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# PLAYING WITH FIRE: THE PROPOSED FLAG BURNING AMENDMENT AND THE PERENNIAL ATTACK ON FREEDOM OF SPEECH

The Constitution of the United States, intended to be a perpetual, yet flexible document, contains an internal amendment provision in Article V.<sup>1</sup> The Article V amendment process serves as a supreme lawmaking device to remedy perceived injustices, omissions or mistakes.<sup>2</sup> Successful amending of the Constitution is ex-

<sup>1</sup> See U.S. CONST. art. V. Article V provides in pertinent part:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing amendments, which, in either Case, shall be valid to all Intents, and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress . . . .

*Id.*

<sup>2</sup> See Stephen B. Presser, *Here Comes the Amendment Jamboree to Put Constitutional Law Back on Track*, CHI. DAILY L. BULL., Apr. 22, 1995, at 24 (proposing that constitutional amendments “may be the most promising means of curing our current social ills”); see also U.S. CONST. amend. I (granting freedom of religion, speech, and press, and right to peaceably assemble); U.S. CONST. amend. IV (granting protection against unreasonable searches and seizures); U.S. CONST. amend. VI (granting right to trial by jury in criminal cases); U.S. CONST. amend. VIII (securing protection against cruel and unusual punishment); U.S. CONST. amend. XIII (abolishing slavery); U.S. CONST. amend. XIV (affording due process and equal protection of law to all people); U.S. CONST. amend. XV (granting right to vote to male citizens); U.S. CONST. amend. XIX (granting right to vote to female citizens); U.S. CONST. amend. XXIV (disallowing federal and state taxes connected with right to vote). *But see* Stephen M. Griffin, *Constitutional Stupidities: A Symposium, The Nominee is . . . Article V*, 12 CONST. COMMENT. 171, 172-73 (1995) (arguing that provisions of Article V make constitutional amendments extremely difficult as practical matter, and, noting that although Constitution has changed through judicial interpretation and political means, “making amendment easier would have the effect of encouraging additional amendments to keep the Constitution up to date”). See generally BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 267-68 (1991) (discussing how classical system of “higher lawmaking,” Article V amendment process, Congressional statutes that are supported by President and are counter to “fundamentals of the pre-existing regime,” all raise questions as to which is proper and necessary amendment process); RICHARD B. BERNSTEIN & JEROME AGEL, *AMENDING AMERICA: IF WE LOVE THE CONSTITUTION SO MUCH, WHY DO WE KEEP TRYING TO CHANGE IT?* 265 (1993) (arguing that “amendment politics” created fervor over flag desecration amendment and detracted attention from truly serious issues confronting the nation); MARY F. BERRY, *WHY THE ERA FAILED: POLITICS, WOMEN’S RIGHTS, AND THE AMENDING PROCESS OF THE CONSTITUTION* 3 (1986) (arguing that controversial constitutional amendments require not only support from voters and legislators, but also perception that urgent societal problem exists); ALAN P. GRIMES, *DEMOCRACY AND THE AMENDMENTS TO THE CONSTITUTION* 166-67 (1978) (stating that democratic nature of amendment politics has resulted because amendments are sponsored by victorious coalitions attempting to “secure their hold on power,” employed to attract new voters, and considered extensions of democ-

tremely rare.<sup>3</sup> A proposed constitutional amendment to protect the American flag, however, appears to have sufficient, if not overwhelming support to overcome past hurdles and become a reality.<sup>4</sup> If passed, such an amendment would represent the first time the Bill of Rights has been limited by amendment.<sup>5</sup>

During the past decade, much controversy has been sparked by the degree of constitutional protection afforded to those who desecrate the American flag for expressive purposes.<sup>6</sup> In *Texas v. Johnson*,<sup>7</sup> the United States Supreme Court recognized First Amendment protection for flag burning. Dissatisfied with the out-

racy); JOHN R. VILE, *THE CONSTITUTIONAL AMENDING PROCESS IN AMERICAN POLITICAL THOUGHT* 173 (1992) (stating that Americans should be able to make any constitutional changes they desire and concluding that Article V amendment process should not be subject to substantive limits).

<sup>3</sup> See U.S. CONST. amends. I-XXVII (listing only 27 ratified amendments in over 200 years).

<sup>4</sup> See Andrew M. Hall, *Lusky and the Long Dark Road*, 11 J.L. & POL. 213 n.33 (1995) (quoting Professor Lusky as stating that amendment ratification would be quick, and would begin "dismal enterprise" of amending Bill of Rights, least popular but most vulnerable part of Constitution because of restraints it imposes upon majority rule); see also Helen Dewey, *Senate Says No to Flag Burning Amendment*, CHI. SUN-TIMES, Dec. 13, 1995, at 3 (noting that after amendment proposal flew through House and fell only three votes shy of approval in Senate, Senator Orrin Hatch (R-Utah) vowed that amendment would be reintroduced); Elizabeth Schwinn, *Senate Flag-Burning Vote Seen as Too Close to Call: House Has Already OK'd Proposed Amendment to the Constitution*, FRESNO BEE, Dec. 12, 1993, at A6 (noting that 49 states already have passed resolutions calling for amendment; only 38 are needed to ratify). But see Jeanne Ponessa, *Home Panel Approves Measure to Prohibit Flag Burning*, CONG. Q. WKLY. REP., June 13, 1995, at 1646, 1647 (indicating that despite overwhelming popular support, many Democrats, including President Clinton, oppose flag desecration amendment because it would infringe on right to free speech); Peter H. Kostmayer, *Risk and Regulation: How Much is Too Much?*, 29 U. RICH. L. REV. 551, 556 (1995) (noting that in 1990 some Americans began to recognize that amending First Amendment is unwise); Mike McCurry, *Press Briefing*, 1995 WL 385862 (White House) June 29, 1995, at 1, 8 (stating that President Clinton opposes flag desecration amendment because "the flag is a symbol of our republic, but the Constitution is the soul of our republic").

<sup>5</sup> See U.S. CONST. amends. XI-XXVII (ensuring freedom from slavery, right to vote and right of due process of law, and providing procedures for elections, taxing and impeachment, but never abridging rights secured by Amendments I-X).

<sup>6</sup> See, e.g., Kent Greenawalt, *O'er the Land of the Free: Flag Burning as Speech*, 37 UCLA L. REV. 925, 947 (1990) (reasoning that use of amendment process to protect against flag desecration would "have an unhealthy effect on respect for free speech and respect for the Supreme Court"); Geoffrey R. Stone, *Flag Burning and the Constitution*, 75 IOWA L. REV. 111, 123-24 (1989) [hereinafter "*Flag Burning*"] (advocating legislative solutions before attempting to amend and arguing that amendment to protect against flag desecration would be undesirable because of infringement upon protected symbolic speech); Charles Tiefer, *The Flag-Burning Controversy of 1989-1990: Congress' Valid Role in Constitutional Dialogue*, 29 HARV. J. ON LEGIS. 357, 391 (1992) (arguing that Congressional dominance over amendment process must be respected); cf. Note, *The Faith to Change: Reconciling the Oath to Uphold With the Power to Amend*, 109 HARV. L. REV. 1747, 1747 (1996) [hereinafter "*The Faith to Change*"] (questioning legislators' ability to uphold Article VI oath while exercising amendment powers).

<sup>7</sup> 491 U.S. 397 (1989).

come in *Johnson*, Congress responded with the Flag Protection Act of 1989.<sup>8</sup> Not long thereafter, the Supreme Court struck down the Act in *United States v. Eichman*.<sup>9</sup> This particular struggle, between the Supreme Court and Congress, is representative of the country's struggle as a whole. In fact, the actions of the Supreme Court and Congress have transformed flag desecration from a First Amendment issue into a topic for the political soapbox.<sup>10</sup>

This Note argues that flag desecration constitutes symbolic expression deserving of constitutional protection. As such, the federal legislative and the executive branches, and candidates for offices within those branches, risk severe damage to freedom of speech by supporting and by implementing a flag desecration amendment. Part I of this Note examines the scope and the application of Article V of the U.S. Constitution. This section will enumerate the requirements necessary to amend successfully the Constitution. Part II traces the series of Supreme Court decisions that extended First Amendment protection to symbolic speech and scrutinizes the application of First Amendment protection. Part III follows with a discussion of the Court's application of First Amendment principles to the issue of flag desecration, reviewing several cases specifically protecting flag desecration as political speech. Parts IV and V examine the significant Court decisions holding legislative efforts to protect the flag unconstitutional. Part VI discusses the supporting and opposing views concerning renewed support for a flag desecration amendment. Finally, this Note concludes that "We the People" must defer to the language of the Constitution and resist efforts towards permanently altering the document to prohibit a constitutional, if perhaps unfortunate, act.

<sup>8</sup> 18 U.S.C. § 700 (Supp. 1990).

<sup>9</sup> 496 U.S. 310 (1990).

<sup>10</sup> See GRIMES, *supra* note 2, at 25-26 (discussing how politicians muster support for their campaigns through "amendment politics"). See generally Robert J. Goldstein, *The Great 1989-1990 Flag Flap: An Historical, Political, and Legal Analysis* (1990), in 2 THE CONSTITUTION AND THE FLAG: THE FLAG BURNING CASES 483, 484 (Michael K. Curtis ed., 1993) (illustrating that *Johnson* and *Eichman* decisions, two failed attempts to amend Constitution, and invalidation of Flag Protection Act of 1989 transformed flag burning controversy into highly political issue abused by politicians for self-interested gain).

## I. THE CONSTITUTIONAL AMENDMENT PROVISION: ARTICLE V

Although the Framers of the Constitution understood the need for a flexible document, they also appreciated the need for a lasting document upon which to found the nation.<sup>11</sup> To enable future statesmen to address unforeseen circumstances, the Framers included Article V, setting forth a procedure to amend the Constitution.<sup>12</sup> In order to propose an amendment, Article V requires the support of either two-thirds of both houses of Congress or two-thirds of the state legislatures through the calling of a constitu-

<sup>11</sup> See *Missouri v. Holland*, 252 U.S. 416, 433 (1920). The Court explained that the Framers performed "a constituent act . . . call[ing] into life a being, the development of which could not have been foreseen completely by the most gifted of begetters." *Id.* See generally Sanford Levinson, *Accounting For Constitutional Change (or, How Many Times Has the United States Constitution Been Amended? (A) < 26; (B) 26; (C) > 26; (D) All of the Above)*, 8 CONST. COMMENT. 409, 422 (1991). Levinson states that "[l]ike most children [the Constitution] could (and did) grow up in ways that might well surprise its parents." *Id.*

<sup>12</sup> See *Ullman v. United States*, 350 U.S. 422, 428 (1956). The Court noted the exclusivity of the Article V amendatory process. *Id.*; see also Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1228-45 (1995). Professor Tribe attacks Professors Amar and Ackerman for their insistence on a "gap" in Article V. *Id.* at 1244-45. Professor Tribe disagrees with the notion that because the text of Article V lacks the word "only," the process of amending the Constitution is open to alternative options. *Id.* He prefers a strict application of and adherence to the text of the Constitution, and believes that "[n]on-exclusive views of Article V . . . enfeeble . . . the Constitution's state-sensitive supermajority requirements for what should be especially solemn modes of lawmaking, and thereby damage the Constitution's basic architecture." *Id.* at 1248.

