court eventually overturned the convictions as completely unsupported by the facts.<sup>231</sup>

As part of the growing wave of persecution, numerous Jehovah's Witnesses were expelled from public schools during the immediate pre-war period. By June 1940, school saluting disputes had developed in at least twenty states, children had been expelled or threatened with expulsion in sixteen states, and over 200 children had actually been expelled, including over 100 in Pennsylvania alone.<sup>232</sup> In this atmosphere of growing hysteria, fueled by Nazi victories in 1940 against France and the Low Countries, the United States Supreme Court decided *Minersville School District v. Gobitis*,<sup>233</sup> which upheld the legality of expelling children from school for refusing to salute the flag on the grounds that the "flag is the symbol of our national unity"<sup>234</sup> and that "[n]ational unity is the basis of national security."<sup>235</sup>

The *Gobitis* decision, along with American entry into the war in December 1941, helped to foster many more expulsions of Jehovah's Witness children and a large and often violent eruption of harassment, beatings, and arrests of adult Witnesses—whose primary crime, now officially endorsed, was their refusal to salute the flag. From June 1935, to June 1943, a total of 2,000 school expulsions were recorded, most of which occurred after the *Gobitis* decision.<sup>236</sup> In 1941, the American Civil Liberties Union reported that between May and October of 1940, almost 1,500 Witnesses had been the victims of mob violence in 355 communities in 44 states and that no religious

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227. *Johnson v. State*, 204 Ark. 476, 477, 163 S.W.2d 153, 153-54 (1942).

228. *Id.* at 477, 477, 163 S.W.2d at 154.

229. See D. MANWARING, *supra* note 215, at 166.

230. *Id.*

231. *McKee v. State*, 219 Ind. 247, 37 N.E.2d 940 (1941); see D. MANWARING, *supra* note 215, at 183.

232. D. MANWARING, *supra* note 215, at 56, 76 & 79.

233. 310 U.S. 586 (1940).

234. *Id.* at 596.

235. *Id.* at 595.

236. D. MANWARING, *supra* note 215, at 163-86.

organization had suffered such persecution "since the days of the Mormons."<sup>237</sup> Witnesses reported about another 300 incidents and 200 arrests between December 1941 and December 1943.<sup>238</sup> The wave of terror against the Witnesses declined only with the intervention of three key factors: the increasing protective intervention of the Justice Department after mid-1942, the growing likelihood of an Allied victory in the war, and the Supreme Court's reversal of *Gobitis* with its landmark decision in *West Virginia Board of Education v. Barnette*,<sup>239</sup> handed down on June 14 (Flag Day), 1943. On the same day, in *Taylor v. Mississippi*,<sup>240</sup> the Court invalidated a Mississippi wartime law which outlawed using language which "reasonably tends to create an attitude of stubborn refusal to salute, honor or respect the flag,"<sup>241</sup> and which had been used to convict three Witnesses.<sup>242</sup>

Only a scattering of flag desecration prosecutions occurred during the American involvement in World War II. For example, a Wisconsin man who pulled down the flag at the house of a policeman was jailed for sixty days and fined \$100 in 1942 by a judge who told him that "nothing can be permitted to hinder" the war effort;<sup>243</sup> a Chicago man was fined \$100 in 1944, in part for verbally abusing the flag;<sup>244</sup> and a New York man was fined \$50 in 1945 for displaying the flag in a reversed position in his delicatessen window.<sup>245</sup> For about twenty years after the end of World War II, there were virtually no flag desecration prosecutions.<sup>246</sup> In one case which provided a precursor to some of the bizarre penalties imposed in flag desecration cases during the Vietnam War, two Illinois youths who were arrested in 1951 for dragging a flag behind their automobile were ordered to recite the Pledge of Allegiance in court, to study a book on flag etiquette, and to attend public gatherings which featured flag ceremonies.<sup>247</sup> In another bizarre case, the distributors of an Illinois magazine were convicted in 1958 for publishing a photograph of a young woman, apparently naked except for a flag strategically placed over her pelvic

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237. ACLU, *LIBERTY'S NATIONAL EMERGENCY: THE STORY OF CIVIL LIBERTY IN THE CRISIS YEAR 1940-1941*, at 27-29 (1941).

238. R. GOLDSTEIN, *supra* note \*, at 283.

239. 319 U.S. 624 (1943).

240. 319 U.S. 583 (1943).

241. *Id.* at 584.

242. *Id.* at 586-90.

243. *See* Prosser, *supra* note 122, at 170-71.

244. *See id.* at 171.

245. *See id.* at 171-72.

246. *See id.*

247. *See id.* at 178.

region.<sup>248</sup> On appeal, however, the court ordered an acquittal on the grounds that the Illinois law was designed to prevent breaches of the peace, and that no such threat of breach had occurred.<sup>249</sup>

### C. *The Vietnam War Flag Flap: Deja Vu*

The Great 1989-1990 Flag Flap in many ways mimicked a similar controversy that had occurred during the height of American involvement in Vietnam. Just as The Great 1989-1990 Flag Flap grew as the result of a single flag burning by Joey Johnson in Dallas, the Vietnam War Flag Flap similarly emerged as the result of a single flag burning at New York's Central Park during an anti-war demonstration on April 15, 1967.<sup>250</sup> Although there had been a few scattered flag desecration incidents in the preceding year or so, the New York burning, unlike the earlier incidents, was televised and widely publicized.<sup>251</sup> Like the 1989 Johnson incident, it triggered a wave of indignation, widespread demands for punitive legislation, and a hastily drafted law which was essentially aimed at the prevention of dissent and eventually emasculated by the Supreme Court.<sup>252</sup> Within three weeks of the Central Park flag burning, the House Judiciary Committee began hearings on a total of over 100 bills, all nearly identical, which had been introduced to combat the menace posed by the desecration.<sup>253</sup> This flurry of legislative activity occurred despite the fact that all fifty states already had flag desecration laws on the books.<sup>254</sup> Within two months, on June 20, 1967, the House had passed an anti-flag desecration measure by a 385-to-16 vote, which was featured on the front page of the *New York Times*.<sup>255</sup> As in the 1989 controversy, public interest in the issue quickly waned. Perhaps this was a result of changing public attitudes towards the war after the January 1968 Tet Offensive, together with the distracting impact of other 1968 traumas, such as the assassinations of Senator Robert Kennedy and Martin Luther King, Jr. At any rate, by the time the Senate passed the bill on June 24, 1968, the issue generated so little interest that no legislative debate was held and the *New York Times* reported the vote in a one-paragraph item on page thirty-two.<sup>256</sup>

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248. *People v. von Rosen*, 13 Ill. 2d 68, 69, 147 N.E.2d 327, 328 (1958).

249. *Id.* at 71, 147 N.E.2d at 329.

250. See Prosser, *supra* note 122, at 159 & nn.1-5.

251. *Id.* at 159-60.

252. See 18 U.S.C. § 700 (1988).

253. See *Hearings*, *supra* note 126, at 1-27, 346-49 (reciting texts of proposed bills).

254. *Id.* at 324-46.

255. Hunter, *House Acts to Make Mutilation of Flag a Federal Crime*, *N.Y. Times*, June 21, 1967, at 1, col. 3.

256. *Flag Burning Bill Voted*, *N.Y. Times*, June 26, 1968, at 32, col. 3. When President

The 1968 law made it illegal to “knowingly cast[] contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it,”<sup>257</sup> subject to a penalty of up to \$1000 and/or one year in jail.<sup>258</sup> It defined “flag” in the expansive manner typical of most of the state laws.<sup>259</sup> The major arguments in support of the law were similar to those advanced in 1989: The flag is a unique and special symbol of America, and especially American freedom, and although the right to dissent is sacred, burning the flag simply goes “too far.”<sup>260</sup> Thus, Congressman James Quillen declared that the flag has “always been the symbol of freedom and liberty,”<sup>261</sup> but there are bounds in which such freedom should be exercised and “when anyone goes so far as to desecrate our beloved flag . . . he has gone too far.”<sup>262</sup> Congressman Richard Roudebush was one of many who termed the flag “sacred,”<sup>263</sup> and considered flag burning to raise a serious threat to the country. Congressman Edna Kelley viewed flag burning as a “direct attack on the sovereignty of the United States [which] tears at the very core of our democratic society [and] is a form of destruction of the basic values and principles of our Government.”<sup>264</sup> Similarly, Congressman Jack Edwards declared that by destroying the symbol of “the freedom of dissent which these skilled agitators pretend to value . . . they seek to destroy the country.”<sup>265</sup> Pennsylvania Supreme Court Justice Michael Musmanno declared, “[T]hose who put a match to the flag of the United States apply an acetylene torch to the police stations, courthouses and Federal and State capitols.”<sup>266</sup> Musmanno inadvertently explained exactly why

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Johnson signed the bill, it was further relegated to one paragraph on page 40. *Flag Burning Bill Signed*, N.Y. Times, July 6, 1968, at 40, col. 7.

257. 18 U.S.C. § 700(b) (1988).

258. *Id.* § 700(a).

259. The law defined a flag as:

[A]ny flag, standard colors, ensign, or any picture or representation of either, or of any part or parts of either, made of any substance or represented on any substance, of any size evidently purporting to be either of said flag, standard, color or ensign of the United States of America, or a picture or a representation of either, upon which shall be shown the colors, the stars and the stripes, in any number of either thereof, or of any part or parts of either, by which the average person seeing the same without deliberation may believe the same to represent the flag, standards, colors or ensign of the United States of America.

*Id.* § 700(b).

260. See *infra* notes 261-78 and accompanying text.

261. *Hearings, supra* note 126, at 29.

262. *Id.* at 32.

263. *Id.* at 55.

264. *Id.* at 46.

265. *Id.* at 63.

266. *Id.* at 70-71.



suppressing flag burning was not an attempt to punish conduct, as supporters of such measures claimed, but was in fact a direct assault on freedom of expression by asking, "How could demonstrations against American policy be more vividly and dramatically manifested than by burning the very flag of the United States?"<sup>267</sup> Many congressmen, such as Representatives Seymour Halpern and Ray Roberts, termed flag burning an act of treason.<sup>268</sup>

No description of flag burners or penalty for their offense could be too harsh. According to various congressmen, flag burners were "unshaven beatniks,"<sup>269</sup> "rabble,"<sup>270</sup> breeders of "anarchy,"<sup>271</sup> "buzzards,"<sup>272</sup> and "dirty, long-haired Communist-led beatniks."<sup>273</sup> Musmanno set some sort of record for invective in his House Judiciary Committee testimony, terming flag burners variously "miserable wretches," "vile America-hating hooligans," and "treasonous" agitators "fit to conspire with Communists who would force our freedoms into the straitjacket of Bolshevistic dictatorship."<sup>274</sup> "Nothing's too strong for them,"<sup>275</sup> declared House Armed Services Committee Chairman Mendel Rivers, while Representative James Haley helpfully suggested that authorities "[l]oad a boat full of them and take them 500 miles out into the ocean and handcuff them, chain the anchor around their necks and throw them overboard."<sup>276</sup>

As in 1989, the smell of political pandering hung heavy over congressional debate on the flag burning bill. One of the few congressmen willing to publicly oppose the measure, Representative Robert Kastenmeier, declared that since all states already had similar measures, among the main functions of the new law would be to "provide empty rhetorical ammunition for the flag wavers" and "feed irrational demands for conformity" amidst "a general climate of war hysteria."<sup>277</sup> One anonymous congressman was quoted by *Newsweek* as saying, "It's a great bill to vote for. We'll let the courts worry about the Constitution."<sup>278</sup> Representative Emmanuel Celler, the chairman

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267. *Id.*

268. *Id.* at 105, 211.

269. *Id.* at 94 (quoting Representative Dan Kuykendall).

270. *Id.* at 133 (quoting Representative E.Y. Berry).

271. *Id.* at 185 (quoting Representative Albert Watson).

272. See Hunter, *supra* note 255, at 1, col. 3 (quoting Representative Mendel Rivers).

273. See *Hot Summers and Short Tempers*, 205 NATION 36, 37 (1967) (quoting Representative Walter S. Baring).

274. *Hearings, supra* note 126, at 70-74.

275. Hunter, *supra* note 255, at 1, col. 3.

276. See *Burning Issue*, TIME, June 30, 1967, at 17.

277. H.R. REP. NO. 350, 90th Cong., 1st Sess. 16 (1967).

278. *Burned Up*, NEWSWEEK, July 3, 1967, at 29.

of the House Judiciary Committee and a liberal who termed the measure a "bad bill" of doubtful constitutionality, explained his ultimate support for it by declaring, "Who can vote against something like this? It's like motherhood."<sup>279</sup> In their rush to propose bills to ban flag desecration, some congressmen did not even bother to understand what their measures meant. Thus, the bill introduced by Representative Maston O'Neal and drafted by the congressional legislative counsel's office made it illegal (as did many other bills) to "defy" the flag.<sup>280</sup> When the House Judiciary Committee asked O'Neal what this meant, he confessed that "you have got me there," then opined that he could "conceive of somebody standing on a platform and hurling one curse after another at the flag."<sup>281</sup>

Just as the arguments for the 1968 law prefigured those advanced for the 1989 Flag Protection Act, the arguments against it resembled those to be advanced against similar proposals and constitutional amendments twenty years later. Aside from criticizing the proponents of the flag law for political pandering, opponents of the measure stressed that flag desecration, although highly distasteful, was essentially a political expression protected by the first amendment and that no substantial state interests, unrelated to suppressing expression, justified forbidding such behavior. Thus, Representatives John Conyers and Don Edwards protested that the proposed legislation "would do more real harm to the Nation than all the flag burners can possibly do" because it would "infringe upon what is certainly one of the most basic freedoms, the freedom to dissent," which was clearly the "real 'evil' at which the bill was directed."<sup>282</sup> Commentators also argued that banning flag desecration would begin a "slippery slope" of eroding first amendment freedoms. Lawrence Speiser, director of the ACLU's Washington office, told the House Judiciary Committee that while the United States would not turn into a "dictatorship" with passage of such a measure, "we [would] be less free than we were before."<sup>283</sup>

Critics of flag desecration legislation also argued that the handful of flag burnings hardly justified congressional action, and that banning such behavior would protect little, but create martyrs, since the flag was not the same as the country or the principles it symbolized. Representative James Scheuer termed the bill "a classic kind of irresponsible overkill" and declared that Congress "does not need to rise

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279. N.Y. Times, June 7, 1967, at 21, col. 4.

280. See *Hearings*, *supra* note 126, at 68-69.

281. *Id.*

282. H.R. REP. NO. 350, *supra* note 277, at 17.

283. *Hearings*, *supra* note 126, at 167.

to meet the bait of every silly college kid who sets out to make a fool of himself."<sup>284</sup> Representatives Conyers and Edwards, rejecting the contention of the House Judiciary Committee that flag burning "inflicts an injury on the entire Nation," instead declared that by unconstitutionally suppressing dissent, legislation "can only result in making dissent more widespread, more bitter and more valid."<sup>285</sup> Whitney Smith, director of the Flag Heritage Association, declared that the flag would be "respected when respectable, reviled when disrespectful," and that "no law, fine or jail term will coerce a man into honoring a flag he believes to have been dishonored by the nation it stands for."<sup>286</sup> Commentators attacked the flag desecration issue as distracting the country from real issues and "real" rather than "symbolic" desecration of the country. Thus, *Commonweal* remarked sarcastically, "Seeing as nothing can be done about the war in Vietnam or rampant racism here, why not at least begin with respect for the flag?"<sup>287</sup> Similarly, the *Christian Century* lamented that "[w]hile our Congress argues about people who burn a bit of bunting, the United States scorches land, blows up humble homes and burns thousands of people to death or until they pray to die. That, more than anything else, desecrates our flag . . . ."<sup>288</sup>

The 1968 flag desecration bill did not end flag desecrations. In fact, the 1968 to 1974 period saw an explosion of flag desecration prosecutions unprecedented in American history.<sup>289</sup> Because many of these cases were unreported, it is not clear how many such incidents were brought to trial or what percentage of them were successfully prosecuted. However, in September 1970, the ACLU reported that nineteen new cases had reached its attention in the past few weeks, and in May 1971, it reported that "easily 100 cases" were being handled.<sup>290</sup> The ACLU reported in September 1970 that it was generally "winning the cases," but a law review article published at about the same time concluded that lower courts had "consistently upheld the constitutionality of the state and federal statutes."<sup>291</sup> Law review essays published in the early 1970's declared that "[s]tate courts ha[d]

284. Hunter, *supra* note 255, at 2, col. 4.

285. See *Hearings*, *supra* note 126, at 68-69.

286. See Hunter, *supra* note 255, at 1, col. 3.

287. *Oh Say, Can You See . . .*, COMMONWEAL, Oct. 18, 1968, at 77.

288. *Who's Desecrating the Flag?*, CHRISTIAN CENTURY, June 14, 1967, at 772.

289. Most of these prosecutions often were brought under newly revised and augmented state laws rather than the new federal measure.

290. *Civil Liberties*, May 1971, at 5, col. 2.

291. Note, *Freedom of Speech and Symbolic Conduct: The Crime of Flag Desecration*, 12 ARIZ. L. REV. 71, 72-73 (1970); *Flag Laws Still Wave*, *supra* note 134, at 1, col. 1.

traditionally upheld flag desecration convictions,"<sup>292</sup> and that "the majority of lower courts" had upheld the professed state interest in protecting the flag as a symbol of the nation.<sup>293</sup>

The present author's comprehensive survey of nearly sixty reported flag desecration cases which occurred between 1966 and 1989, nearly all of which arose before 1974, indicates that acquittals ultimately resulted in about sixty percent of the cases. Such outcomes were increasingly likely after 1972, when American ground combat involvement in Vietnam had begun to decrease markedly and there was a growing consensus that the war had been an error. Also, acquittals were more likely when the allegations involved were relatively less inflammatory, literally and figuratively, than flag burning, such as wearing a "flag patch" on the seat of one's pants or displaying a flag with the "peace sign" replacing the field of stars.<sup>294</sup> The almost sixty cases surveyed were roughly divided into four categories: burning the flag,<sup>295</sup> wearing the flag (usually as a trouser's seat patch),<sup>296</sup> superimposing symbols like the "peace sign" over the flag,<sup>297</sup> and a wide variety of miscellaneous charges which included publishing a picture of a burning flag,<sup>298</sup> pouring paint over the flag,<sup>299</sup> and displaying the flag at half mast in an inferior position to the United

292. Comment, *Flag Desecration as Constitutionally Protected Symbolic Speech*, 56 IOWA L. REV. 614 (1971).

293. Hicks, *Spence v. Washington*; Smith v. Goguen: *Symbolic Speech and Flag Desecration*, 6 COLUM. HUM. RTS. L. REV. 534, 544 (1974-75). For other law review articles published on the Vietnam era cases, see generally Bogdan, *Constitutional Prohibition of Contemptuous Flag Burning Suppresses Constitutionally Protected Free Speech*, 40 WASH. & LEE L. REV. 1541 (1983); Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975); Loewy, *Punishing Flag Desecrators: The Ultimate in Flag Desecration*, 49 N.C.L. REV. 48 (1970); Note, *Constitutional Law—Freedom of Speech—Desecration of National Symbols as Protected Political Expression*, 66 MICH. L. REV. 1040 (1968); Note, *Constitutional Law—First Amendment Rights—Flag Burnings as Symbolic Expression*, 48 N.C.L. REV. 201 (1970); Note, *Flag Desecration Under the First Amendment: Conduct or Speech*, 32 OHIO ST. L.J. 119 (1971); *Constitutional Law—Flag Desecration—Decal Superimposing Peace Symbol over Representation of American Flag Not Within Scope of New York General Business Law § 136-a*, 35 ALB. L. REV. 360 (1971); Comment, *Flag Desecration: Illegal Conduct or Protected Expression?*, 22 CASE W. RES. L. REV. 555 (1971); Comment, *Exploiting the American Flag: Can the Law Distinguish Criminal from Patriot?*, 30 MD. L. REV. 332 (1970); Comment, *Official Symbols: Use and Abuse*, 1 N.M.L. REV. 352 (1971); and Comment, *Flag Desecration Statutes in Light of United States v. O'Brien and the First Amendment*, 32 U. PITT. L. REV. 513 (1971). See also Annotation, *What Constitutes Violation of Flag Desecration Statutes*, 41 A.L.R. 3d 502 (1972).

