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THE IRRELEVANCE OF *SAN FRANCISCO ARTS & ATHLETICS, INC. V. UNITED STATES OLYMPIC COMMITTEE* TO THE FLAG CONTROVERSY

William E. Lee *

Government protection of the flag of the United States is the most politically charged contemporary freedom of expression issue. President Bush believes that the Constitution should be amended to authorize punishment of flag burning.¹ After *Texas v. Johnson*² held flag burning to be constitutionally protected, Congress tried to correct *Johnson* by statute³ but the Supreme Court in *United States v. Eichman*⁴ found the new statute unconstitutional when applied to flag burning as a form of political protest. After *Eichman*, both the House and the Senate rejected the proposed constitutional amendment.⁵ Republican party strategists used the amendment issue to put Democrats on the defensive in the 1990 elections.⁶

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1. President Bush announced that he was "viscerally" angered by flag desecration. Wall St. J., June 28, 1989, at A16, col. 1. For an explanation of the Bush Administration's views on the necessity of a constitutional amendment to protect the flag's symbolism, see *Measures to Protect the Physical Integrity of the American Flag: Hearings Before the Senate Comm. on the Judiciary*, 101st CONG., 1st Sess. 118-19 (1989) [hereinafter *Senate Hearings*] (letter from Attorney General Thornburgh). See also *id.* at 69-89 (statement of Assistant Attorney General Barr). See generally, *Statutory and Constitutional Responses to the Supreme Court Decision in Texas v. Johnson: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st CONG., 1st Sess. (1989).

2. 109 S. Ct. 2533 (1989).

3. Flag Protection Act of 1989, Pub. L. No. 101-131, 103 Stat. 777 (1989). President Bush allowed the measure to become law without his signature because he favors a constitutional amendment. Statement on the Flag Protection Act of 1989, 25 WEEKLY COMP. PRES. DOC. 1619 (Oct. 26, 1989).

4. 110 S. Ct. 2404 (1990).

5. For discussions of the amendment, see 136 CONG. REC. H3,996-4,029, H4,035-88 (daily ed. June 21, 1990); S8,694-8,739 (daily ed. June 26, 1990). The Senate also rejected the amendment in 1989. 135 CONG. REC. S13,733 (daily ed. Oct. 19, 1989). See generally S. REP. NO. 162, 101st CONG., 1st Sess. (1989).

6. Wall St. J., June 12, 1990, at A22, col. 1 (stating that Republicans hope that the flag controversy will revive the party's effort to paint the Democrats as out of step with mainstream views); N.Y. Times, June 22, 1990, at A1, col. 3 (the vote on the flag amendment may be only a prelude to an intense battle in the 1990 Congressional campaigns). President Bush

Johnson and *Eichman* answer a limited range of questions about the government's power to protect the flag. The cases leave unanswered many questions raised by other types of government efforts to protect the flag, such as protecting its physical integrity in all circumstances.⁷ Are the questions raised by the types of laws not addressed in *Johnson* and *Eichman* answered by other Supreme Court cases? In his dissenting opinion in *Johnson*, Chief Justice Rehnquist cited *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*⁸ (*SFAA*), where the Supreme Court upheld restrictions on the use of Olympic symbols, as precedent for government actions protecting the flag.⁹ In testimony before the Senate Judiciary Committee, Professor Tribe also drew upon *SFAA*, stating, "Now, you can't tell me there is more power in Congress to protect the Olympic flag than the American flag. That's nonsense."¹⁰ Both the Chief Justice and Professor Tribe have seriously misread *SFAA*. This Article demonstrates that *SFAA* is not relevant to current governmental efforts to protect the flag.

I. SFAA

The Amateur Sports Act of 1978 regulates relations among amateur sports organizations, establishes rights for amateur athletes and grants the United States Olympic Committee the power to control who uses Olympic emblems—such as the five interlocking rings—and words—such as "Olympic"—for certain promotional purposes.¹¹ The USOC raises the bulk of the money to support American participation in the Olympics by granting licenses for the use of the emblems and words.¹² In *SFAA*, the USOC argued that the petitioner, sponsor of the "Gay Olympics," misappropriated its

also announced that he would talk about the flag issue during the 1990 elections. 26 WEEKLY COMP. PRES. DOC. 939 (June 12, 1990).