But see Bruce A. Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164, 1179, 1181-82 (1988). Professor Ackerman concludes that, in deciding whether to break sharply with their constitutional past, today's Americans look beyond the classical system of Article V, heavily relying on the President, entrusting the Constitution to his Court appointments. *Id.*; Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 801 (1995). The authors argue that an opening exists in Article V permitting "higher lawmaking" to occur outside the Article's supermajority criteria. *Id.*; Akhil R. Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 458-59 (1994) [hereinafter "*Consent of the Governed*"]. Professor Amar writes that Article V "emphatically" does not say that it is the exclusive avenue available to revise the Constitution, and he cites historical support, including the Declaration of Independence, for his proposition that a national referendum to amend the Constitution would satisfy the questions addressed by the Founders. *Id.* at 459. He further asserts that, "[w]e the People of the United States have a legal right [retained and unenumerated] to alter our Government—to change our Constitution—via a majoritarian and populist mechanism . . ." *Id.* at 458; Akhil R. Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1044 (1988) [hereinafter "*Philadelphia Revisited*"]. Professor Amar argues that people retain unenumerated rights beyond Article V to amend the Constitution. *Id.*; Sanford Levinson, *supra* note 11, at 422. Levinson agrees with Professor Ackerman that the Constitution "has indeed been amended by means other than the addition of explicit text." *Id.*; see also Note, *Constitutional Stare Decisis*, 103 HARV. L. REV. 1344, 1356-57 (1990) [hereinafter "*Constitutional Stare Decisis*"]. This Note compares the Article V amendment process with stare decisis and judicial amendment, and advocates strict adherence to stare decisis when considering fundamental constitutional issues. *Id.*

tional convention.<sup>13</sup> These supermajority requirements were intended to avoid whimsical changes to the Constitution.<sup>14</sup> Once an amendment has been proposed, three-quarters of the states must ratify it.<sup>15</sup> Of more than 11,000 proposed amendments, only thirty-three have been submitted to the states pursuant to Article V, and only twenty-seven of those have been ratified.<sup>16</sup>

In *Coleman v. Miller*,<sup>17</sup> the Supreme Court has acknowledged that Article V's amendment power lies exclusively with Congress. Therefore, the constitutional validity of the process is therefore considered a political question, not one for determination by the federal courts.<sup>18</sup> In fact, four concurring Justices in *Coleman* supported granting Congress absolute control over the entire amend-

<sup>13</sup> U.S. CONST. art. V; see Katherine Q. Seelye, *House Easily Passes Amendment to Ban Desecration of Flag*, N.Y. TIMES, June 29, 1995, at A1, A19. The only constitutional convention ever called was convened for the purpose of ratifying the Constitution itself. *Id.*

See ABA SPECIAL CONSTITUTIONAL CONVENTION STUDY COMMITTEE, AMENDMENT OF THE CONSTITUTION BY THE CONVENTION METHOD UNDER ARTICLE V 59-69 (1971). Of the ratified amendments, all but the Twenty-First Amendment were ratified by state legislatures, rather than by constitutional conventions called within the states. *Id.* However, numerous states have requested conventions since 1789. *Id.* at 59-79; see also Michael S. Paulsen, *Rule of Law: The Case for a Constitutional Convention*, WALL ST. J., May 3, 1995, at A15. The author argues that the necessary two-thirds majority of states need to call constitutional convention has been met and that Congress therefore should call one. *Id.*; cf. Clifton McClensky, *Along the Midway: Some Thoughts on Democratic Constitution-Amending*, 66 MICH. L. REV. 1001, 1016 (1968). The author finds that Congress has been wise to keep the amendment process in check by refusing state calls for a constitutional convention. *Id.*

<sup>14</sup> See THE FEDERALIST No. 43, at 278-79 (James Madison) (Clinton Rossiter ed., 1961) (noting that requirements of Article V protect against excessive alteration of Constitution); see also David E. Kyvig, *Refining or Resisting Modern Government? The Balanced Budget Amendment to the United States Constitution*, 28 AKRON L. REV. 97, 98 (1995) (noting that Framers believed that permanent constitutional alterations should require "widest sanction of any republican act"); *Constitutional Stare Decisis*, *supra* note 12, at 1356 (noting that process guards against "transitory passions and compels sober consideration by the polity. . . [and that] this process of deliberation, along with the supermajority provisions, helps secure broad support and acceptance for constitutional amendments").

<sup>15</sup> U.S. CONST. art. V.

<sup>16</sup> See BERNSTEIN & AGEL, *supra* note 2, at 301-03. Six of the 33 proposals failed to receive the support of the states. *Id.* at 301. The six are: a 1789 amendment that would have increased the size of the legislature with population growth; an 1810 amendment revoking citizenship of any person accepting a title of nobility from a foreign sovereign; an 1861 Amendment protecting slavery; the child labor amendment of 1924; the Equal Rights Amendment of 1972; and the District of Columbia Statehood Amendment of 1978. *Id.* at 301-03; LEE EPSTEIN & THOMAS G. WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA 8 (1995) (same).

<sup>17</sup> 307 U.S. 433 (1939).

<sup>18</sup> See *Coleman*, 307 U.S. at 453-54 (deeming efficacy of ratification by state legislature which had previously rejected proposal to be "political question"); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-6, at 65 n.9 (2d ed. 1988) (noting that Supreme Court has indicated that process of amendment proposal and ratification is committed to Congress exclusively).

ment process.<sup>19</sup> While Article V empowers Congress to oversee the amendment process, the Supreme Court is not entirely powerless in this area.<sup>20</sup> Since *Marbury v. Madison*,<sup>21</sup> the Court has enjoyed the power of judicial review.<sup>22</sup> This power to review the constitutionality of Congressional enactments, while extensive, is not unlimited.<sup>23</sup> The Court's role, however, in reviewing amendments to the Constitution is ill-defined.<sup>24</sup>

<sup>19</sup> *Coleman*, 307 U.S. at 459 (Black, J., concurring); see Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 613 (1976) (suggesting that *Coleman* holds that Article V amending process is under complete control of Congress); cf. TRIBE, *supra* note 18, § 3-13, at 101 (doubting whether *Coleman* can be read to require absolute bar on judicial review of amendment process); Grover Rees III, *Throwing Away the Key: The Unconstitutionality of the Equal Rights Amendment Extension*, 58 TEX. L. REV. 875, 888 n.52 (1980) (disagreeing with Professor Henkin's suggestion that *Coleman* was not "political question" case and stating that language of Article V fails to indicate exclusive Congressional control over amendment process).

<sup>20</sup> See TRIBE, *supra* note 18, § 3-6, at 65 n.9 (noting that even "exclusive" Congressional control over process need not preclude Supreme Court review of challenged procedures or actions employed in implementing process).

<sup>21</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>22</sup> *Marbury*, 5 U.S. at 174-79 (vesting Supreme Court with power to review acts of Congress); see BLACK'S LAW DICTIONARY 849 (6th ed. 1990) (defining judicial review as "[p]ower of the courts to review decisions of another department or level of government" (citations omitted)); EPSTEIN & WALKER, *supra* note 16, at 872 (defining judicial review as "[t]he authority of a court to determine the constitutionality of acts committed by the legislative and executive branches and to strike down acts judged to be in violation of the Constitution"); see also Hon. John J. Gibbons, *Judicial Review of the Constitution*, 48 U. PITT. L. REV. 963, 976-77 (1987) (interpreting Supremacy Clause (art. VI, § 1, cl.2), Supreme Court established Constitution as supreme law of land to which Justice Marshall's judicial review must be extended in order to preserve Framers' intent to protect individual liberties from the "mercies of future legislatures"). *Id.*

<sup>23</sup> See Gibbons, *supra* note 22, at 985-87. The Supreme Court is limited in its power of review by certain political constraints. *Id.* at 986. For instance, the Court's high visibility opens its decisions to constant scrutiny. *Id.* Externally, the Court's power is kept in check by the Article III power of Congress to determine when judicial power shall be exercised. *Id.* Through the appointment process the views of the Court as a whole are planned, altered and updated by the executive and legislative branches. *Id.* at 986-87.

<sup>24</sup> See *Philadelphia Revisited*, *supra* note 12, at 1044 n.1 (discussing possibility of unconstitutional amendments); Jeff Rosen, Note, *Was the Flag Burning Amendment Unconstitutional?*, 100 YALE L.J. 1073, 1073-74 (1991) (asserting that amendment cannot alter or destroy "natural right" retained by people through Ninth Amendment). *But see* JOHN AGRESTO, *THE SUPREME COURT AND CONSTITUTIONAL DEMOCRACY* 107-111 (1984) (rejecting amendment process as effective check on Court because it is so difficult to effectuate amendments); ROBERT L. CLINTON, *MARBUY V. MADISON AND JUDICIAL REVIEW* 98-99 (1989) (noting that "[n]o exclusive power to interpret the fundamental law is claimed for the court" anywhere in *Marbury*); 1 RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* § 2.16, 285-86 (2d ed. 1992) (stating that if Congressional acts do not provide for judicial role in amendment process, maybe all amendment questions relating to constitutionality of legislation affecting amendment process should be categorized as political); cf. Gibbons, *supra* note 22, at 977-85 (discussing human limitations of Justices and their difficult task of giving meaning to "open-textured" constitutional provisions).

