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First Amendment Protection of Symbolic Speech: Flag Cases Raise the Standard

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FIRST AMENDMENT PROTECTION OF SYMBOLIC SPEECH: FLAG CASES RAISE THE STANDARD

> Forget not what it means; and for the sake of its ideas, rather than its mere emblazonry, be true to your country's flag.[1]

The public outcry against American involvement in Vietnam brought before both state and federal courts a number of cases involving flag use and desecration as a means of communicating antiwar protest. The question was squarely put: May the government legitimately prohibit expressive conduct which interferes with the physical integrity of the flag? These cases were made difficult not because the principles involved were "obscure but because the flag involved [was] our own."[2] The importance of these flag cases, however, extends beyond issues concerned simply with conduct that affects the flag. They reflect the ambivalence found in all first amendment cases between the need for an ordered society on the one hand and individual freedom on the other. More specifically, these cases involve conduct which has been placed under the rubric of "symbolic speech," a form of communication which has increasing importance in a day and age when control of the national media is in the hands of so few.[3] Symbolic speech is the poor man's media and the lines of protection drawn around it by the Supreme Court have been both unclear and unsatisfactory. An examination of the flag cases may prove helpful in discerning the analytical framework that the Supreme Court is developing to delineate the protection that symbolic speech will be accorded in the future.

I. FLAG STATUTES AND THEIR TREATMENT BY THE COURT

While one of Congress' early acts was to create a national flag,[4] the

1. HENRY W. BEECHER, FREEDOM AND WAR 112-13 (1863).

2. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 641 (1943).

3. *See* Lloyd Corp. v. Tanner, 407 U.S. 551, 580-81 (1972) (Marshall, J., dissenting).

4. The national flag of the United States was officially created on June 14, 1777. 8 JOURNAL OF THE CONTINENTAL CONGRESS 464 (1777) ("Resolved: that the flag of the United States be thirteen stripes alternate red and white; that the Union be thirteen stars, white in a blue field, representing a new constellation"). Although the power to create a national flag was not expressly granted to Congress by the Constitution, its power to create one has never seriously been questioned. Halter v. Nebraska, 205 U.S. 34, 41 (1907). Congress has chosen June 14th as "Flag Day" to commemorate the adoption of the Stars and Stripes as the official flag. 36 U.S.C. § 157 (1970). The week of June 14

first federal flag statutes were not passed until 1968.[5] Prohibition of certain conduct involving the flag was left to the states. Flag use legislation began to be enacted shortly before the turn of the century and within a few years had been passed by all states.[6] The statutes have

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is also Flag Week. *Id.* § 157a. For each new state a new star is added to the flag the following 4th of July. 4 U.S.C. § 2 (1970). The identity of the original designer of the national flag is clouded in mystery and in all probability will remain so. D. EGGENBERGER, FLAGS OF THE U.S.A. 37 (1959).

5. 18 U.S.C. § 700 (1970). In 1942 Congress provided guidelines for proper flag etiquette. 36 U.S.C. §§ 171-82 (1970). These sections are devoid, however, of sanctions for non-compliance and have been interpreted to be merely an expression of flag custom and usage. *See* Lapolla v. Dullaghan, 311 N.Y.S.2d 435, 438 (Sup. Ct. 1970).

In 1947, Congress made it a misdemeanor for any person within the District of Columbia to cast contempt upon the flag by word or act or to use the flag for commercial purposes. Act of July 30, 1947, ch. 389, § 1, 61 Stat. 641 (codified at 4 U.S.C. § 3 (1964), *as amended*, 4 U.S.C. § 3 (1970) (amended in 1968 to delete the portion concerning casting contempt by word or act)).

In 1968, at the height of the Vietnam War, a time when many flags were being desecrated in protest, Congress enacted 18 U.S.C. § 700 (1970), which provided:

> (a) Whoever knowingly 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 or imprisoned for not more than one year, or both.
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> (b) The term "flag of the United States" as used in this section, shall include any flag, standard, colors, ensign, or any picture or representation of either, or of any part or parts of either, made of any substance or represented on any substance, of any size evidently purporting to be either of said flag, standard, color, or ensign of the United States of America, or a picture or a representation of either, upon which shall be shown the colors, the stars and the stripes, in any number of either thereof, or of any part or parts of either, by which the average person seeing the same without deliberation may believe the same to represent the flag, standards, colors, or ensign of the United States of America.
>
> (c) Nothing in this section shall be construed as indicating an intent on the part of Congress to deprive any State, territory, possession, or the Commonwealth of Puerto Rico of jurisdiction over any offense over which it would have jurisdiction in the absence of this section.

The impassioned debate over the passage of this statute consumed more than fifty pages of the Congressional Record. 113 CONG. REC. 16441-99 (1967).

6. This legislation was prompted by widespread instances of flag abuse which brought forth a series of protests and a resultant flurry of remedial state legislation. Prompted by use of the flag in commercial advertisements and improper flag treatment at political rallies, the American Flag Association met in 1897 to urge passage of remedial legislation. *See* UNIFORM FLAG ACT. The Uniform Flag Act was approved by the National Conference of Commissioners on Uniform State Laws and the American Bar Association. *Report of the Committee on Uniform State Laws*, 4 A.B.A.J. 527 (1918). By 1907 more than half of the states had enacted criminal flag desecration statutes. Halter v. Nebraska, 205 U.S. 34, 39-40 (1907). The first such statutes were passed in 1897 by Illinois, Pennsylvania, and South Dakota. The majority of the other states, including the territories of Alaska and Hawaii, adopted similar laws before the First World War. Virginia became the last state to pass a flag statute in 1932. As of 1973 every state in the Union had enacted some type of flag desecration or misuse statute, most of which had been modeled after the Uniform Flag Act. *See* Smith v. Goguen, 415 U.S. 566, 582 n.31 (1974); Note, *Flag Burning, Flag Waving and the Law*, 4 VALPARAISO L. REV. 345, 362-67 (1969). Provisions dealing with flag protocol, use, and desecration should be distinguished. The

changed little since their inception. Although the details and wordings of the acts vary slightly from state to state, the substance of the provisions is generally similar.[7] The legislatures of the states were motivated by two primary concerns in passing these laws. First, there was a strong desire to eliminate the widespread practice of using the flag on commercial products.[8] Second, there was a desire to uphold the "dignity" of the flag and thereby promote "patriotism."[9]

The first cases to consider state flag legislation were concerned primarily with the use of the flag for commercial purposes. Freedom of speech issues were largely ignored.[10] In the 1907 case of *Halter v. Nebraska*,[11] Justice Harlan, writing for the Court, upheld the validity of a flag statute and made it clear that it was well within the legitimate

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protocol provisions are not prohibitory, but rather suggest the proper means of displaying and handling the flag. 36 U.S.C. §§ 173-78 (1970). The use provisions deal with such actions as commercial use of the flag and the placing of words, pictures, and objects on the flag. *See, e.g.*, UNIFORM FLAG ACT § 2. The desecration provisions deal with conduct which abuses or mutilates the flag. *Id.* § 3. Flag desecration statutes have been considered by several commentators. *See, e.g.*, Rosenblatt, *Flag Desecration Statutes: History and Analysis*, 1972 WASH. U.L.Q. 193 [hereinafter cited as *History*]; Note, *Flag Desecration—The Unsettled Issue*, 46 NOTRE DAME LAW. 201 (1970).

7. Typical of such statutes is the Uniform Flag Act. See note 6 *supra*. For a complete compilation of all the state statutes and the federal statute, see Note, *Flag Burning, Flag Waving and the Law*, 4 VALPARAISO L. REV. 345, 362-67 (1969).

8. *See* Halter v. Nebraska, 205 U.S. 34 (1907); Note, *Exploiting the American Flag: Can the Law Distinguish Criminal from Patriot?*, 30 MD. L. REV. 332 (1970) [hereinafter cited as *Exploiting*].

9. *See* Halter v. Nebraska, 205 U.S. 34 (1907); *History, supra* note 6, at 208-09.

10. One of the earliest prosecutions based upon using the flag for commercial purposes was Ruhstrate v. People, 57 N.E. 41 (Ill. 1900). In reversing the defendant's conviction for using the flag upon cigar box labels, the court commented favorably concerning the flag's commercial appeal and declared the Illinois flag law unconstitutional on the basis of equal protection, due process, and privileges and immunities.

In another case concerning cigar boxes decorated with the national flag, the court struck down that portion of the New York statute prohibiting commercial use of the flag. People v. Van De Carr, 70 N.E. 965 (N.Y. 1904).

11. Halter v. Nebraska, 205 U.S. 34 (1907). Defendants were charged with possessing, with intent to sell, beer bottles upon which had been printed representations of the American flag. In a decision focusing upon the validity of the commercial aspects of the questioned statute, the Court sustained the entire statute against all constitutional challenges. The first amendment freedom of speech issues raised by that portion of the Nebraska statute which stated, "or who shall publicly mutilate, deface, defile, or defy, trample upon or cast contempt, either by words or act, upon any such flag, standard, color, or ensign, shall be deemed guilty of a misdemeanor" were left dormant. *Id.* at 37 n.†. Considering that *Halter* was decided 18 years before Gitlow v. New York, 268 U.S. 652 (1925), which concluded that the first amendment applied to the States via the fourteenth amendment, the continuing validity of *Halter* has been placed in doubt. *See* notes 98-102 *infra* and accompanying text; note 194 *infra*.

scope of the state's police power to prevent the use of the flag in a commercial setting.

> [A] state may exert its power to strengthen the bonds of the Union, and therefore, to that end, may encourage patriotism and love of country among its people. When, by its legislation, the state encourages a feeling of patriotism towards the nation, it necessarily encourages a like feeling towards the state. One who loves the Union will love the state in which he resides, and love both of the common country and of the state will diminish in proportion as respect for the flag is weakened. Therefore a state will be wanting in care for the well-being of its people if it ignores the fact that they regard the flag as a symbol of their country's power and prestige, and will be impatient if any open disrespect is shown towards it.[12]

Shortly after *Halter*, prosecutions based solely upon casting contempt upon the flag began to appear.[13] Although the Supreme Court has restricted such prosecutions in the years since,[14] it has not yet provided a definitive answer to the question of whether the states may constitutionally punish physical acts of flag desecration. Consequently, there exists sharp and irreconcilable differences in the answers coming from the lower courts, where many desecration statutes have been upheld[15]

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12. 205 U.S. at 42.

13. In State v. Shumaker, 175 P. 978 (Kan. 1918), defendant was convicted for publicly casting contempt upon the flag by suggesting a vulgar use of the flag while he was conversing in a blacksmith shop. A more severe example is *Ex parte* Starr, 263 F. 145 (D. Mont. 1920), wherein defendant, while in the hands of a hostile mob, refused to kiss the flag, claiming that it might be covered with microbes. The federal district court denied habeas corpus even though Starr had been convicted and sentenced to prison for a period of from 10 to 20 years.

Other examples of early cases are: People v. Von Rosen, 147 N.E.2d 327 (Ill. 1958) (reversing conviction based upon publishing a magazine picture of a nude woman with a flag covering her pubic area); State v. Peacock, 25 A.2d 491 (Me. 1942) (reversing conviction for calling the flag a rag); State v. Schlueter, 23 A.2d 249 (N.J. 1941) (affirming conviction for mutilating a small American flag and throwing it upon the ground); People v. Picking, 42 N.E.2d 741 (N.Y. 1942) (affirming conviction for painting a flag on both sides of an automobile).

14. *See* notes 31-42 *infra* and accompanying text.

15. *See, e.g.*, United States v. Crosson, 462 F.2d 96 (9th Cir. 1972), *cert. denied*, 409 U.S. 1064 (1972) (flag publicly burned); Joyce v. United States, 454 F.2d 971 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 969 (1972) (small flag torn and thrown to ground); Deeds v. Beto, 353 F. Supp. 840 (N.D. Tex. 1973) (four year sentence for burning flag sustained); Sutherland v. DeWulf, 323 F. Supp. 740 (S.D. Ill. 1971) (flag publicly burned); Oldroyd v. Kugler, 327 F. Supp. 176 (D.N.J. 1970) (various unorthodox flag usages); United States v. Ferguson, 302 F. Supp. 1111 (N.D. Cal. 1969) (flag publicly burned); Duncombe v. New York, 267 F. Supp. 103 (S.D.N.Y. 1967) (flag worn as poncho); State v. Van Camp, 281 A.2d 584 (Conn. Cir. App. Div. 1971) (flag worn on seat of pants); State v. Waterman, 190 N.W.2d 809 (Iowa 1971) (flag worn as poncho);

and many others declared unconstitutional.[16]

The Supreme Court has been confronted with attacks on the flag

State v. Royal, 305 A.2d 676 (N.H. 1973) (flag worn on seat of pants and flag sewn upside down on jacket); People v. Radich, 257 N.E.2d 30 (N.Y. 1970), *aff'd by an equally divided Court, sub nom.*, Radich v. New York, 401 U.S. 531 (1971) (public exhibition of sculpture depicting erect male sex organ wrapped in flag); People v. Keough, 305 N.Y.S.2d 961 (Monroe County Ct. 1969) (magazine containing photographs of woman clad only in flag); State v. Mitchell, 288 N.E.2d 216 (Ohio Ct. App. 1972) (flag worn on seat of pants); State v. Liska, 291 N.E.2d 498 (Ohio Ct. App. 1971) (flag decal with superimposed peace symbol held not contemptuous within meaning of Ohio statute); State v. Saionz, 261 N.E.2d 135 (Ohio Ct. App. 1969) (wearing flag as a cape); State v. Saulino, 277 N.E.2d 580 (Ohio, Struthers Mun. Ct. 1971) (flag painted on side of truck with face of Mickey Mouse where stars should be).

16. Typical of those statutes which did not withstand constitutional attack is the California flag desecration statute, CAL. MIL. & VET. CODE § 614 (West 1955), which, prior to being amended in 1970 (in aspects not here relevant) provided:

> A person is guilty of a misdemeanor who:
> (a) In any manner for exhibition or display, places or causes to appear any word, figure, mark, picture, design, drawing, or any advertisement of any nature upon any flag of the United States or of this State.
> (b) Exposes to public view any such flag upon which is printed, painted, or placed or to which is attached, appended, affixed, or annexed any word, figure, mark, picture, design, drawing, or any advertisement of any nature.
> (c) Exposes to public view, manufactures, sells, exposes for sale, gives away, or has in possession for sale or to give away or for use for any purpose any article or substance being an article of merchandise or a receptacle of merchandise . . . upon which is printed, painted, attached, or placed a representation of any such flag, standard, color, or ensign to advertise, call attention to, decorate, mark or distinguish the article or substance on which so placed.
> (d) Publicly mutilates, defaces, defiles or tramples any such flag.