7. Whether Congressional action to protect the flag is constitutional depends in large measure upon both the legislation's terms and its justifications. As Dean Stone pointed out, many of the questions raised by this issue take us "into essentially unexplored territory." *Senate Hearings* at 200, *supra* note 1 (statement of Geoffrey Stone). For an elaboration of his views, see Stone, *Flag Burning and the Constitution*, 75 IOWA L. REV. 111 (1989).

8. 483 U.S. 522 (1987).

9. 109 S. Ct. at 2552 (Rehnquist, C.J., dissenting). In contrast, Justice Brennan's opinion for the Court in *Johnson* brushed *SFAA* aside, stating the case does not even begin to "tell us whether the Government may criminally punish physical conduct toward the flag engaged in as a means of political protest." *Id.* at 2545 n.10. See *infra* text accompanying note 65.

10. *Senate Hearings* at 146, *supra* note 1 (testimony of Professor Laurence Tribe).

11. 36 U.S.C. §§ 371-96 (Supp. V 1981).

12. *Id.* at 380. The USOC's financial statement for 1987 shows revenue of \$35.5 million. Corporate royalty payments amounted to \$16.8 million. The USOC also received \$2.7 million to authorize television advertisers to display the USOC's marks during American telecasts of the 1988 Olympic games. The corporate royalty payments and television royalties

commercially valuable property. The USOC claimed that uncontrolled commercial use of "Olympic" would diminish the value of its marks and reduce its ability to raise funds.¹³ The Supreme Court agreed, holding that the Amateur Sports Act authorized a permanent injunction prohibiting use of the phrase "Gay Olympics."¹⁴ Further, the Court held that the Act did not violate the first amendment.¹⁵ The Court's treatment of the questions of overbreadth and the fit between means and ends reveal the irrelevance of *SFAA* to the current flag controversy.

A. OVERBREADTH

The Amateur Sports Act's scope extends beyond trademark law: the USOC is not required to show that any unauthorized uses of its emblems and terms are likely to cause confusion, and while the Act grants the USOC remedies under trademark law, the unauthorized user does not have the traditional defenses to a trademark infringement action.¹⁶ In its analysis of the statute, moreover, the Court blended trademark, dilution, and misappropriation concepts. First, the Court held that "Olympic" is not a generic term. That is, Congress could reasonably conclude that the commercial value of "Olympic" was created by the USOC. Because of this, Justice Powell found that the Congressional decision to grant the USOC a limited property right in "Olympic" was within the scope of Congressional power to protect trademarks.¹⁷ Second, the law's application to nontrademark infringing uses was justified in antidilution terms.¹⁸ Justice Powell stated that even nonconfusing, noncommercial uses of "Olympic" could reasonably be regarded as lessening the distinctiveness and "thus the commercial value of the

represented 55% of the USOC's 1987 revenue. DELOITTE, HASKINS & SELLS, UNITED STATES OLYMPIC COMMITTEE FINANCIAL STATEMENTS 3 (Apr. 8, 1988).

13. Brief for Respondents at 25-27, *supra* note 8. The Amateur Sports Act does not require that the USOC prove that unauthorized uses of "Olympic" cause harm; a court may presume harm to the USOC. *International Olympic Comm. v. San Francisco Arts & Athletics, Inc.*, 219 U.S.P.Q. (BNA) 982, 986 (N.D. Cal. 1982), *aff'd*, 781 F.2d 733 (9th Cir. 1986), *aff'd*, 483 U.S. 522 (1987).

14. 483 U.S. 532-35.

15. *Id.* at 535-41.

16. *Id.* at 531.

17. *Id.* at 534-35. The rationale for exercising this power was stated in traditional trademark terms: the law insures that the USOC receives the benefit of its own efforts so that it "will have an incentive to continue to produce a 'quality product,' that, in turn, benefits the public." *Id.* at 537. For commentary on the Court's analysis of whether or not "Olympic" was a generic term, see Kravitz, *Trademarks, Speech, and the Gay Olympic Case*, 69 B.U.L. REV. 131 (1989).