See also TRIBE, *supra* note 18, § 3-6, at 65 n.10. Interestingly, four or five Amendments have been enacted in response to decisions of the Court with which Congress disagreed, thus establishing limits to the Court's power. *Id.* Professor Tribe suggests that there have

Although Article V explicitly enumerates the procedure for amending the Constitution, it remains uncertain whether the amendment process can limit or abolish fundamental constitutional rights.<sup>25</sup> The Constitution has been altered only seventeen times since the enactment of the Bill of Rights,<sup>26</sup> and none of those seventeen amendments repealed or revised any portion of the first ten amendments.<sup>27</sup> A most formidable opponent, however, currently threatens the First Amendment: the proposed Flag Desecration Amendment.<sup>28</sup>

been five occasions in which amendments successfully have overruled Supreme Court decisions. *Id.* He cites U.S. CONST. amend. XI (limiting jurisdiction of federal courts in reaction to *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793)); U.S. CONST. amend. XIV, § 1 (recognizing African-American citizens and nullifying *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856)); U.S. CONST. amend. XVI (nullifying *Pollock v. Framer's Loan and Trust Co.*, 157 U.S. 429 (1895), which held federal income tax unconstitutional, *overruled by South Carolina v. Baker*, 485 U.S. 505 (1988) (holding government bond interest not immune from nondiscriminatory federal tax)); U.S. CONST. amend. XXVI (setting aside voting age and nullifying *Oregon v. Mitchell*, 400 U.S. 112 (1970)); U.S. CONST. amend. XIX (granting women right to vote and reversing *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874)). TRIBE, *supra*. Unlike the other amendments noted above, the 19th amendment was not widely perceived as a response to a particular Court decision. *Id.*; Kyvig, *supra* note 14, at 98-99. In the past twenty-five years, an unusually large number of constitutional amendments have been proposed. *Id.* These proposals have addressed issues such as abortion, school prayer, flag desecration, equality for women, federal representation for the District of Columbia, congressional pay and a balanced budget. *Id.*

<sup>25</sup> See *The Faith to Change*, *supra* note 6, at 1748-49 (noting that, if procedural requirements of article V are met, amendment is legitimate regardless of substance or wisdom); see also R. ALLEY, SCHOOL PRAYER 204-05 (1994) (discussing previous attempts to amend Constitution with regard to freedom of religion and association, and noting that last of many recurring attempts for school prayer amendment, which occurred in 1984, fell just 11 votes short of necessary two-thirds majority for Senate approval).

<sup>26</sup> U.S. CONST. amends. XI-XXVII.

<sup>27</sup> See G. Calvin Mackenzie, *Senator George Mitchell and the Constitution*, 47 ME. L. REV. 163, 174 (1995). Senator Mitchell believes that the Bill of Rights should never be amended because it is "so effective in protecting individual liberty of Americans precisely for its unchanging nature. Once that is unraveled, its effectiveness will be forever diminished." *Id.*; Rhonda McMillion, *Star Spangled Skirmish: ABA Opposes Congressional Attempts to Pass Flag-Desecration Amendment*, 81 A.B.A. J. 110, 110 (1995). McMillion asserts that a flag desecration amendment would give great power to state and local governments to create a "patchwork of flag laws to restrict the Bill of Rights." *Id.*; Chris Harvey, *Amendment to Shield Flag Fails in the House*, WASH. TIMES, June 22, 1990, at A1. Even for the flag, the House refused to alter the Bill of Rights for first time. *Id.*; see also BERNSTEIN & AGEL, *supra* note 2, at 191. Opponents of the proposed flag desecration amendment are also concerned with the seeming revival of the old common law crime of seditious libel, under which one could be punished for criticizing the government regardless of the truth of the criticism. *Id.*

<sup>28</sup> See S.J. Res. 332, 101st Cong., 2d Sess., 136 CONG. REC. S8632 (1990).



## II. SYMBOLIC SPEECH: THE FIRST AMENDMENT

The First Amendment protects, among other rights, the right to freedom of speech.<sup>29</sup> Since the decision in *Stromberg v. California*,<sup>30</sup> the Court has expanded speech beyond written and spoken words to encompass symbolic conduct.<sup>31</sup> For example, the First Amendment protects one displaying a red flag in support of Communism.<sup>32</sup> Protection has been extended to a student wearing a black armband in school in protest of United States involvement in the Vietnam War.<sup>33</sup> Wearing an American military uniform in a play criticizing United States military involvement in Vietnam has been protected.<sup>34</sup> The First Amendment also protects participants in sit-ins protesting segregation<sup>35</sup> and picketers protesting the conduct of a business.<sup>36</sup> Failing to pledge allegiance to the flag in public school,<sup>37</sup> and burning a draft card<sup>38</sup> have also been considered expressive forms of conduct.

<sup>29</sup> U.S. CONST. amend. I. The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech . . ." *Id.*

<sup>30</sup> 283 U.S. 359 (1931).

<sup>31</sup> *Id.* at 369-70 (holding that hanging of communist flag contained some elements of speech and was therefore protected as expression of political idea); see also GERALD GUNTHER, CASES AND MATERIALS ON INDIVIDUAL RIGHTS IN CONSTITUTIONAL LAW 832-33 (2d ed. 1976) (discussing historical development of symbolic behavior as form of speech); ROBERT F. LADENSON, A PHILOSOPHY OF FREE EXPRESSION AND ITS CONSTITUTIONAL APPLICATIONS 65-69 (1983) (tracing development of symbolic speech).

<sup>32</sup> See *Stromberg*, 283 U.S. at 369-70 (invalidating state statute that prohibited display of red flag).

<sup>33</sup> *Tinker v. Des Moines Ind. Comm. Sch. Dist.*, 393 U.S. 503, 514 (1969) (holding that wearing of black armbands by student on school grounds in protest of Vietnam War was protected form of expression).

<sup>34</sup> *Schacht v. United States*, 398 U.S. 58, 63 (1970) (permitting actor to wear uniform to protest government).

<sup>35</sup> *Brown v. Louisiana*, 383 U.S. 131, 141-42 (1966) (offering First Amendment protection to peaceful sit-in at segregated library). *But see* *Clark v. Commission for Creative Non-Violence*, 468 U.S. 288, 298-99 (1984) (holding that National Park Service regulation prohibiting camping in certain parks did not violate First Amendment).

<sup>36</sup> *Thornhill v. Alabama*, 310 U.S. 88, 101-03 (1940) (striking down state statute prohibiting picketing). *But see* *International Bhd. of Teamsters, Local 695 v. Vogt, Inc.*, 354 U.S. 284, 294-95 (1957) (picketing not protected if in furtherance of illegal activities).

<sup>37</sup> *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). The decision invalidated a state statute that ordered public school children to pledge allegiance to the flag daily. *Id.* The Court noted that "[s]ymbolism is a primitive but effective way of communicating ideas." *Id.* at 632. The Court decided that the Constitution will tolerate suppression of expression only when the expression presents a "clear and present danger" of action that the state is empowered to prevent and punish. *Id.* at 633. The dissent in *Barnette* urged a lower standard of review, stating that the Court should not second guess the states by "mak[ing] psychological judgments as to the effectiveness of a particular symbol in (inculcating) concededly indispensable feelings . . ." *Id.* at 662 (Frankfurter, J., dissenting); cf. James R. Dyer, Comment, *Texas v. Johnson: Symbolic Speech and Flag Desecration Under the First Amendment*, 25 NEW ENG. L. REV. 895, 900-01 (1991). The author notes that the *Barnette* Court's likely, global awareness that fascist movements, especially the

Once the Court finds certain conduct to be expressive, however, the question remains whether that expressive conduct warrants First Amendment protection.<sup>39</sup> In *United States v. O'Brien*,<sup>40</sup> the defendant, who publicly burned his draft card, challenged a federal statute<sup>41</sup> prohibiting the destruction or the mutilation of a Selective Service certificate.<sup>42</sup> O'Brien argued that his actions were expressive in nature and therefore protected by the First Amendment.<sup>43</sup> The Court set forth a four-part test to determine whether a statute unconstitutionally prohibits expressive conduct.<sup>44</sup> In order to pass constitutional muster, the statute must be within the constitutional power of the state; it must further a substantial governmental interest; it must be unrelated to the suppression of free expression; and, any incidental restrictions on First Amendment freedom in furtherance of the governmental interest must not be greater than those which are essential.<sup>45</sup> The *O'Brien* Court applied the test to determine whether the federal statute was constitutional after the Court preliminarily determined that burning a draft card had a sufficiently "expressive element."<sup>46</sup> The Court held that the government's interests were sufficient to justify the prohibition of such conduct.<sup>47</sup>

Nazis in Germany, were characterized by their creation of flags and passed laws commanding behavior with regard to those flags, may have influenced the decision. *Id.*

<sup>38</sup> *United States v. O'Brien*, 391 U.S. 367, 376 (1968) (government interest in Selective Service efficiency precluded First Amendment protection for burning of draft card).

<sup>39</sup> See Srikanth Srinivasan, *Incidental Restrictions of Speech and the First Amendment: A Motive Based Rationalization of the Supreme Court's Jurisprudence*, 12 CONST. COMMENT. 401, 401-02 (1995). The Court has not established a blanket rule concerning the speech restrictive effect of incidental restraints. *Id.* at 403-05. "[T]he First Amendment implications of incidental restraints apparently depend upon the character of the activity that 'draws' the law's application in any particular case: Only if [enforcement of the speech-restrictive provision] trigger has 'a significant expressive element' does the law raise First Amendment concern." *Id.* at 409 (quoting *Arcara v. Cloud Books*, 478 U.S. 697, 706-07 (1986)).

<sup>40</sup> 391 U.S. at 367.

<sup>41</sup> Universal Military Training and Service Act, § 12, 50 U.S.C.A. App. § 462(b) (West 1990).

<sup>42</sup> *O'Brien*, 391 U.S. at 369-70.

<sup>43</sup> *United States v. O'Brien*, 391 U.S. 367, 370 (1968).

<sup>44</sup> *Id.* at 376-77.

<sup>45</sup> *O'Brien*, 391 U.S. at 377.

<sup>46</sup> *Id.* at 376.

<sup>47</sup> *Id.* at 377-78. The government's interest in keeping records and organizing an efficient draft outweighed the incidental restriction on speech. *Id.* at 377-82. The Court concluded that the law was aimed at non-speech conduct, but destruction of a draft card seems inherently expressive. See Laurence H. Tribe, *The Mystery of Motive, Private and Public: Some Notes Inspired by the Problems of Hate Crime and Animal Sacrifice*, 1993 SUP. CT. REV. 1, 34. Professor Tribe suggest that violations of a ban on draft card destruction will almost

The *O'Brien* Court acknowledged that the First Amendment does not protect all forms of expressive conduct.<sup>48</sup> Courts must apply the *O'Brien* test to identify those statutes which violate protected First Amendment rights.<sup>49</sup> In practice, the *O'Brien* test has become two pronged. First, the Court determines whether the statute is content-neutral or content-based.<sup>50</sup> This distinction depends upon the statute's relation to the suppression of expression.<sup>51</sup> If, however, the statute is deemed content-based it usually will trigger the implementation of a strict scrutiny standard of constitutional review.<sup>52</sup> If the statute is deemed content-neutral, it will provoke a lower level of constitutional review.<sup>53</sup>

Therefore, the paramount issue underlying the flag desecration controversy is whether flag desecration, an act that the Court has repeatedly deemed expressive and deserving of First Amendment protection, is sufficiently special to warrant an exception to the protection granted by the First Amendment.<sup>54</sup>

always be expressive, except for the "odd soul who burns a draft card just to stay warm or to light up his campsite." *Id.*

<sup>48</sup> United States v. *O'Brien*, 391 U.S. 367, 376 (1968).