The statute was first considered in People v. Cowgill, 274 Cal. App. 2d 923, 78 Cal. Rptr. 853 (App. Dep't Super. Ct. 1969), *appeal dismissed*, 396 U.S. 371 (1970). The defendant in *Cowgill* was convicted for wearing a vest fashioned from an American Flag in violation of section 614(d). The court in *Cowgill* construed the California statute as applying only to physical acts of desecration and rejected defendant's symbolic speech contention. The second time section 614 was challenged it did not survive. The court in Alford v. Municipal Court, 26 Cal. App. 3d 244, 102 Cal. Rptr. 667 (1972), *cert. denied*, 409 U.S. 1109 (1973), declared section 614 void for overbreadth when read in conjunction with CAL. MIL. & VET. CODE § 611 (West 1955), which defines the word "flag" as including:

> [E]very flag, standard, color, or ensign authorized by the laws of the United States or of this State, and every picture or representation thereof, of any size, made of any substance, or represented on any substance evidently purporting to be any such flag, standard, color, or ensign of the United States or of this State, and every picture or representation which shows the design thereof.

The courts have also found state flag desecration laws to be unconstitutional in several other cases. *See, e.g.*, Thoms v. Heffernan, 473 F.2d 478 (2d Cir. 1973) (plaintiff sought injunctive relief so that he might wear the flag as a vest without fear of prosecution); Long Island Vietnam Moratorium Committee v. Cahn, 437 F.2d 344 (2d Cir. 1970), *aff'd mem.*, 418 U.S. 906 (1974) (circular representation of flag with peace symbol superimposed); Parker v. Morgan, 322 F. Supp. 585 (W.D.N.C. 1971) (flag worn on jacket with superimposed peace slogan considered along with flag torn and pierced by being affixed to the ceiling of an automobile); Korn v. Elkins, 317 F. Supp. 138 (D. Md. 1970) (picture of burning flag on cover of student magazine); Hodsdon v. Buckson, 310

statutes in only a few cases.[17] Until 1974, the Court failed to deal with the central issue of symbolic speech, leaving it to be "expounded only in dissents and concurrences."[18] Yet two recent cases, *Spence v. Washington*[19] and *Smith v. Goguen*,[20] shed new light on the issues involved. *Spence* has answered some questions, most importantly, when acts involving the flag may be considered as constitutionally protected symbolic speech. Though the Court did not respond to other questions, the decision implies possible answers when juxtaposed against Justice White's concurring opinion in *Goguen* and Justice Rehnquist's dissents in both cases. An examination of the two cases against the background of prior decisions serves as a focal point for assessing the analytical framework the Court might apply in matters dealing with the flag and with symbolic speech.

II. First Amendment Protection of Expression

"Congress shall make no law . . . abridging the freedom of speech . . . ."[21] The simplicity with which the first amendment prohibits restraints on speech belies the complexity of issues which lurk behind the words. One of the key problems is the dichotomy of first amendment protection extended to pure as distinguished from symbolic speech. The focus of recent flag cases, as contrasted to earlier flag decisions, generally has been upon first amendment considerations, especially the pure versus symbolic speech distinctions. Hence these

F. Supp. 528 (D.Del. 1970) (United States flag flown in position subordinate to United Nations flag); City of Miami v. Wolfenberger, 265 So. 2d 732 (Fla. Ct. App. 1972) (flag with superimposed peace symbol on helmet); State v. Kool, 212 N.W.2d 518 (Iowa 1973) (upside down flag with superimposed peace symbol); State v. Zimmelman, 301 A.2d 129 (N.J. 1973) (ice cream truck decorated with two flags having superimposed peace symbols).

17. Long Island Vietnam Moratorium Committee v. Cahn, 418 U.S. 906 (1974), *aff'g mem.* 437 F.2d 344 (2d Cir. 1970); Spence v. Washington, 418 U.S. 405 (1974); Smith v. Goguen, 415 U.S. 566 (1974); Radich v. New York, 401 U.S. 531 (1971), *aff'g by an equally divided Court* People v. Radich, 257 N.E.2d 30, 308 N.Y.S.2d 846 (1970); Cowgill v. California, 396 U.S. 371 (1970); Street v. New York, 394 U.S. 576 (1969); Halter v. Nebraska, 205 U.S. 34 (1907).

18. Smith v. Goguen, 415 U.S. 566, 591 (1974) (Rehnquist, J., dissenting).

19. 418 U.S. 405 (1974) (per curiam).

20. 415 U.S. 566 (1974).

21. U.S. Const. amend. I. The full text reads as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

cases serve as a forum for the Court's philosophy in expanding or contracting the protection accorded symbolic speech.

A. Pure Speech

First amendment rights, at least in pure speech cases, enjoy what is referred to as a *preferred position.*[22] This phraseology is often used as a shorthand expression to state that when a restriction affects first amendment rights, the exercise of the police power is held to a higher standard of justification. Speech may be restricted only when it presents a grave and immediate danger to an interest which the state may constitutionally protect.[23] The mere fact that speech may further lawlessness is not sufficient to suppress it; the evil regulated must be serious and substantial.[24] Therefore, the speech must be likely to make the unlawful action imminent.[25] Additionally, the due process doctrine of vagueness demands a greater degree of specificity in regulations that infringe upon free speech than in other contexts.[26] The traditional rules of standing are relaxed to allow one to challenge the constitutionality of an overly broad statute where a prohibition, which may be constitutional as applied to the challenger, otherwise has a "chilling effect" on protected speech.[27]

Despite the enjoyment of this preferred position, it is clear that the first amendment right to free speech is not absolute. The content of pure speech may be regulated if a threat of disorder arising from that content is substantial and immediate, and the regulating statute is narrowly drawn.[28] Furthermore, there are certain "limited classes" of

22. Kovacs v. Cooper, 336 U.S. 77, 89 (1949) (Frankfurter, J., concurring). The paradigm of pure speech is verbal or written communication totally unassociated with conduct. Such communication enjoys the full protection of the first amendment. In essence, the Court places a very heavy burden upon the government to establish the necessity for legislation which infringes upon speech. *See, e.g.*, West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). The presumption of constitutionality is replaced by judicial scrutiny of such legislation which tends to tilt the scales in favor of individual rights. *See* Schneider v. New Jersey, 308 U.S. 147 (1939).

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

24. Bridges v. California, 314 U.S. 252, 262-63 (1941).

25. Brandenburg v. Ohio, 395 U.S. 444 (1969).

26. Smith v. Goguen, 415 U.S. 566 (1974).

27. Bigelow v. Virginia, 95 S. Ct. 2222 (1975); Dombrowski v. Pfister, 380 U.S. 479, 486 (1965); United States v. Raines, 362 U.S. 17, 21-22 (1960); Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940); *see* note 123 *infra.*

28. Feiner v. New York, 340 U.S. 315 (1951) (sidewalk speaker's conviction for disorderly conduct sustained). It should be noted, however, that mere fear of disorder does not justify silencing a speaker. Spence v. Washington, 418 U.S. 405, 416 (1974) (Douglas, J., concurring); Street v. New York, 394 U.S. 576 (1969); Terminiello v.

speech which are in and of themselves so detrimental that they are not protected.[29] It is also well established that pure speech in the public forum may be regulated as to time, place, and manner.[30]

Although earlier cases permitted prosecution for abusive pure speech directed at the flag,[31] since 1969 such verbal expression cannot constitutionally be singled out and treated differently from other forms of pure speech.[32] In some circumstances the government may have a sufficient interest in regulating its content or manner to overcome its protected nature. However, like other forms of pure speech, a heavy burden is placed on the government to show justification for any restrictions. The "alpha and omega" of first amendment protection of pure speech which is abusive of the flag is found in *West Virginia State Board of Education v. Barnette*[33] and *Street v. New York.*[34]

At issue in *Barnette* was the power of a state to force the students of its public schools to participate in compulsory flag salutes and slogans. The state, in basing its claim to such power on *Minersville School District v. Gobitis,*[35] reasoned "that 'national unity is the basis of national security,' that the authorities have 'the right to select appropriate means for its attainment,' and hence reache[d] the conclusion that such compulsory measures toward 'national unity' are constitutional."[36] In rejecting this argument, Justice Jackson made clear that the first amendment will not allow a state to force citizens to show respect for the flag even assuming such compulsion would benefit national unity. He stated in part:

> National unity as an end which officials may foster by persuasion and example is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement.
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> . . . .

Chicago, 337 U.S. 1 (1949). *See generally* Emerson, *Toward a General Theory of the First Amendment,* 72 YALE L.J. 877 (1963).

29. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (fighting words doctrine).

30. Kovacs v. Cooper, 336 U.S. 77 (1949); Cox v. New Hampshire, 312 U.S. 569 (1941); Thornhill v. Alabama, 310 U.S. 88 (1940); Cantwell v. Connecticut, 310 U.S. 296 (1940); Schneider v. New Jersey, 308 U.S. 147 (1939).

31. *See* note 13 *supra.*

32. Street v. New York, 394 U.S. 576 (1969); *see* notes 38-42 *infra* and accompanying text.

33. 319 U.S. 624 (1943).

34. 394 U.S. 576 (1969).

35. 310 U.S. 586 (1939).

36. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 640 (1943), *quoting* Minersville School Dist. v. Gobitis, 310 U.S. 586, 595 (1939).

> . . . We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.
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> . . . .
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> We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.[37]

In *Street*, the defendant had been convicted for publicly burning an American flag in protest over the shooting of civil rights advocate James Meredith. A police officer testified that he had heard Street say, "We don't need no damn flag," and "Yes; that is my flag; I burned it. If they let that happen to Meredith we don't need an American flag."[38]

In reversing Street's conviction, the Court reached only the issue of whether New York could constitutionally inflict punishment upon one who ventures " 'publicly [to] defy . . . or cast contempt upon [any American flag] by words . . . .' "[39] Writing for the Court, Justice Harlan found four "interests" a State may have in restricting pure speech which is contemptuous of the flag:

> (1) an interest in deterring appellant from vocally inciting others to commit unlawful acts; (2) an interest in preventing appellant from uttering words so inflammatory that they would provoke others to retaliate physically against him, thereby causing a breach of the peace; (3) an interest in protecting the sensibilities of passers-by who might be

37. *Id.* at 640-42. In a case decided the same day as *Barnette*, the Court reversed the convictions of three Jehovah's Witnesses for advocating and teaching refusal to salute the flag. Taylor v. Mississippi, 319 U.S. 583 (1943).

38. Street v. New York, 394 U.S. 576, 578-79 (1969). Street's conviction was based upon a New York statute, N.Y. PENAL LAW § 1425 (16)(d) (McKinney 1965), which made 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]."

39. 394 U.S. at 590. Much to the chagrin of the dissenters, Justice Harlan, writing the opinion, neatly finessed reaching the issue of whether burning the flag was protected symbolic speech. He held that from the trial record it was impossible to "eliminate the possibility either that appellant's words were the sole basis of his conviction or that appellant was convicted for both his words and his deed." *Id.* at 590. Reasoning from Thomas v. Collins, 323 U.S. 516 (1945), that if a conviction could have been based both on a constitutionally protected act and one which may be unprotected, the Court was bound to reverse because of the "unacceptable danger that the trier of fact will have regarded the two acts as 'intertwined' and have rested the conviction on both together." 394 U.S. at 588.

> shocked by appellant's words about the American flag; and (4) an interest in assuring that appellant, regardless of the impact of his words upon others, showed proper respect for our national emblem.[40]

Under the facts of the case, none of the four interests was sufficient to overcome first amendment protection.[41] As to the fourth interest, showing respect for the national symbol, the Court relied exclusively on *Barnette* to conclude, "[W]e have no doubt that the constitutionally guaranteed 'freedom to be intellectually . . . diverse or even contrary,' and the 'right to differ as to things that touch the heart of the existing order,' encompass the freedom to express publicly one's opinions about our flag, including those opinions which are defiant or contemptuous."[42]

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40. 394 U.S. at 591.

41. The Court found Street's utterances unlikely to incite others to commit unlawful acts or to provoke others to physically retaliate against him. It also rejected any state interest in preserving the sensibilities of passers-by or promoting respect for the national emblem. *Id.* at 591-93.

42. *Id.* at 593, *quoting* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 641-42 (1943). Chief Justice Warren and Justices Black, White and Fortas each filed separate dissenting opinions. All were in substantial agreement that the government had the constitutional power to punish physical acts of flag desecration regardless of the communicative intent of the actor. The dissent of Justice Fortas merits special attention as a harbinger of the dissenting opinions of Justice Rehnquist in Smith v. Goguen, 415 U.S. 566, 591 (1974), and Spence v. Washington, 418 U.S. 405, 416 (1974). Justice Fortas' dissent in *Street* represents one of the first attempts in the Supreme Court to analyze flag desecration statutes in property terms. He asserted that:

> If . . . it is permissible to prohibit the burning of personal property on the public sidewalk, there is no basis for applying a different rule to flag burning. And the fact that the law is violated for purposes of protest does not immunize the violator.
>
> Beyond this, however, the flag is a special kind of personalty. Its use is traditionally and universally subject to special rules and regulation. . . . A person may "own" a flag, but ownership is subject to special burdens and responsibilities. A flag may be property, in a sense; but it is property burdened with peculiar obligations and restrictions.

394 U.S. at 616-17 (citations omitted).

Justice Fortas' rationale has been criticised on the basis that any justification of a flag burning statute based upon the regulation of chattels is defectively overnarrow.

> If the governmental interest to be achieved is protection against dangers which arise from the public burning of personal property, why does the statute apply only to those circumstances in which such a public burning carries with it a message? . . . [T]his in itself should render the statute defective, just as if the asserted governmental interest were avowedly directed at the message conveyed.

Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 U.C.L.A.L. REV. 29, 53 (1973) (footnotes omitted) [hereinafter cited as *Speech*].

It should also be noted that the foundation of Justice Fortas' opinion that "special conditions [placed upon the flag as property] are not per se arbitrary or beyond governmental power under our Constitution" is the early flag case of Halter v. Nebraska, 205 U.S. 34 (1907), which upheld a state statute placing restrictions upon use of the flag for commercial purposes. 394 U.S. at 617. The continuing validity of the *Halter* case is questionable. *See* notes 98-102 *infra* and accompanying text and note 194 *infra*.

Hence, *Barnette-Street* stands as an impenetrable barrier to government restrictions on pure speech, no matter how contemptuous that speech might be of the flag, when the only interest is the protection of the flag itself as a symbol of national unity.