18. Dilution statutes are based on the belief that nontrademark infringing uses nonetheless diminish the value of trademarks. The rationale for such laws was stated in Schecter, *The Rational Basis of Trademark Protection*, 40 HARV. L. REV. 813 (1927).

marks."¹⁹ Finally, because unauthorized uses of "Olympic" in the context of athletic events invoke the image "carefully cultivated" by the USOC, such uses misappropriate the USOC's property.²⁰

To Justice Powell, the Amateur Sports Act's reach beyond trademark law did not make the act unconstitutionally overbroad.²¹ The traditional chilling effect notion that underlies the overbreadth doctrine is best understood as resting on a judicial presumption in favor of free expression.²² The harm from a potential chill of constitutionally protected speech exceeds the harm caused when unprotected speech goes unpunished.²³ Since the Court believes that commercial speech is "hardy," the chilling effect justification for overbreadth analysis applies "weakly, if at all" in the commercial speech context.²⁴ Another reason the overbreadth presumption does not apply to the commercial speech is because the Court perceives commercial speech as less important than fully protected types of expression.²⁵ Commercial speech is analogous to nonobscene sexually-oriented expression: partially protected, but not worthy of the extraordinary protection offered by the overbreadth doctrine.²⁶ In rejecting the petitioner's overbreadth claim, Justice Powell noted that the Act applies primarily to commercial speech.²⁷

The Court regards only statutes that are substantially overbroad as facially invalid; that is, the breadth of an invalid statute must extend far beyond its legitimate sweep.²⁸ Since the *SFAA* majority found the Act legitimately applied to commercial expression,

19. 483 U.S. at 539.

20. *Id.* at 541. In the trademark context, the rationale is that since the owner created the mark's value, others should not be able to benefit from its use. Denicola, *Trademarks as Speech: Constitutional Implications of the Emerging Rationales for the Protection of Trade Symbols*, 1982 WIS. L. REV. 158, 166-81. Justice Powell, however, cited a nontrademark case, *International News Service v. Associated Press*, 248 U.S. 215 (1918) (misappropriation of news stories from a rival news service) for the misappropriation aspect of the case. 483 U.S. at 541.

21. 483 U.S. at 536 n.15.

22. Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U.L. REV. 685, 732 (1978). See also Redish, *The Warren Court, the Burger Court and the First Amendment Overbreadth Doctrine*, 78 NW. U.L. REV. 1031, 1041 (1983) (overbreadth doctrine rests upon the special position of first amendment rights); Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 852 (1970) (the preferred status of expression is the ultimate rationale of the overbreadth doctrine).

23. *Bates v. State Bar*, 433 U.S. 350, 380 (1977).

24. *Id.* In other settings the Court has also noted the limited applicability of the overbreadth doctrine. See, e.g., *Parker v. Levy*, 417 U.S. 733, 760 (1974) (military context); *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973) (speech intertwined with conduct).

25. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 563 n.5 (1980).

26. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 61 (1976).

27. 483 U.S. at 539 & 536 n.15.

28. *Broadrick*, 413 U.S. at 615. Where a statute reaches a small range of protected activities, the Court believes the deterrence of protected expression will be minimal. *New*

the overbreadth question was whether the law substantially affected noncommercial expression. The Court found that the law had only a limited impact on noncommercial expression. That finding was bolstered by the following factors: 1) the perception that the SFAA's noncommercial, promotional uses of "Olympic" were part of the Act's legitimate core, and 2) an unwillingness to consider hypothetical applications of the Act and instead a determination to rely solely on its application to the litigant.

With respect to the first factor, the Court deferred to the judgment of Congress on the harm caused by noncommercial, promotional uses of "Olympic." Congress reasonably could conclude, Justice Powell wrote, that such uses implicate the value created by the USOC.²⁹ In particular, the SFAA was exploiting the imagery created by the USOC.³⁰ Regarding the second factor, the Court disregards a law's impact on the litigant and considers the impact on third parties only where there is substantial overbreadth.³¹ In *SFAA* the Court was uninterested in hypothetical applications of the Act because its application to noncommercial speech was limited. Most importantly, "purely expressive" uses of "Olympic" were not affected by the Act.³² As an example of a "purely expressive" use, Justice Powell cited a case in which the Act was not violated by a group that used the USOC's symbols to oppose conversion of an Olympic facility into a jail.³³ While the SFAA claimed that its use of "Olympic" was intended to make a statement about the status of homosexuals in society,³⁴ the Court was unwilling to treat the SFAA's activities as charitable or ideological solicitation³⁵ or as "purely expressive," because the athletic contest was modeled after

York v. Ferber, 458 U.S. 747, 772 (1982). Professor Redish, however, questions this aspect of the overbreadth doctrine, Redish, *supra* note 22, at 1065.