294. See *infra* notes 316-17, 322-24 & 338-41 and accompanying text.

295. See *infra* notes 301-02, 312-15 & 340-41 and accompanying text.

296. See *infra* notes 303, 318-19, 322-24 & 328-30 and accompanying text.

297. See *infra* notes 316-17, 321, 328-33 & 338 and accompanying text.

298. Korn v. Elkins, 317 F. Supp. 138 (D. Md. 1970).

299. People v. Verch, 63 Misc. 2d 477, 311 N.Y.S.2d 637 (N.Y. Sp. Sess. 1970).

Nations flag.<sup>300</sup> The first category, consisting of flag burning charges, invariably led to convictions,<sup>301</sup> at least until 1982.<sup>302</sup> On the other hand, almost all cases involving "superimposition" ultimately resulted in acquittals.<sup>303</sup> About sixty percent of the flag "wearing" cases<sup>304</sup> and a slight majority of the miscellaneous cases resulted in acquittals.<sup>305</sup>

Where prosecutions led to convictions, the courts generally relied upon one or both of the same two alleged state interests to be put forth by Texas in the *Johnson* case: protecting the flag as a symbol of the nation, thereby furthering the state's interest by fostering unity and patriotism; and/or preventing breaches of the peace. For example, in *Deeds v. State*,<sup>306</sup> a 1972 Texas flag burning case whose authority was later rejected by the same Texas Court of Criminal Appeals in *Johnson* in 1988,<sup>307</sup> the court declared that "since the flag symbolizes the entire nation, not just one particular philosophy, the state may determine that it be kept above the turmoil created by competing ideologies."<sup>308</sup> In upholding flag desecration convictions as legitimate

300. *Hodsdon v. Buckson*, 310 F. Supp. 528 (D. Del. 1970).

301. *United States v. Kime*, 673 F.2d 1318 (4th Cir.), *cert. denied*, 459 U.S. 949 (1982); *United States v. Crosson*, 462 F.2d 96 (9th Cir.), *cert. denied*, 409 U.S. 1064 (1972); *United States v. Ferguson*, 302 F. Supp. 1111 (N.D. Cal. 1969); *People v. Sutherland*, 29 Ill. App. 3d 199, 329 N.E.2d 820 (1975), *reh'g denied*, 426 U.S. 942 (1976); *State v. Farrell*, 223 N.W.2d 270 (Iowa 1974), *appeal dismissed*, 421 U.S. 1007 (1975); *People v. Burton*, 27 N.Y.2d 198, 316 N.Y.S.2d 217 (1970), *appeal denied*, 402 U.S. 991 (1971); *Deeds v. State*, 474 S.W.2d 718 (Tex. Crim. App. 1971). The only reported exception was the acquittal, on grounds of lack of scienter, in *State v. Turner*, 78 Wash. 2d 276, 474 P.2d 91 (1970).

302. After 1982, but before *Johnson*, the only two reported flag burning cases also ultimately led to acquittals on grounds similar to those in *Johnson*. See *Bowles v. Jones*, 758 F.2d 1479 (11th Cir. 1985); *Monroe v. Fulton Co.*, 739 F.2d 568 (11th Cir. 1984). In *Monroe*, the court held that the professed state interest in protecting the flag "as a symbol of the nation . . . is not sufficiently substantial as to justify infringement of Monroe's constitutional rights" and that the flag burning in that case "did not produce a clear and present danger of a serious substantive evil" that could have justified arrest for breach of the peace. *Monroe*, 739 F.2d at 574-75.

303. See, e.g., *Spence v. Washington*, 418 U.S. 405 (1974) (peace sign over the flag); *State v. Kool*, 212 N.W.2d 518 (Iowa 1973) (hanging a peace symbol in front of upside-down flag); *State v. Liska*, 32 Ohio App. 2d 317, 291 N.E.2d 498 (1971) (peace sign over a decal composed of 13 red and white stripes and a blue square); *Commonwealth v. Hanoff*, 439 Pa. 212, 266 A.2d 657 (1969) (words placed on flag).

304. See, e.g., *Royal v. New Hampshire*, 531 F.2d 1084 (5th Cir. 1976), *cert. denied*, 429 U.S. 867 (1976); *Parker v. Morgan*, 322 F. Supp. 585 (W.D.N.C. 1971); *State v. Kasnett*, 34 Ohio St. 2d 193, 297 N.E.2d 537 (1973). Convictions were obtained, however, in some cases. See, e.g., *People v. Cowgill*, 274 Cal. App. 2d Supp. 923, 78 Cal. Rptr. 853 (Dep't Super. Ct. 1969), *cert. denied*, 396 U.S. 371 (1970); *State v. Waterman*, 190 N.W.2d 809 (Iowa 1971).

305. See *supra* notes 298-300 and accompanying text; *infra* notes 325-27 & 342-43 and accompanying text.

306. 474 S.W.2d 718 (Tex. Crim. App. 1971).

307. *Johnson v. State*, 755 S.W.2d 92, 95-97 (Tex. Crim. App. 1988).

308. *Deeds*, 474 S.W.2d at 721.

attempts to prevent breaches of the peace, Vietnam era courts often cited a phrase from the 1907 Supreme Court decision in *Halter*, which declared, "It has often occurred that insults to a flag have been the cause of war, and indignities put upon it, in the presence of those who revere it, have often been resented and sometimes punished on the spot."<sup>309</sup> Thus, in *State v. Waterman*,<sup>310</sup> an Iowa court upheld a conviction for wearing the flag as a cape, even without any evidence of actual or threatened disorder, declaring that the state's interest in "preventing breaches of the peace which result from reactions to any attempted defilement of the flag has long been recognized."<sup>311</sup> Similarly, in *Sutherland v. DeWulf*,<sup>312</sup> a federal court declared that public flag burning had a "high likelihood" of causing a breach of the peace and was inherently an act of incitement as "fraught with danger . . . as if a person would stand on the street corner shouting derogatory remarks at passing pedestrians."<sup>313</sup>

Acquittals were based on a wide variety of reasons, some of which directly rejected the professed state's interests referred to above. In *Crosson v. Silver*,<sup>314</sup> a federal court acquitted a flag burner partly on the grounds of rejecting "the existence of a constitutionally recognized state power to prohibit flag desecration based on an interest in preserving loyalty or patriotism."<sup>315</sup> In *State v. Kool*,<sup>316</sup> the Iowa Supreme Court, reversing a conviction in a case involving the superimposition of a peace sign over the flag, rejected any claimed threat to the peace, stating that although someone might have been "so intemperate as to disrupt the peace because of this display, [if] absolute assurance of tranquillity is required we might as well forget about free speech."<sup>317</sup> A number of the convictions involving wearing of flags and "superimposition" of flags were reversed on the grounds that no real desecration had occurred or that no "contempt" had been displayed. Some examples include wearing the flag as a cape,<sup>318</sup> wearing a shirt resembling the flag,<sup>319</sup> substituting dollar signs for the flag's

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309. See *Halter v. Nebraska*, 205 U.S. 34, 41 (1907). However, a comprehensive study of flag desecration incidents between 1915 and 1969 uncovered only 15 incidents of actual or "threshold" breaches of the peace in a total of 95 cases. Prosser, *supra* note 122, at 203, 218.

310. 190 N.W.2d 809 (Iowa 1971).

311. *Id.* at 811.

312. 323 F. Supp. 740 (S.D. Ill. 1971).

313. *Id.* at 745.

314. 319 F. Supp. 1084 (D. Ariz. 1970).

315. *Id.* at 1087.

316. 212 N.W.2d 518 (Iowa 1973).

317. *Id.* at 521.

318. See, e.g., *State v. Saion*, 23 Ohio App. 2d 79, 261 N.E.2d 135 (1969).

319. See, e.g., *Hoffman v. United States*, 445 F.2d 226 (D.C. Cir. 1971) (charging activist

stars,<sup>320</sup> and displaying a peace sign superimposed over the flag.<sup>321</sup>

Many Vietnam era courts struck down state flag desecration laws as unconstitutional, in whole or in part, on the grounds of vagueness or overbreadth. In *Smith v. Goguen*,<sup>322</sup> where an individual was convicted of violating the Massachusetts flag-misuse statute for wearing a flag patch sewn to the seat of his trousers, the United States Supreme Court struck down the statute as unconstitutionally vague.<sup>323</sup> The Court determined that the statute, which outlawed "contemptuously" treating the flag in public, failed to adequately define "contemptuous treatment."<sup>324</sup> In *Hodsdon v. Buckson*,<sup>325</sup> where an individual sought relief from prosecution for displaying the flag at half mast and in an inferior position to the United Nations flag, a federal district court found Delaware's flag desecration law unconstitutionally overbroad since the statute encompassed "acts which bear no relation to any interest within the legislative competence and which are intended and understood as symbolic speech."<sup>326</sup> The court concluded that "the punishment of peaceful symbolic acts rejecting the political ideals bespoken by the flag is as alien to the mandate of the First Amendment as is compulsion to signify adherence."<sup>327</sup> In *Parker v. Morgan*,<sup>328</sup> a case involving wearing a jacket with a sewn-on flag which had the words "Give peace a chance" superimposed on it, a federal district court found North Carolina's law unconstitutionally vague by virtue of its definition of "flag."<sup>329</sup> The court declared:

The definition of a flag in North Carolina is simply unbelievable . . . . Read literally, it may be dangerous in North Carolina to possess anything red, white and blue. Such a definition is a manifest absurdity. Since it is not suggested that the state has the slightest interest in singling out from the spectrum certain colors for unique protection, this definition alone is enough to void the statute . . . .<sup>330</sup>

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Abbie Hoffman). Upon his original conviction, Hoffman lamented, "I regret that I have only one shirt to give to my country." N.Y. Times, Nov. 22, 1968, at 52, col. 8.

320. See, e.g., *State v. Kent*, No. 36,423 (Haw. Cir. Ct. Dec. 9, 1966).

321. See, e.g., *Spence v. Washington*, 418 U.S. 405 (1974); see *infra* notes 388-96 and accompanying text.

322. 415 U.S. 566 (1974).

323. *Id.* at 569.

324. *Id.* at 578-86.

325. 310 F. Supp. 528 (D. Del. 1970), *rev'd on other grounds*, *Hodsdon v. Stabler*, 444 F.2d 533 (3d Cir. 1971).

326. *Id.* at 534.

327. *Id.* at 535.

328. 322 F. Supp. 585 (W.D.N.C. 1971).

329. *Id.* at 593. North Carolina's statute was quite similar to many flag desecration laws from other states and the 1968 federal law.

330. *Id.* at 588.

In *Long Island Vietnam Moratorium Committee v. Cahn*,<sup>331</sup> where an individual had been prosecuted for having buttons and decals which superimposed the "peace sign" over a portion of the flag, a federal court of appeals held that the section of New York's law which banned placing any "word, figure, mark, picture, design, drawing, or any advertisement, of any nature" on the flag violated the first amendment because it was unconstitutionally overbroad.<sup>332</sup> The court stated:

Because of its overbreadth, the statute vests local law enforcement officers with too much arbitrary discretion in determining whether or not a certain emblem is grounds for prosecution. It permits only that expression which local officials will tolerate; for example, it permits local officials to prosecute peace demonstrators but to allow "patriotic" organizations and political candidates to go unprosecuted.<sup>333</sup>

As *Cahn* suggests, the Vietnam era flag desecration prosecutions were cast amongst a backdrop of chaotic, highly discretionary law enforcement actions, and notably inconsistent court decisions. For example, three cases dealing with wearing the flag as a cape,<sup>334</sup> a vest,<sup>335</sup> and a patch on the seat of the pants<sup>336</sup> led to convictions, but in three other cases the same behaviors led to acquittals.<sup>337</sup> A peace sign superimposed on the flag's field of stars invariably led to acquittal,<sup>338</sup> but superimposition of a picture of Mickey Mouse over the flag led to conviction.<sup>339</sup> Before 1982, burning the flag almost invariably led to conviction,<sup>340</sup> but after 1982, the same action consistently culminated in acquittal.<sup>341</sup> Displaying the flag over the artistic representation of an erect penis led to an acquittal in 1974,<sup>342</sup> but rubbing the flag over the genitals and using it as a handkerchief led to

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331. 437 F.2d 344 (2d Cir. 1970).

332. *Id.* at 350.

333. *Id.*

334. *See, e.g., State v. Waterman*, 190 N.W.2d 809 (Iowa 1971).

335. *See, e.g., People v. Cowgill*, 274 Cal. App. 2d Supp. 923, 78 Cal. Rptr. 853 (1969), *cert. denied*, 396 U.S. 371 (1970).

336. *See, e.g., State v. Mitchell*, 32 Ohio App. 2d 16, 288 N.E.2d 216 (1972).

337. *See, e.g., People v. Vaughan*, 182 Colo. 437, 514 P.2d 318 (1973); *State v. Saion*, 23 Ohio App. 2d 79, 261 N.E.2d 135 (1969); *Franz v. Commonwealth*, 212 Va. 587, 186 S.E.2d 71 (1972).

338. *See Long Island Moratorium Comm. v. Cahn*, 437 F.2d 344 (2d Cir. 1973).

339. *See State v. Saulino*, 29 Ohio Misc. 25, 277 N.E.2d 580 (1974).

340. *See supra* note 301-02.

341. *See supra* note 302-04.

342. *See United States ex rel. Radich v. Criminal Court of New York*, 385 F. Supp. 165 (S.D.N.Y. 1974).



conviction.<sup>343</sup>

Much social commentary during this era focused on the arbitrary and somewhat hypocritical manner by which prosecutors enforced these flag desecration statutes. Thus, while "peace" demonstrators were prosecuted for statutory violations, "patriotic" figures who wore flag lapels and who placed flag decals on their windows and cars, often in technical violation of flag desecration statutes, invariably were free from prosecution.<sup>344</sup> The director of the Flag Research Center, Whitney Smith, noted in 1970 that "commercial misuse" of the flag was "more extensive than its misuse by leftists or students, but this is overlooked because the business interests are part of the establishment."<sup>345</sup> *Time* magazine, reporting in the same year on prosecutions for "wearing" the flag, noted that in applying such logic, "Uncle Sam should be indicted first, followed by Roy Rogers and Dale Evans"<sup>346</sup> (the latter had appeared on national television wearing flag costumes). In 1971, *The New York Times* reported that flag desecration laws, despite being so broad that they could be used to punish virtually any alleged "abuse" of the flag, "have rarely been invoked against anyone except those who differ with prevailing ideas of patriotism."<sup>347</sup> In fact, the *Times* reported that many cases involved "rebellious young people [arrested] for improper display of the flag on their clothing by policemen wearing flag patches or pins on their uniforms . . . ."<sup>348</sup>

On occasion, the courts explicitly recognized the discriminatory manner by which states enforced their respective flag desecration statutes during this era. In one case, a Topeka, Kansas, man was arrested for having a "peace flag" decal on his car, but the charge was dropped after his lawyer pointed out that city police cars bore flag decals "defaced" by a "love it or leave it" slogan.<sup>349</sup> In *Smith v. Goguen*,<sup>350</sup> the Supreme Court noted the candid concession of the state's attorney from Massachusetts in admitting that a "war protester who, while attending a rally at which it begins to rain, contemptuously covers

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343. See *Van Slyke v. State*, 489 S.W.2d 590 (Tex. Crim. App. 1973), *appeal dismissed*, *Van Slyke v. Texas*, 418 U.S. 907 (1974).

344. See generally *Who Owns the Stars and Stripes?*, *TIME*, July 6, 1970, at 8; *Americana: New Glory*, *NEWSWEEK*, June 15, 1970, at 30.

345. See Hunter, *supra* note 255, at 1, col. 3.

346. See *Who Owns the Stars and Stripes*, *supra* note 344, at 15.

347. Graham, *The Flag: Chaos over the Issue of Its Abuse*, *N.Y. Times*, Jan. 10, 1971, § 4 (Magazine), at 10.

348. Ripley, *The American Flag: A Center of Dispute on Birthday of U.S.*, *N.Y. Times*, July 5, 1971, at 1, col. 2.

349. *Who Owns the Stars and Stripes*, *supra* note 344, at 14.

350. 415 U.S. 566 (1974).

himself" with the flag, would be prosecuted, while "a member of the American Legion who, caught in the same rainstorm while returning from an 'America—Love It or Leave It' rally, similarly uses the flag, but does so regrettably, and without a contemptuous attitude, would not be prosecuted."<sup>351</sup>

#### D. *The Supreme Court and the Flag Desecration Issue Before Johnson*

In its 1931 *Stromberg v. California*<sup>352</sup> decision, the Supreme Court first indicated that "symbolic speech" was, in some cases and to some degree, protected under the first amendment.<sup>353</sup> It failed, however, then and subsequently, clearly to define symbolic speech or to outline the extent of the protection it enjoys. This was especially true in flag desecration cases where, until *Texas v. Johnson*,<sup>354</sup> the Court three times reversed flag burning convictions while refusing directly to address whether flag desecration constituted symbolic speech.<sup>355</sup>

Beginning with *Stromberg*, in which an individual was convicted for displaying a red flag as an emblem in opposition to organized government,<sup>356</sup> the Court established that freedom of speech extends beyond purely verbal utterances to encompass also, at least to some degree, conduct with symbolic overtones.<sup>357</sup> The Court used this principle to protect under the first amendment the refusal to salute the American flag,<sup>358</sup> the right peacefully to picket in labor disputes,<sup>359</sup> the right to parade in support of civil rights,<sup>360</sup> and the right to wear black armbands to school to oppose the Vietnam War.<sup>361</sup> The Court not only views such conduct as essentially communicative in nature, but has noted that symbolic speech might be the only way for relatively powerless individuals to gain public attention and support. In *Milkwagon Driver's Union v. Meadowmoor Dairies, Inc.*,<sup>362</sup> the Court observed that "[p]eaceful picketing is the working man's means

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351. *Id.* at 575.

352. 283 U.S. 259 (1931).

353. *Id.*

354. 109 S. Ct. 2533 (1989).

355. See *infra* notes 373-97 and accompanying text.

356. *Stromberg*, 283 U.S. at 359.

357. *Id.* at 363.