B. Symbolic Speech

The protection of the first amendment is not, however, limited to pure speech. That certain forms of conduct, without any verbal components, are in and of themselves so communicative that they are protected by the first amendment was established in *Stromberg v. California.*[43] Since that time, the questions of whether or not expressive conduct is to be protected and the extent of that protection have come before the court in a number of contexts,[44] from sit-ins[45] and picketings,[46] to draft card burning.[47]

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43. 283 U.S. 359 (1931). For displaying a red flag the defendant was convicted under a California statute which prohibited "the display of the flag 'as a sign, symbol or emblem of opposition to organized government'." *Id.* at 369. In reversing the conviction, Chief Justice Hughes implied such conduct was a form of "free political discussion" and as such, a statute prohibiting the conduct was repugnant to the Constitution. *Id.*

44. Cases of symbolic speech arising from the 1960's civil rights movement and from demonstrations of protest over the Vietnam War evidenced the Supreme Court's awareness of the need to extend first amendment safeguards to other than verbal or written forms of communication. *See* Gregory v. Chicago, 394 U.S. 111 (1969) (protest marchers refused to disperse); Tinker v. Des Moines School Dist., 393 U.S. 503 (1969) (wearing black armbands in school as protest over Vietnam War); Brown v. Louisiana, 383 U.S. 131 (1966) (refusing to leave segregated library); Cox v. Louisiana, 379 U.S. 559 (1965); Cox v. Louisiana, 379 U.S. 536 (1965) (courthouse picketing); Edwards v. South Carolina, 372 U.S. 229 (1963) (protest marchers refused to disperse); Garner v. Louisiana, 368 U.S. 157 (1961) (restaurant sit-in). However, expressive conduct does not enjoy first amendment protection if it infringes upon valid state interests which justify prohibiting such conduct. United States v. O'Brien, 391 U.S. 367 (1968) (conviction sustained for publicly burning draft card); Adderley v. Florida, 385 U.S. 39 (1966) (protesters' trespass conviction sustained). The state of the law concerning symbolic speech, prior to Spence v. Washington, 418 U.S. 405 (1974), has been widely discussed. *See, e.g.*, Note, *Symbolic Conduct*, 68 COLUM. L. REV. 1091 (1968) [hereinafter cited as *Conduct*]; *Speech, supra* note 42.

45. *See, e.g.*, Brown v. Louisiana, 383 U.S. 131 (1966); Garner v. Louisiana, 368 U.S. 157 (1961).

46. For example, Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949), upheld an injunction against peaceful picketing on grounds it violated a legitimate state anti-trade-restraint law when the picketing's sole purpose was to induce an ice company to refrain from selling to non-union distributors. The Court stated, "It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute. We reject the contention now." *Id.* at 498. It continued, "[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of

Symbolic speech is subject to the same restrictions concerning time, place, manner, and content as pure speech;[48] but, due to its nature, it has been subject to other limitations. The leading Supreme Court decision concerning limitations which the government may place upon symbolic speech is *United States v. O'Brien*.[49] In sustaining O'Brien's conviction for publicly burning his draft card, Chief Justice Warren, speaking for the Court, stated:

> We cannot accept the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea . . . . This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[50]

In essence, *O'Brien* suggested that first amendment protection of symbolic speech contains a "Catch 22"[51] not found in the protection of pure speech. If the government could establish the requisite interest in controlling the conduct, free speech would take a back seat to the regulation.[52]

The *O'Brien* approach, on its face although not in practical application, appears to be a compromise between the showing necessary to

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language, either spoken, written, or printed." *Id.* at 502. It should be noted that cases such as *Giboney* do not involve symbolic speech but rather what has been termed "speech plus," *i.e.*, speech carried out by a form of conduct which is not necessarily communicative. *See Speech, supra* note 42, at 31 n.13; *Conduct, supra* note 44, at 1094.

47. United States v. O'Brien, 391 U.S. 367 (1968).

48. *See* notes 28-30 *supra* and accompanying text.

49. 391 U.S. 367 (1968).

50. *Id.* at 376-77 (footnotes omitted).

51. J. HELLER, CATCH-22, at 47 (1961).

52. "[I]f the state can pose a non-speech interest as the basis for suppressing conduct, then such conduct should not be regarded as protectible under the first amendment . . . ." *Speech, supra* note 42, at 39; *cf.*, Tinker v. Des Moines School Dist., 393 U.S. 503, 515 (1969) (White, J., concurring).

enable the government to justify a limitation on pure speech and the showing necessary to justify a limitation on conduct alone.[53] This approach has been criticized, with the major complaint being that symbolic speech should logically be entitled to the same protection as pure speech.[54]

It is clear from the cases that not all conduct will be considered symbolic speech. In this respect, *Spence* stands as a major decision in the area of symbolic speech. It is unique for it is the first attempt by the Supreme Court to establish "a test for determining at what point conduct becomes so intertwined with expression that it becomes necessary to weigh the State's interest in proscribing conduct against the constitutionally protected interest in freedom of expression."[55] Spence sought to protest the recent invasion of Cambodia and the killings at Kent State University.[56] Taking his privately owned flag, he affixed a peace

53. It has been suggested that *O'Brien* establishes essentially the same protection for both symbolic and pure speech. Note, *Freedom of Speech and Symbolic Conduct: The Crime of Flag Desecration*, 12 ARIZ. L. REV. 71, 77-80 (1970). Yet this suggestion appears erroneous. One might ask why the Court felt compelled to spell out new tests when symbolic speech was involved if the established pure speech tests applied. In some cases the result of applying the *O'Brien* test may be the same as applying the "pure speech" test. For example, when dealing with restrictions on time, place, and manner of speaking in public, both pure and symbolic speech would have to succumb to reasonable restrictions. *See, e.g.*, Cox v. New Hampshire, 312 U.S. 569 (1941). In other cases, however, the results would be different. For example, when a breach of peace is involved the government is required to make a showing of likely and imminent danger before it may restrict pure speech. Brandenburg v. Ohio, 395 U.S. 444 (1969). Yet such a showing is not suggested by the test of *O'Brien*. *Cf.* Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1491 (1975) [hereinafter cited as Ely]. The telling difference appears in the manner *O'Brien* is applied by the courts, for they seem to require the government to show little more than a rational relation between the interest and the restriction. *Speech, supra* note 42, at 43; *Conduct, supra* note 44, at 1101-02. *See generally* notes 107-23 *infra* and accompanying text.

54. "Any attempt to disentangle 'speech' from conduct which is in itself communicative will not withstand analysis. The speech element in symbolic speech is entitled to no lesser (and also no greater) degree of protection than that accorded to so-called pure speech." *Speech, supra* note 42, at 33. *See also* Velvel, *Freedom of Speech and the Draft Card Burning Cases*, 16 U. KAN. L. REV. 149 (1968); *Conduct, supra* note 44. Difficulty with *O'Brien* appears in light of the limitation on statutes designed to punish the communication of ideas unfavorable to the controlling majority. This arises under statutes which Professor Nimmer has called "overnarrow." *See* note 42, *supra*. From an *O'Brien* analysis, the government could justify a statute which was drawn to control conduct that was communicative, while at the same time allowing similar, uncommunicative conduct to go unpunished. An analysis of this situation has not been undertaken by the Court. It appears to be but a further manifestation of the problems arising from treating symbolic and pure speech so differently.

55. Cowgill v. California, 396 U.S. 371, 372 (1970) (Harlan, J., concurring).

56. 418 U.S. at 408.

symbol made of removable black tape to either side and hung the flag in an upside down position from his apartment window. Three Seattle police officers, observing this display, entered the apartment house, arrested Spence, and seized his flag.[57] Spence was cooperative and no disturbance of any kind occurred.[58]

Spence was charged under the Washington "improper use" statute which prohibits placing "any word, figure, mark, picture, design, drawing or advertisement of any nature upon any flag . . . of the United States . . . ."[59] Tried before a local justice court, Spence was found guilty and sentenced to 90 days detainment, 60 days of which was suspended.[60] Exercising his right to be tried de novo, Spence received a jury trial before the King County Superior Court.[61] Testifying in his own defense, Spence stated: "I felt there had been so much killing and that this was not what America stood for. I felt that the flag stood for America and I wanted people to know that I thought America stood for peace."[62] After having been instructed that all the statute required for conviction was a finding that the defendant had intended to display the flag with the peace symbol attached, the jury found Spence guilty, and the Court sentenced him to 10 days in jail, subsequently suspending the sentence and imposing a fine of $75.[63] On appeal[64] the conviction was reversed on the grounds that the improper

57. *Id.*

58. *Id.*

59. WASH. REV. CODE ANN. § 9.86.020 (1961). The statute provides:

> No person shall, in any manner, for exhibition or display:
>
> (1) Place or cause to be placed any word, figure, mark, picture, design, drawing or advertisement of any nature upon any flag, standard, color, ensign or shield of the United States or of this state, or authorized by any law of the United States or of this state; or
>
> (2) Expose to public view any such flag, standard, color, ensign or shield upon which shall have been printed, painted or otherwise produced, or to which shall have been attached, appended, affixed or annexed any such word, figure, mark, picture, design, drawing or advertisement . . . .

Id.

WASH. REV. CODE ANN. § 9.86.010 (1961) defines flag thusly:

> The words flag, standard, color, ensign or shield, as used in this chapter, shall include any flag, standard, color, ensign or shield, or copy, picture or representation thereof, made of any substance or represented or produced thereon, and of any size, evidently purporting to be such flag, standard, color, ensign or shield of the United States or of this state, or a copy, picture or representation thereof.

60. 418 U.S. at 407.

61. *Id.* at 408.

62. *Id.*

63. *Id.*

64. State v. Spence, 490 P.2d 1321 (Wash. Ct. App. 1971), *rev'd*, 506 P.2d 293 (1973), *rev'd*, 418 U.S. 405 (1974). The court stated:

> The next question presented, therefore, is whether a peace symbol, which would be protected symbolic speech if used away from the flag has no such special consti-

use statute suffered from overbreadth and was void on its face under the first and fourteenth amendments.[65] The court of appeals was reversed by the Washington Supreme Court and Spence's conviction was reinstated.[66]

Thus, Spence's appeal to the Supreme Court necessitated a decision as to whether or not his conduct was so intertwined with expression that the state would have to prove an interest sufficient to justify the control of speech, as well as conduct. In deciding the issue, the Court established a framework which may be applied in all cases where conduct is alleged to be symbolic speech. Such a determination must be made on the facts by looking at the nature of the activity combined with the factual context and environment in which it is undertaken.[67] In examining these three elements, it appears the Court was concerned with discerning both the amount of "meaning" which is conveyed by the acts and the extent that the acts will infringe on possible state interests. The ultimate object is to weigh those two interests and accommodate the more compelling interest in a given case.

Spence's concern with the "meaning" of the conduct is a logical extension of the first amendment analysis of pure speech. The extent of "meaning" conveyed by pure speech is important in establishing whether or not it is to be protected by the first amendment;[68] a fortiori, it is no less important when the speech is symbolic speech. In the Court's analysis, the meaning conveyed by the conduct is a function of its nature and the context in which it takes place. The actor must intend to convey a particularized message and the surrounding circumstances must make it likely that those who view the conduct will understand the message.[69] The more meaningful, direct and likely to be understood, the

tutional protection when the peace symbol is placed upon the flag itself. If the flag mirrors American experience, past and present; and if respect for the flag cannot constitutionally be compelled by a mandatory flag salute; and if symbolic opposition to the flag cannot be prohibited; and if symbolic as well as actual speech is entitled to constitutional protection; and if the suppression of free expression cannot be upheld in the absence of an independent governmental interest to be protected, unrelated to the suppression of free expression and not broader than is necessary for that purpose; and if offense to the sensibilities of the average citizen is not enough to condemn the exercise of free speech—can it be said to really matter, on a balancing of interest, whether the words or symbols are used away from the flag or representations thereof even though in closest proximity thereto, or whether such words or symbols are used on the flag itself.

Id. at 1326, (citations omitted).

65. *Id.*

66. State v. Spence, 506 P.2d 293 (Wash. 1973), *rev'd*, 418 U.S. 405 (1974).

67. 418 U.S. at 409-10.

68. *See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

69. 418 U.S. at 410-11.

more closely akin to pure speech conduct becomes and, therefore, the more deserving of the same protection. However, meaning alone is not sufficient to meet *Spence*'s requirements. Just as in the area of pure speech, the Court also considers how likely it is the conduct will infringe upon a governmental interest. Governmental interests in controlling the conduct are a function of the environment in which the conduct takes place. The less disruptive and the less it infringes on the rights of others, the more deserving the conduct is of first amendment protection.[70]

Applying the analysis set forth to the facts in *Spence*, one is led to the conclusion, as was the Court, that the conduct was so intertwined with expression that it constituted a form of speech. First, the nature of the activity was the use of the flag and a peace symbol. Conduct with such symbols has long been considered "a primitive but effective way of communicating ideas. The use of an emblem or flag to symbol-

70. Such reasoning is not altogether new. In Tinker v. Des Moines School Dist., 393 U.S. 503 (1969), the same considerations are reflected. The Tinker children wore black arm bands to school in protest of the Vietnam War. When asked by school officials to remove them, they refused and were suspended until they would return without them. Recognizing this to be a case dealing with symbolic speech, the Court laid great stress on the fact that the acts were "entirely divorced from actually or potentially disruptive conduct" and were therefore "closely akin to 'pure speech' which . . . is entitled to comprehensive protection under the First Amendment." *Id.* at 504-06. The conduct was not aggressive or disruptive, did not interfere with class work, and there were no threats or acts of violence. The Court pointed out:

> The school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners. There is here no evidence whatever of petitioners' interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students.

Id. at 508. Under such circumstances the school authorities were required to show a material and substantial interference with discipline before the restriction could be justified. *Id.* at 514; *cf.* Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966); Blackwell v. Issaquena County Bd. of Educ., 363 F.2d 749 (5th Cir. 1966). "[U]ndifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." 393 U.S. at 508 (1969); *cf.* Brown v. Louisiana, 383 U.S. 131 (1966) (convictions for breach of peace against Black defendants who refused to leave an unconstitutionally segregated library were reversed). In *Brown*, Justice Fortas wrote the opinion for the Court and stressed that there was "no disorder, no intent to provoke a breach of the peace and no circumstances indicating that a breach might be occasioned by petitioners' actions." *Id.* at 141. Under such circumstances, first amendment

> rights are not confined to verbal expression. They embrace appropriate types of action which certainly include the right in a peaceable and orderly manner to protest by silent and reproachful presence, in a place where the protestant has every right to be, the unconstitutional segregation of public facilities.