<sup>49</sup> *Id.*

<sup>50</sup> See David R. Fine, Comment, *Symbolic Expression and the Rehnquist Court: The Lessons of the Peculiar Passions of Flag Burning*, 22 U. TOL. L. REV. 777, 783 n.32 (1991). If a statute is content-neutral it needs to pass only a deferential means-ends test. *Id.* If it is content-based it must pass strict First Amendment scrutiny." *Id.*; see also TRIBE, *supra* note 18, § 12-8, at 832-33. Professor Tribe agrees with this approach. *Id.*

<sup>51</sup> See generally Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 48-50 (1987) (describing various categories of speech recognized by Supreme Court); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 190-97 (1983) [hereinafter "*Content Regulation*"] (discussing distinction between content-based and content-neutral laws).

<sup>52</sup> See, e.g., *Turner Broadcasting v. F.C.C.*, 512 U.S. 622, 642, 657-61 (1994) (declining to apply strict scrutiny to broadcasting "must-carry" rules that are content-neutral); *Cary v. Brown*, 447 U.S. 455, 461-62 (1980) (carefully scrutinizing Illinois residential picketing statute); *Police Dep't v. Mosely*, 408 U.S. 92, 95 (1972) (carefully scrutinizing Chicago school picketing statute).

<sup>53</sup> See *Turner Broad.*, 512 U.S. at 662-68 (applying intermediate scrutiny to content-neutral statute); see also Stone, *Content Regulation*, *supra* note 51, at 190-94 (content-neutral regulations will be upheld if limitations on speech do not outweigh "substantial interests" of government and there is no less intrusive means available to government).

<sup>54</sup> See *The Supreme Court, 1988 Term—Leading Cases*, [hereinafter "*Leading Cases*"] 103 HARV. L. REV. 137, 249-50 (1989). The emotional reaction of the nation "reflects a deeper constitutional debate arising from alternative philosophical visions of the appropriate balance to be struck among competing first amendment values." *Id.* at 250; see also Greenawalt, *supra* note 6, at 943-44 (suggesting that flag should enjoy exception from First Amendment scrutiny). But see *id.* at 944-46 (asserting five interests in preserving the right to burn the flag: (1) preserving the right to burn the flag reflects our commitment to free speech; (2) protecting the symbol weakens its symbolic value; (3) attaching a "nonrational reverence" to the flag subjects us to manipulation by those who control it; (4) venerating the flag may cause reverence for it to become a substitute for critical thought about govern-

### III. Flag Desecration as Expressive Conduct

Between 1959 and 1974, the Court was presented with three occasions to address the issue of flag desecration.<sup>55</sup> In each instance, the Court invalidated the state's flag desecration or misuse statute on narrow grounds without directly addressing whether flag desecration constituted symbolic speech protected by the First Amendment.<sup>56</sup>

The first case was *Street v. New York*.<sup>57</sup> Street had publicly burned an American flag upon learning of the murder of civil rights activist James Meredith.<sup>58</sup> Street was convicted under a New York statute which declared it a misdemeanor to "publicly mutilate, deface, defile, or defy, trample upon, or cast contempt upon either by words or act [any flag of the United States]."<sup>59</sup> By declaring the statute invalid on its face, the Court avoided the issue of whether flag burning was constitutionally protected speech.<sup>60</sup> The Court found that the wording of the statute allowed an offender to be punished for showing contempt for the flag by

ment policy; (5) allowing the flag to represent particular values may lead, or already have led, to those values being too highly regarded).

See Steven Chapman, *A Flag-Burning Amendment Would Singe Our Principles*, CHI. TRIB., Mar. 5, 1995, at 3. The Citizens Flag Alliance can cite only three incidents of flag burning since the last flag burning amendment was proposed in 1990. *Id.*; *Amendment Bid Revived on Flag Burning*, BOSTON GLOBE, May 25, 1995, at 10. Rep. John Conyers cites fewer than forty-five reported flag burnings in our history. *Id.*

<sup>55</sup> *Spence v. Washington*, 418 U.S. 405, 406 (1974) (per curiam) (improper use of flag to tape on peace sign); *Smith v. Goguen*, 415 U.S. 566, 566 (1974) (misuse of flag to sew flag patch into seat of pants); *Street v. New York*, 394 U.S. 576, 578 (1969) (burning of flag in protest of civil rights leader's murder).

<sup>56</sup> See *Spence*, 418 U.S. at 409-10 (applying full First Amendment analysis, but carefully limiting holding to display of altered flag); *Goguen*, 415 U.S. at 578-79 (reversing conviction because of vagueness of statute); *Street*, 394 U.S. at 585-88 (concluding Street may have been convicted solely on words and reversing); see also John Hart Ely, Comment, *Flag Desecration: A Case Study in the Roles and Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1482 (1975) (noting these three occasions which Court "on one narrow ground or another, has avoided definitively ruling on the constitutionality of the convictions for politically inspired destruction or alteration of the American flag"); Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 16-20 (1964) (critiquing Court's deference to Congress by making narrow decisions or avoiding controversial ones).

In *Spence*, *Smith* and *Street*, at least three justices dissented, foreshadowing the 5-4 split to come in *Texas v. Johnson*, 419 U.S. 397 (1989) and *United States v. Eichman*, 496 U.S. 310 (1990). See Sheldon H. Nahmod, *The Sacred Flag*, 66 IND. L.J. 511, 516 (1991) (discussing precedential foreshadowing of *Johnson*).

<sup>57</sup> 394 U.S. at 576; cf. *Halter v. Nebraska*, 205 U.S. 34, 45-46 (1907) (upholding Nebraska flag burning statute as constitutional before First Amendment was made applicable to states).

<sup>58</sup> *Street*, 394 U.S. at 578.

<sup>59</sup> *Id.* at 578 (citing N.Y. PENAL LAW § 1425(16)(d) (1909)).

<sup>60</sup> *Street v. New York*, 394 U.S. 576, 591 (1969).

either words or acts.<sup>61</sup> Thus, because the statute could be violated by the use of mere words, the Court struck it down as an overbroad limitation upon free speech.<sup>62</sup>

The Court revisited the flag desecration issue in *Smith v. Goguen*.<sup>63</sup> Goguen was convicted for publicly wearing an American flag sewn into the seat of his pants.<sup>64</sup> The Court again skirted the expressive conduct issue, instead holding that the statute under which Goguen was convicted was irreparably vague as to what constituted impermissible treatment of the flag.<sup>65</sup>

In *Spence v. Washington*,<sup>66</sup> the Court established a two-part test for identifying symbolic speech or expressive conduct worthy of constitutional protection.<sup>67</sup> The *Spence* test is used to determine if expressive conduct exists; while the *O'Brien* test is used to determine the level of scrutiny and the government interest to justify the statute. In *Spence*, the Court addressed the constitutionality of an improper use statute.<sup>68</sup> Spence affixed a peace symbol to an American flag and draped it outside his apartment window in protest of the United States' invasion of Cambodia and the Kent State killings.<sup>69</sup> First, the Court examined the actor's intent to communicate a particular message, and then, given the circumstances surrounding the conduct, the probability that the intended message would be understood by those present to receive it.<sup>70</sup> The Court found the appellant's message to be particularized and recognizable, and consequently held his conduct to be within the scope of First Amendment protection.<sup>71</sup>

<sup>61</sup> *Id.* at 581.

<sup>62</sup> *Street*, 394 U.S. at 590. The Court also rejected the argument that such words could constitute "fighting words." *Id.* at 592.

<sup>63</sup> 415 U.S. 566 (1974).

<sup>64</sup> *Id.* at 568-69. The statute punished "[w]hoever publicly mutilates, tramples upon, defaces or treats contemptuously the flag of the United States . . . whether such flag is public or private property . . ." *Id.* (quoting MASS. GEN. L. ch. 264, § 5 (Supp. 1973)).

<sup>65</sup> *Id.* at 567-68, 579. This vagueness was primarily found in the "treats contemptuously" language of the statute. *Id.* at 569.

<sup>66</sup> 418 U.S. 405 (1974) (per curiam).

<sup>67</sup> *Id.* at 414.

<sup>68</sup> *Id.* at 406-07 (citing Washington Improper Use Statute, WASH. REV. CODE § 9.86.020) (1970).

<sup>69</sup> *Id.* at 405, 407-08. Here, the flag was not destroyed or desecrated, but rather it was "misused." *Id.* at 407. The defendant used tape to affix the symbol, specifically to avoid permanent injury to the flag. *Id.* at 408.

<sup>70</sup> *Id.* The Court found Washington's "improper use" statute unconstitutional as it applied to the petitioner, because he intended to convey a particularized message which, under the circumstances, was likely to be understood by those who viewed it. *Id.* at 410-11.

<sup>71</sup> *Spence v. Washington*, 418 U.S. 405, 415 (1974) (per curiam).

#### IV. Flag Burning Cases

Until 1989, lower courts were divided over the constitutionality of flag protection statutes.<sup>72</sup> In 1989, however, the Supreme Court squarely addressed the issue in *Texas v. Johnson*.<sup>73</sup> By the time the Court heard *Johnson*, forty-eight states<sup>74</sup> and Congress<sup>75</sup> had enacted statutes criminalizing flag desecration.

In *Johnson*, the defendant was charged with violating Texas' "Desecration of a Venerated Object" law<sup>76</sup> which deemed it a mis-

<sup>72</sup> See Fine, *supra* note 50, at 781-82 (citing examples of lower court inconsistencies). Compare *United States v. Crosson*, 462 F.2d 96 (9th Cir. 1972) (upholding flag-burning conviction), *cert. denied*, 409 U.S. 1064 (1972); *Iowa v. Farrell*, 223 N.W.2d 270 (Iowa 1974) (same), *dismissed*, 421 U.S. 1007 (1975), with *Bowles v. Jones* 758 F.2d 1479 (11th Cir. 1985) (overturning conviction for flag burning); *Johnson v. State*, 755 S.W.2d 92 (Tex. Crim. App. 1988) (same); see also *Radich v. New York*, 401 U.S. 531, 531 (1971) (avoiding First Amendment issue and affirming on lower court's finding of substantial governmental interest in preserving peace); *Halter v. Nebraska*, 205 U.S. 34, 45-46 (1907) (upholding state statute prohibiting use of flag for advertising purposes).

<sup>73</sup> 491 U.S. 397 (1989); see Greenawalt, *supra* note 6, at 927 (questioning Court's choice of *Johnson*, which had attracted little attention, to reverse its prior course of issue avoidance, and commenting on relatively trivial nature of case because flag burning incidents are so rare); Tiefer, *supra* note 6, at 362 n.22 (noting dearth of amicus briefs, including none by United States, despite potential implications of decision).