358. See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

359. See *Thornhill v. Alabama*, 310 U.S. 88 (1940).

360. See *Cox v. Louisiana*, 379 U.S. 536 (1965).

361. The Court stated that wearing armbands was "closely akin to 'pure speech'" where no disruption was involved because "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969).

362. 312 U.S. 275 (1941).

of communication."<sup>363</sup> Justice Douglas's dissent in *Adderley v. Florida*<sup>364</sup> added support to this proposition by noting that:

Conventional methods of petitioning may be, and often have been, shut off to large groups of our citizens. . . . Those who do not control television and radio, those who cannot afford to advertise in newspapers or circulate elaborate pamphlets may have only a more limited type of access to public officials. Their methods should not be condemned as tactics of obstruction and harassment as long as the assembly and petition are peaceful.<sup>365</sup>

Although recognizing the concept of symbolic speech, the Court has suggested that such "conduct" may not enjoy as much protection under the first amendment as "pure speech." In its 1965 *Cox v. Louisiana*<sup>366</sup> decision, for example, the Court declared, "We emphatically reject the notion . . . that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing . . . as these amendments afford to those who communicate ideas by pure speech."<sup>367</sup> Later, in *United States v. O'Brien*,<sup>368</sup> the Court upheld a criminal conviction under a 1965 draft card burning statute<sup>369</sup> declaring that "[w]e cannot accept the view that an apparently limitless variety of conduct can be labelled 'speech.'"<sup>370</sup> The Court set forth a balancing test to determine when the government constitutionally could regulate expressive conduct:

[W]hen "speech" and "nonspeech" elements are combined in the same course of conduct . . . a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.<sup>371</sup>

The statute in *O'Brien* was constitutional because the Court found it was designed to foster effective functioning of the draft, not to hinder

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363. *Id.* at 293.

364. 385 U.S. 39 (1966).

365. *Id.* at 50-51.

366. 379 U.S. 536 (1965).

367. *Id.* at 555.

368. 391 U.S. 367 (1968).

369. This legislation clearly was intended to suppress a form of widely publicized dissent as reflected in the congressional debates in which draft card burners were called filthy beatniks, communist stooges, and traitors. See R. GOLDSTEIN, *supra* note \*, at 435.

370. *O'Brien*, 391 U.S. at 376.

371. *Id.* at 377.

free expression.<sup>372</sup>

Rather than resolving the issue of when expressive conduct deserved first amendment protection, application of the *O'Brien* test resulted in inconsistent lower court opinions because the Supreme Court failed clearly to define critical terms of its test.<sup>373</sup> Further, the Court itself often failed to apply *O'Brien* in later opinions, preferring to resolve flag desecration issues on narrow grounds rather than addressing the state's interest in curbing expressive conduct. In *Street v. New York*,<sup>374</sup> for example, a flag burner was arrested in the aftermath of the 1966 shooting of civil rights activist James Meredith.<sup>375</sup> Street had accompanied his symbolic protest with the oral declamation, "If they let that happen to Meredith, we don't need an American flag."<sup>376</sup> The Court reversed Street's conviction by a 5-to-4 vote on the ground that he had been charged under a state statutory provision forbidding casting "contempt upon . . . [the flag] either by words or act,"<sup>377</sup> and that it was possible that Street had been convicted solely for his words.<sup>378</sup> Explaining that the "public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some,"<sup>379</sup> the Court held Street's conviction to be a violation of the first amendment.<sup>380</sup> Further, the Court noted that "the 'right to differ as to things that touch the heart of the existing order,' encompass[es] the freedom to express publicly one's opinions about the flag, including those opinions which are defiant or contemptuous."<sup>381</sup> By focusing on the pure speech aspects of Street's conduct, the Court avoided the physical flag desecration issue despite a vigorous dissent.<sup>382</sup> Although evading the physical flag desecration issue, *Street* established that flag abuse involving "public expression of ideas" is constitutionally protected.<sup>383</sup>

372. *Id.* at 386.

373. The Court failed to define "free expression," "incidental," "essential," "important," and "furtherance."

374. 394 U.S. 576 (1969).

375. *Id.*

376. *Id.* at 579.

377. *Id.* at 578 (quoting N.Y. PENAL LAW § 1425(16)(d) (1909)).

378. *Id.* at 590.

379. *Id.* at 592.

380. *Id.*

381. *Id.* at 593 (quoting *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943)).

382. The dissent clearly would have upheld the constitutionality of a flag burning conviction. *Id.* at 605, 610, 615 & 617 (Warren, Black, White, and Fortas, JJ., dissenting).

383. *Id.* at 592. New York also contended that Street's conviction should have been upheld under *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), because flag abuse would tend to breach the peace. *Id.* In *Chaplinsky*, the Court held that:

[Personal insults that] by their very utterance inflict injury or tend to incite an immediate breach of the peace . . . are no essential part of an exposition of ideas,

The Court reversed two other flag desecration convictions during the Vietnam era, again without addressing the validity of the state's interests in protecting the physical integrity of the flag under the *O'Brien* test. In *Smith v. Goguen*,<sup>384</sup> a Massachusetts man was convicted under a state statute<sup>385</sup> for treating the flag "contemptuously" by wearing a flag patch on his trousers.<sup>386</sup> The Court reversed by a 6-to-3 vote, holding the statute unconstitutionally vague.<sup>387</sup> In *Spence v. Washington*,<sup>388</sup> the Court reversed a conviction, again by a 6-to-3 vote, for taping a peace symbol to the flag.<sup>389</sup> The Court assumed without analysis that there might have been a state interest in "preserving the national flag as an unalloyed symbol of our country,"<sup>390</sup> but concluded that no such interest had been harmed because Spence had not "permanently disfigure[d] the flag [n]or destroy[ed] it."<sup>391</sup> In a bitter dissent, Justice Rehnquist asked whether the majority's result would have been the same if Spence had "subsequently tor[n] the flag in the process of trying to take the tape off."<sup>392</sup>

The *Spence* decision contained a highly significant point in a footnote in which the Court declared that if Washington state had an interest in preserving the symbolic value of the flag, such an interest was "directly related to expression"<sup>393</sup> and involved "no other government interest unrelated to expression . . . in the context of activity like that undertaken"<sup>394</sup> by Spence. Thus, the statute would not have

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and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

*Id.* at 572.

Rather than holding Street's remarks to be within the *Chaplinsky* exception, however, the Court applied the principle of *Terminiello v. City of Chicago*, 337 U.S. 1 (1949), that a function of free speech is "to invite dispute . . . [and that] it may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are or even stirs people to anger." *Id.* at 4; *cf.* *Cohen v. California*, 403 U.S. 15, 16 & 25 (1971) (reversing a conviction for disturbing the peace for wearing a jacket bearing the words "Fuck the Draft," noting that "one man's vulgarity is another's lyric."); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (declaring that even advocacy could not be punished "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.").

384. 415 U.S. 566 (1974).

385. *Id.*

386. *Id.* at 568.

387. *Id.*

388. 418 U.S. 405 (1974).

389. *Id.*

390. *Id.* at 412.

391. *Id.* at 415.

392. *Id.* at 420 (Rehnquist, J., dissenting).

393. *Id.* at 414 n.8.

394. *Id.* at 415.

been subject to the *O'Brien* balancing test used with conduct mixed with expression, but rather could have been subjected to much stricter protection accorded pure expression.<sup>395</sup> Although the Court was not addressing flag burning, this was the first time<sup>396</sup> it had stated clearly that symbolic protest utilizing the American flag could be considered a matter of pure expression.<sup>397</sup>

Two factors led to lower court confusion as to whether flag desecration constituted protected symbolic speech under the first amendment. First, the Court's holdings in *Street*, *Goguen*, and *Spence* signaled the Court's reluctance both to uphold flag abuse or desecration convictions and to apply the *O'Brien* test to determine whether the state had a sufficient interest to regulate flag desecration. However, the Court refused to grant certiorari in flag burning cases for twenty years<sup>398</sup>—from the 1969 *Street* decision until the 1989 *Texas v. Johnson* decision.<sup>399</sup> In one case, Justice Brennan wrote a blistering critique of the Court's refusal to grant certiorari. In *United States v. Kime*,<sup>400</sup> a flag burner had been convicted after a peaceful political protest under the 1968 federal law forbidding "knowingly cast[ing] contempt"<sup>401</sup> upon the flag. Applying *Spence*, Brennan declared that the flag burning was clearly expressive in nature<sup>402</sup> and that the only possible government motive in banning such behavior was to suppress expression which challenged the government's interest in fostering the flag's symbolic value.<sup>403</sup> Basing his argument on the proposition that there could be "no aesthetic or property interest in protecting a mere aggregation of stripes and stars for its own sake,"<sup>404</sup> Brennan declared that the terms of the 1968 federal law made the crime totally dependent upon expression of a particular viewpoint.<sup>405</sup> He archly noted, "This is indeed a narrowly drawn statute; it is drawn so that everything it might possibly prohibit is constitutionally protected expres-

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395. *Id.* at 414 n.8.

396. *Id.* at 416.

397. Also tucked away in the *Spence* decision was the Court's first real guideline for determining when conduct could constitute expression. *Id.* at 410-11. The Court suggested that expression might be defined as occurring when "an intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it." *Id.*

398. The Court refused to grant certiorari in *United States v. Kime*, 459 U.S. 949 (1982); *Sutherland v. Illinois*, 425 U.S. 947 (1976); and *Farrell v. Iowa*, 421 U.S. 1007 (1975).

399. 109 S. Ct. 2533 (1989).

400. 459 U.S. 949 (1982).

401. *Id.* at 954 (quoting 18 U.S.C. § 700 (1988)) (Brennan, J., dissenting).

402. *Id.* at 950.

403. *Id.* at 951.

404. *Id.*

405. *Id.*

sion."<sup>406</sup> Even the *Greensboro Daily News* captured the point that Brennan's eight colleagues missed:

Across the land the flag is honored and well-kept. That a few rag-tag radicals would destroy a flag in public does nothing to diminish what the flag stands for. It is curious that the high court's decision in effect protects only the symbol of the country—the flag—and not the essence of it—freedom and free speech. Curious, and regrettable.<sup>407</sup>

Three other pre-*Johnson* decisions rendered in the 1970-to-1988 period, although non-flag related, established or reinforced legal principles which were important both for resolution of the issues raised in *Johnson*, as well as for the subsequent attempt to circumvent *Johnson* by legislation. First, in 1970, in *Schacht v. United States*,<sup>408</sup> the Court invalidated a law prohibiting the unauthorized use of military uniforms in dramatic productions when such use "tend[ed] to discredit"<sup>409</sup> the military, holding that a law discriminating on the basis of content of expression could not survive first amendment scrutiny.<sup>410</sup> Second, in 1988, in *Boos v. Barry*,<sup>411</sup> the Court invalidated a statute outlawing picketing close to embassies if picket signs tended to bring the foreign government into "public odium . . . or . . . disrepute,"<sup>412</sup> holding that the statute impermissibly focused "only on the content of the speech and . . . [its] direct impact . . . on its listeners."<sup>413</sup> Moreover, the Court declared that "in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide 'adequate "breathing space" to the freedoms protected by the First Amendment.'"<sup>414</sup> Third, in 1980, in *Consolidated Edison Co. v. Public Service Commission*,<sup>415</sup> the Court reversed the New York Public Service Commission's order forbidding Consolidated Edison from inserting political messages, including those relating to nuclear power, in monthly bills.<sup>416</sup> The Court held that even though all such messages were forbidden by the Commission's order, regardless of content, "[t]he First Amendment's hostility to content-based regula-

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406. *Id.*

407. T. TEDFORD, FREEDOM OF SPEECH IN THE UNITED STATES 16 (1985) (quoting *Greensboro Daily News*, Oct. 23, 1982, at A12, col. 1).

408. 398 U.S. 58 (1970).

409. *Id.* at 62-63.

410. *Id.* at 60 (quoting 10 U.S.C. § 772(f) (1956)).

411. 108 S. Ct. 1157 (1988).

412. *Id.* at 1161 (quoting D.C. CODE ANN. § 22-1115 (Michie 1981)).

413. *Id.*

414. *Id.* at 1164 (quoting *Hustler Magazine, Inc. v. Falwell*, 108 S. Ct. 876, 882 (1988)).

415. 447 U.S. 530 (1980).

416. *Id.*

tion extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic."<sup>417</sup> Further, the Court "rejected the suggestion that a government may justify a content-based prohibition by showing that [the] speakers have alternative means of expression."<sup>418</sup>

### E. *The Prelude to Johnson*

Two developments during the year preceding *Johnson* signaled the highly emotive response that flag burning was likely to invoke in the American public. In the 1988 presidential campaign, then-Vice-President Bush thrust the flag issue before the voters by criticizing Michael Dukakis<sup>419</sup> for vetoing, as governor of Massachusetts in 1977, a law requiring daily recitation of the Pledge of Allegiance to the flag in public schools.<sup>420</sup> Although Dukakis vetoed the law based on the advice of Massachusetts' highest court that the law was unconstitutional under *Barnette*,<sup>421</sup> Bush used it effectively to impugn Dukakis's patriotism. Bush asked at one point, "What is it about the American flag that upsets this man so much?"<sup>422</sup> Dukakis's response, although legally correct, was "politically devastating."<sup>423</sup> At the same time, Bush was elevating his own political status by leading audiences in mass recitals of the Pledge, surrounding his campaign with flags, and visiting a flag factory. One reporter noted wryly, "[F]lags surround . . . [Bush] on the stump like flowers at a Mafia funeral."<sup>424</sup> Another characterized Bush's campaign as "a cross-country version of [the children's game] 'capture the flag.'"<sup>425</sup>

A second flag-related development preceding *Johnson* was a heated dispute over a Chicago art exhibit in February and March 1989. This dispute surely must have impressed upon politicians that the flag issue had not disappeared with the presidential election.<sup>426</sup>

417. *Id.* at 537.

418. *Id.* at 541 n.10.

419. See generally J. GERMOND & J. WITCOVER, *WHOSE BROAD STRIPES AND BRIGHT STARS? THE TRIVIAL PURSUIT OF THE PRESIDENCY*, 1988 (1989); P. GOLDMAN & T. MATHEWS, *THE QUEST FOR THE PRESIDENCY: THE 1988 CAMPAIGN* (1989).

420. See Opinion of the Justices to the Governor, 372 Mass. 874, 363 N.E.2d 251 (1977).

421. *Id.*

422. *Flag Burning and Flag Waving*, *THE ECONOMIST*, July 1, 1989, at 19.

423. Toner, *Politics: Democrats, in a Flurry of Bills, Seek to Recapture the Flag Issue from the Foe*, *N.Y. Times*, June 26, 1989, at B6, col. 5.

424. Cohen, *Whose Flag is it Anyway?*, *Wash. Post*, Oct. 13, 1988, at A19, col. 1.

425. Gerstenzang, *'Capture the Flag' a Vital Game in '88 Campaign*, *L.A. Times*, Sept. 21, 1988, at A13, col. 1.

426. Wilkerson, *The Art Institute of Chicago Under Fire*, *N.Y. Times*, July 3, 1989, at A13, col. 1; *N.Y. Times*, June 22, 1989, at B8, col. 1; Schmidt, *Disputed Exhibit of Flag Is Ended*, *N.Y. Times*, Mar. 17, 1989, at A19, col. 1.



The exhibit included a display entitled "What is the Proper Way to Display the American Flag?"<sup>427</sup> It featured a photograph collage of flag burnings and flag-draped coffins. A flag was positioned on the floor in front of a ledger in a manner that invited patrons to walk on it in order to record their responses to the display. The exhibit sparked a storm of controversy in Chicago in which thousands of people picketed, and which a British magazine referred to as Chicago's "own little Rushdie affair."<sup>428</sup> This controversy caused the Illinois and Indiana legislatures to condemn the display and to pass resolutions eliminating funding to the school and banning placement of the flag on the floor.

Bush's campaign success with the flag issue clearly influenced the 1989 congressional debate during the *Johnson* controversy. By demanding passage of a constitutional amendment to overturn *Johnson*, Bush was attempting again to capture the flag for the Republican Party. Democrats, still stinging from the 1988 campaign and fearing negative advertisements in upcoming elections, feared appearing less than 100% patriotic and thus refused to support the *Johnson* decision. One reporter noted that "[m]any Democrats swore they would never be outflagged again."<sup>429</sup> Although opposing a constitutional amendment, Democrats led the fight for passage of a statute as a swift means of circumventing *Johnson* while leaving the first amendment intact. This political maneuver enabled Democrats to join Republicans in blasting the Supreme Court for its decision. As the *Washington Post* reported, congressional Democrats "kept up a fusillade of pro-flag rhetoric . . . matching the Republicans word for word"<sup>430</sup> and "talked bar-room tough, essentially saying no Republican had better call them soft on the flag."<sup>431</sup>

Democrats made no secrets of their political fears. Kentucky State Democratic Senator Roger Noe declared, "Given the kind of mud-slinging being used these days, I can envision seeing campaign ads with opponents who were not strongly supportive of the amendment being pictured as communist or pinko or un-American."<sup>432</sup> In order to "avoid what he termed the 'deathtrap for Democrats,'" Cali-

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427. *Protecting the Flag*, THE ECONOMIST, Mar. 11, 1989, at 32.

428. *Id.*

429. See Toner, *supra* note 423, at B6, col. 5.

430. Phillips & Dewar, *Senate Votes to Rewrite Law Against Flag Desecration*, Wash. Post, June 24, 1989, at A17, col. 1.

431. Phillips & Dewar, *Democrats Brace for Real Battle over Symbolism*, Wash. Post, June 28, 1989, at A5, col. 1.

432. Nance, *Flag Burning Issue Spurs Anger, Fear*, Lexington (Ky.) Herald-Leader, June 30, 1989, at B1, col. 1.

ifornia State Senate Democratic majority leader Barry Keene voted for a resolution supporting a constitutional amendment to ban flag burning,<sup>433</sup> as did former anti-Vietnam war radical and now California assemblyman Tom Hayden.<sup>434</sup> Keene declared that the principal flag desecrators were George Bush and Republican National Committee Chairman Lee Atwater<sup>435</sup> and that the real desecration of the flag was the "shameful, cynical, tawdry, manipulative exploitation of the flag for political purposes."<sup>436</sup> Keene, however, lamented that "[t]hey know that their political trick will succeed because we can't take the risk of being thought to be unpatriotic."<sup>437</sup> Under these circumstances, the major focus in the aftermath of *Johnson*, at least among politicians, became how, not whether, to override the Court. The fundamental constitutional principles involved in the Court's decisions were virtually neglected as both parties battled to demonstrate their patriotism.

#### IV. THE DEBATE OVER *JOHNSON*

For the sake of both conciseness and comprehensiveness, this Essay will summarize the key arguments for and against the Supreme Court decision in *Johnson* by synthesizing points made (1) in the legal briefs and oral arguments in the case, (2) in the various opinions written by the Justices of the Court, and (3) in the general media. By presenting the arguments for both sides, I do not pretend to remain neutral. Although I have attempted to present fairly both positions, I view the arguments of *Johnson*'s opponents as hopelessly inadequate, both from a legal standpoint and from a standpoint based on democratic theory. Conversely, I view the arguments of *Johnson*'s supporters generally to be cogent and soundly based in law and democratic principles.