29. 483 U.S. at 540-41 & n.20.

30. *Id.* at n.19.

31. Secretary of State v. Joseph H. Munson Co., 467 U.S. 947, 959 (1984) (stating that unless a litigant can show that a statute is substantially overbroad, it has no "standing" to allege that, as applied to others, the statute might be unconstitutional).

32. 483 U.S. at 536 & n.14. At oral argument, counsel for the USOC emphasized that the statute did not reach discussions of public controversy such as "We protest the Olympic Games." Transcript of Oral Argument at 33, *supra* note 8. None of the Justices probed this point.

33. Stop the Olympic Prison v. United States Olympic Comm., 489 F. Supp. 1112 (S.D.N.Y. 1980).

34. The SFAA used the term "Olympic" to describe its athletic competition because it conveyed the format of the event and described the SFAA's goals of "peace, friendship and positive social interaction." Brief for Petitioners at 6, *supra* note 8.

35. The Court regards ideological or charitable solicitation as noncommercial speech and closely scrutinizes regulation of such solicitation. See *Riley v. National Fed'n of the Blind*, 487 U.S. 781 (1988). The *SFAA* Court was unwilling to treat the SFAA's activities as protected because of the "exploitation" of the USOC's marks. The Court rejected SFAA's argument that its nonprofit status affected the case: "But when the question is the scope of a

the Olympics.³⁶ Had the SFAA merely burned the Olympic flag to protest discrimination against homosexuals, the Court likely would have treated the action as protected speech; the sponsorship of an athletic event, however, even when intended to make a political statement, was not regarded as “purely expressive.”

Justice Brennan’s dissent found the Act overbroad because it prohibited noncommercial uses of “Olympic” to promote athletic and theatrical events, even when those events are aimed at educating the public about social and political ideas.³⁷ The range of non-commercial promotional speech affected by the Act included “critical reviews of theatrical performances, anticipatory notices and descriptions in the media of athletic competitions, and distribution of educational literature describing the sociopolitical reasons for holding the public events.”³⁸ In Justice Brennan’s view, non-confusing and good faith descriptive uses—which do not violate trademark rights—were impermissibly prohibited by the Act.³⁹

The dispute between Justice Powell and Justice Brennan in *SFAA* hinges on the communicative importance of “Olympic” and the harm caused by noncommercial, promotional uses. Justice Brennan regarded “Olympic” as a unique term with a deep history in our language and culture.⁴⁰ Further, he found no evidence in the record to suggest that trademark law was insufficient to protect the USOC from economic harm.⁴¹ Justice Powell, though, thought that there were other ways for the SFAA to express its views about the status of homosexuals in society; the SFAA was merely exploiting the “commercial magnetism” of “Olympic,” a word which would decline in value through uncontrolled use.⁴²

B. REASONABLENESS

Justice Brennan’s dissent raises an interesting question: given the existence of less restrictive laws, such as the federal trademark law and state dilution statutes, was the Amateur Sports Act broader than necessary? The majority was uninterested in whether less restrictive laws would sufficiently protect the USOC. Instead, it was satisfied that Congress considered the Act to be necessary. That

legitimate property right in a work, the SFAA’s distinction [between nonprofit and for profit groups] is inapposite.” 483 U.S. at 541 n.19.

36. 483 U.S. at 540 & n.18.

37. *Id.* at 567-68 (Brennan, J., dissenting).

38. *Id.* at 566 n.28.

39. *Id.* at 563-66.

40. *Id.* at 569.

41. *Id.* at 572.

42. 483 U.S. at 536, 539-40.

analysis was largely dictated by the Court's determination that the Act would be scrutinized under the commercial speech and *O'Brien* tests.