Id. at 142. *See also* Edwards v. South Carolina, 372 U.S. 229 (1963) (peaceful assembly at the state capital to protest grievances).

ize some system, idea, institution, or personality, is a short cut from mind to mind."[71] Indeed, it has been contended by some commentators and lower courts that *any* act done with a flag per se communicative and entitled to be called symbolic speech.[72] This contention, however, appears to have been rejected by *Spence*. The activity—use of the flag—is but one factor to consider.

Second, the factual context in which the activity took place gave meaning to the symbols used. The invasion of Cambodia and the killings at Kent State University had taken place shortly before Spence displayed the adorned flag from his window. Spence's uncontroverted testimony at trial regarding the purpose of his act was that he "wanted people to know that I thought America stood for peace."[73] At a different time, at a different place, and under different circumstances, this very same act—displaying a flag upside down with a peace symbol on it—"might be interpreted as nothing more than bizarre behavior, but it would have been difficult for the great majority of citizens to miss the drift of appellant's point at the time that he made it."[74] His act was not one of "mindless nihilism," but rather one of "pointed expression."[75]

It appears significant that the Court did not end its analysis of the conduct at this point but continued to examine the environment in which the act took place. Spence had displayed a privately owned flag on private property and not "in an environment over which the state by necessity must have certain supervisory powers unrelated to expression."[76] *Spence* was not a case where the state had a right to control access to public areas in terms of reasonable time, manner, or place, and there was no proof of any risk of a breach of the peace or of need to protect the sensibilities of passersby. For these reasons the Court scrutinized "with particular care the interests advanced by appellee to

71. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (1943).

72. *See, e.g.*, Long Island Vietnam Moratorium Comm. v. Cahn, 437 F.2d 344, 348 (2d Cir. 1970), *aff'd mem.* 418 U.S. 906 (1974); Crosson v. Silver, 319 F. Supp. 1084, 1086 (D. Ariz. 1970); *Exploiting, supra* note 8. *But see* Parker v. Morgan, 322 F. Supp. 585, 587 (W.D.N.C. 1971).

73. 418 U.S. at 408.

74. *Id.* at 410.

75. *Id.*

76. *Id.* at 411. In West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 630 (1943), the Court stated:

> The freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual. It is such conflicts which most frequently require intervention of the State to determine where the rights of one end and those of another begin. . . . The sole conflict is between authority and rights of the individual.

support its prosecution."[77] In short, the conduct in this case was "direct, likely to be understood, and within the contours of the first amendment,"[78] and it was incumbent upon the state to demonstrate a state interest sufficient to allow suppression of speech.

III. THE APPLICABILITY OF *O'Brien* IN LIGHT OF *Spence*

In *Spence*, the Court assumed that the State of Washington had a valid interest in preserving the flag as an unalloyed symbol of our country.[79] In an intriguing footnote, however, the Court stated:

> If this interest is valid, we note that it is directly related to expression in the context of activity like that undertaken by appellant. For that reason and because no other governmental interest unrelated to expression has been advanced or can be supported on this record, the four-step analysis of *United States v. O'Brien* is inapplicable.[80]

The *O'Brien* test is "inapplicable" because it applies only "when 'speech' and 'nonspeech' elements are combined in the same course of conduct" *and* when "a sufficiently important governmental interest in regulating the *nonspeech* element" is asserted.[81] Although a case

77. 418 U.S. at 411.

78. *Id.* at 415. The first lower court decision to interpret and apply *Spence* is United States *ex rel.* Radich v. Criminal Court, 385 F. Supp. 165 (S.D.N.Y. 1974). In deciding the case, Judge Cannella applied what he felt was the "analytical framework" of *Spence*. He said *Spence* called for a two step analysis. "First, a determination of whether flag-related conduct is within the protections of the First Amendment, and, second, whether, upon the record of the given case, the interests advanced by the state are so substantial as to justify infringement of constitutional rights." *Id.* at 173.

The determination of the first step, *i.e.*, whether the conduct was entitled to first amendment protection, was to be made objectively by examining the nature, context, and environment of the activity. From this examination it would have to be found that the conduct was intended to convey a particularized message and that it would likely be understood by viewers before protection would be granted.

The nature of the activity was the same as in *Spence, i.e.*, use of the flag to convey a message. Judge Cannella then examined the "context and environment" of the activity to determine if it would have been meaningful to viewers.

> [T]he context and environment in which Radich displayed the . . . constructions is revealing. He did so at the time of this nation's most significant involvement in the Vietnam conflict, as a means of signifying his dissent and protest against the American action. The playing of recorded anti-war protest music in the gallery during the exhibition further intensified the symbolic and communicative nature of the display.

Id. at 175. Under such circumstances the court found it would have been difficult "to miss the drift" of the point sought to be made by the display and, hence, the activity was within the ambit of the first amendment. The Court then examined the interests in suppression of this expression and found them to be insufficient to justify a restriction.

79. 415 U.S. at 413-14.

80. *Id.* at 414 n.8 (citations omitted).

81. United States v. O'Brien, 391 U.S. 367, 376 (1968) (emphasis added). The four step *O'Brien* test is in reality a three step test which applies only when the governmental

may involve governmental regulation of symbolic conduct, *Spence* makes it clear that the *O'Brien* test is not automatically applicable. When the state's interest is directly related to the suppression of speech, its sufficiency to justify the state regulation must be measured by the test used when pure speech is involved, rather than the less stringent *O'Brien* test.[82] Hence, when it has been determined that a case in-

interest is directed toward regulating the nonspeech element. The so-called "third step" of *O'Brien*, that the "governmental interest is unrelated to suppression of free expression," is in fact a prerequisite for applying the other three steps. *But see* Ely, *supra* note 53, at 1482.

82. *See* notes 21-54 *supra* and accompanying text. In cases where the governmental interest is directly related to suppressing the speech element of symbolic conduct, the court must perform a pure speech categorization test and balancing analysis and eschew further analysis under the *O'Brien* case as being inapplicable. The categorization method is exemplified by the approach of Justice Harlan in Cohen v. California, 403 U.S. 15 (1971). If expression does not fit within one of "various established exceptions" to first amendment protection, then in "most situations the State" will not have a "justifiable interest in regulating speech." *Id.* at 19-20. *See also* Ely, *supra* note 53, at 1492-93. Categories arise, however, from prior decisions which have employed balancing techniques. *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). Hence, where a novel governmental interest is asserted and the expression does not fall within an established category, the Court will resort to a balancing approach. *See, e.g.*, Spence v. Washington, 418 U.S. 405 (1974); Cohen v. California, 403 U.S. 15 (1971). When balancing competing interests, "the court must, in each case, balance the individual and social interest in freedom of expression against the social interest sought by the regulation which restricts expression." Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 912 (1963); *see, e.g.*, Konigsberg v. State Bar, 366 U.S. 36 (1961); Barenblatt v. United States, 360 U.S. 109 (1959); NAACP v. Alabama, 357 U.S. 449 (1958); American Communication Ass'n v. Douds, 339 U.S. 382 (1950); United States v. Miller, 367 F.2d 72 (2d Cir. 1966), *cert. denied*, 386 U.S. 911 (1967); United States v. Aarons, 310 F.2d 341 (2d Cir. 1962).

The issue presented by flag cases, in balancing terms, is whether the state may remove a national symbol from the roster of materials that may be used as a background for communication in order to preserve the character of that symbol. To be balanced against the prominent position the flag has enjoyed in our nation's art, music, history, and literature is the deep rooted philosophy underlying the first amendment and our constitutional form of government for which the flag stands.

The essence of this philosophy, which has found voice in several Supreme Court decisions, is that the very foundation of our constitutional form of government is its ability to tolerate expression of opinion and belief that seem to the majority to be of the rankest error. Our democracy is based on the belief that truth is to be distilled from a multitude of tongues rather than from a select few and that debate on controversial issues should be uninhibited, wide open, and robust. New York Times v. Sullivan, 376 U.S. 254 (1964); Cantwell v. Connecticut, 310 U.S. 296 (1940); De Jonge v. Oregon, 299 U.S. 353 (1937); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). To subjugate this principle for its emblem, the flag, is to exult form over substance, to discard the philosophy and keep the rhetoric. The reason that the flag is so important to so many people is not because it has been celebrated in the many ways pointed out by Justice Rehnquist (*see* Smith v. Goguen, 415 U.S. 566, 600-03 (1974) (Rehnquist, J., dissenting)), but rather, because it stands for the proposition that:

volves symbolic conduct,[83] the next analytical step is to determine whether the state's interest in regulating that symbolic conduct is directly related to suppressing the speech element of that conduct. In *Spence*, the interest asserted by the government was directly aimed at regulating the speech element of the defendant's conduct. Therefore, the *O'Brien* test was not appropriate and was not used.

Spence also sheds light on when a governmental interest in regulating symbolic conduct will be considered directly related to the speech element. The aim of the governmental interest, as with the determination of whether or not conduct is symbolic speech,[84] may be discerned by examining the nature, context, and environment of the conduct. The nature and context of the conduct reveal the extent of its speech element while its environment reveals the extent of its nonspeech element.[85] The conduct approaches pure speech as its speech element increases and its nonspeech element decreases. As it does so, the governmental interest in controlling that conduct becomes more and more directly related to expression. Whether or not the governmental interest has crossed the line between being incidentally or directly related to expression depends upon the facts of each case.

In *Spence*, the nature and context of the conduct was such that the prosecution was "for the expression of an idea through activity."[86] Moreover, the conduct took place in an environment in which the nonspeech element was minimal, *i.e.*, an environment where its possible disruptive effects were negligible.[87] Hence, the interest was found to be directly related to expression.[88] It remains to be seen whether or not the additional nonspeech element of conduct involved in acts of

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If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . .

West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943); *see* note 64 *supra*.

83. *See* notes 67-78 *supra* and accompanying text.

84. *Id.*

85. *See* notes 67-70 *supra* and accompanying text. In Crosson v. Silver, 319 F. Supp. 1084, 1087 (D. Ariz. 1970), the court stated:

[W]e must . . . determine what are the speech and nonspeech elements in such conduct in order to decide whether there is an important or substantial governmental interest in regulating the non speech element. The speech element is the readily recognizable expression of discontent with something the flag symbolizes. The non speech element in an act of flag desecration is the physical act of desecration.

See also Speech, *supra* note 42, at 36. *But see* Ely, *supra* note 53, at 1493-96.

86. 418 U.S. at 411.

87. *See* notes 76-79 *supra* and accompanying text.

88. 418 U.S. at 414 n.8.

flag *desecration*, which involve actual physical harm to the cloth of the flag, will be sufficient to establish a governmental interest *not* directly related to suppression of expression.[89]

Once having determined whether the state's interest is either directly or incidentally related to suppression of expression, the final step for the court is to measure that governmental interest according to the applicable standard—the pure speech standard,[90] when the interest is directly related, or the *O'Brien* standard,[91] when it is incidentally related to suppression of expression.

IV. Possible Governmental Interests in Prohibiting Use of the Flag in Symbolic Conduct

Ultimately, the validity of flag statutes rests upon whether or not the government has any interest in protecting the "physical integrity" of the flag that is sufficient to outweigh first amendment rights.[92] The following interests have been offered in justification of flag legislation and the concomitant burden it places upon symbolic speech: (1) encouragement of patriotism and love of country by promoting respect for the national emblem;[93] (2) preservation of the sensibilities of passers-by;[94] (3) prevention of breaches of the peace;[95] (4) protection of a governmental property interest in the flag;[96] and, (5) preservation of the national flag as an unalloyed symbol of our country.[97] Each interest should be examined individually.

89. *But see* notes 211-13 *infra* and accompanying text.

90. *See* notes 22-27 *supra* and accompanying text; note 82 *supra*.

91. *See* notes 49-54 *supra* and accompanying text.

92. This is so regardless of the standard, (pure speech or *O'Brien*), which is applied in a given case. The pure speech standard will, of course, make it more difficult for the government to establish the sufficiency of its interest.

93. Halter v. Nebraska, 205 U.S. 34, 42 (1907).

94. This interest was rejected in Street v. New York, 394 U.S. 576, 592 (1969); *see* notes 38-42 *supra* and accompanying text.

95. Although this interest has been suggested by the Court in several cases, in no case has the factual situation been such as to require an analysis of its validity. Spence v. Washington, 418 U.S. 405, 409 (1974); Street v. New York, 394 U.S. 576, 591-92 (1969); Halter v. Nebraska, 205 U.S. 34, 41 (1907). This interest was expressly approved in *Halter* and has never been expressly disapproved by a majority of the Court. Halter v. Nebraska, 205 U.S. 34, 41 (1907). *But see* notes 107-23 *infra* and accompanying text.

96. First alluded to in Halter v. Nebraska, 205 U.S. 34, 42-43 (1907), and later expanded upon by Justice Rehnquist in his dissenting opinion in Smith v. Goguen, 415 U.S. 566, 594-96 (1974), this interest was later discredited somewhat (at least as to privately owned flags) by the majority opinion in Spence v. Washington, 418 U.S. 405, 408-09 (1974). *See* notes 124-68 *infra* and accompanying text.

97. This interest was advanced by Justice Rehnquist in his dissent in Spence v.

A. *Encouragement of Patriotism*

That an interest in the encouragement of patriotism would be sufficient to support the constitutionality of flag statutes was first suggested in *Halter*. There the Court found that the "statute in question evidently had its origin in a purpose to cultivate a feeling of patriotism."[98] The *Halter* Court was "unwilling to adjudge that in legislation for that purpose the State erred in duty or ha[d] infringed the constitutional right of anyone."[99] The continued validity of *Halter* has been questioned[100] and *Barnette* rejects the idea that advancement of patriotism is a constitutionally sufficient basis to sustain a coercive state statute.[101] Hence, it follows that this asserted interest has merely historical and not legal significance today. Yet, contemporary assertions of a sufficient state interest in the flag as a symbol, though not crassly calling for the advancement of patriotism, draw heavily on the rationale and, indeed, the language of *Halter* for support.[102]

B. *Preservation of the Sensibilities of Passers-by*

In *Spence*, an interest in protecting the sensibilities of passers-by was found insufficient to support the regulation. Public "expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."[103] In some situations the government may be justified in protecting "captive audiences" in which unwilling and unsuspecting viewers may have a distasteful mode of expression thrust upon them.[104] Such justification is "dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner."[105] *Spence* found, however, the defendant's conduct did not impose ideas upon a captive audience. A viewer who was displeased could simply turn his head. "Anyone who might have been offended could easily have avoided the display."[106] It fol-

Washington, 418 U.S. 405, 421 (1974). The majority opinion in *Spence* expressly declined to consider the validity of this interest. *Id.* at 413-14.