##### A. *The Arguments for Texas*

In the end, both the legal and popular arguments made for upholding *Johnson*'s conviction in particular, and banning flag dese-

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433. Ingram, *State Senate Jumps on Bandwagon for the Flag*, L.A. Times, July 14, 1989, at A3, col. 5.

434. See *Legislators Supporting Flag Move*, *supra* note 66, at 6, col. 1.

435. *Id.*

436. See Ingram, *supra* note 433, at A3, col. 5.

437. *Id.* Compare the comments of Pennsylvania Democratic minority leader Senator John Dent, concerning an "anti-communist" bill that he personally opposed during the height of "McCarthyism" in 1951: "I would be derelict in my duties to the Democratic Party if I did not vote for this piece of legislation today. . . . I cannot permit my party to be further stigmatized as a party-friendly to un-American activities." See R. GOLDSTEIN, *supra* note \*, at 367.

cration in general, either by law or constitutional amendment, are grounded in the proposition that the flag, as the most popular symbol of freedom and of the nation, is unique and that while dissent is a legitimate and critical part of the democratic process, desecrating the flag goes too far. For example, Senate Minority Leader Robert Dole declared, "Freedom of speech is a constitutional guarantee that America holds dear. But we draw the line when it comes to our flag."<sup>438</sup> President Bush proclaimed that he felt "viscerally about burning the American flag"<sup>439</sup> because it is "a unique national symbol."<sup>440</sup> He declared that "as president, . . . I will uphold our precious right to dissent, but burning the flag goes too far."<sup>441</sup> A columnist unintentionally caricatured the position of the critics of the *Johnson* decision, when in her own bitter attack on the Court she castigated the tribunal for declaring that freedom of speech was "more important than respecting the symbol of freedom."<sup>442</sup> Senator Strom Thurmond captured the emotional force of much of the criticism of the Court when he proclaimed to the Senate, "We must stand up for America. The flag, the flag. America, America. For us!"<sup>443</sup>

The *Johnson* decision was attacked in popular discussions as ignoring the wishes of the vast majority and condoning behavior that would damage the symbolic value of the flag and the strength of the country. The *Indianapolis Star* asked in an editorial, "Who will protect the rights of the millions who oppose destruction of the symbols of American freedom?"<sup>444</sup> Senate Majority Leader George Mitchell said the *Johnson* decision "devalued and cheapened"<sup>445</sup> the flag, while an officer of the Seattle chapter of the Veterans of Foreign Wars declared that "when you destroy that flag, you destroy the principles of our country."<sup>446</sup>

Much of the popular criticism of the *Johnson* decision, especially in the immediate period after June 21, 1989, was couched in highly vitriolic terms. Representative Ron Marlenee termed the decision "treasonous," and in reference to the six Marines depicted in the Iwo Jima Memorial, declared, "These six brave soldiers were symbolically

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438. Richardson, *Bush Burns at Court's Flag Edict*, Wash. (D.C.) Times, June 23, 1989, at A6, col. 3.

439. Phillips & Dewar, *supra* note 431, at A5, col. 1.

440. *Id.*

441. *Id.*

442. Boston Herald, June 23, 1989, at B3, col. 1.

443. Ann Arbor (Mich.) News, June 23, 1989, at C2, col. 2.

444. 20 EDITORIALS ON FILE 715 (1989) (reprinting editorial published in the *Indianapolis Star*, June 23, 1989).

445. Wash. Post, June 23, 1989, at A1, col. 2.

446. L.A. Times, June 23, 1989, at 1, col. 5.

shot in the back by five men in black robes."<sup>447</sup> The chairman of the South Carolina Joint Veterans Council called on Americans to write to their elected officials to demand that "this crap" be stopped.<sup>448</sup> Conservative columnist Pat Buchanan termed the decision an "atrociousity" and the Court a "renegade tribunal" to which the American people should respond by putting "a fist in their face."<sup>449</sup> News stories of public reaction quoted one man as declaring that the "degree of senility among these judges is greater than most people think."<sup>450</sup> Another citizen declared that "they should wrap these five justices up in a flag and burn them; I wouldn't mind putting a match to it myself."<sup>451</sup> The *New York Daily News* labeled the *Johnson* decision as "dumb" and reported that it put the Court in "naked contempt" of the American people through the justices' display of "pompous insensitivity to the most beloved symbol of the most benevolent form of government ever to appear on this Earth."<sup>452</sup> On the same day, the *Daily News* also published a cartoon showing an American soldier, bearing a resemblance to President Bush, pouring gas on a pile of law books forming a pyre below five bound judges who were bearing copies of the "flag case," with the caption "Anybody got a match?"<sup>453</sup> The *Dallas Times Herald* repeated this theme by illustrating five judges raising glasses to toast the imminent burning of the Iwo Jima memorial.<sup>454</sup> *Newsday* published a cartoon showing a dirtied flag being used as a doormat outside the entrance to the Supreme Court,<sup>455</sup> while the *New Jersey Record* showed Supreme Court justices roasting marshmallows over a fire fueled by a burning flag.<sup>456</sup>

With no apparent sense of irony, a number of critics of the *Johnson* decision called for or exercised the right of symbolic protest in order to declare that *Johnson* should have no such right. Thus, some burned symbolic judges' robes on the steps of the Supreme Court, while others proposed flying flags upside down or at half-mast.<sup>457</sup> Flag burners, themselves, received even more intense criticism than

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447. Isaacson, *O'er the Land of the Free*, TIME, July 3, 1989, at 14.

448. Columbia (S.C.) State, June 23, 1989, at A1, col. 2.

449. Buchanan, *Congress Must Overrule Supreme Court*, N.Y. Post, June 23, 1989, at 21, col. 1.

450. N.Y. Daily News, June 23, 1989, at A1, col. 1.

451. D'Antonio & Firstman, *supra* note 58, at 4.

452. N.Y. Daily News, *supra* note 450, at A1, col. 1.

453. *Id.*

454. Dallas Times-Herald, June 23, 1989, at A16, col. 3.

455. Newsday, July 1, 1989, at 16, col. 4.

456. N.J. Rec., July 4, 1989, at A12, col. 2.

457. *The High Court Stands 5-4 on a Burning Issue*, U.S. NEWS & WORLD REP., July 3, 1989, at 8; Rogers, *supra* note 135, at D1, col. 2; D'Antonio & Firstman, *supra* note 58, at 4; Richardson, *supra* note 438, at A4, col. 1; Las Vegas Sun, June 23, 1989, at B1, col. 3.

did the five majority justices. Many echoed the remarks of Senator Dole's statement: "[I]f they don't like our flag, they ought to go find one they do like."<sup>458</sup> The *New York Daily News* quoted one "man on the street" as declaring that if he saw flag burners, "[h]e would smack them in the head," and another as stating that he would accept the Court's decision if it "also upholds my right to express myself by beating the hell out of a flag burner without it being considered a crime."<sup>459</sup>

The legal argument for upholding Johnson's conviction did not differ greatly from the popular argument. In its brief in *Johnson*, Texas essentially took the position, supported by two amici briefs, that the government had a "unique and compelling interest"<sup>460</sup> in protecting the "physical integrity of the flag so that it may serve as the paramount symbol of nationhood and unity"<sup>461</sup> and in preventing the "dilution of the flag as a symbol."<sup>462</sup> Texas argued that the flag was a "unique symbol, qualitatively different from any other symbol that this nation uses to express its existence."<sup>463</sup> This uniqueness simply made protecting its symbolic value override "any First Amendment rights an individual may have in expressive conduct."<sup>464</sup> "Wanton destruction in a public context"<sup>465</sup> would endanger the flag's symbolic value. Texas' position, essentially anchored in the eighty-year-old *Halter* decision,<sup>466</sup> reasoned that ordinary legal principles concerning freedom of expression simply did not apply where the flag was concerned. In fact, both Texas and one of its amici declared at one point that the flag was "sui generis."<sup>467</sup>

The four dissenting justices adopted this "sui generis" position. Chief Justice Rehnquist began his dissent by quoting Justice Holmes's statement that "a page of history is worth a volume of logic," and then proceeded to demonstrate convincingly that logic had not much attracted his interest.<sup>468</sup> Chief Justice Rehnquist declared that the

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458. Wash. Post, *supra* note 445, at A1, col. 2.

459. N.Y. Daily News, *supra* note 450, at A1, col. 1.

460. Brief for Petitioner, *supra* note 9, at 24.

461. *Id.* at 20.

462. *Id.* at 30.

463. *Id.* at 26.

464. *Id.* at 30. See generally Brief of the Legal Affairs Council as Amicus Curiae, *Texas v. Johnson*, 109 S. Ct. 2533 (1989) (No. 88-155); Brief of Washington Legal Foundation, *supra* note 147.

465. Brief for Petitioner, *supra* note 9, at 24.

466. *Halter v. Nebraska*, 205 U.S. 34 (1907).

467. Petitioner's Reply Brief at 6, *Texas v. Johnson*, 109 S. Ct. 2533 (1989) (No. 88-155) [hereinafter Petitioner's Reply Brief]; Brief of Washington Legal Foundation, *supra* note 147, at 11.

468. *Texas v. Johnson*, 109 S. Ct. 2533, 2548 (1989) (Rehnquist, C.J., dissenting).

“flag is not simply another ‘idea’ or ‘point of view’ competing for recognition in the marketplace of ideas,” but a symbol viewed with “almost mystical reverence” by millions of Americans.<sup>469</sup> Justice Stevens, in his dissent, without any attempt to cite legal precedents, pronounced that if “the ideas of liberty and equality . . . are worth fighting for [then] it cannot be true that the flag that uniquely symbolizes their power is not itself worthy of protection and respect.”<sup>470</sup> He concluded that “sanctioning the public desecration of the flag will tarnish its value.”<sup>471</sup>

Chief Justice Rehnquist’s dissent explicitly endorsed the concept that the views of popular majorities should be controlling with regard to outlawing behavior which they view as abhorrent. In stating this, Chief Justice Rehnquist hopelessly blurred the distinction between political expression and common criminality by declaring, “Surely one of the high purposes of a democratic society is to legislate against conduct that is regarded as inherently evil and profoundly offensive to the majority of people—whether it be murder, embezzlement, pollution or flag burning.”<sup>472</sup> Similarly, Justice Stevens compared Johnson’s burning of a flag to spray painting “his message of dissatisfaction on the facade of the Lincoln Memorial.”<sup>473</sup> Texas and its amicus repeatedly analogized the flag, which in fact is primarily an idea which concretely exists only in millions of often privately-owned representations, to unique, publicly-owned buildings.<sup>474</sup>

Texas also argued that forbidding flag desecration placed only a minor burden on free expression because it “does no more than prohibit one form of conduct by which a demonstrator may express himself; there remain abundant alternative avenues of communication.”<sup>475</sup> Similarly, Chief Justice Rehnquist, who declared at one point that flag burning was not an expression at all, but “the equivalent of a inarticulate grunt or roar,” opined that the Texas law

469. *Id.* at 2552.

470. *Id.* at 2556 (Stevens, J., dissenting).

471. *Id.*

472. *Id.* at 2555 (Rehnquist, C.J., dissenting). Contrast this narrow view of the Supreme Court’s role and of the principles of constitutional democracy with Justice Jackson in *Barnette*:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One’s right to life, liberty and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

473. *Johnson*, 109 S. Ct. at 2557 (Stevens, J., dissenting).

474. Brief for Petitioner, *supra* note 9, at 11.

475. *Id.*

left Johnson with "a full panoply of other symbols and every conceivable form of verbal expression."<sup>476</sup> He continued by claiming that Johnson could have conveyed his message "just as forcefully in a dozen different ways."<sup>477</sup> Justice Stevens added that Johnson had an "available, alternative form of expression including uttering words critical of the flag."<sup>478</sup> Neither Justice explained, given his analysis of the unique nature of the flag and the need to protect its symbolic value, why even verbal criticism of it should be allowed.

Aside from the claimed state interest in protecting the symbolic value of the flag, Texas advanced a second argument supporting the notion that compelling state interests overrode any first amendment considerations: preservation of the peace.<sup>479</sup> Although Texas conceded that no breach of the peace occurred during the Dallas flag burning, it argued that this was "merely fortuitous" given that the incident had occurred "at the climax of a turbulent, destructive and potentially violent demonstration, which had attracted a sizeable crowd."<sup>480</sup> Moreover, the burning followed actual "violations of the law" for which "charges of criminal mischief . . . could doubtless have been brought."<sup>481</sup> As was the case with its "symbolic protection" argument, Texas' argument that flag desecration inherently posed a considerable threat of provoking a breach of the peace was essentially based on *Halter* and subsequent lower court decisions following *Halter*.<sup>482</sup> Conceding the lack of such a breach during the flag burning, Texas stressed that "the purpose of flag desecration statutes . . . is the prevention of a breach of the peace as opposed to a punishment for a breach of the peace."<sup>483</sup> Chief Justice Rehnquist endorsed this argument, citing *Chaplinsky* and some of the Vietnam era lower court decisions.<sup>484</sup>

A major weakness in Texas' argument related to the provision of the Texas law which made the entire crime of "desecration" of a "venerated" object dependent upon the commission of an act which the actor "knows will seriously offend" any person witnessing or discovering the action.<sup>485</sup> This provision apparently made the Texas law unconstitutional in light of Supreme Court decisions such as *Street*,

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476. *Johnson*, 109 S. Ct. at 2556 (Rehnquist, C.J., dissenting).

477. *Id.* at 2555.

478. *Id.* at 2556 (Stevens, J., dissenting).

479. Official Transcript, *supra* note 29, at 5.

480. Brief for Petitioner, *supra* note 9, at 34-35.

481. *Id.*

482. *Id.* at 31-36.

483. *Id.* at 38.

484. *Texas v. Johnson*, 109 S. Ct. 2533, 2553 (1989) (Rehnquist, C.J., dissenting).

485. TEX. PENAL CODE ANN. § 42.09(a)(3) (Vernon 1989).

which had declared that the public expression of ideas could not be forbidden merely because the ideas are themselves offensive to some of their listeners.<sup>486</sup> Texas supported this provision of the statute by arguing that the law focused on forbidding specific conduct—defacing, damaging, or otherwise physically mistreating the flag—rather than on the ideas which sought expression.<sup>487</sup> Despite the clear language of the law, Texas claimed that the law did not fall afoul of *Boos* because it was “content neutral,” forbidding flag desecration for any purpose whatsoever.<sup>488</sup>

This reasoning placed Texas and its amici in a legally untenable position. Thus, when Justice Scalia asked Dallas Assistant District Attorney Drew in oral argument before the Supreme Court to suggest a circumstance in which the flag would be desecrated in order to “honor” it, she lamely suggested that one could violate the Texas law by choosing to “burn a flag as an honor for all the individuals who died in Vietnam.”<sup>489</sup> Texas further maintained, despite the clear language of the law, that it focused not on whether observers might be offended by flag desecration, but on the “culpable mental state” of the actor who had to be engaged in “clear, severe and flagrant acts of desecration.”<sup>490</sup> Thus, Texas argued that “no actual serious offense need occur in order for the statute to be violated,”<sup>491</sup> and also that “relatively casual touching or mishandling of the flag, such as wadding it up and tucking it under a tee shirt” could not be covered even if it offended people.<sup>492</sup> Following this reasoning, the Washington Legal Foundation, in an amicus brief, argued that the statute was completely “content neutral.”<sup>493</sup> The Foundation nonetheless pronounced that the statute could not apply to cases involving burning a worn flag in order to dispose of it in a dignified manner “because no one would be offended by such conduct and because burning is the preferred method of disposing of worn flags.”<sup>494</sup> Such an argument notably ignored the Gregory Lee Johnsons of this country, who might be offended by the dignified disposal of a worn flag, but whose opinions were clearly not thought worthy of consideration, much less constitutional protection, by Texas and its amici.

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486. See *supra* notes 374-84 and accompanying text.

487. Brief for Petitioner, *supra* note 9, at 39-41.

488. *Id.* For a discussion of *Boos v. Barry*, 108 S. Ct. 1157 (1988), see *supra* notes 41-45 and accompanying text.

489. Official Transcript, *supra* note 29, at 13.

490. Petitioner's Reply Brief, *supra* note 467, at 11-13.

491. *Id.*

492. *Id.*

493. Brief of Washington Legal Foundation, *supra* note 147, at 5.

494. *Id.*



### B. *The Arguments for Johnson*

The arguments made by the Supreme Court majority, Johnson, and his amici supporting Johnson's constitutional right to burn a flag as a form of political protest were largely congruent with the public sentiment represented by a number of newspaper editorialists, civil libertarians, American Bar Association members, and hundreds of individual lawyers.<sup>495</sup> The proponents' essential argument was that flag desecration, while distasteful to most Americans, was a form of political expression and that no existing state interests compelled overriding the first amendment rights involved. Thus, Justice Brennan, writing for the Court's majority, citing *Spence v. Washington*<sup>496</sup> and *West Virginia State Board of Education v. Barnette*,<sup>497</sup> declared that in *Johnson*, where the flag burning occurred within the context of a public political demonstration, "the expressive, overtly political nature of this conduct was both intentional and overwhelmingly apparent"<sup>498</sup> as an "expression of dissatisfaction with the policies of this country."<sup>499</sup> Noting that under the Texas law *Johnson* was prosecuted specifically for an expression which he knew would cause "serious offense," the Court declared that it was "a bedrock principle underlying the First Amendment . . . that the Government may not prohibit the expression of an idea itself simply because society finds the idea offensive or disagreeable."<sup>500</sup> Thus, while recognizing that Texas had a legitimate interest in promoting respect for the flag, Justice Brennan held that this could not provide any constitutional basis

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495. A number of editorials from major newspapers either explicitly endorsed the Supreme Court decision or criticized President Bush and/or Congress for attempting to circumvent it. See 20 EDITORIALS ON FILE 700-15 (1989). Amici briefs in support of Johnson were filed by the American and Texas Civil Liberties Unions and by 21 other public interest organizations, including the National Lawyers Guild, People for the American, the National Organization of Women, and the United Electrical, Radio, and Machine Workers of America. The American Bar Association opposed both legislative and constitutional circumvention of the *Johnson* decision at its annual 1989 convention. Biskupic, *Scholars Split over Response to Flag-Burning Ruling*, CONG. Q., Sept. 2, 1989, at 225. Additionally, many civil libertarians, legal scholars and others, including former Solicitors General Charles Fried and Erwin Griswold endorsed the *Johnson* decision in hearings before the House and Senate Judiciary Committees. *Id.*; see also *Flag Desecration Legislation*, 68 CONG. DIG. 193 (1989). For a complete account of the congressional hearings on this issue, see *Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 1st Sess., Serial No. 24 (Washington: GPO 1989) [hereinafter *House Hearings*]; and *Hearings Before the Senate Comm. on the Judiciary*, 101st Cong., 1st Sess., Serial No. 5-101-33 (Washington: GPO 1989) [hereinafter *Senate Hearings*].

496. 418 U.S. 405 (1974).

497. 319 U.S. 624 (1943).

498. *Texas v. Johnson*, 109 S. Ct. 2533, 2540 (1989).

499. *Id.* at 2543.