<sup>74</sup> See, e.g., ARIZ. REV. STAT. ANN. § 13-3703 (1989); ARK. STAT. ANN. § 5-51-207 (1990); CAL. MIL. & VET. CODE § 614 (Deering 1990); COLO. REV. STAT. § 18-11-204 (1990); DEL. CODE ANN. tit. 11 § 1331 (1990); FLA. STAT. § 876.52 (1989); GA. CODE ANN. § 50-3-9 (1990); HAW. REV. STAT. § 711-1107 (1990); IDAHO CODE § 18-3401 (1990); ILL. REV. STAT. ch. 1, ¶ 3351 (1988); IND. CODE ANN. § 35-45-1-4 (Burns 1990); IOWA CODE § 32.1 (1989); KAN. CRIM. CODE ANN. § 21-4111 (Vernon 1988); KY. REV. STAT. ANN. § 525.110 (Baldwin 1988); LA. REV. STAT. ANN. § 116 (West 1989); MD. ANN. CODE art. 27, § 83 (1989); MASS. ANN. LAWS ch. 264, § 5 (Law. Co-op. 1990); MISS. CODE ANN. § 97-7-39 (1990); MO. REV. STAT. § 578.095 (1989); MONT. CODE ANN. § 97-7-39 (1990); NEB. REV. STAT. § 28-928 (1989); NEV. REV. STAT. ANN. § 201.290 (Michie 1989); N.M. STAT. ANN. § 30-21-4 (1990); N.Y. GEN. BUS. LAW § 136 (McKinney 1990); N.C. GEN. STAT. § 14-381 (1990); OHIO REV. CODE ANN. § 2927.11 (Baldwin 1990); 18 PA. CONS. STAT. § 2102 (1988); R.I. GEN. LAWS § 11-15-2 (1989); S.D. CODIFIED LAWS ANN. § 22-9-1 (1990); TEX. PENAL CODE ANN. § 42.14 (Vernon 1989); UTAH CODE ANN. § 76-9-601 (1990); VA. CODE ANN. § 18.2-488 (1990); WASH. REV. CODE § 9.86.030 (1990); W. VA. CODE § 61-1-8 (1990); WIS. STAT. § 946.05 (1988); see also Fine, *supra* note 50, at 780 n.13. These state laws have not been repealed, though an attempt to enforce them would likely be held unconstitutional under *Johnson* and *Eichman*. *Id.*

Five of the states retaining their flag desecration laws still include as protected the flag of the Confederate States of America. See ARK. STAT. ANN. § 1-5-107 (1990); FLA. STAT. § 256.051 (1989); GA. CODE ANN. § 50-3-9 (1990); LA. REV. STAT. ANN. § 116 (West 1989); MISS. CODE ANN. § 97-7-39 (1990). See generally Albert M. Rosenblatt, *Flag Desecration Statutes: History and Analysis*, 1972 WASH. U. L.Q. 193, 193-237 (discussing state flag desecration statutes and how courts have applied them).

<sup>75</sup> 18 U.S.C. § 700 (1979); see also NATIONAL FLAG CODE, ch. 435, § 1-5, 56 Stat. 377 (1942) (codified as amended at 36 U.S.C. § 173-77 (1988)) (codifying flag etiquette).

<sup>76</sup> TEX. PENAL CODE ANN. § 42.09 (Vernon 1974). Before amendment the Texas statute provided:

(a) A person commits an offense if he intentionally or knowingly desecrates:

- (1) a public monument;
- (2) a place of worship or burial; or
- (3) a state or national flag.

demeanor to "desecrate" the flag in a manner likely to "seriously offend" onlookers.<sup>77</sup> Johnson had burned an American flag during the Republican National Convention to protest the agenda of President Ronald Reagan's administration,<sup>78</sup> while approximately one hundred other protesters chanted, "America, the red, white and blue, we spit on you."<sup>79</sup>

First, the Court questioned whether flag burning constituted "expressive conduct"<sup>80</sup> sufficient to constitute speech and invoke First Amendment protection.<sup>81</sup> Applying the test set forth in *Spence*,<sup>82</sup> the Court questioned whether Johnson intended to particularize a message, and whether that message was likely to be understood.<sup>83</sup> The majority, weighing heavily the overtly political context of the burning, found that First Amendment expression rights were indeed at issue.<sup>84</sup>

Next, the Court balanced the interests of the state against the rights of the individual.<sup>85</sup> Applying the *O'Brien* test,<sup>86</sup> the Court

(b) For purposes of this section, "desecrate" means 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.

(c) An offense under this section is a Class A misdemeanor.

*Id.* After *Johnson*, the legislature slightly amended the law. See TEX. PENAL CODE ANN. § 42.14 (Vernon 1989).

<sup>77</sup> TEX. PENAL CODE ANN. § 42.09 (Vernon 1974); see *Johnson*, 491 U.S. at 408. Several witnesses testified that they were seriously offended by Johnson's act. *Id.*; Nahmod, *supra* note 56, at 516 n.30. The author asserts that even though the Texas statute was based upon offense to others, it is doubtful that a flag statute could ever be content-neutral or viewpoint-free. *Id.* The criterion of offense to others makes the desecration non-private in nature. *Id.* at 517 n.34.

<sup>78</sup> *Texas v. Johnson*, 491 U.S. 397, 399 (1989).

<sup>79</sup> *Id.* Following the burning, an Army Corps of Engineers employee collected the ashes and buried them quietly in his backyard. *Id.*

<sup>80</sup> *Id.* at 404, 409-10. The Court examined *Spence v. Washington*, 481 U.S. 405 (1974) and *Stromberg v. California*, 238 U.S. 347 (1915). *Id.* The Court also noted that symbols are "a short cut to the mind." *Id.* at 405 (quoting *West Virginia v. Barnette*, 319 U.S. 624, 632 (1943)).

<sup>81</sup> *Johnson*, 491 U.S. at 403; see *United States v. O'Brien*, 391 U.S. 367, 377 (1968) (discussing First Amendment protection of expressive conduct).

<sup>82</sup> 418 U.S. 405 (1974).

<sup>83</sup> *Texas v. Johnson*, 491 U.S. 397, 405-06 (1989).

<sup>84</sup> *Id.*; cf. Nina Kraut, *Speech: A Freedom in Search of One Rule*, 12 T.M. COOLEY L. REV. 177, 186 (1995). Professor Kraut would have taken Justice Holmes' "single rule" approach to First Amendment protection. *Id.* She suggests that under the "single-rule" theory, once the Court deemed Johnson's flag burning activity to be expressive and worthy of protection under the free speech clause, the Court simply could have focused on whether Texas' interest was sufficient to infringe upon Johnson's choice of medium. *Id.* at 188. Professor Kraut believes that if this theory were implemented, the Court's discussion would have been more economical and effective, thereby eliminating discussion of "content-based or neutral, or viewpoint-based or neutral." *Id.* at 189, 192.

<sup>85</sup> *Johnson*, 491 U.S. at 407; see *O'Brien*, 391 U.S. at 377. Under the *O'Brien* test, a government regulation is sufficiently justified if it fits within the constitutional power of

examined Texas' asserted justifications for the statute, namely keeping the peace and preserving the flag as a symbol of American unity.<sup>87</sup> The Court found neither actual danger<sup>88</sup> nor threat of a breach of the peace in the petitioner's conduct, because it was neither "directed to inciting or producing" nor "likely to incite or produce" imminent violence.<sup>89</sup> The majority summarily rejected the government's contention that burning the flag constituted "fighting words," an unprotected category of speech.<sup>90</sup> The Court found that Johnson's act was neither a direct, personal insult nor

the government, furthers an important or substantial governmental interest unrelated to the suppression of free expression, and the incidental infringement upon the individual's first amendment rights is minimal. *Id.* But see FRANKLYN S. HAIMAN, "SPEECH ACTS" AND THE FIRST AMENDMENT 18 (1993). Haiman criticizes the Court's use of the *O'Brien* test in cases where individuals burn their own flags. *Id.* He claims the act "is as much speech and as little action as an oration or an editorial verbally condemning the flag." *Id.* Therefore, he contends, "the conduct, though nonverbal, is essentially symbolic and [ ] the same First Amendment tests that are used in cases of verbal communication should apply." *Id.*; Ely, *supra* note 56, at 1487. Ely argues that, in *O'Brien*, the government kept its own records and, therefore, its interest in having individuals carry draft cards was insubstantial. *Id.*

<sup>86</sup> *United States v. O'Brien*, 391 U.S. 367, 377 (1968); see *Johnson*, 491 U.S. at 407. Under the third criterion of the test, the *Johnson* Court inquired as to whether the state interest in convicting was "unrelated to the suppression of expression." *Id.*

<sup>87</sup> *Texas v. Johnson*, 491 U.S. 397, 407 (1989).

<sup>88</sup> *Id.* at 409 (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969) (requiring that "actual danger" be created by expressive conduct for such conduct to be unprotected)).

<sup>89</sup> *Texas v. Johnson*, 491 U.S. at 409 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 574 (1942)).

<sup>90</sup> *Johnson*, 491 U.S. at 409. The Court narrowly construed its view of "fighting words" to "a direct personal insult or an invitation to exchange fisticuffs." *Id.* See generally, TRIBE, *supra* note 18, § 12-10, at 849-56. The Court decided that flag burning did not constitute "fighting words" so as to fall outside First Amendment protection. *Id.* But see *Johnson*, 491 U.S. at 431 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist asserted that burning the flag is akin to "fighting words" because of its slight social value. *Id.*

In addition, they rejected the state's argument under the "hostile audience" doctrine. *Id.* Under this doctrine, the state may punish speech only if it presents a "clear and present danger" of an imminent, violent audience response. *Id.*; see *Feigner v. New York*, 340 U.S. 315, 320-21 (1951) (addressing directly issue of hostile audience and upholding arrest as effort to prevent threatened violent reaction of audience); *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940) (reversing convictions for breach of peace where there was no record of threat of harm or personal abuse); *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (arguing that "[o]nly an emergency can justify repression"). See generally ARYEH NEIER, *DEFENDING MY ENEMY: AMERICAN NAZIS, THE STOKIE CASE, AND THE RISKS OF FREEDOM* 123-24, 141-42 (discussing "clear and present" danger test in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), and its subsequent application); JOHN E. NOWAK & RONALD D. ROTUNDA *CONSTITUTIONAL LAW* §§ 16.39-16.40 (4th ed. 1991) (tracing development of hostile audience doctrine and subsequent cases possibly overruling *Feigner*); GEOFFREY R. STONE, ET AL., *CONSTITUTIONAL LAW* 1025-1040 (1991) (discussing dangerous ideas and expressions that induce unlawful conduct); *Flag Burning*, *supra* note 6, at 115-16 (distinguishing *Johnson* situation from one in which narrow "hostile audience" doctrine would apply).



an invitation to engage in physical confrontation and, therefore, it did not constitute "fighting words."<sup>91</sup>