98. 205 U.S. at 43.

99. *Id.*

100. *See* note 194 *infra.*

101. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 640-42 (1943).

102. *See* note 194 *infra.*

103. 418 U.S. at 412, *quoting* Street v. New York, 394 U.S. 576, 592 (1969).

104. *See* Lehman v. City of Shaker Heights, 418 U.S. 298 (1974); Rowan v. Post Office Dept., 397 U.S. 728 (1970).

105. Cohen v. California, 403 U.S. 15, 21 (1971) (conviction for disturbing the peace by wearing a jacket bearing the words "Fuck the Draft" in the corridor of a municipal court was overturned).

106. 418 U.S. at 412; *cf.* Cohen v. California, 403 U.S. 15 (1971).

lows that this interest, apart from the captive audience situation, is insufficient to support flag statutes.

C. *Prevention of Breaches of the Peace*

The legitimacy of the state's interest in preventing breaches of the peace is unquestioned.[107] Under certain circumstances such an interest can even be used to silence a protester whose sole form of communication is verbal.[108] However, in order to invoke a breach of the peace rationale for this purpose, the statute must be narrowly drawn and the danger of disorder arising from the speaker's words must be substantial and immediate.[109] Until that degree of danger is reached, the protester is free to disseminate his views no matter how disturbing or offensive his audience or the state legislature might find them.[110]

It is beyond doubt that acts prohibited by flag statutes would in some circumstances precipitate an emotional reaction. It was pointed out long ago "that insults to a flag have been the cause of war, and indignities put upon it, in the presence of those who revere it, have often been resented and sometimes punished on the spot."[111] Yet, in other circumstances, no such reaction will be provoked.[112] The question is, "[H]ow imminent must a breach of the peace be, before [the state] can validly act to punish an individual for exercising his First Amendment rights?"[113]

The state's interest in preventing breaches of the peace will not jus-

107. Feiner v. New York, 340 U.S. 315 (1951).

108. *Id.*

109. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

110. *Cf.* Spence v. Washington, 418 U.S. 405, 415 (1974) (Douglas, J., concurring); Street v. New York, 394 U.S. 576 (1969); Terminiello v. Chicago, 337 U.S. 1 (1949).

It should be recognized that this is a "pure speech" standard. *See* notes 22-42 *supra* and accompanying text. However, this is the appropriate standard to be applied when a state attempts to justify flag legislation on a breach of the peace rationale. Since these statutes focus upon a particularized activity which can be dealt with under the aegis of a general breach of the peace statute, under the *Spence* analysis (*see* notes 84-85 *supra* and accompanying text), it must be concluded that they are directly related to suppression of expression. This being so, *O'Brien* becomes inapplicable and the pure speech standard comes into play. *See* notes 79-91 *supra* and accompanying text. Applying the pure speech standard mandates the conclusion that these statutes are overbroad and unconstitutional. *See* notes 111-123 *infra* and accompanying text.

111. Halter v. Nebraska, 205 U.S. 34, 41 (1907).

112. *See, e.g.*, Spence v. Washington, 418 U.S. 405 (1974); Long Island Vietnam Moratorium Committee v. Cahn, 437 F.2d 344 (2d Cir. 1970), *aff'd* 418 U.S. 906 (1974); Parker v. Morgan, 322 F. Supp. 585 (W.D.N.C. 1971).

113. United States *ex rel.* Radich v. Criminal Court, 385 F. Supp. 165, 180 (S.D.N.Y. 1974).

tify restriction of the activities of most people who choose to communicate through flag symbolism. Today, when informal use of the flag is a widespread social phenomenon, the usual audience reaction to any type of flag "desecration" is mild or nonexistent.[114] Thus, the overwhelming majority of cases wherein some dissident has made symbolic use of the flag are totally devoid of any facts which would allow a breach of the peace statute to be constitutionally invoked to prevent the protester from continuing. In fact, a flag statute based solely upon preventing breaches of the peace would function only in isolated instances to achieve that which is really sought to be accomplished by most supporters of flag statutes: the suppression of the use of the flag as a *form* of expression, or, in the words of Justice Rehnquist, preventing the flag's use as a "background for communications."[115]

It is for the above reasons that preventing breaches of the peace, as a state interest in support of flag legislation, has never been fully considered by either the majority or minority Supreme Court opinions in recent cases. Lack of any breach of the peace danger in the factual context of these cases has precluded the majority from analyzing this interest except in dicta, which usually mention that its elements are not present, and, therefore, it is not a factor to be considered.[116] The dissenters will not embrace it because it can only logically lead to that which they do not wish to accept—opening the flag as a legitimate form of communication, with exception only for the narrow restraints applicable to pure speech.

Even if one were to acknowledge that the state's interest in preventing breaches of the peace would, in some cases, justify stopping a flag protester, the question would remain: Is such an interest sufficient to sustain present flag legislation from constitutional attack? The answer is no. Any activity sought to be prevented by a flag statute based upon

114. In Smith v. Goguen, 415 U.S. 566 (1974), the Court stated:

> [W]e see the force of the District Court's observation that the flag has become "an object of youth fashion and high camp. . . ." As both courts below noted, casual treatment of the flag in many contexts has become a widespread contemporary phenomenon. Flag wearing in a day of relaxed clothing styles may be simply for adornment or a ploy to attract attention. It and many other current, careless uses of the flag nevertheless constitute unceremonial treatment that many people may view as contemptuous. Yet in a time of widely varying attitudes and tastes for displaying something as ubiquitous as the United States flag or representations of it, it could hardly be the purpose of the Massachusetts Legislature to make criminal every informal use of the flag.

Id. at 573-74 (citations omitted).

115. Spence v. Washington, 418 U.S. 405, 423 (1974) (Rehnquist, J., dissenting).

116. *See, e.g.*, Spence v. Washington, 418 U.S. 405, 409 (1974); Smith v. Goguen, 415 U.S. 566, 568 (1974); Street v. New York, 394 U.S. 576, 592 (1969).

the state's interest in preventing breaches of the peace could be stopped by a breach of the peace statute of general application. That is to say, if a public speaker, under appropriate circumstances of danger, may be silenced through the aegis of a general breach of the peace statute, he may also be silenced even though using the flag as a form of symbolic speech if the same circumstances are present.[117] A narrowly worded general breach of the peace statute is clearly constitutional, because, although it may act to restrict speech, it does so only under conditions of imminent danger and does not place a prior restraint upon any particular mode of communication.[118]

Arguably, any statute which totally prohibits use of the flag to convey symbolic messages on the rationale that such activity in and of itself is *likely* to cause a breach of the peace is unconstitutional. It has been held that "an act of flag desecration standing alone is insufficient provocation to justify the imposition of criminal sanctions or [the] abridge[ment of] First Amendment rights . . . ."[119] In addition, other "objective evidence which demonstrates the imminence of public unrest or a clear and present danger that a breach of the peace is likely must be adduced . . . ."[120] It is not sufficient to show merely that onlookers may react emotionally, for "a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."[121] The effect of a statute that makes an act of flag desecra-

117. "Such acts which do constitute breaches of the peace can be adequately prevented and controlled as such, rather than as acts of flag desecration, through the use of traditional breach-of-peace statutes." *Exploiting, supra* note 8, at 345. *See also* Crosson v. Silver, 319 F. Supp. 1084 (D. Ariz. 1970).

118. See notes 107-10 *supra* and accompanying text.

119. United States *ex rel.* Radich v. Criminal Court, 385 F. Supp. 165, 180 (S.D.N.Y. 1974).

120. *Id.*; *cf.* State v. Kool, 212 N.W.2d 518 (Iowa 1973).

121. Terminiello v. Chicago, 337 U.S. 1, 4 (1949). *Cf.* Spence v. Washington, 418 U.S. 405, 415 (1974) (Douglas, J., concurring), where Justice Douglas cited the rationale of the Iowa Supreme Court in State v. Kool, 212 N.W.2d 518 (Iowa 1973). In that case the defendant placed a peace symbol made from cardboard and tin foil in his window and then hung a flag in an upside down position behind it. After holding that this display constituted symbolic speech the Iowa court stated:

> Someone in Newton might be so intemperate as to disrupt the peace because of this display. But if absolute assurance of tranquility is required, we may as well forget about free speech. Under such a requirement, the only "free" speech would consist of platitudes. That kind of speech does not need constitutional protection.

Id. at 521. Justice Douglas declared that this view was an exact articulation of his own. 418 U.S. at 416.

tion, without more, the subject of criminal sanction, even if based upon the state's interest in preventing breaches of the peace, would be to place a prior restraint upon a particular form of communication and would do so merely on the basis of a tenuous apprehension of disorder. It is not disputed that those acts which would definitely cause substantial disturbance can be prevented.[122] But by placing prior restraints on acts which would not have this effect, flag statutes based on the state's interest in preventing breaches of the peace are overbroad and unconstitutional.[123]

D. *Property Interest*

In exercising free speech, one may not infringe upon another's protected property rights.[124] If then the government has a recognizable

122. Feiner v. New York, 340 U.S. 315 (1951).

123. As stated in *Radich*:

> [A] standard which views the act of display as solely sufficient to allow for the imposition of criminal sanctions, apparently upon the premise that the act creates a possible or hypothetical danger to the public peace, is insufficient predicate upon which the exercise of constitutional rights may be chilled.

United States *ex rel.* Radich v. Criminal Court, 385 F. Supp. 165, 179 (S.D.N.Y. 1974) (footnotes omitted).

Basically, the principle of overbreadth is invoked by the courts whenever the state seeks to regulate activities constitutionally subject to such regulation, but does so by means which unnecessarily invade other areas of activity which are constitutionally protected. *See* Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970). Traditionally, an overbroad statute would be narrowed on a case by case basis if it were found that certain portions of the statute were unconstitutional "as applied" in a given case. *Id.* This "as applied" approach was in keeping with the rule that "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." United States v. Raines, 362 U.S. 17, 21 (1960). Recognition of the fact that the first amendment needs "breathing space," however, led to the development of the "facial" overbreadth doctrine. Under this approach one to whom the statute may constitutionally be applied may, nonetheless, challenge its constitutionality because the real evil of such an overbroad statute is that it "chills" the protected rights of others not before the court. *See, e.g.*, Bigelow v. Virginia, 95 S. Ct. 2222 (1975); Gooding v. Wilson, 405 U.S. 518 (1972); Coates v. City of Cincinnati, 402 U.S. 611 (1971).

In Broadrick v. Oklahoma, 413 U.S. 601 (1973), the facial overbreadth doctrine appears to have been narrowed in regard to statutes regulating conduct. To challenge such a statute for facial overbreadth one must show that the overbreadth is not only real but also substantial. Although the Court did not define "substantial," it is submitted that the overbreadth created when a flag statute is based on an interest in preserving the peace is not only real, but substantial as well. Indeed, the legitimate sweep of the statutes in such cases seems to be less than the illegitimate sweep. *See* notes 112-15 *supra* and accompanying text. *See generally* 45 U. COLO. L. REV. 361 (1974); 13 WASH. L.J. 524 (1974).

124. Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).

property interest in the flag, it may outweigh any free speech interest which impinges upon it. It has been argued that such a property interest exists and that it is sufficient to uphold the constitutionality of flag statutes. In his concurring opinion in *Goguen*,[125] Justice White asserted this theory; and in his dissents in *Goguen*[126] and *Spence*,[127] Justice Rehnquist further elaborated upon it.

In *Goguen*, the defendant was standing and talking to a group of people in the downtown business district of Leominster, Massachusetts. This event was normal in every aspect except that two police officers noticed that Goguen was wearing a small cloth flag sewn to the seat of his pants. The next day one of the officers swore out a complaint under the Massachusetts flag desecration law,[128] charging "specifically and only that Goguen 'did publicly *treat contemptuously* the flag of the United States' . . . ."[129] Goguen was convicted in the state courts but eventually the conviction was reversed in the lower federal courts.[130]

125. 415 U.S. at 583.

126. *Id.* at 591.

127. 418 U.S. at 416.

128. MASS. GEN. LAWS ANN., ch. 264, § 5 (1970). At the time of Goguen's arrest and conviction the relevant portion of the statute provided:

> Whoever *publicly* mutilates, tramples upon, defaces or *treats contemptuously* the flag of the United States or of Massachusetts, whether such flag is public or private property, or whoever displays such flag or any representation thereof upon which are words, figures, advertisements or designs, or whoever causes or permits such flag to be used in a parade as a receptacle for depositing or collecting money or any other article or thing, or whoever exposes to public view, manufactures, sells, exposes for sale, gives away or has in possession for sale or to give away or for use for any purpose, any article or substance, being an article of merchandise or a receptacle of merchandise or articles upon which is attached, through a wrapping or otherwise, engraved or printed in any manner, a representation of the United States flag, or whoever uses any representation of the arms or the great seal of the commonwealth for any advertising or commercial purpose, shall be punished by a fine of not less than ten nor more than one hundred dollars or by imprisonment for not more than one year, or both. Words, figures, advertisements or designs attached to, or directly or indirectly connected with, such flag or any representation thereof in such manner that such flag or its representation is used to attract attention to or advertise such words, figures, advertisements or designs, shall for the purposes of this section be deemed to be upon such flag.

Id. (emphasis added).

129. 415 U.S. at 570 (1974) (footnotes omitted and emphasis added).

130. Goguen was tried in Worcester County Superior Court, found guilty, and sentenced to six months in the Massachusetts House of Corrections. *Id.* On appeal to the Massachusetts Supreme Judicial Court, Goguen's argument that the statute, on its face and as applied to him, acted as a restraint upon the right of freedom of speech was rejected. Commonwealth v. Goguen, 279 N.E.2d 666, 667 (Mass. 1972). Shortly after he commenced serving his sentence, Goguen petitioned the United States District Court for a writ of habeas corpus. Goguen v. Smith, 343 F. Supp. 161 (D. Mass. 1972). The court, although finding flag statutes in general to be justified on the basis of preserving the national flag as an unalloyed symbol, *id.* at 165, went on to find the wording of the flag contempt portion of the Massachusetts statute to be so "encompassing and vague as to

On appeal to the Supreme Court the majority opinion by Justice Powell agreed with the lower federal courts that the "treats contemptuously" portion of the statute was impermissibly vague and capable of touching expression protected by the first amendment.[131] Noting that unceremonious treatment of the flag had become common, the Court determined that the statute failed to adequately delineate between flag treatment which is criminal and that which is not.[132] The most notable deficiency of the statute for the Court, however, was its failure to provide satisfactory guidelines for law enforcement officials, thus allowing them to pursue their personal predilections concerning enforcement.[133] In rejecting the state's contention that Goguen was a hard core violator and that as applied to his conduct the statute was not vague,[134] the Court stated that the statute was vague " 'not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all'."[135] The state's other arguments were likewise rejected.[136] Goguen's first amendment contentions were not reached

violate the First and Fourteenth Amendments." *Id.* at 167-68.