500. *Id.* at 2544.

for allowing a state to “foster its own view of the flag by prohibiting expressive conduct relating to it,”<sup>501</sup> and, in particular, to criminally punish “a person for burning a flag as a means of political protest.”<sup>502</sup>

The Court rejected outright the minority’s suggestion that Johnson could have expressed his views in some way other than flag burning, since constitutionally protected expression “is not dependent on the particular mode in which one chooses to express an idea.”<sup>503</sup> Moreover, the majority pointed out that it was the symbolic power of the flag itself that enabled Johnson to convey such a forceful message by burning it, thus refuting Chief Justice Rehnquist’s argument that Johnson could have conveyed his message “just as forcefully by words or alternative means.”<sup>504</sup> The Court may have based its opinion on the rationale that banning certain forms of political expression, merely because other forms were available which the government found acceptable, would truly open the door to an unlimited evisceration of American political freedoms. Similarly, the Court rejected the suggestion of the minority that, due to its unique symbolic importance and power, “a separate judicial category exists for the American flag alone.”<sup>505</sup> The Court noted:

To conclude that the Government may permit designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernible or defensible boundaries. Could the Government, on this theory, prohibit the burning of state flags . . . [or] of the Constitution? In evaluating these choices under the First Amendment, how would we decide which symbols were sufficiently special to warrant this unique status?<sup>506</sup>

The Court also clearly rejected Texas’ contention that its flag desecration law was “content neutral.” Justice Brennan noted that by putting forth a state interest in protecting the flag as a “symbol of nationhood and national unity,” Texas would have the Court endorse a theory that only symbolic uses of the flag in agreement with that interpretation of symbolism should be protected.<sup>507</sup> Moreover, Brennan noted that, “We never before have held that the Government may ensure that a symbol be used to express only one view of that symbol or its referents.”<sup>508</sup>

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501. *Id.* at 2545.

502. *Id.* at 2547.

503. *Id.* at 2546.

504. *Id.* at 2546 n.11.

505. *Id.* at 2546.

506. *Id.*

507. *Id.*

508. *Id.* (citing *Schacht v. United States*, 398 U.S. 58 (1970)).

To counter Texas' argument that the possibility of a breach of the peace without any showing of imminent disturbance could justify suppression of Johnson's first amendment rights, the majority stated, "We have not permitted the Government to assume that every expression of a provocative idea will incite a riot, but have instead required a careful consideration of the actual circumstances surrounding such expression."<sup>509</sup> Justice Brennan rejected Chief Justice Rehnquist's argument that *Chaplinsky* was a controlling precedent because, in *Johnson*, there was no direct personal insult of the "fighting words" variety likely to provoke an individual to assault Johnson.<sup>510</sup> The Court also cast doubt upon the sincerity of Texas's alleged interest in preventing a breach of the peace as justification for prosecuting Johnson. The Court pointed out that the state had demonstrated that actual, rather than hypothetical, "disorderly actions" occurred during the period of the demonstration that preceeded Johnson's flag burning, yet "no charges were brought on the basis of this conduct."<sup>511</sup>

The majority rejected the notion that flag burning would in fact damage the symbolic value of the flag, a contention for which Texas never presented a shred of evidence, and asserted that "conduct such as Johnson's will not endanger the special role played by our flag or the feelings it inspires."<sup>512</sup> The Court asserted the hypothesis, which would come to fruition in the post-*Johnson* uproar, that "one gesture of an unknown man [would not] change our Nation's attitude towards its flag."<sup>513</sup> Finally, the Court clearly drew a distinction between substance and symbol—between the fundamental and real values of political freedoms involved in protecting Johnson's first amendment rights as opposed to protecting only a symbol of such freedoms. Justice Brennan declared that the "flag's deservedly cherished place in our community [would be bolstered by] a reaffirmation of the principles of freedom and inclusiveness [that it] best reflects."<sup>514</sup> He concluded that "[w]e do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents."<sup>515</sup>

Virtually all of the major points made in Brennan's decision were also noted in the briefs filed on *Johnson*'s behalf and in the commentary of supporters of the decision. The most common arguments sup-

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509. *Id.* at 2542.

510. *Id.*

511. *Id.* at 2541.

512. *Id.* at 2547.

513. *Id.*

514. *Id.*

515. *Id.* at 2547-48.

porting the Court's decision focused on the fundamental democratic principles at stake and the Court's valuation of this substantive concern over the protection of a symbol of those principles. A letter to the editor of the *New York Daily News* (one of the most bitter critics of the decision) declared that suppression of dissent would "render meaningless the symbol we think we are protecting. The true beauty of our flag lies not in the materials it is woven from but in the meaning behind it."<sup>516</sup> Similarly, the *Los Angeles Times* made this same point with a cartoon showing President Bush burning the Bill of Rights, while declaring, "Burning the flag goes too far."<sup>517</sup> The *Salt Lake Tribune* depicted Bush as a Founding Father changing a draft of the first amendment to exempt from its protections "flag burning or anything else that is unpopular and makes a lot of voters unhappy."<sup>518</sup> An *Atlanta Constitution* cartoon suggested the lack of any real physical or symbolic threat to the flag by showing President Bush, as a fireman on a huge flag-bedecked, speeding fire engine labeled "constitutional amendment," explaining to a pedestrian, "We got a report of a flag on fire!"<sup>519</sup> Justice Brennan's "slippery slope" argument that a "flag exception" to the Constitution would open the way for other exceptions was the subject of an hilarious column by Mike Royko.<sup>520</sup> Royko asked why nothing was done to protect the dignity of the national anthem, which he declared was by far more frequently scorned by inattention and improper behavior at athletic events than the flag was threatened by burnings.<sup>521</sup> After describing a litany of such sins, Royko proposed a corrective constitutional amendment to make it a crime "during the singing of the national anthem in any public place [to] drink any beverage, chew gum, talk, whisper, scratch, yawn, pick your nose, gawk, leer or slouch [or to] fail to sing," with mutes "required to sing in sign language."<sup>522</sup>

## V. IN THE AFTERMATH OF JOHNSON

### A. Constitutional Amendment Versus Overriding Legislation

As previously discussed, the immediate reaction to the *Johnson* decision, from the public as well as from President Bush and Con-

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516. Letter from T. Bronson to the Editor of the *New York Daily News* (July 9, 1989), reprinted in *N.Y. Daily News*, July 9, 1989, at A12, col. 4.

517. Hertzberg, *The Flag Is Fireproof*, *L.A. Times*, June 29, 1989, at II: 7, col. 1.

518. *Salt Lake Tribune*, July 5, 1989, at A3, col. 1.

519. *Atlanta Constitution*, July 6, 1989, at B13, col. 2.

520. Royko, *Stand up to Abuse of National Anthem*, *Ann Arbor News*, July 2, 1989, at B7, col. 4.

521. *Id.*

522. *Id.*

gress, was overwhelmingly negative. Five hundred and eight congressmen voted resolutions of disapproval of the decision within a week of its delivery, with only eight members in both houses voting against the resolutions.<sup>523</sup> Although the initial public uproar died down considerably after about a month, the only substantive debate in Washington quickly became centered upon whether it would be possible to circumvent *Johnson* by law, a position favored by most Democrats, or whether a constitutional amendment would be required, a position taken by President Bush and most Republicans. Even members of Congress who believed neither alternative was desirable felt compelled for political reasons to support one of these approaches. Thus, when former Solicitor General Charles Fried told a House Judiciary subcommittee that the Court's decision was correct and that Congress should take no action to override it, Subcommittee Chairman Don Edwards said, "Your point of view is the correct point of view, but it's such a [political] loser."<sup>524</sup> Congresswoman Pat Schroeder agreed, stating, "We're not talking about a purist world. We're talking about a very political world."<sup>525</sup>

Those who opposed both a constitutional amendment and a law essentially repeated the above summarized arguments made in support of the *Johnson* decision. There were, however, three additional arguments once the amendment-law debate began. The first was that the whole issue had become one of political pandering more than anything else. President Bush was especially criticized for allegedly trying to repeat his 1988 presidential campaign strategy. Thus, a *Salt Lake Tribune* cartoon depicted Bush as an emperor, naked except for the flag,<sup>526</sup> while the *Washington Post* showed a flag reading "politics first" hoisted over the American flag atop the White House.<sup>527</sup> Others criticized politicians of both parties. Radio personality and author Garrison Keillor suggested that "[a]ny decent law to protect the flag ought to prohibit politicians from wrapping it around themselves,"<sup>528</sup> while the *Philadelphia Inquirer* published a cartoon showing a Republican elephant and a Democratic donkey tearing a flag to shreds in a tug-of-war.<sup>529</sup>

A second criticism of the Flag Flap was that, given the lack of any real flag burning threat to the country, the whole issue was an

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523. See *supra* notes 61-68 and accompanying text.

524. Wash. Post, July 20, 1989, at A17, col. 1.

525. N.Y. Times, July 20, 1989, at A8, col. 4.

526. Salt Lake Tribune, July 2, 1989, at A3, col. 1.

527. Wash. Post, June 30, 1989, at A22, col. 4.

528. Keillor, *Toasting the Flag*, N.Y. Times, July 2, 1989, at E13, col. 3.

529. Philadelphia Inquirer, July 2, 1989, at B6, col. 3.

absurd distraction to solving the country's real problems. Representative Walter Fauntroy termed the entire controversy "another example of misplaced priorities of too many of our national leaders and our people" since issues such as "affordable housing, adequate health care, education and the anti-drug effort [were] far more critical to the quality of life of the American people."<sup>530</sup> A *New York Daily News* cartoon illustrated this point by depicting politicians scrambling to get under a "flag amendment" tent to avoid a rainy downpour of "issues."<sup>531</sup> Similarly, the *New Jersey Record* portrayed a flag-covered bandwagon crowded with politicians and led by President Bush, with an attached sign reading "Free ride for all politicians!! Tired of controversial issues? Hop aboard! No Risk!! Photo-ops galore!!"<sup>532</sup>

A third criticism of the drive to circumvent the Court was that there would be no way satisfactorily to define such terms as "flag" and "desecrate" in either legislation or a constitutional amendment. For example, a *Washington Post* cartoon showed a man rushing to stop his wife from burning the trash, since an envelope in the wastebasket had "an American flag [stamp] on it."<sup>533</sup> A columnist in the *Wall Street Journal* reported coming across an American flag depicted in a flower bed in New York's City Hall Park and wondering if it would be legal to "[s]pray-pesticide the flag?"<sup>534</sup> The columnist pondered whether "an organically grown flag" would be approved, but a chemically-grown flag would be "a constitutional no-no."<sup>535</sup> He also questioned whether not having a flower bed flag blooming by Flag Day would lead to charges of "disloyalty," and what would happen if an inept gardener "allow[ed] slugs to eat holes in the flag?"<sup>536</sup> A satirical column in the *Washington Post* suggested that "desecration" be defined to mean "subjecting the flag to damage, disrespect or funny business," and that anyone who, with regard to a flag, "misfolds, improperly launders, shreds, deep-fat-fries . . . sneezes at, whips-chops-and-purees, wears a hat in the whereabouts of . . . [or] fails to get kinda misty at [would be subject to] two years imprisonment . . . making license plates emblazoned with the motto 'Land of the Free, Home of the Symbolically Obedient.'"<sup>537</sup> The column also proposed the establishment of a commission on "Symbolico-Devo-

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530. *Should Congress Pass Laws to Protect Flag and Gains of Blacks?*, JET, July 17, 1989, at 7.

531. N.Y. Daily News, Aug. 8, 1989, at B3, col. 2.

532. N.J. Record, July 12, 1989, at A12, col. 4.

533. Wash. Post, Oct. 15, 1989, at B6, col. 3.

534. Hagen, *Flag Flap Takes Root in the Garden*, Wall St. J., July 24, 1989, at A12, col. 1.

535. *Id.*

536. *Id.*

537. Suplee, *Flag Follies*, Wash. Post, July 23, 1989, at 6, col. 1.

tional Malfeasance,' [to] advise the states and the federal government, on properly reverent behavior towards the Flag and Related Textile Entities."<sup>538</sup>

While those who argued that nothing should be done about the *Johnson* decision no doubt offered an astute analysis, the real debate occurred between proponents of an amendment versus proponents of a law. The Democratic congressional leadership, most congressional Democrats, and a scattering of others (including Harvard Law Professor Laurence Tribe), all of whom favored a law, noted that the *Johnson* decision struck down a Texas statute that forbade flag desecration likely to cause "serious offense" to observers.<sup>539</sup> As the Court noted, the Texas law was not aimed at "protecting the physical integrity of the flag in all circumstances."<sup>540</sup> Moreover, proponents of the statute explained that the Court had never explicitly ruled on such a law. They argued that five members of the Supreme Court might uphold a "content neutral" law forbidding flag desecration under all circumstances, without reference to any "offensive" impact upon observers or any behavior casting "contempt" upon the flag, as was the case with the 1968 federal law and many of the state flag desecration laws.<sup>541</sup> The majority of the House Judiciary Committee endorsed the "monuments" theory as a justification for such a "content neutral" law, arguing that its proposed bill "reflects the government's power to honor [the] diverse and deeply held feelings of the vast majority of citizens for the flag [through the] protection of a venerated object in the same manner that protection is afforded to gravesites or historic buildings."<sup>542</sup>

Because such a law would effectively ban flag burning, and, if upheld, overturn *Johnson*, its proponents argued that its passage would be quicker than a constitutional amendment and would avoid "tinkering" with the Constitution, thereby allegedly circumventing any "slippery slope" of additional constitutional infringements on first amendment freedoms.<sup>543</sup> Of course, since proponents of a statute openly proclaimed that its advantage would be to hasten the same effect as a constitutional amendment, it is difficult to see how their

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538. *Id.*

539. *Senate Hearings, supra* note 495, at 140.

540. *Texas v. Johnson*, 109 S. Ct. 2533, 2543 (1989).

541. *See supra* notes 163-65 & 257 and accompanying text. For the arguments favoring a statute, see sources cited *supra* note 495; and *infra* notes 543-44.

542. H.R. Rep. No. 231, 101st Cong., 1st Sess. 9 (1989) [hereinafter H.R. REP.].

543. For examples of the argument against "tinkering" with the Bill of Rights, see S. REP. No. 162, 101st Cong., 1st Sess. 4-9 (1989) [hereinafter S. REP.], and various statements printed in *House Hearings, supra* note 495.

“slope” would be any less “slippery.” In fact, such action could open up a precedential path for quickly and easily evading Supreme Court decisions upholding unpopular constitutional rights by legislative subterfuge. Many of the proponents of a statute also suggested that they would back a constitutional amendment if the statutory approach failed in the Supreme Court,<sup>544</sup> suggesting that only tactics, and not fundamental democratic principles, were really at issue. Their fundamental point was, as the Senate Judiciary Committee majority put it, that “the amendment process should be invoked as a last—not as a first—resort.”<sup>545</sup> In contrast, many Democrats gave the general impression that they actually accepted the *Johnson* decision as constitutionally proper, but regarded the effects of supporting its outcome as political suicide.<sup>546</sup>

The political strategy of the statute’s proponents was to hope that public and political pressure would cause at least one Justice from the *Johnson* majority to uphold a “content neutral” law. These supporters noted that Justice Blackmun, who voted with the majority in *Johnson*, had suggested in *Smith v. Goguen*<sup>547</sup> fifteen years earlier that he supported the constitutionality of a law that provided general protection for the flag’s physical integrity.<sup>548</sup> The Senate Judiciary Committee openly announced this strategy, not only by pointing to Justice Blackmun’s *Goguen* dissent,<sup>549</sup> but also by quoting in its report the following written testimony of Columbia Law School Professor Henry Monaghan:

*Texas v. Johnson* is far too unstable a precedent to permit a confident conclusion that a majority of the Court would reach [the] result [of striking down all flag desecration statutes]. *Johnson* itself was 5-4, and the minority seems adamant. Thus, the fundamental question is whether the proposed legislation is sufficiently different to detach one or more members of the majority. As a predictive matter, that seems to me a fair possibility . . . .<sup>550</sup>

Similarly, two other law professors were quoted as predicting that at least one of the Justices in the *Johnson* 5-to-4 majority would validate a statute which was “content-neutral, at least on its face,” by

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544. For statements by backers of a statute that if necessary they would seriously consider or support a constitutional amendment, see *House Hearings, supra* note 495, at 31 (statement of Sen. Arlen Specter); and Wash. Post, July 28, 1989, at A6, col. 6 (quoting Rep. Jack Brooks, Chairman, House Judiciary Committee).

545. S. REP., *supra* note 543, at 4.

546. See *supra* notes 429-37 and accompanying text.

547. 415 U.S. 566 (1974).

548. *Id.* at 591 (Blackmun, J., dissenting).

549. S. REP., *supra* note 543, at 13.

550. *Id.* at 15.



distinguishing it from the Texas law.<sup>551</sup> Senator Arlen Specter, while denying any intent to "intimidate" the Court into "changing its interpretation of the First Amendment" even noted two historical examples where public discontent had apparently led Justices to change their orientation: the 1930's "court packing" controversy and the late 1950's "subversion" controversy.<sup>552</sup>

Proponents of a constitutional amendment argued that no bill which sought to outlaw flag desecration could stand Supreme Court scrutiny under the principles established in *Johnson*, a position which the Supreme Court shortly thereafter validated in *United States v. Eichman*.<sup>553</sup> The only result of passing an inevitably constitutionally defective statute, amendment backers argued, would be to generate litigation which, after a long delay, would result in the new law being struck down, followed by a return to the alternative of seeking a constitutional amendment.<sup>554</sup> In the words of Judge Robert Bork, "After several years we would be right where we are now."<sup>555</sup> Proponents of the constitutional amendment approach added that since the flag was "unique," there could be no "slippery slope."<sup>556</sup> Moreover, they asserted that attempting to circumvent a Supreme Court decision by legislation would create its own "slippery slope" of bad precedent.<sup>557</sup> Eight dissenting members of the House Judiciary Committee revealed much about the mentality of the amendment's proponents when they asked, "Why are we so reluctant to amend the Constitution to demand that flag desecration be prohibited? Is it too much to ask that those who call themselves Americans be *required* to have respect for

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551. *Id.*

552. *Id.* at 30.

553. 110 S. Ct. 2404 (1990). This position was stated most clearly by Assistant Attorney General William P. Barr, who described the *Johnson* holding to the House Judiciary Subcommittee on Civil and Constitutional Rights as follows:

[W]henver someone burns the Flag for expressive purposes, that conduct is protected by the First Amendment; that to prohibit such conduct, the Government must have a compelling reason that is unrelated to expression; that the Government's reason for protecting the flag (to preserve it as a symbol of national unity) is inherently and necessarily related to expression; and that the Government's interest in protecting the flag as a symbol of our national unity can never be sufficiently compelling to overcome an individual's First Amendment interest in burning the Flag for communicative purposes. This reasoning plainly would extend to any Flag desecration statute enacted to protect the Flag as a symbol of our Nation.

*House Hearings*, *supra* note 495, at 174.

554. *See House Hearings*, *supra* note 495, at 32-37; *see also H.R. REP.*, *supra* note 542, at 15-26.

555. 68 CONG. DIG. 218 (1989).