Commercial speech regulations must be no greater than necessary.⁴³ This prong of the commercial speech test requires that the fit between the legislature's ends and the means chosen to accomplish those ends be reasonable, a standard that "requires something short of a least-restrictive-means standard."⁴⁴ Similarly, the *O'Brien* test for content-neutral restrictions⁴⁵ has a no-greater-than-necessary prong that is easily satisfied.⁴⁶ A central aspect of both the commercial speech and *O'Brien* tests is the Court's deference to the judgment of the legislature. For example, in *Posadas de Puerto Rico Associates v. Tourism Co.*⁴⁷ the Court held that a ban on casino gambling advertising was valid even though less restrictive means of discouraging gambling, such as government-sponsored antigambling messages, were not employed. The Court stated, "[w]e think it is up the legislature to decide whether or not such a 'counterspeech' policy would be as effective in reducing the demand for casino gambling as a restriction on advertising."⁴⁸ In *United States v. Albertini*⁴⁹ the Court upheld a protester's exclusion from a military base open house even though less restrictive methods of protecting the base's security existed. The Court held that under *O'Brien*, the validity of regulations "does not turn on a judge's agreement with the responsible decision maker concerning the most appropriate method for promoting significant government interests."⁵⁰

In *SFAA* the Court applied the commercial speech test to those aspects of the Act affecting commercial speech and the *O'Brien* test to those aspects affecting noncommercial speech. Since the two tests are substantially similar,⁵¹ the Court merely required that the law do no more than promote the governmental interest. Thus, it was hardly surprising that the Court uncritically stated that Congress could reasonably have determined that the commercial and noncommercial aspects of the Act were no broader than

43. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980).

44. *Board of Trustees v. Fox*, 109 S. Ct. 3028, 3033 (1989).

45. 391 U.S. 367, 377 (1968).

46. *Ward v. Rock Against Racism*, 109 S. Ct. 2746, 2758 (1989).

47. 478 U.S. 328 (1986).

48. *Id.* at 344.

49. 472 U.S. 675 (1985).

50. *Id.* at 689.

51. 483 U.S. at 537 n.16.

necessary.⁵²

The choice of the *O'Brien* test ensured that the noncommercial aspects of the Act would not be subjected to a more stringent test than the test applied to those aspects affecting commercial speech.⁵³ Why the Court selected *O'Brien* is significant. The Court regarded the Act's restrictions as incidental⁵⁴ to the "primary congressional purpose of encouraging and rewarding the USOC's activities."⁵⁵ That is, this was not a suppression of expression to protect onlookers from offense, or some similar message-related rationale, this was a suppression that was justified in nonmessage-related terms. The broader goal of the Act is to advance the Olympic movement and the Act served this goal by supplying the USOC with the means to raise money for American participation.⁵⁶ Moreover, the restrictions did not stand by themselves, but were part of a comprehensive statute that regulated amateur sports. A ban on unauthorized uses of "Olympic" has the same impact on speech whether the ban regulates only expression or whether it regulates expression along with the rights of amateur athletes and relations among amateur sports organizations. The difference between the two laws is that the comprehensive law is justified by a more significant interest than the law that restricts only expression. Also, a comprehensive law is more easily justified in content-neutral terms, and may not easily be viewed as underinclusive.

Justice Brennan's dissent operated from a different perspective:

52. *Id.* at 539. That the Court was especially uninterested in considering whether the Act's contours were broader than necessary is revealed by the following comment concerning the ban on theatrical promotions:

Although a theatrical production is not as closely related to the primary use of the word by the USOC as is an athletic event, Congress reasonably could have found that when the word "Olympic" is used to promote such a production, it would implicate the value given to the word by the USOC.

Id. at 541 n.20.

53. In *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), the Court dissected a billboard ordinance and treated those aspects regulating commercial speech differently from those aspects regulating noncommercial speech.

54. The Court uses the term in different ways. Sometimes the Court describes incidental restrictions as those that have an indirect or unintended effect on expression. *See, e.g.*, *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 789 n.5 (1988). *See also* *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298 n.8 (1984) (camping regulation affecting both expressive and nonexpressive acts described as having an incidental impact on speech). The Court also describes direct regulations of expression that have only a slight impact on expressive opportunities as incidental. *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 808 (1984) (ordinance aimed only at signs). *SFAA* dealt with a direct restriction on expressive activity. The *SFAA* Court's reference to the restriction on "Olympic" as incidental is most likely both a reference to the slight impact on communicative opportunity and the fact that the restriction was an accompanying circumstance of legislation to foster American participation in the Olympics.