The court of appeals in *Goguen* affirmed the district court on both overbreadth and vagueness. Goguen v. Smith, 471 F.2d 88 (1st Cir. 1972). The conclusion was that the "treats contemptuously" portion of the Massachusetts statute was void for vagueness because it

> gives no sufficient warning to prospective offenders as to the reach of the law, affords law enforcers no clear guide for evaluation of actions, and offers neither judge nor jury any sufficient standards for inclusion and exclusion . . . .

Id. at 96.

131. 415 U.S. 566, 572-73 (1974); *cf.* Commonwealth v. Morgan, 331 A.2d 444 (Pa. 1975) (applying *Goguen*). The cases setting forth the elements of the void-for-vagueness doctrine are categorized in Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972).

132. *Id.* at 573-74.

133. *Id.* at 574-75. Recognizing that there are some areas in which standards cannot be organized with great precision, the Court went on to say that the area of flag contempt is not one of them.

> [T]here is no . . . reason for committing broad discretion to law enforcement officials in the area of flag contempt. Indeed, because display of the flag is so common and takes so many forms, changing from one generation to another and often difficult to distinguish in principle, a legislature should define with some care the flag behavior it intends to outlaw. Certainly nothing prevents a legislature from defining with substantial specificity what constitutes forbidden treatment of United States flags.

Id. at 581-82 (citations and footnotes omitted).

134. *Id.* at 577.

135. *Id.* at 578, *quoting* Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971).

136. The Court rejected the arguments that if anyone wanted to avoid conviction under this statute, all he had to do was avoid contact with the United States flag; that the "treats contemptuously" phrase of the statute became more definite when construed in light of the more specific accompanying language; that the statute was saved because the Massachusetts Supreme Judicial Court had narrowed its scope to intentional contempt;

by the Court because the statute was void for vagueness and the meager record from below provided too few facts for the careful analysis merited by the issues.[137]

Justice White concurred in the result, but disagreed with the majority's conclusion that the Massachusetts statute was impermissibly vague, either on its face or as applied to Goguen's conduct,[138] and, therefore, felt constrained to inquire into whether the statute could withstand the scrutiny of the first amendment.[139] Reasoning that the power of the government to protect the purity of the flag derives from the necessary and proper clause[140] of the Constitution and that the flag is a monument subject to the same protection that is afforded to the Lincoln Memorial, Justice White asserted that state statutes which safeguard the physical integrity of the flag or forbid use of the flag as a vehicle for words, symbols, or advertisements are undoubtedly constitutional.[141] Combining his conclusion that the United States may properly create a flag with his assertion that the flag is "national property," he reasoned that "the Nation may regulate those who would make, imitate, sell, possess, or use it."[142]

It should be noted that Justice White cited no cases or federal statutes in support of his assertion that the flag is a national property.[143] His comparison of the flag to the Lincoln Memorial is weak, for this analogy ignores the fact that there is only one Lincoln Memorial and that it is publicly owned. One could not seriously assert that the pro-

that law enforcement officials were willing to read the statute narrowly; and finally, that the statute, properly read, reached only acts directly affecting the physical integrity of the flag. *Id.* at 578-80.

In dismissing the above arguments the Court found that Goguen had been convicted under the "treats conntemptuously" portion of the statute alone and that the state court had not relied upon any general-to-specific principle of statutory construction. *Id.* at 579-80. The fact that the statute had arguably been limited to instances of intentional contempt did not resolve the central vagueness issue for the Court, namely, what activities were to be considered contemptuous. *Id.*

137. *Id.* at 583 n.32.

138. Basically, Justice White argued that anyone with common sense would realize that on the continuum of possible behavior toward the flag, some behavior is clearly contemptuous and that Goguen's conduct obviously fell within this end of the spectrum. For this reason, the statute had enough certainty to avoid facial vagueness and was not vague as applied to Goguen's act. *Id.* at 584.

139. *Id.* at 584-86; *see* note 187 *infra* and accompanying text.

140. U.S. CONST. art. I, § 8.

141. 415 U.S. at 586-87.

142. *Id.* at 587.

143. Justice White's assertion that the flag is a national property is subject to the same criticism as Justice Rehnquist's property analysis in his *Goguen* dissent. *See* notes 155-68 *infra* and accompanying text.

tection extended to the real Lincoln Memorial should be expanded to include all small privately owned replicas. By the same reasoning, the protection extended to publicly owned flags should not be expanded to include all privately owned flags. In light of *Spence*, the distinction between publicly and privately owned flags becomes crucial.[144]

Justice Rehnquist, with whom Chief Justice Burger joined, dissented from the Court's reversal of Goguen's conviction.[145] He agreed with Justice White that the statute was not vague and with Justice Blackmun[146] that it did not violate the first amendment.[147]

144. *See* notes 162-68 *infra* and accompanying text.

145. 415 U.S. at 590.

146. Justice Blackmun, with whom Chief Justice Burger joined, dissented from the Court's reversal of Goguen's conviction. 415 U.S. at 590 (Blackmun, J., dissenting). Justice Blackmun agreed with Justice White in his belief that the Massachusetts statute was not vague, but disagreed with his conclusion that the "treats contemptuously" portion of the statute was directed at protected speech and therefore must fall under the four part *O'Brien* analysis. His opinion was based upon the ground that the Massachusetts Supreme Judicial Court had saved the statute by giving it a narrowing construction which limited its scope to protecting only the physical integrity of the flag. Under this interpretation Goguen's conviction for treating the flag "contemptuously" was based solely upon the impairment of the flag's physical integrity and not for any communicative element contained in his conduct while doing so.

Justice Blackmun's dissent ignores the difficulties presented by an appellate court's narrowing construction in the very case in which the defendant has been convicted under a previously overbroad statute. *E.g.*, Ashton v. Kentucky, 384 U.S. 195, 198 (1966). (Defendant in *Ashton* was convicted of common law criminal libel which included, among other things, any writing calculated to create a breach of the peace. In affirming his conviction the state court deleted the breach of the peace element as being unconstitutional. In reversing defendant's conviction, the Supreme Court stated that where an accused is tried and convicted under a broad construction of an Act which would make it unconstitutional, the conviction cannot be sustained on appeal by a limiting construction which eliminates the unconstitutional features of the Act, as the trial took place under the unconstitutional construction of the Act. *Id.* at 198.) Justice Blackmun's dissent also assumes that the State of Massachusetts had a legitimate interest, which met all the *O'Brien* criteria, in protecting the physical integrity of a privately owned flag such as Goguen's. It should be noted, however, that the Court has subsequently indicated that any state interest in safeguarding the physical integrity of a privately owned flag may be outweighed by first amendment freedom of speech considerations. Spence v. Washington, 418 U.S. 405, 415 (1974).

147. 415 U.S. at 590. Addressing himself to Goguen's first amendment contentions, Justice Rehnquist noted that the application of the first amendment to symbolic conduct in flag cases had been discussed only in dissents and concurrences and, therefore, the application of the first amendment to the display of the flag in this case appeared to be an open one. *Id.* at 591-92.

Justice Rehnquist stated that there was nothing in the slender record which would indicate that Goguen was attempting to communicate and that had Goguen merely been convicted for improper display of the flag he would have concluded that Goguen's act did not come within even the outermost fringe of symbolic speech that is entitled to first amendment protection. *Id.* at 592-93. Justice Rehnquist then went on to note, however,

To support his conclusions, Justice Rehnquist stated: "a defendant . . . may not escape the reach of the police power of the state . . . by asserting that his act affected only his own property."[148] He cited governmental controls on private property and governmental regulation of drugs, firearms, copyrights and advertisements.[149] In giving examples of governmental controls placed on private property, Justice Rehnquist stated: "So long as the zoning laws do not, under the guise of neutrality, actually prohibit the expression of ideas because of their content, they have not been thought open to challenge under the First Amendment."[150]

It would seem apparent, however, that the fairness of any analogy of governmental control of the above items to governmental control of a privately owned flag would depend upon the state's interest in controlling such items. Justice Rehnquist seemed to acknowledge that the state interests advanced in support of controlling the above items are not the same as those which could be advanced in support of governmental control of a privately owned flag:

> The statute which Goguen violated, however, does not purport to protect the related interests of other property owners, neighbors, or indeed any competing ownership interest in the same property; the interest which it protects is that of the Government, and is not a traditional property interest.[151]

However, he then went on to cite examples of statutes "which protect only a peculiarly governmental interest in property otherwise privately owned"[152] and continued with the statement that:

> [I]f the Government may create private proprietary interests in written work and in musical and theatrical performances by virtue of copyright laws, I see no reason why it may not, for all of the reasons mentioned, create a similar governmental interest in the flag by prohibiting even

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that since Goguen's conviction was for treating the flag contemptuously, the jury must have found some idea expressed by his act and, therefore, Goguen's conduct must have reflected marginal elements of symbolic speech. *Id.* at 593.

148. *Id.* at 594.

149. *Id.* at 595.

150. *Id.* Later, however, in *Spence* he endorsed the complete statutory withdrawal of the flag as a background for *any* communication. It seems that he is actually advocating the prohibition of a complete form of communicating ideas, regardless of their content. Therefore, his position should be subject to attack under the first amendment.

151. *Id.*

152. *Id.* He cited governmental prohibitions against reproducing postage or revenue stamps, disfiguring or altering any Federal Reserve or national bank note, and unauthorized wearing of military uniforms or service medals. *Id.* at 595-96.

> those who have purchased the physical object from impairing its physical integrity . . . .
>
> The permissible scope of governmental regulation of this unique physical object cannot be adequately dealt with in terms of law of private property or by a highly abstract, scholastic interpretation of the First Amendment.[153]

Justice Rehnquist concluded his dissent by noting that Goguen "was simply prohibited from impairing the physical integrity of a unique national symbol . . . of which he had acquired a copy . . . [and that] Massachusetts had a right to enact this prohibition."[154]

His assertion of the existence of a governmental property interest in the flag[155] is subject to some doubt. There is no federal statute claiming a governmental property interest in privately owned flags, and if one were to be enacted, it would raise problems of "taking without compensation."[156] Furthermore, Justice Rehnquist's reliance on the

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153. *Id.* at 602-03.

154. 415 U.S. at 604.

155. *See* text accompanying note 152 *supra.*

156. In People v. Van De Carr, 70 N.E. 965 (N.Y. 1904), the court struck down that portion of a flag statute prohibiting the use of the flag on a trade label. It reasoned that such labels in existence prior to enactment of the statute were legal and the statute acted as an invasion of an existing property right. *See* note 10 *supra* and accompanying text. However, in Halter v. Nebraska, 205 U.S. 34 (1907), the Court stated:

> Nor can we hold that anyone has a right of property which is violated by such an enactment as the one in question. If it be said that there is a right of property in the tangible thing upon which a representation of the flag has been placed, the answer is that such representation—which, in itself, cannot belong, as property, to an individual—has been placed on such thing in violation of law, and subject to the power of government to prohibit its use for purposes of advertisement.

Id. at 42-43. *But see* Spence v. Washington, 418 U.S. 405, 408-09 (1974) ("[T]his was a privately owned flag. In a technical property sense it was not the property of any government"). It would seem, therefore, that if the government were to declare a national property interest in all privately-owned flags where none existed before, there would arise a compensation issue under the fifth and fourteenth amendments to the Constitution. The fifth amendment prevents the government from taking private property "for public use, without just compensation." U.S. CONST. amend. V. The Supreme Court has interpreted the fourteenth amendment as imposing the same limitation on the states. Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226 (1897). The Court has held, however, that the government may impose restrictions on private property through its police power and that it need not compensate owners for losses which are merely incidental to such valid regulations. Goldblatt v. Hempstead, 369 U.S. 590 (1962). Zoning regulations, therefore, that seek to achieve goals which are unrelated to a governmental property interest in taking the land being regulated give rise to no duty to compensate the owner for any diminution in the land's value caused thereby. A flag regulation, on the other hand, which is justified solely upon an asserted governmental property interest in the flag, where none existed before, is clearly a taking which is not incidental to an otherwise valid police regulation and arguably should give rise to a duty to compensate flag owners for any resultant property loss. *See generally* Michelman, *Property, Utility,*

government's ability to create private property interests by copyright[157] to support his assertion that it may create an analogous governmental property interest in the flag is unjustified. The flag has never been a trademark of the government.[158] Although at one time the use of the flag in private trademarks was completely legal,[159] at the present time there is a federal statute prohibiting anyone from registering a trademark consisting of a flag.[160] There is also a federal statute prohibiting a copyright in any publication of the national government.[161] By analogy, one might argue that no copyright-type interest should exist in the flag of the United States.

One would not argue with the validity of Justice Rehnquist's later observation, in his dissenting opinion in *Spence*, that any law, if construed with sufficient ingenuity, could be viewed as infringing upon some person's preferred mode of expression.[162] And no one would seriously dispute his additional observation that the state could prohibit a protester from painting a public building or taping a peace symbol onto a federal courthouse,[163] this being merely a proper exercise of the state's police power in performing its duty of protecting the physical integrity of *publicly owned* property. But the issue to be decided in *Spence* was whether the state could properly act to prevent misuse of a *privately owned* flag on *private* property; hence, any analogy to protection of public property is not really relevant.

Spence rejects the notion that the government has a special property interest in the flag and stresses the distinction between a privately owned flag and one owned by the government. The fact that the flag in the case was privately owned was an important factor for "[i]n a technical property sense it was not the property of any government."[164] Although the government could properly "forbid anyone from mishandling in any manner a flag that is public property,"[165] such a prohi-

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and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law, 80 HARV. L. REV. 1165 (1967); Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

157. *See* text accompanying note 153 *supra*.

158. Parker v. Morgan, 322 F. Supp. 585, 588 (W.D.N.C. 1971).

159. *See* People v. Van De Carr, 70 N.E. 965 (N.Y. 1904); Johnson v. Hitchcock, 3 N.Y.S. 680 (Sup. Ct. 1888).

160. 15 U.S.C. § 1052(b) (1970).

161. 17 U.S.C. § 8 (1970).

162. 418 U.S. at 417; *see* note 194 *infra*.

163. *Id.*

164. 418 U.S. at 408-09.