Because it was aimed at protecting the physical integrity of the flag in situations involving expressive conduct, the Court deemed the Texas statute content-based and subjected it to strict scrutiny.<sup>92</sup> The Court found the state's asserted interest in preserving national unity insufficient to satisfy the strict scrutiny standard.<sup>93</sup> Thus, the Court struck down the statute.<sup>94</sup>

The four dissenting Justices asserted that the act of flag burning was non-expressive.<sup>95</sup> Instead of applying the *O'Brien* test and waging war on the First Amendment analysis of the majority, the dissenters examined the flag as a unique, patriotic symbol.<sup>96</sup> Chief Justice Rehnquist, joined by Justices White and O'Connor, cited Ralph Waldo Emerson's "Concord Hymn," Francis Scott Key's

<sup>91</sup> *Johnson*, 491 U.S. at 409. "No reasonable onlooker would have regarded Johnson's generalized expression of dissatisfaction with the policies of the Federal Government as a direct insult or an invitation to exchange fisticuffs." *Id.*; cf. *Cohen v. California*, 403 U.S. 15, 16 (1971) (refusing to extend state power to limit "indecent speech" to punish person for publicly wearing jacket inscribed with "Fuck the Draft"); *Collin v. Smith*, 578 F.2d 1197, 1199 (7th Cir.) (striking down Skokie, Illinois village ordinance which prohibited all public demonstrations which "incite violence, hatred, abuse or hostility toward a person or group of persons by reason of reference to religious, ethnic, national or racial affiliation"), cert. denied, 439 U.S. 916 (1978). See generally LEE C. BOLLINGER, *THE TOLERANT SOCIETY* 31-32, 179-81, 197-200 (1986) (discussing fighting words issue in *Chaplinsky*, *Collin* and *Cohen*); NEIER, *supra* note 90, at 52-53, 137-39, 141-42 (same).

<sup>92</sup> *Texas v. Johnson*, 491 U.S. 397, 411 (1989). The majority believed that the exemption for burners of old and soiled flags made the statute content-based. *Id.*; see 36 U.S.C. § 176(k). "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." *Id.*

<sup>93</sup> See *Boos v. Barry*, 485 U.S. 312, 320-21 (1988) (stating that when laws that place restrictions on expression cannot "be justified without reference to the content of the regulated speech," they are to be subjected to "the most exacting scrutiny" (quoting *Virginia Pharmacy Bd. v. Virginia Citizen's Consumer Council, Inc.*, 425 U.S. 748, 771 (1978))); see also *Carey v. Brown*, 447 U.S. 455, 461-62 (1980) (scrutinizing carefully Illinois residential picketing statute); *Police Dep't of Chicago v. Mosely*, 408 U.S. 92, 95-96 (1972) (stating that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content").

<sup>94</sup> *Texas v. Johnson*, 491 U.S. 397, 414. The Court declared, "[w]e do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents." *Id.* at 420. The Court noted that Texas could have charged Johnson, who had stolen from a bank the flag he burned, with a crime other than flag desecration. *Id.* at 418.

<sup>95</sup> *Id.* at 430-32 (Rehnquist, C.J., dissenting) (labeling Johnson's act "equivalent of an inarticulate grunt or roar that . . . is most likely to be indulged in not to express an idea, but to antagonize others").

<sup>96</sup> *Id.* at 422-23 (Rehnquist, C.J., dissenting) (focusing on flag as unique symbol worthy of special protection); *Id.* at 436 (Stevens, J., dissenting) (same). See generally Fine, *supra* note 50, at 790 (comparing majority's focus on state interests and First Amendment with minority's focus on flag as unique symbol); James McBride, "Is Nothing Sacred?": *Flag Desecration, the Constitution and the Establishment of Religion*, 65 ST. JOHN'S L. REV. 297, 311-14 (1991) (noting that majority and dissenters in *Johnson* utilized different approaches).

"Star Spangled Banner," and John Greenleaf Wittier's "Barbara Friechie" in an effort to convey their strong feelings for the flag.<sup>97</sup> Moreover, Chief Justice Rehnquist justified the Texas statute by invoking the flag's historical strength in times of both war<sup>98</sup> and peace.<sup>99</sup> Further, the Chief Justice asserted that the flag should be protected because of its "uniqueness," arguing that the United States possessed a private property right in the flag.<sup>100</sup> He urged that the United States government has the power to prevent conduct that has no social value and, like fighting words, can incite breaches of the peace.<sup>101</sup> Rehnquist also pointed to the Framers' intent to protect the flag, not merely for its symbolic value, but for

<sup>97</sup> *Texas v. Johnson*, 491 U.S. 397, 422-25, 429 (1989) (Rehnquist, C.J., dissenting). The Chief Justice saw the flag as a "visible symbol embodying our Nation" regarded "with an almost mystical reverence." *Id.* at 429. *But see* Robert J. Goldstein, *The Great Flag Flap*, 45 U. MIAMI L. REV. 19, 36-37 (1990) (providing various indications of lack of passion for flag); Arnold H. Loewy, Essay, *The Flag Burning Case: Freedom of Speech When We Need It Most*, 68 N.C. L. REV. 165, 169 (1989) (sarcastically attacking Chief Justice Rehnquist's sentimentalism).

<sup>98</sup> *Johnson*, 491 U.S. at 425-26; *see* Tiefer, *supra* note 6, at 374-76 (illustrating importance of flag from Civil War era to as recently as reflagging of Kuwaiti tankers in 1987).

<sup>99</sup> *Texas v. Johnson*, 391 U.S. 397, 426-27. *But see* Greenawalt, *supra* note 6, at 938 (arguing that Chief Justice Rehnquist's property and sovereignty arguments quickly became argument for government to possess power to preserve flag as symbol).

<sup>100</sup> *Johnson*, 491 U.S. at 429-30. (Rehnquist, C.J. dissenting) (arguing that if Congress has power to license words such as "Olympic," it can award congressional protection to symbols as well) (citing *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522 (1987)). *See generally* Dyer, *supra* note 37, at 916 (discussing *Johnson* dissents and "mystical reverence" for flag in American thinking). *But see* Ely, *supra* note 56, at 1505. "The cloth, in such a case, is surely the disfigurer's alone. And while the ideas it represents just as surely are not, neither are they the exclusive property of the government." *Id.*; Dilan A. Esper, *Some Thought on the Puzzle of State Action*, 68 S. CAL. L. REV. 663, 676 n.65 (1995). "If the Court subjected private conduct to serious constitutional scrutiny, large holes might be punched through important constitutional guarantees by amendment." *Id.*

<sup>101</sup> *Johnson*, 491 U.S. at 430-31 (Rehnquist, C.J., dissenting). Justice Rehnquist argued for "fighting words" treatment of flag burning, a distinction that would remove such conduct from the First Amendment's protections. *Id.* at 431. He stated that, like Chaplinsky's provocative words, Johnson's conduct is "no essential part of any exposition of ideas, and [is] of such slight social value as a step to truth that any benefit that might be derived from [it] is clearly outweighed" by the public interest in avoiding a probable breach of the peace." (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)). *Id.*; *see* Eric J. Segall, *The First Amendment in a Justice Rehnquist World*, 44 DEPAUL L. REV. 825, 826 n.8 (1995). The author notes that Justice Rehnquist was the only member of the Court to vote both to uphold the anti-flag burning law, and, in another case, to strike down an anti-hate speech law on the basis that a state cannot prohibit only race-based fighting words. *Id.* In Rehnquist's world, the states could legally outlaw flag burning as a means of demonstrating political disapproval, but they could not prohibit the burning of a cross demonstrating racial hatred. *Id.* at 826.

its practical uses.<sup>102</sup> Finally, the Chief Justice asserted that the Court's decision ran contrary to the will of the majority.<sup>103</sup>

Justice Stevens, in a separate dissent, joined in the uniqueness argument of Chief Justice Rehnquist but, in addition, he focused on Johnson's conduct.<sup>104</sup> Justice Stevens believed that the Texas statute penalized Johnson not for his "disagreeable ideas," but for his "disagreeable conduct."<sup>105</sup> He compared Johnson's conduct to spray-painting the Lincoln Memorial.<sup>106</sup> Commentators have noted, however, that this analogy failed to address the obvious difference in ownership of a public monument and a private flag.<sup>107</sup> The First Amendment was safe, but not for long.

## V. THE AFTERMATH OF *JOHNSON*

The American public was outraged by the *Johnson* decision.<sup>108</sup> Immediately following the decision, more than seventy percent of Americans polled favored a constitutional amendment to set aside

<sup>102</sup> *Texas v. Johnson*, 491 U.S. 379, 422 (1989) (Rehnquist, C.J., dissenting) (citing historical importance of flag for identifying trade and war ships); see also, e.g., Tiefer, *supra* note 6, at 368-72. During the American Revolution, American vessels sailed under an authorized national flag. *Id.* at 369. The establishment of the Navy was closely tied to establishing and protecting that sovereign flag. *Id.* at 370.

<sup>103</sup> *Johnson* 491 U.S. at 435 (Rehnquist, C.J., dissenting). See generally *Leading Cases*, *supra* note 54, at 253-59. The author's argument initially supports Rehnquist's dissent in that, under a communitarian view, self-fulfillment in society "depends upon an ability to participate fully as a member" of certain groups, and the government's function is to aid the groups, not individuals, in their development. *Id.* at 254-55. However, to be an "American," one would certainly have to embrace "American values," one of which is certainly respect for the First Amendment. *Id.* at 258.

<sup>104</sup> *Texas v. Johnson*, 491 U.S. 397, 438 (1989) (Stevens, J., dissenting).

<sup>105</sup> *Johnson*, 491 U.S. at 436 (1989) (Stevens, J., dissenting). Stevens believed that the content of Johnson's message was irrelevant. *Id.* at 438. Instead, Justice Stevens focused on "whether those who view the *act* will take serious offense." *Id.*; see Dyer, *supra* note 37, at 918-19. The author notes Justice Stevens' argument that Texas' statute was content-neutral and Johnson's message was irrelevant. *Id.*; Fine, *supra* note 50, at 791-93. Fine concludes that Johnson's mode of conveyance was offensive aspect. *Id.* But see Greenawalt, *supra* note 6, at 929-30. Greenawalt asserts that Johnson's conduct easily met the *Spence* requirement because the "burning of a revered symbol antagonized, but it also communicated a strong message." *Id.*

<sup>106</sup> *Johnson*, 491 U.S. at 438 (Stevens, J., dissenting) (comparing flag burning with vandalizing government monument).

<sup>107</sup> See McBride, *supra* note 96, at 308 (noting that, in analyzing "intangible dimension" of flag, neither dissent acknowledged that monument is not owned by defacer as flag often is owned by burner).