556. H.R. REP., *supra* note 542, at 22.

557. *Id.*

the flag?"<sup>558</sup>

### B. *An Analysis of the Flag Protection Act of 1989*

Amidst the hysterical reaction during the period following the *Johnson* decision,<sup>559</sup> it was widely predicted that a constitutional amendment to outlaw flag desecration would quickly pass both Houses of Congress and be ratified by the states in record time. The day after *Johnson* was decided, American University Law Professor Herman Schwartz assessed the chances of a constitutional amendment as "pretty good" because allowing flag burning would be "like prohibiting Americans from eating apple pie."<sup>560</sup> A week later, *New Republic* columnist Hendrik Hertzberg decried President Bush's proposed amendment as "just another tactic for narrow partisan gain," but lamented that "it's hard to see at this point who's going to stop him."<sup>561</sup> Duke University Law Professor Walter Dellinger predicted that "any amendment that comes out of the Congress will be ratified faster than any amendment on record."<sup>562</sup> Kansas State Senate President Paul Burke declared that a constitutional amendment to ban flag burning "would blow through the House or Senate like a thunderstorm through Kansas."<sup>563</sup>

Despite the initial surge of support for a constitutional amendment, by late July press reports suggested a considerable lessening of public interest in the entire issue, coupled with increasing public acceptance of the argument that the Constitution should not be hastily "tinkered" with if other alternatives were available.<sup>564</sup> Thus, Kansas Senator Nancy Kassebaum reported that while she had been deluged with petitions demanding an amendment in late June, by late July, sixty percent of her mail on the issue opposed such action.<sup>565</sup> Representative Ben Jones reported a similar shift in feelings among his Georgia constituents, noting that the "issue has cooled and people are more thoughtful" and "more reflective about whether they want to alter the constitution in response to this kind of stupidity."<sup>566</sup> A poll published in mid-July, reflective of this shift in opinion, indicated that fifty-one percent of a cross-section of Americans preferred a law

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558. *Id.* (emphasis added).

559. See *supra* notes 58-70 and accompanying text.

560. Wash. Times, June 23, 1989, at A1, col. 1.

561. Hertzberg, *supra* note 518, at II: 7, col. 3.

562. Wash. Post, July 1, 1989, at A4, col. 1.

563. *Legislators Supporting Flag Move*, *supra* note 66, at A6, col. 2.

564. Hentoff, *Whatever Happened to the Flag Fire*, Wash. Post, Aug. 5, 1989, at A17, col. 1.

565. Dewar & Kenworthy, *supra* note 74, at A1, col. 1.

566. *Id.*

to overturn the decision, while only thirty-one percent of that same group supported an amendment.<sup>567</sup> Several congressmen reported that by mid-summer their mail and personal conversations with constituents revealed relatively little interest in the entire issue.<sup>568</sup> For example, Senator Bob Kerrey, a Vietnam veteran and Congressional Medal of Honor winner, reported that although polls in his state in August showed sixty-three percent support for an amendment, he had heard "almost nothing" from his constituents about his own public opposition to either a law or a constitutional amendment.<sup>569</sup> Kerrey concluded that "[i]t looks like a hot political issue, but it isn't."<sup>570</sup> Senate Judiciary Committee Chairman Joseph Biden, the chief sponsor of the legislative approach, declared that due to political fear, congressmen "got out ahead of the people" and that "even among the veteran's groups, there's not any real enthusiasm" for an amendment.<sup>571</sup>

Perhaps due to a cooling of public sentiment, to the "elite's" growing opposition to a constitutional amendment as evidenced by a public letter to that effect signed by over 500 law professors,<sup>572</sup> or to the growing public preference for a statute rather than constitutional "tinkering," the drive for a constitutional amendment, which had seemed unstoppable in late June 1989, was clearly sputtering by October 1989. During the Senate vote on October 19 which killed the amendment by a 51-to-48 vote (with a two-thirds vote required for approval), four Republicans, who had originally co-sponsored the proposed amendment, voted against it.<sup>573</sup> Included in this foursome was Senator John Danforth, who publicly declared that he had earlier made a "mistake of the heart" since the "great thing" about the United States was that "our constitution protects any crackpot who wants to stand on his soapbox and express any oddball point of view."<sup>574</sup>

Although the October 19 vote killed, at least temporarily, the movement in support of the passage of a constitutional amendment which would essentially overturn *Johnson*, both houses had passed the

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567. *Id.*

568. *Id.*; see also Toner, 'Star' Girds at Home for Senate War, N.Y. Times, Aug. 31, 1989, at 11, col. 1; Toner, Back in Grass Roots, Congressman Is All Ears, N.Y. Times, Aug. 1, 1989, at 1, col. 4.

569. Dewar & Kenworthy, *supra* note 74, at A1, col. 2.

570. *Id.*

571. *Id.*

572. 137 CONG. REC. S13647 (daily ed. Oct. 18, 1989) (letters from law professors).

573. Wash. Post, Oct. 18, 1989, at A1, col. 5.

574. Wash. Post, Oct. 20, 1989, at A1, col. 6.

Flag Protection Act of 1989 during the interim.<sup>575</sup> This law provided for penalties of up to one year in jail and a \$1000 fine for anyone who “knowingly mutilates, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States” with “flag” defined as “any flag of the United States, or any part thereof, made of any substance, of any size, in a form that is commonly displayed.”<sup>576</sup> Specifically exempted from the statute was “any conduct consisting of the disposal of a flag when it has become worn or soiled.”<sup>577</sup> The law mandated expedited judicial review by way of a direct appeal to the Supreme Court from a federal district court’s final judgment.<sup>578</sup> The law declared that upon such an appeal, the Supreme Court “shall, if it has not previously ruled on the question, accept jurisdiction over the appeal and advance on the docket and expedite to the greatest extent possible.”<sup>579</sup>

The Flag Desecration Act of 1989 was one of the most hypocritical, illogical, poorly drafted, and blatantly unconstitutional laws which Congress has ever passed—and the Supreme Court struck it down in record time in the *United States v. Eichman* decision.<sup>580</sup> As the *Arkansas Gazette* noted on October 8, 1989, the bill’s only virtues “are negative ones—it’s not as bad as [permanently disfiguring the Constitution with] an amendment, and it might lessen support for an amendment.”<sup>581</sup> The *Chicago Tribune* noted on October 15, 1989, that the vast majority of congressmen “hope passage of a law will provide them with political cover while heading off” such an amendment.<sup>582</sup> These negative virtues, however, were not enough to uphold the propriety of the law, morally, legally, or linguistically.

The fundamental legal justification of the Flag Desecration Act stemmed from an interpretation of the Supreme Court’s analysis of the Texas statute at issue in *Johnson*. In its analysis, the Court specifically noted that the statute was “not aimed at protecting the physical integrity of the flag in all circumstances,”<sup>583</sup> but rather was designed to protect the flag “from intentional and knowing abuse that causes

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575. See *supra* notes 72-74 and accompanying text.

576. See Flag Protection Act of 1989, Pub. L. No. 101-131, § 2(a)(1), 103 Stat. 777 (amending 18 U.S.C. § 700).

577. *Id.* § 2(a)(2).

578. *Id.* § 2(d)(2).

579. *Id.*

580. 110 S. Ct. 2404 (1990).

581. 20 EDITORIALS ON FILE 1197 (1989) (reprinting editorial published in *Arkansas Gazette*, Oct. 8, 1989).

582. *Id.* at 1200 (reprinting editorial published in *Chicago Tribune*, Oct. 15, 1989).

583. *Texas v. Johnson*, 109 S. Ct. 2533, 2536 (1989).

serious offense to others.”<sup>584</sup> Johnson’s conviction “depended on the likely communicative impact of his expressive conduct” and “the content of the message he conveyed.”<sup>585</sup> The wording of the Flag Desecration Act was based on these fragments from the *Johnson* decision and the possibility that Justice Blackmun might abandon his position and join the *Johnson* minority in upholding the constitutionality of a supposedly “content neutral” statute.<sup>586</sup> Thus, the Senate Judiciary Committee report supporting the Act maintained that the Act focuses “solely and exclusively on the conduct [as opposed to any intended message] of the actor”<sup>587</sup> and protects the “physical integrity of the flag in all circumstances.”<sup>588</sup> This was proclaimed consistent with the Congress’s alleged right to “protect symbols and landmarks,” especially the “unique and unalloyed symbol of the nation,” in recognition of the “diverse and powerfully held feelings of our citizens for the flag.”<sup>589</sup> The Committee declared that “[w]hen it comes to the American flag—that one symbol of the spirit of our democracy—we care more about protecting its physical integrity than about determining why its integrity has been threatened.”<sup>590</sup> The Committee also claimed, somewhat anomalously, that protecting the flag’s physical integrity because “of what it expresses and represents” poses no first amendment problems because such protection was not designed to “censor or suppress the person who might attack it.”<sup>591</sup>

The Committee’s analysis contained several fundamental problems. First, the claim that the Flag Protection Act’s objective was simply to protect the flag’s physical integrity rather than to suppress dissent is an obvious and blatant distortion. After all, the entire uproar over the *Johnson* decision was in reaction to Johnson’s burning of the flag as a form of political protest.<sup>592</sup> Moreover, rather than being “content neutral,” the Act pointedly prohibited symbolic uses of flags which have traditionally been used for protest purposes, including placing a flag on the floor, even though these uses do not threaten the flag’s physical integrity, while it allowed all symbolic uses which traditionally have been used for patriotic purposes, including carrying flags into battle, even if they threaten the flag’s physical integrity. Further, as Senators Hatch and Grassley, who supported a

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584. *Id.*

585. *Id.* at 2543.

586. *See supra* notes 548-52 and accompanying text.

587. S. REP., *supra* note 543, at 4.

588. *Id.*

589. *Id.* at 3, 4.

590. *Id.* at 5.

591. *Id.*

592. *See id.* at 6-9.

constitutional amendment,<sup>593</sup> commented in their dissent to the Senate Judiciary Committee's report:

[I]t simply cannot be denied that the principal if not the only purpose in enacting a facially neutral statute is to prohibit expressive conduct that physically desecrates the flag. No one claims that we are interested in protecting the material, the thread and the dye in the flag. We protect the flag as a symbol, including against those who would desecrate the flag as part of political expression.<sup>594</sup>

Second, the explicit exception made for the desecration of "worn and soiled" flags<sup>595</sup> completely undercuts the claim of the Act's supporters that it would impartially protect the flag from desecration, regardless of motive.<sup>596</sup> As the House Judiciary Committee noted,<sup>597</sup> this exception was added because burning has been the traditional and preferred method of disposing of worn flags under the United States flag code.<sup>598</sup> The House Committee ineffectively justified this exception to its purportedly "content neutral" law which, in fact, legalized burning a flag for good motives, but outlawed burning one for bad motives, by asserting that it was not an exception at all since a worn flag "is no longer a fitting emblem for display."<sup>599</sup> Thus, governmental interests in protecting a worn flag's physical integrity would no longer apply. Further, without this exception, the Committee claimed the new law would "require the maintenance of all flags in perpetuity."<sup>600</sup>

In fact, the Committee's reasoning demonstrates that the governmental interest is not in the physical integrity of the cloth of the flag at all, but rather in the flag's symbolic value. This symbolic value can be damaged only by speech or other expression because, as an abstract idea, the flag cannot be damaged by the physical destruction of any one emblem. Unlike the uniqueness of the Lincoln Memorial or the original copy of the Constitution, both of which have inherent monetary or historic value, the flag exists only in the form of symbolic replicas. Thus, its value cannot, in practical terms, be physically

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593. *Id.* at 26. Senators Hatch and Grassley believe that a "constitutional amendment is the safest, surest, and most permanent way of achieving the protection of the flag." *Id.*

594. *Id.* at 24.

595. See Flag Protection Act of 1989, Pub. L. No. 101-131, § 2(a)(2), 103 Stat. 777 (amending 18 U.S.C. § 700). Under the Act, "any conduct consisting of the disposal of a flag when it has become worn or soiled" is permitted. *Id.*

596. See S. REP., *supra* note 543, at 3-5.

597. H.R. REP., *supra* note 542, at 10.

598. See 36 U.S.C. § 176(k) (1988) which states: "The flag, when it is in such condition that it is no longer a fitting emblem for display, should be destroyed in a dignified way, preferably by burning."

599. H.R. REP., *supra* note 542, at 9.

600. *Id.* at 10.

damaged, but only symbolically damaged, and then merely by the expression of ideas which are protected by the first amendment.

Moreover, the Act's supporters misread *Johnson* by focusing on references to the Texas law's serious offense provision. Instead, they should have focused on the heart of the Court's decision that Johnson had burned the flag as an "expressive, overtly political" act, and that Texas' professed interest in "preserving the flag as a symbol of nationhood and national unity" was "related to expression" and emerged "only when a person's treatment of the flag communicate[d] some message."<sup>601</sup> Recognizing that the "bedrock principle underlying the First Amendment is . . . that the Government may not prohibit the expression of an idea because society finds the idea itself offensive or disagreeable,"<sup>602</sup> the Court specifically held that the government may not "foster its own view of the flag by prohibiting expressive conduct relating to it"<sup>603</sup> or by permitting "designated symbols to be used to communicate only a limited set of messages."<sup>604</sup> In particular, the government may not achieve this end by seeking criminally to punish a person for burning the flag as a means of political protest.<sup>605</sup> Further, the Court anticipated passage of a statute such as the Flag Protection Act, and opined that a law outlawing flag burnings in general while exempting the ceremonial burning of worn flags would not be content neutral or pass constitutional muster.<sup>606</sup> It stated:

Texas's focus on the precise nature of Johnson's expression, moreover, misses the point of our prior decisions: their enduring lesson, that the government may not prohibit expression simply because it disagrees with its message, is not dependent on the particular mode in which one chooses to express an idea. If we were to hold that a State may forbid flag-burning where it is likely to endanger the flag's symbolic role, but allow it wherever burning a flag promotes that role—as where, for example, a person ceremoniously burns a dirty flag—we would be saying that when it comes to impairing the flag's physical integrity, the flag itself may be used as a symbol . . . only in one direction. . . . We would be permitting a state to [legislate] . . . that one may burn the flag to convey one's attitude toward

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601. *Texas v. Johnson*, 109 S. Ct. 2533, 2540-42 (1989). Indeed, in his June 30, 1989, speech at the Iwo Jima memorial urging support for a constitutional amendment, President Bush termed the flag "one of our most powerful ideas." Remarks of President George Bush, *supra* note 118, at 1.

602. *Johnson*, 109 S. Ct. at 2544.

603. *Id.* at 2545.

604. *Id.* at 2536.

605. *Id.* at 2544; *cf.* *Street v. New York*, 394 U.S. 576, 580 (1969) (holding that a state may not criminally punish persons for making derogatory comments about the flag).

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

it and its referents only if one does not endanger the flag's representation of nationhood and national unity.<sup>607</sup>

In light of *Johnson* and the Court's earlier decisions regarding content neutral legislation,<sup>608</sup> a content neutral statute would not be one banning all physical desecrations of the flag regardless of motive, but one forbidding all symbolic uses of the flag, including flying it, waving it, or burning it. The Congress should have known, however, that even then the law would be unconstitutional under *Consolidated Edison Co. v. Public Service Commission*,<sup>609</sup> where the Court declared that "[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to the prohibition of public discussions of an entire topic."<sup>610</sup> In short, although the analysis of those favoring a constitutional amendment to overrule *Johnson* reflects an inadequate understanding of the meaning of freedom of speech in a democratic society, the proponents were correct in deducing that a constitutional amendment would be the only way to overturn *Johnson*.<sup>611</sup> The constitutional amendment proponents were also correct in pointing to the hypocrisy of the statute's proponents who maintained they did not want to "tinker" with the Bill of Rights. As Senators Hatch and Grassley remarked, "How is a statute which prohibits flag desecration in all or some instances not a threat to First Amendment principles, while a constitutional amendment achieving the same thing is such a threat?"<sup>612</sup>

Other provisions of the the Flag Protection Act rendered it constitutionally suspect as well. The Act's terms and definitions were hopelessly vague and confusing. Undoubtedly, the terms "mutilate," "deface," and "physically defile"<sup>613</sup> would have led to the same morass of endless and inconsistent litigation characteristic of flag burning cases of the Vietnam era.<sup>614</sup> Further, because it made no distinction between public and private actions, one could violate the Act

607. *Id.*

608. *See, e.g.,* *Boos v. Barry*, 108 S. Ct. 1157 (1988); *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530 (1980); *Schacht v. United States*, 398 U.S. 58 (1970). For a discussion of these cases in connection with content neutrality, see *supra* notes 408-18 and accompanying text.

609. 447 U.S. 530 (1980).

610. *Id.* at 536.

611. *See* S. REP., *supra* note 543, at 24, 26. Senators Hatch and Grassley concluded that "a constitutional amendment is absolutely necessary to ensure with certainty the validity of any statute banning flag desecration . . . [I]t is futile to try to overturn [the *Johnson* Court's] interpretation by a statute." *Id.* at 24, 29.

612. *Id.* at 26.

613. *See* Flag Protection Act of 1989, Pub. L. No. 101-131, § 2(a)(1), 103 Stat. 777 (amending 18 U.S.C. § 700).

614. *See supra* notes 289-351 and accompanying text.



simply by thumbtacking a flag to a wall in one's home. While thus broadly outlawing potentially expressive and non-expressive conduct, the Act at the same time provided an absolute defense for additional damage inflicted upon worn or soiled flags for any reason whatsoever.<sup>615</sup> As ten dissenting members of the House Judiciary Committee declared, a "dirty flag defense" is an absolute defense for any protestor who feels the need to torch 'Old Glory.'<sup>616</sup> In opposition to both a law and an amendment, Senator Metzenbaum declared that, under the terms of the Act, cases will likely turn "upon the amorphous concept of whether a flag was sufficiently tattered to have warranted disposal."<sup>617</sup> Such an issue would be virtually unresolvable; first, because the law defines neither "worn" nor "soiled," and second, because once a flag is disposed of, so is the evidence, in the absence of any photographs that definitively establish the flag's prior condition.

The most insidious aspect of the Act is that it fails clearly to define what constitutes a flag, defining it as "any flag of the United States, or any part thereof made of any substance, of any size, in a form that is commonly displayed."<sup>618</sup> This definition begs the question as to what constitutes "any part" of a flag or "common display." Would anything with red and white stripes or a white star on a blue field be a flag for purposes of the statute? Would a tee-shirt with a flag printed on it constitute a "commonly displayed" form? The House Committee on the Judiciary suggested that the law would not include "photographs of flags, products with flags printed on them, decorative representations of flags [such as] flag designs on clothing, a cake in the shape of a flag," or flags on such items as napkins, paper plates, or socks which "are not actual flags in that they are not commonly displayed as flags and have other uses."<sup>619</sup> But none of this legislative gloss was reflected in the language of the Act itself, which refers to flags "made of any substance, of any size."<sup>620</sup> In addition, because the alleged government interest pertains to preserving the flag's "physical integrity" as the "symbol of the spirit of our democracy," it is illogical to exclude damaging a representation of the flag on a tee-shirt or defacing a large photograph or billboard of the flag. In any case, the underlying question is whether the government has

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615. Flag Protection Act of 1989, Pub. L. No. 101-131, § 2(a)(2), 103 Stat. 777 (amending 18 U.S.C. § 700).