165. *Id.* at 409.

bition is not viable in a case concerning private property. In reference to Spence's acts the Court declared:

> Given the protected character of his expression and in light of the fact that no interest the State may have in preserving the physical integrity of a *privately owned* flag was significantly impaired on these facts, the conviction must be invalidated.[166]

On one occasion, therefore, the Supreme Court has found that the individual's interest in using a privately owned flag as a vehicle for symbolic speech outweighs any alleged state property interest in preserving such flag in a totally unblemished conformation.[167]

As long as the *Spence* distinction between publicly and privately owned flags prevails, any governmental "property interest" in a flag is limited to those which are publicly owned. It follows, then, that flag statutes of general application cannot be justified upon this interest alone for they include within their broad sweep restrictions on privately owned flags as well as publicly owned flags and hence suffer from overbreadth.[168]

E. Interest in Preserving the Flag as an Unalloyed Symbol of Our Country

Spence pointed out that the government might have an interest in preserving the flag as an unalloyed symbol of our country for two reasons. First, "this interest might be seen as an effort to prevent the appropriation of a revered national symbol by an individual, interest group, or enterprise where there was a risk that association of the symbol with a particular product or viewpoint might be taken erroneously as evidence of governmental endorsement."[169] The second possible interest in preserving the flag as an unalloyed symbol is "based on the uniquely universal character of the national flag as a symbol."[170]

1. Association of the Symbol with a Particular Product or Viewpoint

An interest in preventing the association of the flag with a particular product or viewpoint is the underpinning for the ban on commercial

166. *Id.* at 415 (footnotes omitted and emphasis added).

167. One lower federal court has stated: "We find that the State has no property interest in the flag sufficient to support a prohibition against the . . . physical desecration of the flag." Crosson v. Silver, 319 F. Supp. 1084, 1087-88 (D. Ariz. 1970).

168. *See* note 123 *supra.*

169. 418 U.S. at 412-13 (footnote omitted).

170. *Id.* at 413.

use of the flag which was upheld in *Halter*. Whether this interest remains sufficient today to support the constitutionality of flag use statutes was not answered by *Spence*. Rather, the Court found that Spence's acts would not be erroneously taken as evidence of governmental endorsement of his political viewpoint and, that commercial exploitation of the flag was not at issue in the case.[171]

In his dissent, Justice Rehnquist argued that the decision in *Spence* must either mean that "political expression deserves greater protection than other forms of expression"[172] or that *Halter* has been overruled so that now "the flag could be auctioned as a background to anyone willing and able to buy or copy one."[173] He felt the decision had placed the Court in the position of either favoring Spence's message, because of its content, or ultimately making the flag available to innumerable commercial and political expressions.[174] Citing *Halter*,[175] as upholding the state's interest in maintaining the flag as an untarnished symbol,[176] he noted that the majority found that decision irrelevant to *Spence* and postponed a discussion of the use of the flag in a commercial context until a future date.[177] In Justice Rehnquist's estimation, even though *Halter* was decided several years before the first amendment was made applicable to the states, it still maintained viability in assessing the state's interest in protecting the flag.[178] He went on to state that if the Court's point in indicating the antiquity of the *Halter* decision was to suggest that the case would be decided differently today, then this conclusion, combined with the Court's statement that the state's interest in protecting the flag must fall before any speech which is "direct, likely to be understood and within the contours of the First Amendment,"[179] meant that the flag would be available as a background for communication to any person able to purchase one.

171. This seems to suggest that even non-commercial speech may enjoy less than full protection if it is erroneously taken as a government endorsement.

172. 418 U.S. at 419. He suggested that the Court might be advancing the idea that political expression is more deserving of protection than other forms of expression but that this inference was negated by the position taken by nearly all the same Justices in Lehman v. City of Shaker Heights, 418 U.S. 298 (1974). The position referred to in *Lehman*, according to Justice Rehnquist, states in effect that once a first amendment forum has been established, principles of equal protection and free speech prohibit discrimination based solely upon subject matter or content. 418 U.S. at 419-20.

173. 418 U.S. at 420. *Cf.* State v. Spence, 506 P.2d 293, 300-01 (Wash. 1971).

174. 418 U.S. at 418.

175. Halter v. Nebraska, 205 U.S. 34 (1907); *see* note 11 *supra.*

176. 418 U.S. at 418-19.

177. *Id.* at 419.

178. *Id.*

179. *Id.* at 415; *quoting in id.* at 420.

Since the majority opinion in *Spence* implies that any speech protected by the first amendment overrides the state's interest in preserving the flag as a symbol,[180] the question becomes whether commercial speech is protected by the first amendment, and if so, to what degree. If it is fully protected, then Justice Rehnquist's fears concerning the flag as a vehicle for unlimited communication will be realized. At the present time, however, commercial speech does not enjoy the full protection of the first amendment.[181] It follows that a narrowly drawn statute covering only commercial use of the flag could be constitutionally justified. To that extent, *Halter* would be relevant today.

2. Interest in the Flag as a Symbol

Finally, it has been urged that the government has an interest in protecting the symbolic nature of the flag. In his concurrence in *Goguen*, Justice White stated, "One need not explain fully a phenomenon to recognize its existence and in this case to concede that the flag is an important symbol of nationhood and unity, created by the Nation and endowed with certain attributes."[182] He argued that Congress surely has the right and power to protect the integrity of the flag by virtue of the fact that it may provide for the general welfare, control interstate commerce, provide for the common defense, and exercise any powers necessary and proper for those ends.[183]

Justice Rehnquist, in his dissent in *Goguen*, also asserted that the governmental interest in a privately owned flag may be characterized as an interest in preserving "the physical integrity of a unique national symbol."[184] He reasoned that when people buy flags, "what they have

180. *See* notes 182-210 *infra* and accompanying text.

181. Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973); Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973); Valentine v. Chrestensen, 316 U.S. 52 (1942). It should be noted, however, that the commercial speech distinction may be in doubt. *See* Bigelow v. Virginia, 95 S. Ct. 2222 (1975).

182. Smith v. Goguen, 415 U.S. 566, 587 (1974) (White, J., concurring).

183. *Id.* at 586.

184. *Id.* at 604 (Rehnquist, J., dissenting). But unlike Justice White, Justice Rehnquist concluded that the Supreme Judicial Court of Massachusetts *would read* the "treats contemptuously" portion of the state flag statute as requiring "some actual physical contact with the flag itself." *Id.* at 596-97. This would exclude derogatory gestures and verbal disparagements of the flag. *Id.* at 597. By interpreting the statute as limited to acts which affect the physical integrity of the flag, Justice Rehnquist claims to have met the objection of Justice White that the statute was concerned with the expression associated with the act of desecration rather than with the act itself. *Id.* at 597-98. Under Justice Rehnquist's interpretation, the law "metes out punishment to anyone who publicly mutilates, tramples, or defaces the flag, regardless of his motive or purpose." *Id.* at 598.

Justice Rehnquist's argument that the Massachusetts Supreme Judicial Court would

purchased is not merely cloth dyed red, white, and blue, but also the one visible manifestation of two hundred years of nationhood"[185] and because one purchases not only property but also a unique national symbol when one buys a flag, the government may prohibit impairment of its physical integrity.

Spence assumed arguendo that there was a valid state interest in preserving the flag as an unalloyed symbol, but found on the facts of the case that such an interest was not significantly impaired so as to warrant suppression of the symbolic speech.[186] The interest was unimpaired for two reasons. First, the flag was used as a symbol "in a way closely analogous to the manner in which flags have always been used to convey ideas;" and second, there was no physical damage done to the privately owned flag as an object—it was not permanently disfigured or destroyed.[187] Thus the Court was able to avoid a discussion of the validity of this alleged interest. The position that the state has an interest in preserving the flag as an unalloyed symbol is questionable. While Justices Rehnquist and White have attempted to support such an interest to justify flag legislation, they have failed to deal adequately with the first amendment issues involved.

In *Goguen*, which was Justices Rehnquist's and White's first attempt

read the "treats contemptuously" portion of the contested statute as protecting only the physical integrity of the flag, ignores the problem presented by an appellate court affirming a defendant's conviction while narrowing the very statute under which he was convicted. Furthermore, even by this interpretation, the statute cannot logically be read as a law designed only to preserve the flag's physical integrity. To do so would be to ignore the requirement that the act of desecration be done publicly before it becomes subject to sanction. When the Government prohibits reproduction of postage stamps, it does not distinguish between public and private reproduction. If the sole purpose of the law is to preserve the physical integrity of the flag, it would cover private as well as public acts which impair the flag's physical integrity. By limiting its application only to public acts of desecration, the state's interest is obviously directed at suppressing the expression associated with the act rather than merely prohibiting the act itself.

185. *Id.* at 603.

186. 418 U.S. at 415.

187. *Id.* Justice Rehnquist in his dissent, in which Chief Justice Burger and Justice White joined, agreed with the majority that Spence's display was a form of communication, but he did not agree with the Court that the state was prohibited by the first amendment from protecting it. 418 U.S. at 416-17 (Rehnquist, J., dissenting).

The Chief Justice also dissented separately, saying that although the statute in question may be unwise or be capable of unwise application, the flag as a symbol of national unity can be protected, and he felt that it should be left to the common sense of the people of each state to determine the method. *Id.* at 416 (Burger, C.J., dissenting). Although recognizing the dichotomy between unwise laws and unconstitutional laws, Chief Justice Burger's dissent did not articulate his reasons for believing that flag desecration laws fall within the former and not the latter. Apparently he was in full agreement with the views advanced by Justice Rehnquist with whom he joined dissenting. *Id.*

to conform flag regulation statutes to the confines of the first amendment, both justices analyzed such regulations in light of *O'Brien*. Justice White concluded that statutes which ignore the motive of the desecrater and which seek merely to safeguard the physical integrity of the flag are undoubtedly constitutional.[188] Justice Rehnquist stated that the Massachusetts statute under which Goguen was convicted substantially complied with the *O'Brien* test.[189] As support for his position he cited both the dissenting opinions in *Street* and Justice White's concurrence in *Goguen*. He also gave examples to illustrate the prominent place the flag has had in our national heritage.[190]

It should be noted, however, that the espousal of an *O'Brien* analysis in support of their assertion that the government has an interest in pre-

188. 415 U.S. at 586-87. Justice White asserted, however, that Goguen was not convicted for impairing the physical integrity of the flag but rather for being contemptuous of it and that Massachusetts had failed to narrow the "contemptuous" portion of its statute to prohibiting only physical acts of flag desecration without reference to any communicative element contained in the act. *Id.* at 588. A conviction on this basis, according to Justice White, does not serve to protect the state's valid interest in preserving the physical integrity of the flag but serves only "to punish for communicating ideas about the flag unacceptable to the controlling majority in the legislature." *Id.* (footnote omitted). Justice White observed that one cannot be forced to express favorable opinions regarding the flag and that contemptuous words concerning the flag may not be punished. *Id.* at 589. He also noted that acts of symbolic speech are protected by the first amendment and may not be forbidden except when necessary to prevent unprotected conduct or speech. *Id.* Comparing the Massachusetts flag statute with the statute sustained in *O'Brien*, which prohibited the burning of draft cards, Justice White discerned that the Massachusetts statute did not merely require that one perform an act of flag desecration to be punished, but that such act *be performed contemptuously*. *Id.* at 589-90. Finding it unlikely that a law which prohibited only *contemptuous* burning of draft cards would have been sustained in *O'Brien*, Justice White asserted that the Massachusetts law must be declared unconstitutional. *Id.* at 590.

Justice White's position seems to necessitate the removal of any element of contemptuous intent from flag desecration statutes. That is to say, in order to pass muster under Justice White's analysis, the statute must encompass patriotic as well as unpatriotic desecrators.

189. *Id.* at 599. He claimed that "[t]here can be no question that a statute such as the Massachusetts one here is 'within' the constitutional power of a State to enact." *Id.* He also asserted that by his interpretation, which limits the statute's application to acts which would impair the flag's physical integrity "without regard to presence or character of expressive conduct in connection with those [acts] . . . [that] the governmental interest is unrelated to the suppression of free expression." *Id.* Justice Rehnquist treated the two remaining requirements of the *O'Brien* test ("whether the governmental interest is 'substantial' and 'whether the restriction imposed is no greater than is essential to the furtherance of that interest' ") as a unit. *Id.* at 599-600. His analysis consisted simply of stating his belief that both "tests are met and that the governmental interest is sufficient to outweigh whatever collateral suppression of expressive conduct was involved in the actions of Goguen." *Id.* at 600.

190. *Id.* at 600-02.

serving the symbolic nature of the flag is irrelevant. As the majority in *Spence* pointed out,[191] any statute based on preserving the flag as a symbol is directly related to expression as a result of the context of the very activity it seeks to prevent. The activity of Goguen was sufficiently analogous to that of Spence to warrant the conclusion that if the state's interest in preserving the flag as an unalloyed symbol is directly related to expression in the context of Spence's activity, it is also directly related to expression in the context of Goguen's activity.[192] Once it has been established that the asserted governmental interest is directly related to suppression of speech, then *O'Brien* cannot be relied upon to support a finding of a governmental interest sufficient to warrant protection.[193]

Justice Rehnquist attempted to respond to this in his dissent in *Spence*, by characterizing the speech element involved in Spence's conduct as synonymous with forms of pure speech which have been held to be susceptible to regulation when an important countervailing state interest is involved. He noted as examples the state's interest in preventing perjury and libel, and in protecting copyrights. He offered the state's concern in preventing riots and maintaining free passage through public thoroughfares as other areas wherein the right of free speech could be constitutionally subordinated for the public good.[194] This response, however, is clearly inadequate

191. 418 U.S. at 414 n.8.

192. *See* text accompanying notes 79-80 *supra*.

193. *See* notes 79-89 *supra* and accompanying text.

194. 418 U.S. at 417. Justice Rehnquist further reasoned that since the state may place direct limitations on speech in furtherance of certain state interests, then a fortiori, it may act to protect an important state interest wherein only an incidental limitation on free expression results. *Id.* He stated that any law could be viewed as an infringement upon some person's preferred method of communication. He asserted that laws preventing the painting of public buildings or the taping of peace symbols on federal court houses are of this nature, yet there is little doubt that prosecutions based on such laws are constitutional. *Id.*; *see* text accompanying notes 162-63 *supra*. Justice Rehnquist proceeded to state that:

> [T]he Court today holds that the State of Washington cannot limit use of the American flag, at least insofar as its statute prevents appellant from using a privately-owned flag to convey his personal message.