<sup>108</sup> See, e.g., Michelle Battle, *Poll: 69% Want Flag Protected*, USA TODAY, June 23, 1989, at 1A (illustrating vast public support for flag burning amendment); Tamar Jacoby, *A Fight for Old Glory: The Supreme Court Rules that Flag-Burning is Not a Crime—Sparking Outrage Across the Nation*, NEWSWEEK, July 3, 1989, at 18 (noting that, in response to poll asking "[w]ould you support a new constitutional amendment that would make flag-burning illegal?" 71% said "yes," and 24% said "no").

the Court's decision.<sup>109</sup> President Bush declared that the Court had erred in its decision and recognized the need for a constitutional amendment to protect the flag.<sup>110</sup>

Congress attempted to pass such an amendment to override the Court's decision.<sup>111</sup> The proposed amendment would have provided Congress with the power to prohibit the physical desecration of the flag.<sup>112</sup> Exactly one year after *Johnson*, however, the amendment failed in the House of Representatives,<sup>113</sup> negating the need for Senate consideration.<sup>114</sup> Nevertheless, the Senate, choosing to vote on the amendment anyway, also failed to obtain the requisite two-thirds majority.<sup>115</sup>

<sup>109</sup> See Jacoby, *supra* note 108, at 18 (reporting that Newsweek Poll by Gallup showed 71% of public supported amendment protecting flag).

<sup>110</sup> See BERNSTEIN & AGEL, *supra* note 2, at 191 (stating that, although he insisted upon necessity of amendment, President Bush signed Flag Protection Act of 1989 into law); John Dillin, *Bush's Call Sparks Ardent Debate: Defenders of Old Glory Undermine First Amendment Guarantees, Cautious Voices Warn*, CHRISTIAN SCI. MONITOR, July 6, 1989, at 8 (noting President Bush's belief that flag burning amendment as worded protected flag while preserving "widest conceivable range of options for free expression").

<sup>111</sup> See Tom Kenworthy, *Flag Amendment Fails in Decisive House Vote; Year-Long Fight on Desecration Put to Rest*, WASH. POST, June 22, 1990, at A1. This article reports that in response to *Johnson*, the House held an emotionally charged seven hour debate concerning amendment. *Id.* Criticism of Congress' attempts to override Supreme Court decisions followed. See generally Paul Brest, *Congress as a Constitutional Decisionmaker and its Power to Counter Judicial Doctrine*, 21 GA. L. REV. 57, 98-100 (1986). Professor Brest favors the independent Judiciary to "legislators who are most intimately involved in the decision-making process [and] often have publicly committed themselves to a particular position . . . ." *Id.* at 100; David L. Faigman, *By What Authority?: Reflections on the Constitutionality and Wisdom of the Flag Protection Act of 1989*, 17 HASTINGS CON. L. Q. 353, 353-54 (1990). Faigman points to Congress' timidity, irresolute vision and lack of integrity. *Id.*; Greenawalt, *supra* note 6, at 927. Greenawalt feels that the obsession about flag burning panders to an uninformed public and reflects cowardice in confronting hard problems. *Id.* But see Tiefer, *supra* note 6, at 359. As Deputy General Counsel to the Clerk of the U.S. House of Representatives, Tiefer commends the self-restraint demonstrated by Congress, and defends Congress' vital role in constitutional issues. *Id.*

<sup>112</sup> See S.J. Res. 332, 101st Cong., 2d Sess., 136 CONG. REC. S8632 (1990). The text of the proposal provided: "The Congress and the States shall have the power to prohibit the physical desecration of the flag of the United States." *Id.*

<sup>113</sup> See 136 CONG. REC. S8632 (1990) (statement of Sen. Biden) (noting that on June 21, 1990, by vote of 254 in favor and 177 against, amendment failed in House by only 34 votes); see also Harvey, *supra* note 27, at A1 (embracing arguments of Democratic leaders and despite last minute lobbying by President Bush, House refused to erode free-speech protection of Bill of Rights for first time); Steven A. Holmes, *Amendment to Bar Flag Desecration Fails in the House*, N.Y. TIMES, June 22, 1990, at A1 (documenting vote); Kenworthy, *supra* note 111, at A01 (reporting that House vote followed emotional seven-hour debate).

<sup>114</sup> See Tiefer, *supra* note 6, at 365-66 (discussing debate before vote in Senate as to whether constitutional amendment or more carefully constructed federal statute was required to override Supreme Court's decision).

<sup>115</sup> See 136 CONG. REC. S8693-04 (1990); see also Tiefer, *supra* note 6, at 378 (noting that Senate rejected amendment by only 58 to 42 margin).

In response to the Supreme Court's declaration that flag desecration statutes violate the First Amendment,<sup>116</sup> Congress passed the Flag Protection Act of 1989.<sup>117</sup> In an effort to get away from the expressive element of the Act, Congress replaced "casts contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it shall be fined not more than \$1,000 . . ." with "mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States shall be fined under this title . . ."<sup>118</sup> The drafters of the Act sought to avoid implicating the First Amendment by removing the focus on offensive, communicative conduct from the statute.<sup>119</sup> The Act was designed in part to avoid the content-based label, with hopes of swaying Justices Scalia and Ken-

<sup>116</sup> *Texas v. Johnson*, 491 U.S. 397, 418 (1989); see H.R. REP. NO. 101-231, 101st Cong., 1st Sess. 2 (1989); S. REP. NO. 101-152, 101st Cong., 1st Sess. 4 (1989), 1989 U.S.C.C.A.N. 612 (demonstrating legislative history of this responsive action). See generally *Hearings on Measures to Protect the Physical Integrity of the American Flag, Hearings Before the Comm. on the Judiciary, United States Senate*, 101st Cong., 1st Sess. 1-754; *Statutory and Constitutional Responses to the Supreme Court Decision in Texas v. Johnson, Hearings Before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary, House of Representatives*, 101st Cong., 1st Sess. 1-572 (1989).

<sup>117</sup> Pub. L. No. 101-131, 103 Stat. 777 (1989) (amending 18 U.S.C. § 700 (1988)). The Act provides in pertinent part:

(a)(1) Whoever knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States shall be fined under this title or imprisoned for not more than one year, or both.

(a)(2) This subsection does not prohibit any conduct consisting of the disposal of a flag when it has become worn or soiled . . . .

(b) As used in this section, the term 'flag of the United States' means any flag of the United States, or any part thereof, made of any substance, of any size, in a form that is commonly displayed.

18 U.S.C. § 700 (Supp. 1990).

<sup>118</sup> *Id.*

<sup>119</sup> See 18 U.S.C. § 700(a) (1988). The Act replaced the former flag-burning statute that prohibited, "knowingly cast[ing] contempt" upon any flag of the United States. *Id.*; *United States v. Eichman*, 496 U.S. 310, 314 n.3. (1990). In *Eichman*, the government contended that the new Act was constitutional because it did not target expressive conduct based on its content. *Id.* at 315. The Court, however, disagreed and found that the new statute was unconstitutional because it unnecessarily infringed upon First Amendment rights. *Id.* at 318; Katherine F. Rowe, *Visual Artists and the First Amendment; Moral Rights; Resale Royalties, in LAW AND BUSINESS OF ART 318* (PLI Pat., Copyrights, Trademarks, and Literary Prop. Course Handbook Series No. G4-3851, 1990). The author states that the Act attempts to delete all references to motive or to effect upon onlookers. *Id.*; S. Kathryn Spruill, Comment, *Old Glory and Flag Protection Legislation: Can Congress Wrap Itself in the Flag Without Getting Burned?*, 95 DICK. L. REV. 407, 416-17. The old Act applied regardless of whether the offender burned the flag out of disrespect or admiration, excluding only burning of, in compliance with tradition, worn flags. *Id.* See generally R. Neil Taylor III, Case-note, *The Protection of Flag Burning as Symbolic Speech and the Congressional Attempt to Overturn the Decision: Texas v. Johnson*, 58 U. CIN. L. REV. 1477, 1500-08 (1990) The author criticizes Professor Tribe's testimony at the Senate Judiciary Committee as lackluster. *Id.*; Tiefer, *supra* note 6, at 365-68. The author documents arguments made before House and Senate Judiciary Committees.

nedy to align with the *Johnson* dissenters.<sup>120</sup> In addition, unlike the Texas statute struck down in *Johnson*, the 1989 Act avoided the issue of offense to bystanders.<sup>121</sup>

The Act was tested immediately upon becoming law.<sup>122</sup> Within forty-eight hours of its enactment, individuals protesting various aspects of foreign and domestic policy and the Flag Protection Act of 1989, set fire to several American flags on the steps of the United States Capitol.<sup>123</sup> The Supreme Court addressed the First Amendment implications of the protestors in light of the Flag Protection Act. In *United States v. Eichman*,<sup>124</sup> the Supreme Court ruled that the Flag Protection Act was unconstitutional as it applied to those protestors.<sup>125</sup> Although the Court admitted that the government has a legitimate interest in preserving the flag's function as an "incident of sovereignty,"<sup>126</sup> the majority held that the Act was content-based and suppressed expression.<sup>127</sup> Although

<sup>120</sup> See *Johnson*, 491 U.S. at 420-21 (Kennedy, J., concurring). Justice Kennedy stated: And I agree that the flag holds a lonely place of honor in an age when absolutes are distrusted and simple truths are burdened by unneeded apologetics.

With all respect to those views, I do not believe the Constitution gives us the right to rule as the dissenting Members of the Court urge, however painful this judgment is to announce . . . . It is poignant but fundamental that the flag protects those who hold it in contempt.

*Id.* at 421; see also McBride, *supra* note 96, at 305 (stating that Act was allegedly "content neutral," and its enforcement did not "turn on communicative impact").

<sup>121</sup> 18 U.S.C. § 700 (Supp. 1990); see McBride, *supra* note 96, at 305 (stating that legislative history of Act illustrates that legislators took into account difference between bystanders' reaction and actor's intention).

<sup>122</sup> See David Cole, *Flagging Issue for Mr. Bush*, NAT'L L.J., Nov. 20, 1989, at 13 (noting that at 12:01 a.m. on day Act became law, *Johnson*, *Eichman* and others burned flag in New York, but were not arrested until they burned flag two days later in Washington, D.C.).

<sup>123</sup> *Eichman*, 496 U.S. at 312.

<sup>124</sup> 496 U.S. 310 (1990) (consolidating two cases challenging Act); see *United States v. Haggerty*, 731 F. Supp. 415 (W.D. Wash. 1990) (finding government interest in protecting flag insufficient to satisfy strict scrutiny test); *United States v. Eichman*, 731 F. Supp. 1123 (D.D.C. 1990) (finding Flag Protection Act unconstitutional), *aff'd*, 496 U.S. 310 (1990).