616. H.R. REP., *supra* note 542, at 22.

617. S. REP., *supra* note 543, at 20.

618. Flag Protection Act of 1989, Pub. L. No. 101-131, § 2(b), 103 Stat. 777 (amending 18 U.S.C. § 700).

619. H.R. REP., *supra* note 542, at 11.

620. See *supra* text accompanying note 618.

any legitimate interest in regulating the use its citizens make of objects that symbolize "the spirit of our democracy."<sup>621</sup>

### C. *The Flag Protection Act in the District Courts*

The Flag Protection Act took effect at midnight on October 28, 1989. Just minutes after midnight, protesters burned a flag in Seattle, Washington, during a political demonstration in front of the post office; two days later, protesters burned flags under similar circumstances on the steps of the capitol in Washington, D.C.<sup>622</sup> Altogether, seven people were prosecuted for the flag burnings and two federal court cases resulted: *United States v. Haggerty*<sup>623</sup> and *United States v. Eichman*.<sup>624</sup> Early in 1990, the federal district courts ruled in both cases that, under the principles of *Johnson*, the Flag Protection Act of 1989 was unconstitutional as applied to political protesters who desecrated the flag.<sup>625</sup> Both courts essentially accepted the defense position that the *Johnson* case was controlling because the defendants were engaged in expressive conduct requiring first amendment scrutiny, and because the underlying government interest of protecting the symbolic value of the flag provided no overriding compelling concern.<sup>626</sup>

Three different government briefs filed in both cases—one each from the Justice Department, the Senate, and the House of Representatives—all argued that the Flag Protection Act was "distinguishable from the law reviewed in *Johnson*," but reached such a conclusion "by differing and even conflicting means."<sup>627</sup> Since all three briefs ultimately agreed, however, that the "underlying purpose" of the new law was to preserve the flag's symbolic value, the statute was determined to be "content-based and subject to strict scrutiny."<sup>628</sup> In so holding, the district court in each case rejected House and Senate arguments for application of the more lenient *United States v. O'Brien*<sup>629</sup> test because neither court believed that the Flag Protection

621. S. REP., *supra* note 543, at 5.

622. See *A Thousand Points of Light: Flag Desecration Protests Spread in Opposition to Law*, Emergency Comm. to Stop Flag Amend. & L., Newsl. No. 5, at 2, col. 1 (Dec. 1989) (on file with author).

623. 731 F. Supp. 415 (W.D. Wash. 1990), *aff'd sub nom.* *United States v. Eichman*, 110 S. Ct. 2404 (1990).

624. 731 F. Supp. 1123 (D.D.C. 1990), *aff'd*, 110 S. Ct. 2404 (1990).

625. See *id.* at 1131; *Haggerty*, 731 F. Supp. at 421-22.

626. See *Eichman*, 731 F. Supp. at 1128-31; *Haggerty*, 731 F. Supp. at 418-22.

627. *Haggerty*, 731 F. Supp. at 417.

628. *Eichman*, 731 F. Supp. at 1128.

629. 391 U.S. 367 (1968).

Act could be justified on non-speech regulation grounds.<sup>630</sup> Further, as the *Haggerty* court noted, the law simply was not content neutral because it singled out for prohibition conduct “associated with disrespect for the flag,” but allowed conduct that threatened the flag’s physical integrity if it did not “communicate a negative or disrespectful message.”<sup>631</sup> At the same time, the district courts rejected the Justice Department’s stance maintaining that the government’s interest was “sufficiently compelling to survive strict scrutiny,” despite the Supreme Court’s rejection of this position in *Johnson*.<sup>632</sup> The Justice Department argued that since the *Johnson* decision, “both the Congress and the Executive have pronounced the protection of the flag as a necessary policy goal” and their actions demonstrate the “compelling nature of the government’s interest.”<sup>633</sup> Both courts, in holding the Flag Protection Act unconstitutional, were equally eloquent in defending first amendment rights. The *Eichman* court stated that “[h]owever compelling the government may see its interests, they cannot justify restrictions on speech which shake the very cornerstone of

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630. See *Eichman*, 731 F. Supp. at 1128-29; *Haggerty*, 731 F. Supp. at 417-18. The *Haggerty* court noted that by so “strenuously” arguing this point, Congress implicitly conceded that “[t]he Act cannot survive the more stringent standards applied in *Johnson*.” *Id.* at 421. For a discussion of the *O’Brien* balancing test, see *supra* notes 372-376 and accompanying text. The Senate’s argument that the new law was content neutral because it sought to protect the “physical integrity of the flag by proscribing certain destructive conduct regardless of the actor’s intent to convey a message or the communicative impact on the audience” was rejected as constituting an attempt to suppress expression, such as “those viewpoints which are expressed through the symbolic destruction of the flag.” *Haggerty*, 731 F. Supp. at 420 n.6. The *Haggerty* court similarly rejected the House of Representatives’ argument that the government had a non-speech related interest in shielding “the flag as an incident of sovereignty with a specific legal significance apart from its symbolic value.” *Id.* at 420. The court noted two flaws in House’s argument. First, the court determined that despite the legislative history’s references to the importance of protecting the flag because of the value it symbolizes, the “legislative history contains not one mention of sovereignty interest as a reason for enacting legislation.” *Id.* at 421. Second, the court stated that “the use of the flag as a means of indicating sovereignty is itself a symbolic use.” *Id.* Therefore, any government interest in protecting such a “sovereignty interest” could only be directed at suppressing expression which amounted to a “rejection of United States sovereignty, i.e., expressive conduct.” *Id.* Furthermore, the *Haggerty* court noted that the House never explained “how the governmental interest in preserving the flag as an incident of sovereignty would be harmed by defendants’ act of flagburning.” *Id.* at 421 n.7.

631. *Haggerty*, 731 F. Supp. at 420 n.6.

632. *Id.* at 421.

633. *Eichman*, 731 F. Supp. at 1130-31. The Justice Department’s position, which taken to its logical conclusion would destroy the entire concept of the Court’s role in protecting minorities against majority assaults on their basic rights, was summarily rejected by both district courts. These courts noted that the *Johnson* Court had proclaimed that protection of minority political dissent was a “bedrock principle” which was “situated at the core of our First Amendment values.” *Haggerty*, 731 F. Supp. at 421 (quoting *Johnson*, 109 S. Ct. at 2543); see *Eichman*, 731 F. Supp. at 1131.

the First Amendment.”<sup>634</sup> The *Haggerty* court noted that “in order for the flag to endure as a symbol of freedom, we must protect with equal vigor the right to wave it and the right to destroy it.”<sup>635</sup>

## VI. FLAG BURNING: ROUND TWO IN THE SUPREME COURT AND CONGRESS

### A. United States v. Eichman

On March 13, 1990, Solicitor General Kenneth Starr invoked the extraordinary provisions of the 1989 Flag Protection Act calling for mandatory and expedited Supreme Court review of any final federal district court decision.<sup>636</sup> On March 30, 1990, the Supreme Court noted probable jurisdiction and scheduled oral arguments for May 14, 1990.<sup>637</sup>

Starting with the premise that “the flag stands for something valuable, and should be safeguarded because of that value,”<sup>638</sup> the Government asked the Court to reconsider its holding in *Johnson* that flag burning was “expressive conduct meriting full first amendment protection.”<sup>639</sup> The Government compared flag burning to previously excluded forms of expression such as obscenity, child pornography, defamation, and “fighting words.”<sup>640</sup> The Government asserted that “physical destruction” of the flag should be outside the protections of the first amendment because it is “uniquely . . . [an] anathema to the

634. *Eichman*, 731 F. Supp. at 1131.

635. *Haggerty*, 731 F. Supp. at 422. Perhaps in reference to the recent democratic revolutions in Eastern Europe, the *Haggerty* Court declared, “This is an inspiring time for those of us who treasure freedom,” and the “freedom of speech . . . is the crucial foundation without which other democratic values cannot flourish.” *Id.* The Court added:

Burning the flag as an expression of political dissent, while repellant to many Americans, does not jeopardize the freedoms which we hold dear. What would threaten our liberty is allowing the government to encroach on our right to political protest. It is with the firm belief that this decision strengthens what our flag stands for that this court finds the Flag Protection Act unconstitutional as applied to defendants’ conduct in burning the flag.

*Id.*

636. Starr asked the Supreme Court to consolidate the two district court cases and note probable jurisdiction within two weeks, to schedule oral arguments for April 25, 1990 (although under ordinary procedures, cases accepted after mid-February would not have been scheduled until the Fall of 1990), and to order a simultaneous exchange of briefs by April 16, 1990 (although normally 45 days are allowed after the court accepts jurisdiction for the filing of the first brief with additional time allowed for reply briefs).

637. Joint Appendix at 85, *United States v. Eichman*, 110 S. Ct. 2404 (1990) (Nos. 89-1433 & 89-1434).

638. Brief for the United States at 42, *United States v. Eichman*, 110 S. Ct. 2404 (1990) (Nos. 89-1433 & 89-1434) [hereinafter Brief for United States].

639. *Id.* at 24.

640. *Id.* at 31.

Nation's values" and constitutes a "physical, violent assault on the most deeply shared experiences of the American people."<sup>641</sup>

Next, echoing the government's position in the district courts, the Government argued that in passing the Flag Protection Act of 1989, it had demonstrated a compelling interest to overcome first amendment protections of speech and expression in connection with flag desecration.<sup>642</sup> Arguing, in effect, that Congressional passage of a law was a per se establishment of a compelling governmental interest, the Government stated:

[T]hrough passage of the Flag Protection Act, the people's elected representatives have now made clear that the physical integrity of the flag of the United States, as the unique symbol of the Nation, merits protection not accorded other national emblems. And that representative consensus identifies the substantial potential harm posed by physical damage and mistreatment of the American flag—the assault upon and injury to the shared values that bind our national community. Upon reflection, therefore, the assumption so newly and narrowly embraced in *Johnson* should not now obliterate Congress's considered—and limited—legislative determination of the compelling need to protect the physical integrity of the American flag.<sup>643</sup>

In oral argument before the Court on May 14, 1990, the Government changed the tenor of its argument. Departing from its brief, which had essentially conceded that the Flag Protection Act was not content neutral,<sup>644</sup> the government maintained that in the Flag Protection Act Congress had followed carefully the *Johnson* guidelines to create a law which was free of "content-laden language"<sup>645</sup> and which protected the physical integrity of the flag without "singling out certain viewpoints for disfavored treatment."<sup>646</sup> Congress had created a law, the Government claimed, that protected the flag "because of its symbolic value[,] . . . not from criticism, but from physical destruction or mutilation," in the same way that Congress could protect houses of worship or the bald eagle against destruction, regardless of the motivation.<sup>647</sup> The Government also introduced an entirely new position in oral argument. It asserted that flag burning fails to meet the *Spence*

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641. *Id.* at 23-24.

642. *Id.* at 44.

643. *Id.*

644. *Id.* at 28-29.

645. Official Transcript of Proceedings Before the Supreme Court of the United States at 5, *United States v. Eichman*, 110 S. Ct. 2404 (1990) (Nos. 89-1433 & 89-1434) [hereinafter Official Transcript].

646. *Id.* at 16.

647. *Id.* at 11-13.

v. *Washington*<sup>648</sup> test of expression requiring delivery of a particularized message,<sup>649</sup> because flag burning leaves a "major message gap" and resembles an "overload loudspeaker"<sup>650</sup> or the "mindless nihilism"<sup>651</sup> that the *Spence* Court suggested was undeserving of first amendment protection.<sup>652</sup>

In response, defendants argued that based on *Johnson* the Flag Protection Act was unconstitutional under the first amendment because it was not content neutral and not based on any compelling state interest which justified overriding first amendment rights.<sup>653</sup> They argued that Congress had impermissibly criminalized flag burning to preserve the flag's symbolic value, directly in contravention of *Johnson's* principles.<sup>654</sup> Further, the defendants claimed that the purpose of the Flag Protection Act was not solely to protect the flag's physical integrity. The Act allowed "patriotic" conduct that imperilled the flag, such as flying it in a storm or in battle, while it protected the flag only from "those who would hurt it or cast it in a bad light"<sup>655</sup> even without physical damage, such as maintaining a flag on the floor under a glass cover.<sup>656</sup> The very act of singling out the flag for special protection, the defendants argued, rendered the law content based and thus subject to strict scrutiny under the first amendment.<sup>657</sup> The defendants maintained that the content-based nature of the statute would have been immediately apparent if the statute had forbidden desecrating the "emblem of the Democratic party" instead of the flag.<sup>658</sup>

Defendants rejected the Government's analogy between protecting the flag and protecting bald eagles or monuments, arguing that because flags are infinitely reproducible, non-corporeal symbols, the appropriate analogy would be between protecting flags and protecting models of bald eagles or monuments.<sup>659</sup> Responding to the House of Representatives amicus that Congress had a non-speech interest in

648. 418 U.S. 405 (1974).

649. *Id.* at 408.

650. Official Transcript, *supra* note 645, at 5.

651. *Id.* at 19.

652. *See Spence*, 418 U.S. at 408.

653. *See* Brief for Appellees at 21, *United States v. Eichman*, 110 S. Ct. 2404 (1990) (Nos. 89-1433 & 89-1434) [hereinafter Defendants' Brief].

654. *Id.* at 9.

655. Official Transcript, *supra* note 645, at 28.

656. Defendants' Brief, *supra* note 653, at 21.

657. *Id.* at 31. Defendants noted that the Government's urging of Court deference to Congress in this case would "leave the Bill of Rights to the whims of legislators" and would place the sanctity of its official symbols above the reality of human freedom." *Id.*

658. *Id.*

659. Defendant's Brief, *supra* note 653, at 14, 22 n.23.

protecting the flag as an "incident of sovereignty," the defendants queried how burning a flag would deprive it of its "function in demarcating boundaries and identifying ships."<sup>660</sup> In response to the Government's argument that flag burning did not elicit a particularized message, defendants stated that "that's true of all non-verbal communication. . . . [Y]ou can't relegate non-verbal expression to the scrap heap."<sup>661</sup> When the Government analogized flag desecration to child pornography or defamation which falls outside the first amendment, the defendants declared that "in the area of political speech, a government cannot make judgments of what is overly offensive or unimportant."<sup>662</sup> In effect, the defendants argued that the Government was seeking to turn the flag into a golden image that its citizens must worship.<sup>663</sup> They concluded that "once people are compelled to respect a political symbol, then they are no longer free and their respect for the flag is quite meaningless. . . . To criminalize flag burning is to deny what the First Amendment stands for."<sup>664</sup>

The Supreme Court's 5-to-4 decision invalidating the Flag Protection Act was handed down with extraordinary speed on June 11, 1990, less than a month after oral argument.<sup>665</sup> The *Eichman* decision essentially followed *Johnson's* reasoning in finding that the *Boos v. Barry*<sup>666</sup> test of "most exacting scrutiny" must apply because the government's interests of protecting the flag's "status as a symbol of our Nation and certain national ideals" was related "to the suppression of free expression."<sup>667</sup> The Court held that protecting the flag's status of a symbol could not justify "infringement on First Amendment rights"<sup>668</sup> and refused to "reconsider [its] rejection in *Johnson* of the claim that flag burning as a mode of expression, like obscenity or 'fighting words' does not enjoy the full protection of the First Amend-

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660. *Id.* at 27.

661. Official Transcript, *supra* note 645, at 35.

662. *Id.* at 45.

663. *Id.* at 47.

664. *Id.* at 46.

665. See *Eichman*, 110 S. Ct. at 2404. In response to the Government's argument that flag burning did not convey a particularized message, Justice Kennedy termed flag burning an "internationally recognized form of protest," while Justice Scalia said the message clearly was, "I am in opposition to this country." See Official Transcript, *supra* note 645, at 8, 15. Justice Scalia also issued a devastating critique of the government's claim that the Flag Protection Act was "content neutral" given the wording of the law. He declared that "if I get a spot on my tie, I don't say, gee, I've defiled my tie. . . . Or if I tear my jacket I don't say, my, I've mutilated my jacket. These are words of cast contempt upon." *Id.* at 17.

666. 485 U.S. 312 (1988). For a discussion of *Boos v. Barry*, see *supra* notes 41-45 & 411-14 and accompanying text.

667. See *Eichman*, 110 S. Ct. at 2408-09.

668. *Id.* at 2409.

ment.”<sup>669</sup> Conceding that the federal law, unlike the Texas statute at issue in *Johnson*, “contain[ed] no explicit content-based limitation on the scope of prohibited conduct,”<sup>670</sup> the Court nevertheless applied its strict scrutiny test because the Act suffered from the same fundamental flaw as the Texas law. It could not be “justified without reference to the content of the regulated speech.”<sup>671</sup> This conclusion was clear not only from the government’s asserted interest in protecting the flag’s symbolic value, but also from the “precise language” of the law, which outlawed conduct “connot[ing] disrespectful treatment of the flag” while simultaneously exempting disposition of worn flags by methods “traditionally associated with patriotic respect for the flag.”<sup>672</sup> The Court accepted the argument of the government’s amicus that the flag is “emblematic of the Nation as a sovereign entity,”<sup>673</sup> and that the government had a legitimate interest in preserving this function, but noted that the amicus could not explain how the law was “designed to advance this asserted interest” since flag burning “does not threaten to interfere with [it].”<sup>674</sup>

The Court rejected the government’s argument that protecting the symbolic value of the flag could not infringe upon first amendment rights in view of “Congress’ recent recognition of a purported ‘national consensus’ favoring a prohibition of flag burning.”<sup>675</sup> The Court bluntly declared that “any suggestion that the Government’s interest in suppressing speech becomes more weighty as popular opposition to that speech grows is foreign to the first amendment.”<sup>676</sup> Recognizing that flag desecration is “deeply offensive to many,” the Court pointed out that the same could be said about other forms of protected speech, such as “virulent ethnic and religious epithets . . . vulgar repudiations of the draft . . . and scurrilous caricatures.”<sup>677</sup> It concluded by quoting its own “bedrock principle” statement from *Johnson* and declared that “[p]unishing desecration of the flag dilutes the very freedom that makes this emblem so revered, and worthy of revering.”<sup>678</sup>

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669. *Id.* at 2407.

670. *Id.* at 2408.

671. *Id.*

672. *Id.* at 2409.

673. *Id.* at 2408 n.6 (citing Brief for the Speaker and the Leadership Group of the United States House of Representatives at 25, *United States v. Eichman*, 110 S. Ct. 2404 (1990) (Nos. 89-1433 & 89-1434)).

674. *Id.*

675. *Id.* at 2409 (citing Brief for United States, *supra* note 642, at 27).

676. *Id.* at 2409.

677. *Id.* at 2410 (citations omitted).

