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Texas v. Johnson: The Constitutional Protection of Flag Desecration

I. INTRODUCTION

On August 22, 1984, an American flag was flying in front of the Mercantile Bank building in Dallas, Texas. While Dallas was hosting the Republican National Convention, Gregory Lee Johnson and fellow protesters were marching through the streets to challenge the policies of the Reagan Administration.[1] Along the way, they spray painted buildings and staged "die-in's" to demonstrate the effect of a nuclear explosion.[2] When the protestors arrived at the Mercantile Bank building, they bent down the flagpole and one of them removed the American flag from its pole and handed it to Johnson.[3] The march continued to the Dallas City Hall where Johnson burned the flag while the protesters chanted "America, the red, white, and blue, we spit on you."[4] The police arrived about thirty minutes later. Johnson was arrested, charged, and eventually convicted[5] of violating the Texas flag desecration statute.[6] Daniel Walker, an employee of the Army Corps of Engineers, was in the crowd that day and witnessed the flag's burning. Walker gathered up the charred remains of the flag and quietly buried them in his backyard.[7]

Johnson and Walker symbolically represent the competing interests in *Texas v. Johnson*.[8] Johnson, supported by his attorney, William M. Kunstler, and the American Civil Liberties Union as amicus curiae, represents the first amendment right of an individual to express his political beliefs.[9] Walker, by his silent reverence for the flag, symbolizes the position advocated by the State of Texas[10] and

1. Texas v. Johnson, 109 S. Ct. 2533, 2536 (1989); Brief for the State of Texas at 5-6, Texas v. Johnson, 109 S. Ct. 2533 (1989) (No. 88-155).
2. Brief for the State of Texas at 7, *Johnson* (No. 88-155).
3. *Id.* at 8.
4. *Johnson*, 109 S. Ct. at 2536.
5. *Id.* at 2537.
6. *See* TEX. PENAL CODE ANN. § 42.09(a)(3) (Vernon 1989). For the text of this statute, see *infra* note 141.
7. Johnson v. State, 755 S.W.2d 92, 94 (Tex. Crim. App. 1988); Brief for the State of Texas at 11, *Johnson* (No. 88-155).
8. 109 S. Ct. 2533 (1989); *see infra* notes 59-61 and accompanying text.
9. *See infra* notes 38-97 and accompanying text.
10. *See infra* note 150 and accompanying text.

the minority opinion of the United States Supreme Court.[11] They believe that preserving the American flag as a symbol of nationhood and national unity is a more compelling interest than an individual's first amendment right to burn the flag in political protest.[12]

Ultimately, Johnson and the first amendment won the day.[13] However, the Supreme Court was sharply divided in its five-to-four decision, highlighted by an apologetic explanation in a concurring opinion by Justice Kennedy.[14] Case law precedent indicated the clear path to the Court's decision,[15] and the Court's first amendment analysis brought no surprises.[16] However, *Texas v. Johnson* is unique because of the compelling nature of the state's interest. Rarely has an issue so deeply touched the hearts of the American people who, like Justice Kennedy, are torn between the love of their country and their desire for fundamental human rights.

This note is divided into five parts. Part I traces the history of the flag desecration statutes.[17] Part II explores the first amendment and the modern decisions establishing the strict standard of review employed by the majority in *Johnson*.[18] Part III then provides a complete analysis of *Johnson*.[19] The impact of the decision is discussed in Part IV, with particular focus on the congressional and presidential responses.[20] A brief conclusion and epilogue comprise Part V.[21]

II. FLAG DESECRATION: STATUTES AND CASE LAW

A. Early Statutes and Cases: 1890-1918

Although flag desecration statutes have been in existence since 1898,[22] their association with first amendment issues is a modern phe-

11. *See infra* notes 190-229 and accompanying text.

12. *See Johnson*, 109 S. Ct. at 2548 (Rehnquist, C.J., dissenting); *see also infra* notes 150, 192, 216-23 and accompanying text.

13. *Johnson*, 109 S. Ct at 2548; *see infra* note 146.