<sup>125</sup> *Eichman*, 496 U.S. at 319; see also *United States v. Eichman*, 731 F. Supp. 1123, 1125 (1990). Gregory Lee Johnson was among those arrested, but he was not charged because his flag failed to ignite. *Id.*; FACTS ON FILE, Nov. 17, 1989, at 862, B3. Johnson felt that dropping the charges against him was an act of "cowardice on the part of Bush and the administration." *Id.* Continuing the sentiments of *Johnson*, the Court stated that "[p]lunishing desecration of the flag dilutes the very freedom that makes this emblem so revered, and worth revering." *Id.*

<sup>126</sup> *Eichman*, 496 U.S. at 316 n.6 (noting "flag's 'historic function' for such sovereign purposes as marking 'our national presence'" (quoting Brief for Speaker and Leadership Group of U.S. House of Representatives as *Amicus Curiae* at 25)); see Tiefer, *supra* note 6, at 372-76. Professor Tiefer believes the Court was too quick to discard the original intent of the Framers. *Id.* at 373. "The Framers would have understood such sovereignty-related functions to require punishment for defiling the flag, based on English, early colonial, and late colonial precedents." *Id.* at 373-74 (citations omitted).

<sup>127</sup> *Eichman*, 496 U.S. at 315.

the asserted government interest was in the symbol of the flag,<sup>128</sup> because the Act provided for burning as "proper disposal," the Act only prohibited burnings expressing disapproval of the United States, the government, or the flag itself.<sup>129</sup> Thus, the Court held in both *Johnson* and *Eichman* that the First Amendment rights of free expression outweighed any governmental interest in preserving the flag as a national symbol.<sup>130</sup>

## VI. RENEWED INTEREST IN BANNING FLAG DESECRATION

The support for a flag desecration amendment has experienced a rebirth.<sup>131</sup> The latest proposed amendment reads: "The Congress and the States shall have the power to prohibit the physical desecration of the flag of the United States."<sup>132</sup> On June 28, 1995, the House voted 312 to 120 in support of the amendment.<sup>133</sup> On July 20, 1995, the Senate Judiciary Committee passed the measure by a vote of 12 to 6.<sup>134</sup> On December 13, 1995, however, the amendment fell three votes shy of the required two-thirds major-

<sup>128</sup> *Id.* at 317-18.

<sup>129</sup> *United States v. Eichman*, 496 U.S. 310, 317-18 (1990); see also David Dyroff, *Legislative Attempts to Ban Flag Burning*, 69 WASH. U. L.Q. 1023, 1027 (1991). Dyroff thinks that legislatures would be required to justify statutes with governmental purposes implicated by any burning, not only burning to express anti-U.S. views. But see *Eichman*, 496 U.S. at 321-22 (Stevens, J., dissenting). Joined by Chief Justice Rehnquist and Justices White and O'Connor, Justice Stevens felt that Congress had the power to impose the minor limitation on *Eichman* of removing one of the myriad methods of expression open to him. *Id.* at 322. He also believed the government had a legitimate interest in preserving the flag as a unique symbol. *Id.* at 321. The flag "uniquely symbolizes the ideas of liberty, equality, and tolerance—ideas that Americans have passionately defended and debated throughout our history. The flag embodies the spirit of our national commitment to those ideals." *Id.*

<sup>130</sup> See *Texas v. Johnson*, 491 U.S. 391, 418 (1989). The *Johnson* Court held that the government's interest in preserving this national symbol cannot justify the criminal punishment of political protestors. *Id.*; *Eichman*, 496 U.S. at 314 (1990). The *Eichman* Court concluded that the state interests asserted did not justify the infringement upon First Amendment rights. *Id.*; see also *Cary v. United States*, 498 U.S. 916, 916 (1990). *Cary* presented the Court with a final chance to alter its stance on the flag issue. *Cary* burned the flag in Minneapolis in 1988 and threw the burning flag into an Armed Services Recruitment Center. *Id.*; *Cary v. United States*, 897 F.2d 917, 918-19 (8th Cir. 1990). Although the state courts felt the case was distinguishable from *Eichman*, the Supreme Court refused to consider it, and remanded to the Eighth Circuit, advising the court to conform to the holding in *Eichman*. 498 U.S. 916.

<sup>131</sup> See *Dole Attacks Clinton in Flag Burning: GOP Candidate Supports Measure to Bar the Protest*, BOSTON GLOBE, June 15, 1996, at 9 (illustrating politicians awareness of vast popular support for flag).

<sup>132</sup> See *Seelye*, *supra* note 13, at A1 (quoting amendment proposal).

<sup>133</sup> See *id.* at A1, A19. Ninety-three Democrats joined the 219 Republicans to surpass the 280 votes that constitute a two-thirds majority of the House. *Id.* at A1. Twelve Republicans, 107 Democrats and one independent were in opposition. *Id.*

<sup>134</sup> See Tom Diemer, *Senate Panel OKs Flag Desecration Ban*, THE PLAIN DEALER (Cleveland), July 21, 1995, at 12A (documenting full senate vote).

ity of the full Senate.<sup>135</sup> Supporters of the amendment vow that the issue will persist.<sup>136</sup>

Based upon the resolutions presented at the House vote from every state but Vermont, it appears that the states are eager to ratify should congressional proponents succeed.<sup>137</sup> Veterans groups have invested millions of dollars and have produced countless signatures to ensure that the issue will not be forgotten.<sup>138</sup> In fact, approximately one hundred organizations, including the American Legion, the Knights of Columbus and the Fraternal Order of the Police, have joined forces to create the Citizens Flag Alliance.<sup>139</sup> The Alliance has unveiled a high-tech, \$3.5 million lobbying campaign in support of the amendment.<sup>140</sup>

Major opponents of the proposed amendment include President Clinton,<sup>141</sup> the American Bar Association<sup>142</sup> and the American Civil Liberties Union.<sup>143</sup> Opponents argue that flag desecration is not a problem worthy of a constitutional amendment.<sup>144</sup> Additionally, opponents feel that only the Supreme Court, removed from the pressures of our political system, can provide the proper forum

<sup>135</sup> See Marcy Gordon, *In Close Vote, Senate Defeats Amendment Banning Flag Burning*, ASSOC. PRESS POL. SERV., Dec. 12, 1995 (reporting 63 votes for and 36 against amendment).

<sup>136</sup> See *id.* Senate Judiciary Committee Chairman Orrin Hatch (R-Utah) stated: "This amendment is not going to go away." *Id.*

<sup>137</sup> See Melissa Healy, *House Panel Ok's Proposal to Ban Flag Burning*, L.A. TIMES, May 26, 1995, at 4. Rep. Gerald B.H. Solomon (R-N.Y.) predicts this amendment "will be ratified faster than any other constitutional amendment put before the American people." *Id.*; See-lye, *supra* note 13, at A19 (noting resolutions at House vote of every state but Vermont).

<sup>138</sup> See *Political Ads Urge Spector to Support Flag Burning Amendment*, ASSOC. PRESS POL. SERV., Nov. 25, 1995 (discussing Citizen Flag Alliance advertisement campaign).

<sup>139</sup> See Chapman, *supra* note 54, at 3 (describing make-up of Alliance); see also Christopher Drew, *High-Tech Lobbying Heats Up Flag Burning Amendment*, CHI. TRIB., Mar. 4, 1995, at 1 (noting that American Legion, nation's largest veterans' group, alone has 3.2 million members).

<sup>140</sup> See Drew, *supra* note 139, at 1. The coalition is using satellite hookups to convey its message and computer databases to mobilize support. *Id.* The Alliance has also hired Jim McAvoy of Burson-Marsteller, one of the largest public relations firms in the country. *Id.*

<sup>141</sup> See Ann Devroy, *Entering Fray, Administration to Announce Opposition to Flag-Burning Amendment*, WASH. POST, June 6, 1995, at A4. President Clinton's position has political, but little practical effect, for he cannot veto a proposed amendment. *Id.* Clinton has stated that he is against a flag burning amendment, but he has also been careful to speak vaguely on the issue and not to rule out that an amendment to the Constitution may be necessary to protect the flag in light of the Court's decisions. *Id.*

<sup>142</sup> See McMillion, *supra* note 27, at 110 (citing that ABA recognized problems with amendment relating to scope, First Amendment, and use of terms "desecration" and "flag").

<sup>143</sup> See Drew, *supra* note 139, at 1 (listing obstacles flag desecration amendment must overcome).

<sup>144</sup> See Bradley Goodson, *July Letter of the Month Focuses on Flag Burning Proposal*, NEWS TRIB. (Tacoma, Wa.), Aug. 6, 1995, at F5 (proposing that since Bill of Rights, many constitutional amendments have been frivolous, and sarcastically noting that now Congress is attempting to save us from "the epidemic of flag burning").



for determining such a highly emotional issue.<sup>145</sup> Finally, in addition to the theoretical problems facing the proposed amendment, serious practical problems will arise as individual states begin to interpret the terms "desecration" and "flag."<sup>146</sup>

The proposed flag burning amendment will continue to rear its head, and the American public must be aware of the grave consequences associated with the support of such a drastic measure. Whenever a fundamental right comes under attack, Americans must, armed with all of the facts at issue, carefully scrutinize the repercussions of their vote and the permanence of their power. The proposed flag burning amendment is wrought with theoretical and practical problems too serious to allow it overnight passage into the Constitution.

#### CONCLUSION

The Framers intended Article V to be a device empowering future legislatures to improve and expand upon the freedoms enumerated in the Constitution and the Bill of Rights. The utilization of Article V's amendment powers to limit a fundamental right, guaranteed by the First Amendment, runs counter to the intent of the Framers and the spirit of the Constitution. Contrary to what eager politicians and patriotic veterans assert, the flag is not in need of constitutional protection. To feel strongly about the flag, the very embodiment of our nation, proves noble and just, but to compromise the fundamental principles for which both the flag and our nation stand proves myopic and hypocritical. Time and energy is better spent on nurturing and protecting that above which we raise our immortal flag.

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<sup>145</sup> See Justice Craig Enoch, *Foreword*, 48 SMU L. REV. 723, 735 n.27 (1995). Justice Enoch argues that the flag burning issue ideally should be left up to an independent judiciary capable of affording adequate consideration to constitutional freedoms. *Id.* Detachment from the popular sentiments and interests of society allows the judiciary "a more authoritative claim to represent the true principles and aspirations of society." *Id.*

<sup>146</sup> See, e.g., Seelye, *supra* note 13, at A17. Rep. John Bryant (D. Texas) urged the supporters of the amendment to adopt language that would define desecration as "burning, soiling, trampling or rending the flag." *Id.* His attempt failed, 63 to 369. *Id.* Rep. Gary Ackerman (D.-N.Y.) produced on the floor several flag related "knickknacks" and asked if the nation was ready to prosecute the manufacturers, purchasers and wearers of such flag related items. *Id.*; cf. 4 U.S.C. § 1 (1994). The statute provides the design and exact dimensions of the American flag. *Id.*