678. *Id.*



Similar to the *Johnson* dissent, the dissent in *Eichman* claimed that the unique importance of the flag, such as its role in symbolizing "the ideas of liberty, equality and tolerance,"<sup>679</sup> justified infringing upon political expression to protect its symbolic value, especially when there was no "interference with the speaker's freedom to express his or her ideas by other means."<sup>680</sup> However, the tone of the dissent was far less passionate than in *Johnson*. For example, whereas in *Johnson*, Justice Stevens had clearly compared flag desecration to placing "graffiti on the Washington Monument"<sup>681</sup> and Chief Justice Rehnquist lumped flag burning together with murder and embezzlement,<sup>682</sup> in *Eichman*, Justice Stevens clearly repudiated such analogies by declaring that burning a privately-owned flag "is not, of course, equivalent to burning a public building" as it "causes no physical harm to other persons or to their property" and its impact is "purely symbolic."<sup>683</sup> Further, the *Eichman* dissent delivered a sharp rebuke to some politicians who opposed flag burning by stating that "[t]he integrity of the symbol has been compromised by those leaders who seem to advocate compulsory worship of the flag even by individuals whom it offends, or who seem to manipulate the symbol of national purpose into a pretext for partisan disputes about meaner ends."<sup>684</sup>

### B. *The Attempted Constitutional Amendment in 1990*

After *Eichman*, President Bush and members of Congress again called for the passage of a constitutional amendment prohibiting flag desecration. Bush declared, "The law books are full of restrictions on free speech. And we ought to have this be one of them."<sup>685</sup> In the immediate aftermath of *Eichman*, many predicted that a constitutional amendment would pass quickly and without difficulty. Thus, on the day of the *Eichman* decision, Republican House minority leader Robert Michel, an amendment advocate, predicted Congressional passage, asking rhetorically, "Who wants to be against the flag, mother and apple pie?"<sup>686</sup> And Harvard Law Professor Christopher Edley, the issues director for the 1988 Dukakis campaign, declared,

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679. *Id.* at 2411. (Stevens, J., dissenting).

680. *Id.*

681. *See Texas v. Johnson*, 109 S. Ct. 2533, 2556 (1989) (Stevens, J., dissenting).

682. *Id.* at 2555 (Rehnquist, C.J., dissenting).

683. *Eichman*, 110 S. Ct. at 2412 (Stevens, J., dissenting).

684. *Id.*

685. Balz & Kenworthy, *Bush Again Calls for Flag Amendment*, Wash. Post, June 13, 1990, at A1, col. 1.

686. Koenig, *Ruling Heats Up Dispute in Congress over Flag Amendment*, St. Louis Dispatch, June 12, 1990, at A13, col. 1.

“Opposition to the amendment may be noble, but it may take a miracle to stop it.”<sup>687</sup>

Public opinion polls indicated that about sixty percent of the public favored passage of a constitutional amendment.<sup>688</sup> The intensity of public interest, however, was far weaker in mid-1990 than it had been a year earlier. This loss of interest undoubtedly played a key role in the amendment’s demise. For example, Democratic Representative Richard Durbin of Ohio, who listed himself as undecided as of June 18, stated, “The phone isn’t ringing, the mail isn’t coming in. The intensity of this is much lower than a year ago.”<sup>689</sup> Similarly, Democratic Representative Dennis Eckart of Ohio, an announced amendment supporter, declared, “There is nowhere near the [mail] volume as there was . . . a year ago.”<sup>690</sup> And an anonymous high-level Republican operative was quoted as lamenting, “This is an issue whose time has come and gone.”<sup>691</sup> This perceived lack of intense public demand for a flag amendment no doubt helped to persuade undecided congressmen to oppose the amendment in the weeks following *Eichman*. An Associated Press survey published June 20, 1990, indicated that 255 Representatives and 58 Senators favored an amendment, while 114 Representatives and 24 Senators opposed one, leaving 65 Representatives and 18 Senators undecided.<sup>692</sup> In the June 21 House vote, however, there were 177 negative votes, and in the June 26 Senate vote, there were 42 negative votes,<sup>693</sup> indicating that virtually all wavering congressmen ended up opposing the amendment.

There are several reasons why an issue that one Washington reporter termed “hot as a magnesium flare” in the summer of 1989 had become politically lukewarm by the late spring and early summer of 1990.<sup>694</sup> Although proponents of the Flag Protection Act failed in the sense that the Supreme Court invalidated the law, some of the statute’s less enthusiastic backers succeeded in delaying serious consideration of a constitutional amendment until passions cooled. The

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687. Shribman & Wermeil, *Justices Strike Down Flag Burning Law Revising a Push to Amend Constitution*, Wall St. J., June 12, 1990, at A18, col. 1.

688. *Sacred Symbol*, Nat’l J., June 30, 1990, at 1624, col. 1; *Flag Amendment a Burning Issue*, USA Today, June 13, 1990, at 1, col. 2.

689. Kenworthy & Taylor, *Opponents of Flag Amendment Seeking Quick Kill on House Floor*, Wash. Post, June 19, 1990, at A8, col. 1.

690. *Id.*

691. *Id.*

692. Plain Dealer (Cleveland, OH), June 20, 1990, at 1, col. 1.

693. See Biskupic, *supra* note 87 and accompanying text.

694. Hey, *Flag Desecration a Burning Issue Again in Washington*, Christian Sci. Monitor, June 13, 1990, at 9, col. 3.

public simply lost much of its interest in an issue that had not only dragged on for a year, but which had become, in effect, a summer re-run. This was especially true given that most Americans never saw anyone burn a flag except on television and were not really affected in their daily lives by flag burners. As an anonymous House Democratic leadership aide told the *National Journal*, "Put this up against whether or not people think they have got enough money to send their kids to college, and this isn't going to be an issue."<sup>695</sup>

Another factor that strengthened opposition to a constitutional amendment was the negative public reaction to the political mileage that amendment backers overtly indicated they intended to get for their vote.<sup>696</sup> On the day of the *Eichman* decision, for example, Senate Minority Leader Robert Dole declared that a vote against a constitutional amendment "would make a pretty good 30-second spot" during the 1990 elections.<sup>697</sup> Marc Nuttle, executive director of the National Republican Congressional Committee, termed the fight over the amendment a "real opportunity" that "allows us to make a true comparison between parties and candidates."<sup>698</sup> Such statements aroused sharp criticism on both sides of the political aisle and irritated members of the public already cynical about politicians' motives. Thus, as one Republican political consultant advised, "Democrats who get on the wrong side of this may face political oblivion, but Republicans who exploit it ought to face intellectual hell."<sup>699</sup>

A final factor that may have influenced the public's ambivalence about a constitutional amendment in 1990 was that the "framing" of the argument varied greatly from that of the previous year. In 1989, Republican Senator Strom Thurmond told his Senate Judiciary colleagues at the beginning of hearings on August 1 that the goal was to determine "the most desirable and effective approach to" overturn *Johnson*.<sup>700</sup> Similarly, House Judiciary Subcommittee on Civil and Constitutional Rights Chairman Don Edwards, a well known civil libertarian, told his colleagues at the beginning of his hearings on July 13 that their task was to determine "just how we can ensure consistent with our constitutional freedoms that this symbol of our liberty can be

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695. *Back at the Great Divide*, Nat'l J., June 23, 1990, at 1569, col. 1.

696. The number of political references by Republican amendment backers sharply contrasted with the paucity of overt political comments in the aftermath of *Johnson*.

697. Kennedy & Dewar, *Ruling Rekindles Amendment Debate*, Wash. Post, June 12, 1990, at A7, col. 1.

698. See Shribman & Wermeil, *supra* note 687, at A18, col. 1.

699. *Id.*

700. See *Senate Hearings*, *supra* note 495.

protected from harm.”<sup>701</sup> With the issue thus framed, the concept that the flag could not or should not be protected from harm never entered the 1989 political arena. The only question was whether Congress would vote for passage of an amendment or passage of a law, both of which in fact would infringe upon freedom of expression.

Following *Eichman*, which effectively eliminated the statutory option, opponents of an amendment, including many who had shown no compunction about diminishing freedom of expression through legislation the previous year, got constitutional religion. They reframed the issue as a battle of competing icons: the flag, which symbolizes liberty, versus the Constitution and Bill of Rights, both of which provide the substance of liberty. Thus, on the day the *Eichman* decision was rendered, Senate Democratic Majority Leader George Mitchell declared that “[t]he issue is not the flag [but] whether we are going to amend the Bill of Rights,”<sup>702</sup> while Senator Edward Kennedy declared that “[w]e don’t need to destroy the First Amendment in order to save the American flag.”<sup>703</sup>

This reframing of the question to stress the freedom of expression issues at heart in the flag controversy was likely enhanced in its appeal by the East European democratic revolutions of late 1989, which had prominently featured widespread desecration of national flags to support demands for greater freedoms.<sup>704</sup> In reference to these European changes, Representative Louise Slaughter expressed opposition to the constitutional amendment and told the House on June 21, 1990:

A year ago last April I had an opportunity to visit Hungary when they were writing their constitution. They were eager to talk to us about the Bill of Rights. . . . When we saw people in Eastern Europe carrying the flags of their country with the hammer and sickle cut out of the middle, all of us had to realize that had they done that before changes in those regimes, they would have been immediately punished and put in jail because they did not have the liberty to protest as we do. . . . If our future generations of Americans must serve [in battle] do not send them out to carry a flag diminished by our action here today.<sup>705</sup>

Similarly, Representative Jim Slattery told the House on the same day, “We have a choice. We can join countries like the Soviet Union,

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701. See *House Hearings*, *supra* note 495.

702. See Koenig, *supra* note 686, at A13, col. 1.

703. *Rejection of Flag Burning Law Sets Stage for Constitutional Fight*, Plain Dealer (Cleveland, OH), June 12, 1990, at 1, col. 1.

704. Savage, *High Court Voids Law Against Flag Burning*, L.A. Times, June 12, 1990, at A1, col. 2.

705. 136 CONG. REC. H4047-48 (daily ed. June 21, 1990).

Iran, South Africa and China, who have banned flag burning, or we can express our unwavering support for the fundamental freedoms contained in our Bill of Rights represented by the flag we all love."<sup>706</sup>

## VII. CONCLUSION

In assessing the 1989-1990 flag burning controversy, Congressman Don Edwards lamented, "To think that a nincompoop in Dallas, Texas, could do something that could trigger this reaction is rather distressing."<sup>707</sup> The reaction displayed by both the American public and the political elite certainly says some distressing things about the health of the American body politic. Although this reaction demonstrates that forms of symbolic political protest like flag burning are unlikely to generate any significant public support, in a peculiar way the American political system is indebted to Joey Johnson for exposing some of its fundamental and distressing realities. In particular, The Great 1989-1990 Flag Flap suggests a distinct lack of political courage and understanding of basic democratic principles among many and, perhaps, most of America's elites and general population. It also illustrates an eagerness among elites to devote vast amounts of time and energy in squelching unthreatening symbolic protests rather than addressing more far-reaching problems that persistently erode our society. The striking down of the Flag Protection Act of 1989 and the failure of a constitutional amendment provides little comfort since not only did attempts to suppress the expression of a fundamental right consume Washington for over one year and divert attention away from more pressing issues, but these attempts repeatedly gained the support of majorities of both Houses of Congress, of President Bush, and, perhaps most frightening of all, of four out of nine Supreme Court Justices. Although by the late fall of 1990 the entire flag desecration issue seemed to have died, the recent resignation of Justice Brennan raises the prospect that a flag desecration law might pass constitutional muster in the future.

Whatever one's opinion of the wisdom of flag burning as a means of political protest, there can be no question that it is a form of political expression that has no concrete adverse consequences. Not only has the frequency of such behavior been minimal during the last fifteen years, but as *Washington Post* columnist Judy Mann pointed out, "[W]hen it happens, the sum total of the damage is a burned flag. No

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706. *Id.* at H4044.

707. Phillips & Dewar, *supra* note 430, at A17, col. 1.

one is deprived of liberty or justice."<sup>708</sup> Every bit of evidence from both the Vietnam War and The Great 1989-1990 Flag Flaps suggests that, rather than diminishing the symbolic value of the flag in the eyes of most Americans, flag burnings have exactly the opposite effect. In fact, few Americans recently have done as much to buoy patriotism as Joey Johnson.

Even if mass flag burnings were to become everyday occurrences, by themselves such actions would do no real harm. Indeed, they may even provide the service of informing political leaders of their constituents' most adamant grievances. In any case, sending flag abusers to jail is hardly going to convert them into flag waving patriots, nor will it produce any other positive effects.

As burning the flag is a form of harmless political expression, clearly protected by the Bill of Rights, the real significance of the 1989-1990 controversy is found in the reaction that it caused. This reaction was considerably amplified by politicians and their aspirations. The political stakes involved were demonstrated by House Speaker Tom Foley, a supporter of the Flag Protection Act, when he protested, "Anybody who suggests that there is a party difference in respect for the American flag is using this deep affection of Americans, twisting it, manipulating it, using it for the most base and crass political purposes."<sup>709</sup>

However, political pandering over the flag issue would be effective only if there was a responsive audience, and thus the deeper significance of the 1989-1990 flag controversy is not that the issue was exploited, but that it was so exploitable. The ultimate explanation for this fact lies not on the surface of public reaction—that Americans are full of pride and support for their country—but rather, the explanation lurks underneath that surface, where insecurity and doubts about the fundamental health of the country prevail. Certainly, the massive political and public reaction to a handful of flag burnings is not a sign of national self-confidence, but rather one of national self-doubt.

This insecurity apparently stems from a collective feeling of an America in decline, both internationally and domestically. Internationally, despite minor psychological victories like the invasions of Grenada and Panama and the current patriotic upsurge to protect Kuwait, the American psyche still suffers not only from the trauma of Vietnam, but also from recurrent strategic failures in places such as

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708. Mann, *Defending Symbols and Denying Justice*, Wash. Post, June 30, 1989, at C3, col. 4.

709. Simpson, *Decision Unravels Flag's Very Fabric*, Wash. (D.C.) Times, July 24, 1989, at C5, col. 1 (quoting House Speaker Thomas S. Foley (D. Wash.)).

Lebanon and Iran, coupled with a severe lessening of America's relative economic prowess. Historian Terrence McDonald of the University of Michigan notes that, in the twentieth century, "It's always been a good idea for a politician to wrap himself in the flag. [The] resurgent nationalism [of 1989 is] linked to the perceived decline in American power in relation to the rest of the world. When reality gets too hard to handle, you can fall back on symbols of nationhood."<sup>710</sup>

A similarly perceived deterioration of American domestic life has also contributed to the collective expression of insecurity. Thus, Richard Madsen, a sociologist at the University of California at San Diego states that "American concern about the flag is a sign of great insecurity about our own values and unity. Many people have the sense of America in decline, a sense of intractable problems from drug abuse to the environment. Under these conditions, people get doubly upset when the flag is desecrated."<sup>711</sup>

Evidence in support of this analysis abounds. After the *Johnson* decision, a visitor to the site of the American revolutionary battlefield at Concord, Massachusetts, told a reporter, "The country is torn by crime and drugs. We really should have something to rally around."<sup>712</sup> In the minority report supporting a constitutional amendment (rather than a law) to overturn *Johnson*, ten members of the House Judiciary Committee stated that "[i]n this day and age, when it seems that perversion is accepted and morality [is] a taboo religion, perhaps this small mandate for freedom is not asking too much!"<sup>713</sup> Columnists and letters to the editors of America's newspapers often implied a similar theme. Columnist Ray Kerrison, for example, lumped the Court's decision with what he termed the "step by step [dismantling of] nearly all the institutions, beliefs, practices and safeguards of the past 200 years."<sup>714</sup> He further held that there was nothing surprising about this in a "climate where family life is in shreds, [marriage is a] take-it or leave-it proposition, [the] school system is poisoned with destructive social aberrations, [and] religion is not only mocked and ridiculed incessantly on radio and TV, but these attacks are subsidized in the arts by federal and state governments."<sup>715</sup> Similarly, a letter writer to the *New York Times* declared, in reference to the *Johnson* decision, that "America is in a free fall"

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710. Alters, *supra* note 131, at 1, col. 2.

711. D'Antonio & Firstman, *supra* note 58, at 4.

712. Alters, *supra* note 131, at 1, col. 2.

713. H.R. REP., *supra* note 542, at 22.

714. N.Y. Post, June 23, 1989, at A6, col. 2.

715. *Id.*

like a truck “plummeting downhill in pitch darkness with no brakes, no headlights to illuminate our vision of where the road is heading.”<sup>716</sup>

In addition to reflecting public insecurity about the state of the country, The Great 1989-1990 Flag Flap also suggests that the American political leadership is too often consumed with symbols rather than substance. Either out of inability or a reluctance to tackle real problems, much of the leadership seems to be more comfortable with unproductive and ultimately divisive public relations extravaganzas concerning purely symbolic issues. As Senator Bob Kerrey of Nebraska pointed out with regard to the flag debate:

When you're all done arguing, what have you got? Have you built a house? Have you helped somebody? Have you created a better world? Have you fought a battle worth fighting? Or are you banging into the shadows on the wall of a cave? It seems to me there's nothing produced from it and you've divided the nation.<sup>717</sup>

The *Seattle Times* similarly pointed out that, above all, the flag controversy amounted to a distraction from the real issues and thus reflected poorly on the quality of the nation's leaders:

Into a nation plagued by inadequate housing, rampant drug abuse, a mammoth federal budget deficit and the growing specter of AIDS, those wonderful folks in Washington, D.C. have introduced a flag law. . . .

The real desecration of democracy occurs when people don't have places to live or work or adequate health insurance. . . .

Those kind of issues don't seem to play well in the nation's capital. Maybe it's because they require real statescraft and that's in a lot shorter supply than the hype and rhetoric that's been conjured up around a non-issue like flag burning.<sup>718</sup>

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716. Doughty, *America in a Free Fall*, N.Y. Times, July 2, 1989, at E12, col. 3 (letter to the editor). Illinois Republican Congressman Henry Hyde perhaps best articulated the view that the burning of a symbol itself represented a symbol of a country in decline, when he told the House Judiciary Committee on June 19, 1990:

Those who are shocked, revolted and frustrated by the excesses of the counter-culture, the pornography and obscenity that inundates our entertainment industry, the drugs, the AIDS explosion, the high abortion rate view flag burning as one more slap in the face of millions of veterans who found enough values in America to risk their lives in combat. People resent the vulgarization of their country. . . . I once saw a bumper-sticker that said, “Honk if you believe in anything!” That says it all for some people.

Newsletter from Henry J. Hyde to his constituents (June 19, 1990) (discussing flag protection amendment).

717. Toner, *supra* note 568, at 1, col. 4 (quoting Senator Robert Kerrey).

718. Editorials on File, *supra* note 581, at 1198 (quoting a *Seattle Times* editorial (Oct. 14, 1989)).



The amount of time and energy devoted by those in power to The Great 1989-1990 Flag Flap reflects a political system which increasingly emphasizes smoke and mirrors above real political discussions and real political issues. Although the American people certainly cannot escape some responsibility, ultimately it is the American leadership that sets the tone and must bear the bulk of the blame for this.

If accusing leaders of diverting public and political attention away from real issues and pandering to the public's worst instincts is a strong accusation, then a far more serious charge is that these leaders apparently have little or no faith or understanding in the most basic of democratic principles: the free marketplace of ideas and tolerance for even the most unpopular and offensive political dissent.<sup>719</sup> This fundamental democratic lesson was eloquently expressed by Justice Jackson in *West Virginia State Board of Education v. Barnette*:<sup>720</sup> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein."<sup>721</sup> It is a sad commentary that in 1989-1990, the two-hundredth anniversary of the drafting and ratification of the Bill of Rights, the American political leadership still needs to learn this lesson and to reflect it in their daily words and actions.

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719. See *Abrams v. United States*, 250 U.S. 616 (1919) (Holmes, J., dissenting).

720. 319 U.S. 624 (1943).

721. *Id.* at 642.