14. *Johnson*, 109 S. Ct. at 2548 (Kennedy, J., concurring); *see infra* notes 187-89 and accompanying text.

15. *See infra* notes 98-138 and accompanying text.

16. G. Stone, Statement before the United States Senate Committee on the Judiciary Hearings on the United States Supreme Court Decision in Texas v. Johnson 1 (Aug. 1, 1989). Stone, a Harry Kalven, Jr., Professor of Law and Dean of the University of Chicago Law School, testified to the Senate Committee that the decision in *Johnson* held no surprises because it was based on constitutional doctrines that had been established over the last century. *Id.*

17. *See infra* notes 22-48 and accompanying text.

18. *See infra* notes 49-138 and accompanying text.

19. *See infra* notes 139-228 and accompanying text.

20. *See infra* notes 229-96 and accompanying text.

21. *See infra* notes 297-305 and accompanying text.

22. By 1906, more than half the states had enacted flag abuse statutes:
Ariz., Rev. Stat. 1901, p. 1295; Colo. 3 Mills Anno. Stat., vol. 3, Rev. Supp., 1891-1905, p. 542; Conn., Gen. Stat., 1902, p. 387; Cal. Stat., 1899, p. 46; Del., 22 Sess. Laws, p. 982; Hawaii, Sess. Laws, 1905, p. 20; Idaho, Sess. Laws, 1905, p.

nomenon.[23] It took nearly three-quarters of a century for political protesters to realize that the flag was a powerful means of expression, and just as long for notions of first amendment protection to expand enough to encompass such acts.

Early cases primarily involved improper commercial use of flags in advertising and trademarks.[24] In *Halter v. Nebraska*,[25] a 1906 landmark case, the United States Supreme Court upheld the conviction of a businessman accused of selling whiskey bottles with labels displaying the American flag.[26] The Court ruled that an individual cannot acquire property rights in the American flag,[27] and that the use of the flag for commercial purposes "tends to degrade and cheapen the flag in the estimation of the people, as well as to defeat the object of maintaining it as an emblem of National power and National Honor."[28] After a few proceedings,[29] flags were no longer seen on commercial items, and flag misuse cases were not prevalent.[30]

B. Statutes and Cases During World War I

With the fervor of patriotism accompanying World War I came the next wave of flag statutes. Federal statutes made it a crime to cast contempt, either by words or act, upon the United States flag.[31]

328; Ill., Sess. Laws, 1899, p. 234; Ind., Acts, 1901, p. 351; Kans., Gen. Stat., 1905, p. 499, § 2442; Me., R.S., 1903, p. 911; Md., Laws, 1902, p. 720; Mass., 2 Rev. Laws, 1902, p. 1742; Mich., Pub. Acts, 1901, p. 139; Minn., Rev. Laws, 1905, § 5180; Mo., 2 Anno. Stat., 1906, § 2352; Mont., Laws, 1905, p. 143; N.H., Pub. Stat., 1901, p. 810; N.J., Laws, 1904, p. 34; New Mex., Laws, 1903, p. 121; N.Y., Laws, 1905, vol. 1, p. 973; N. Dak., Laws, 1901, p. 103; R.I., Sess. Acts, Jan. & Dec., 1902, p. 65; Utah, Laws, 1903, p. 29; Vt. Laws, 1898, p. 93; Washington, Session Laws, 1901, p. 321; Wis., Laws, 1901, p. 173; Wyo., Laws, 1905, p. 86.
Halter v. Nebraska, 205 U.S. 34, 39 n.1 (1906).

23. *See* Rosenblatt, *Flag Desecration Statutes: History and Analysis*, 93 WASH. U.L.Q. 193, 201-02 (1972) (no mention of first amendment rights were made for many years).

24. *See, e.g.*, Ruhstrat v. People, 185 Ill. 133, 57 N.E. 41 (1900). Ruhstrat was found guilty of displaying the national flag on a cigar box in violation of the Illinois flag statute. On appeal, the statute was held unconstitutional on the basis of the equal protection and due process clauses. *Id.* at 147-48, 57 N.E. at 46.