55. 483 U.S. at 536 (note omitted).

56. *Id.* at 538-39.

the Court rather than Congress should decide whether less restrictive measures are inadequate to protect the asserted interests.⁵⁷ He claimed that there was no evidence in the record that trademark law was insufficient to protect the USOC from economic harm, nor was there evidence that the SFAA's use of "Olympic" harmed the reputation of the USOC.⁵⁸ Further, the USOC failed to prove that the California dilution statute was insufficient to protect the USOC's marks from loss of distinctiveness⁵⁹ or that disclaimers would be ineffective.⁶⁰

II. CONCLUSION

SFAA is irrelevant to the current debate about the measures necessary to protect the flag's symbolism. The Bush Administration and Congress are unconcerned with commercial exploitation of the flag's symbolism. Yet *SFAA* is a commercial speech case bearing a striking resemblance to *Posadas*⁶¹ (decided only a year earlier); both cases rest on the premise that restrictions on certain types of nondeceptive commercial speech are easily justified. Certainly a central attribute of the Court's current free speech doctrine is that commercial speech is subject to "modes of regulation that might be impermissible in the realm of noncommercial expression."⁶²

SFAA represents a special extension of trademark law. The concept of commercially valuable property permeated the Court's treatment of the law's limited impact on noncommercial expression. Because of *SFAA*'s emphasis on commercially valuable property, the dilution aspect of *SFAA* is far removed from concerns that flag destruction dilutes the symbolic value of the flag.⁶³

SFAA speaks to the question of the government's authority to offer limited protection to symbols created by others.⁶⁴ The Court's analysis of *SFAA* surely would have been different if purely political speech had been affected by the statute. As long as the Court maintains a first amendment distinction between commercial speech and

57. *Id.* at 572-73 (Brennan, J., dissenting).

58. *Id.* at 572 & n.36.

59. *Id.* at 564 n.25.

60. *Id.* at 572.

61. 478 U.S. 328 (1986).

62. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978).

63. Similarly, the Court's treatment of misappropriation is phrased in terms of commercially valuable property. See, e.g., 483 U.S. at 541 (quoting *International News Serv. v. Associated Press*, 248 U.S. 215, 239-40 (1918)) (emphasizing the commercial value of news reports).

64. For arguments that the first amendment limits the scope of trademark rights, see Denicola, *supra* note 20; Kravitz, *supra* note 17; Note, *Trademark Parody: A Fair Use and First Amendment Analysis*, 72 VA. L. REV. 1079 (1986).

political speech, a flag protection law affecting political speech presents issues entirely different from those addressed in *SFAA*. The majority opinion in both *Johnson* and *Eichman* recognize this. For example, the Court in *Eichman* stated, "We deal here with concededly political speech and have no occasion to pass on the validity of laws regulating commercial exploitation of the image of the United States flag."⁶⁵

Central to *SFAA* is the content-neutral justification for the restriction: the government asserted a content-neutral interest beyond merely protecting "Olympic" as a symbol. Although Congress rewrote the federal flag law in an attempt to eliminate many of the content-based features that led to invalidation in the Texas case, its justification for flag protection remained in content-based terms.⁶⁶ Even a flag law justified in content-neutral terms raises questions about the government's ability to protect its own symbols. Those questions are unanswered by *SFAA*. Acknowledging the limitations of *SFAA* is not to say that the Constitution must be amended to protect the flag's symbolism. Rather, it is to recognize that the type of symbol and speech at issue in *SFAA* are unlike the type of symbol and speech of concern to the Bush Administration.

65. 110 S. Ct. at 2408 n.4. See also *id.* at n.6 (distinguishing harm caused by commercial appropriation of the image of the flag from harm caused by flag burning). Counsel for *Eichman* conceded at oral argument that Congress could prohibit use of the flag for commercial purposes. Transcript of Oral Argument at 29, *supra* note 4.

66. 110 S. Ct. at 2408.