418 U.S. at 418. Noting that the Court expressed its willingness to assume, arguendo, that the State of Washington had a valid interest in preserving the flag as an unalloyed symbol, Justice Rehnquist criticized the method used by the Court in finding this interest insufficient to support Spence's conviction. He accused the Court of devaluing this interest in its statement that "no interest the State may have in preserving the physical integrity of a privately owned flag was significantly impaired on these facts . . ." and by its emphasis that Spence did not "permanently disfigure the flag or destroy it. . . ." *Id.*

Justice Rehnquist also objected to the conclusion of the Court that such state interests are secondary to messages which are "direct, likely to be understood, and within the

for it fails to recognize the crux of the issue. While it is true that even speech protected by the first amendment is subject to some direct state limitations, it is also true that any such limitations must be based on a state interest *not directly related* to the suppression of speech. The state's interests in preventing perjury, libel, infringement of copyrights, incitement to riot, and interference with free passage on public thoroughfares are concedely unrelated to directly limiting speech. These interests find their basis on grounds different from those supporting a state's interest in prohibiting flag desecration, especially if that interest is couched in terms of preserving the integrity of the flag as a national symbol. Therefore, the analogy by

contours of the First Amendment." *Id.* Turning his attention to the state's interest in the flag, he criticized the Court's emphasis on the lack of actual harm to the flag by noting that the Washington misuse statute sought to "prevent personal *use* of the flag, not simply particular forms of *abuse*." *Id.* at 420. He asserted that the State of Washington "has directed that [the flag] not be turned into a common background for an endless variety of superimposed messages," *Id.* at 420-21, and that "[t]he physical condition of the flag itself is irrelevant to that purpose." *Id* at 421. According to Justice Rehnquist the state's interest in the flag was of a dual nature, preserving the flag's physical integrity and preserving the flag as a symbol of nationhood and unity. *Id.* He asserted that although the Court in *Spence* ignored these important interests they were considered controlling in *Halter* and quoted the Court in *Halter* as saying:

> As the statute in question evidently had its origin in a purpose to cultivate a feeling of patriotism among the people of Nebraska, we are unwilling to adjudge that in legislation for that purpose the State erred in duty or has infringed the constitutional right of anyone. On the contrary, it may reasonably be affirmed that a duty rests upon each State in every legal way to encourage its people to love the Union with which the State is indissolubly connected.

Id. quoting Halter v. Nebraska, 205 U.S. 34, 43 (1907). Justice Rehnquist pointed out that although there was no "physical impairment" of the flag in *Halter* because no real flag was involved, the Court's discussion concerning the state's interest would have been unaffected had the defendant in *Halter* been accused of decorating the flag with removable stickers advertising his beer in a display analogous to Spence's removable peace sign. 418 U.S. at 421.

The Court in *Halter* upheld the state's interest in promoting respect for the flag and maintaining the flag "as an emblem of national power and honor." Halter v. Nebraska, 205 U.S. 34, 41-42 (1907). Presently, however, both of these interests are of questionable validity. The Court in *Street* specifically disapproved the former interest, 394 U.S. at 593, and the Court in *Spence* has specifically found the latter to be directly related to suppression of free expression in the context of activity such as Spence's. First amendment symbolic speech issues were not considered by the Court in *Halter* because it was decided nearly 20 years before the first amendment was made applicable to the states via Gitlow v. New York, 268 U.S. 652, 666 (1925).

The present issue in flag desecration cases is the first amendment's limitations on supporting state interests; therefore, a case which upheld those interests, but did so without considering the first amendment, is of no value in assessing such interests in light of the first amendment and its modern application to symbolic conduct. Once this is realized, it becomes obvious that quoting from *Halter* is anachronistic in the determination of the validity of these same state interests being offered today in support of flag desecration statutes.

Justice Rehnquist of the state's interest in preserving the flag as a symbol to the interests supporting the prohibitions against perjury and so forth is unsound.

Justice Rehnquist refused to recognize any direct correlation between a state interest in preserving the flag as a symbol of government and the suppression of free speech. However, his assertion that "[i]t is the *character,* not the cloth, of the flag which the State seeks to protect"[195] is a strong indication that the majority was correct in its conclusion that the state interest of preserving the flag as an untarnished emblem is directly related to the suppression of speech. The "character" of which he speaks is the symbolic character of the flag. But the Court stressed the point that Spence had used the flag as a symbol, *i.e.,* in a manner in keeping with its character. True, Spence meant to relay a message different from that typically associated with the flag, but that alone does not change the character of the flag. The character is symbolic and a "person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn."[196] Hence, when the flag is used in symbolic conduct and suffers no physical harm, it follows that the government is attempting to control the conduct because of its meaning and not because of its effect on the flag. A regulation so aimed steps out of the realm of protecting tangible physical matters and into that of prohibiting intangible ideas communicated by symbols. Viewed in this context Justice Rehnquist's position concerning limitations flowing from flag statutes as being incidental to free speech is untenable.

Another problem underlying Justice Rehnquist's position is the invalidity of his assertion that flag regulations which require no affirmative action by an individual are constitutional. In *Goguen* he asserted that the suppressive aspects of the Massachusetts statute could be justified in that it did not compel affirmative gestures of respect toward the flag.[197] Likewise, in *Spence* his dissent acknowledged that the state

195. Spence v. Washington, 418 U.S. 405, 421 (1974) (emphasis added).

196. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 632-33 (1943).

197. 415 U.S. at 603-04. *Cf.* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); United States v. O'Brien, 391 U.S. 367 (1968). It should be noted that Justice Rehnquist in *Goguen* also asserted that not only was the defendant free from any Massachusetts statute requiring an affirmative manifestation of respect toward the flag but he was also at liberty to express, by alternative means, "whatever views he was seeking to express by wearing a flag sewn to his pants . . . ." 415 U.S. at 603. This rationale was rejected in a footnote by the majority in *Spence*:

> A subsidiary ground relied on by the Washington Supreme Court must be rejected summarily. It found the inhibition on the appellant's freedom of expression "miniscule and trifling" because there are "thousands of other means available to [him] for dissemination of his personal views. . . ." As the Court noted in . . .

could not utilize its interest in preserving the flag as a symbol to either "require all citizens to own [a] flag or compel [them] to salute one."[198] This position, however, overlooks the essence of the first amendment, which not only protects an individual from being compelled to speak, but more importantly, allows one to express his own ideas.[199] As one federal judge has noted, for first amendment purposes there is no apparent reason to differentiate between the government's seeking to coerce expressions of respect and its seeking to prohibit expressions of disrespect.[200]

In further support of his position, Justice Rehnquist noted that the state "*presumably* cannot punish criticism of the flag, or the principles for which it stands, anymore than it could punish criticism of this country's policies or ideas."[201] This concession, however, does nothing more than acknowledge the holding of the Court in *Street v. New York*.[202] Justice Rehnquist should have taken his observations one step further and noted that the holding in *Street*, when combined with the holding in *O'Brien*, leads to the conclusion that since one has the right to say things about the flag verbally, he also has the right to say them symbolically, using the flag itself, unless the state's interest in stopping his conduct is justifiable.

In the final analysis, the fact that Justice Rehnquist found in *Spence* that a significant state interest was impaired is largely a result of his belief that allowing the flag to be employed as Spence did would also require allowing *unlimited use* of the flag.[203] This is clearly unacceptable to him. As he sees it, the only alternative is to recognize the interest of the state as paramount and completely withdraw the flag from unorthodox use. His dissent in *Spence* evidenced this approach in urging the validity of the Washington statute. Justice Rehnquist wrote:

Its operation does not depend upon whether the flag is used for com-

Schneider v. State, "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."

418 U.S. at 411 n.4 (citation omitted). Justice Rehnquist did not respond to this. *But see* United States v. O'Brien, 391 U.S. 367, 388 (1968) (Harlan, J., concurring).

198. 418 U.S. at 422.

199. *See* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); text at notes 37 and 42 *supra*.

200. United States v. Crosson, 462 F.2d 96, 105 (9th Cir. 1972) (Browning, J., dissenting), *cert. denied*, 409 U.S. 1064 (1973).

201. Spence v. Washington, 418 U.S. 405, 422 (1974) (Rehnquist, J., dissenting) (emphasis added). Justice Rehnquist's choice of the word *presumably* merits note in light of the Court's unequivocal holding in *Street* that such penal statutes are unconstitutional.

202. 394 U.S. 576 (1969).

203. 418 U.S. at 422.

> municative or noncommunicative purposes; upon whether a particular message is deemed commercial or political; upon whether the use of the flag is respectful or contemptuous; or upon whether a particular segment of the State's citizenry might applaud or oppose the intended message. It simply withdraws a unique national symbol from the roster of materials that may be used as a background for communications.[204]

This approach seems to be an attempt by Justice Rehnquist to avoid the necessity of conducting a case by case analysis to determine in which instances the speech involved is to be protected; yet such is the principal approach of the Court in the first amendment area.[205]

A statute which is based upon suppression of free speech, however, cannot be justified either by saying that its scope includes all conduct, whether communicative or noncommunicative, or by saying that its scope includes all messages, political and commercial, *i.e.*, those fully protected by the first amendment as well as those which are not.[206] The fact that the statute's operation does not depend upon whether the use of the flag is respectful or contemptuous does tend to cloud its inherent invalidity. If the statute's prohibition of flag use were to depend upon the frame of mind of the actor, then it would fall prey to the objections voiced by Justice White in *Goguen*.[207] He stated that such a statute clearly seeks to punish for communicating unacceptable ideas concerning the flag and as such is manifestly unconstitutional under *O'Brien*. Since the Washington statute, however, has been demonstrated to rest on a state interest directly related to suppressing speech, the fact that it is unconcerned with the state of mind of the actor will not save it from falling.

Finally, the fact that the statute does not depend upon whether any segment of society would approve or disapprove of the intended message does not act to save it. A statute which is directly related to suppression of free speech cannot be justified on the basis that it does not depend upon the reaction of the audience. The Court in *Street* said "the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."[208] It can be concluded, therefore, that none of the characteristics of the Washington statute that were listed by Justice Rehnquist can be used to save it from its inherent unconstitutionality.

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204. *Id.* at 422-23.

205. *See* note 82 *supra*.

206. For a discussion of the commercial speech distinction, see note 81 *supra* and accompanying text.

207. See note 188 *supra*.

208. 394 U.S. 576, 592 (1969).

In case there remained any doubt, Justice Rehnquist's final statement concerning the effect of the Washington statute that "[it] simply *withdraws* a unique national symbol *from* the roster of *materials that may be used* as a background *for communications*,"[209] completely supports the conclusion that the state interest of preserving the flag as an inviolate symbol of government is aimed at directly suppressing speech. The fact that the purpose and effect of the statute is to preclude a unique form of expression, without concern for the actual message intended to be conveyed, cannot logically be accepted as saving the statute from being declared unconstitutional under a first amendment analysis.[210]

Spence leaves open the question of whether or not the government interest in protecting the flag from actual physical harm would be sufficient to sustain flag desecration statutes as constitutional. It suggests a possible argument that it would be.

> It might be said that we all draw something from our national symbol, for it is capable of conveying simultaneously a spectrum of meanings. If it may be destroyed or permanently disfigured, it could be argued that it will lose its capability of mirroring the sentiments of all who view it.[211]

Unlike the acts in the *Spence* case, those of burning or disfiguring the flag change the flag in the process of the communication and "rape [it] of its universal symbolism."[212] It remains to be seen whether this "possible argument" is sufficient to uphold the statutes and exactly

209. 418 U.S. 405, 423 (1974) (Rehnquist, J., dissenting) (emphasis added).

210. Two weeks after the decision in *Spence*, the Court affirmed the lower federal court decision in Long Island Vietnam Moratorium Comm. v. Cahn, 437 F.2d 344 (2d Cir. 1970). Cahn v. Long Island Vietnam Moratorium Committee, 418 U.S. 906 (1974). The court of appeals in *Cahn* found the New York statute which regulated display and use of flags, GENERAL BUSINESS LAW N.Y. § 136(a) (McKinney's 1968), unconstitutional for vagueness and overbreadth. It also found the statute unconstitutional as applied to defendant's display which consisted of a circular representation of the American flag with a superimposed peace symbol. Section 136(a) reads as follows:

> Any person who: a. In any manner, for exhibition or display, shall place or cause to be placed, any word, figure, mark, picture, design, drawing, or any advertisement, of any nature upon any flag, standard, color, shield or ensign of the United States of America, or the state of New York, or shall expose or cause to be exposed to public view any such flag, standard, color, shield or ensign, upon which . . . shall have been printed, painted or otherwise placed, or to which shall be attached, appended, affixed or annexed, any work, figure, mark, picture, design, or drawing, or any advertisement of any nature . . . .
>
> . . . .
>
> Shall be guilty of a misdemeanor.

Id.

211. 418 U.S. at 413.

212. United States *ex rel.* Radich v. Criminal Ct., 385 F. Supp. 165, 178 (S.D.N.Y. 1974).

what the limits of such an argument might be.

It is submitted, however, that desecration statutes are also unconstitutional. Even applying the *O'Brien* standard the State's interest in protecting the flag's cloth, appears insufficient.[213] A fortiori, the arguments against the constitutionality of flag desecration laws would be much stronger if a court were to apply the pure speech standard called for by *Spence*. Under a pure speech standard *Barnette-Street* would come into play and, when coupled with *Spence*'s distinction between public and private flags, would require that flag laws give way to first amendment rights in the case of a privately owned flag.

V. CONCLUSION

Spence v. Washington not only provides a standard by which to measure the constitutionality of flag statutes, but also stands as a landmark decision in the area of first amendment protection of symbolic speech by setting forth a test to determine when expressive conduct will be considered protected by the first amendment. Its analytical framework provides a means of determining whether a state's interest in controlling symbolic conduct is directly or incidentally related to the supression of expression. If, as in *Spence*, the state's interest is found directly related to expression, *O'Brien* becomes inapplicable and the symbolic speech is protected to the same extent as pure speech. Although the Court failed to reach the overbreadth issue in *Spence*, the decision certainly portends a finding that flag use statutes which apply to privately as well as publicly owned flags are overbroad and unconstitutional.

The question remaining to be answered by the Court is whether flag desecration statutes which encompass privately owned flags are constitutional. It has been submitted that even these statutes should be held unconstitutional in light of *Barnette, Street,* and *Spence*. In this regard, it is well to keep in mind the words of Judge Cannella:

> The flag and that which it symbolizes is dear to us, but not so cherished as those high moral, legal and ethical precepts which our Constitution teaches. When our interests in preserving the integrity of the flag conflict with the higher interest of preserving, protecting and defending the Constitution, the latter must prevail . . . .[214]

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213. *See Speech, supra* note 42, at 56-7; *Exploiting, supra* note 8, at 346.

214. United States *ex rel.* Radich v. Criminal Court, 385 F. Supp. 165, 184 (S.D.N.Y. 1974).