25. 205 U.S. 34 (1906).

26. *Id.*

27. *Id.* at 42-43.

28. *Id.* at 42.

29. *See, e.g.*, Halter v. Nebraska, 205 U.S. 34 (1906); Ruhstrat v. People, 185 Ill. 133, 57 N.E. 41 (1900); People *ex rel.* McPike v. Van DeCarr, 178 N.Y. 618, 70 N.E. 965 (1904).

30. Rosenblatt, *supra* note 23, at 205.

31. UNIFORM FLAG ACT OF 1917 § 3. The Act provides: "No person shall publicly mutilate, deface, defile, defy, trample upon, or by word or act cast contempt upon any such flag, standard, color, ensign or shield." PROCEEDINGS OF NATIONAL CONFERENCE

While earlier cases were based on flag degradation through advertising, the World War I cases expanded the notion of degradation to include contemptuous language.[32] In *Ex Parte Starr*,[33] the defendant was sentenced to ten to twenty years of hard labor for saying, "What is this thing anyway? Nothing but a piece of cotton with a little paint on it and some other marks in the corner there. I will not kiss that thing. It might be covered with microbes."[34] As patriotic fever died down with the armistice, so did the occurrence of flag desecration cases. Consequently, there were no American flag cases between the two world wars.[35]

C. Statutes and Cases During World War II

During World War II, a resurgence of patriotism engendered more litigation and stronger federal flag legislation.[36] In 1942, Congress passed a national flag code with strict rules for the display and disposal of the flag, as well as procedures for the pledge of allegiance.[37] As the legislation became stricter during this era, the Court began to consider the first amendment issues inherent in such legislation. For example, In *West Virginia State Board of Education v. Barnette*,[38] the Court upheld school children's right to refrain from pledging allegiance to the flag, ruling that the government cannot compel affirmative declarations.[39] The *Barnette* case involved children who were Jehovah's Witnesses and were forbidden by their religion to make such a pledge.[40] The children had been expelled from school or threatened with exclusion, and their parents were subject to pros-

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OF COMMISSIONERS ON UNIFORM STATE LAWS 323-24 (1917), *quoted in* Texas v. Johnson, 109 S. Ct. 2533, 2552 (1989) (Rehnquist, C.J., dissenting).

32. Rosenblatt, *supra* note 23, at 205-06.

33. 263 F. 145 (D. Mont. 1920).

34. *Id.*; *see also* State v. Shumaker, 103 Kan. 741, 175 P. 978 (1918). Shumaker was convicted of using contemptuous language about the American flag in front of other people. The court did not mention what Shumaker's words were, but described them as vulgar:

> Such language will not, cannot, be used by any man in any place concerning our flag, if he has proper respect for it. The man who uses such language concerning it, either in jest or in argument, does not have that respect for it that should be found in the breast of every citizen of the United States. Such language concerning our country's flag will not be used except for the purpose of casting contempt upon it.

Id. at 742, 175 P. at 979.

35. Rosenblatt, *supra* note 23, at 206.

36. *Id.* at 206-07.

37. Joint Resolution to Codify and Emphasize Existing Rules and Customs Pertaining to the Display and Use of the Flag of the United States of America, 36 U.S.C. § 174 (1988).

38. 319 U.S. 629 (1943) (reversing Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940)).

39. *Id.* at 642.

40. *Id.* at 629.

ecution.[41] Although the Court relied on the first amendment,[42] the context was *coercive* legislation.[43] The Court did not apply the first amendment to legislation that *prohibits* affirmative political expression, thus leaving the doors open for the modern flag cases.

During the World War II era, courts also began to make the distinction between public and private disrespect for the flag. Public disrespect was a crime, while private disrespect was not.[44]

D. The Vietnam War Era

The most significant changes in the flag desecration cases came with the political turbulence of the Vietnam War era.[45] For the first time, flag desecration was used as a method of protest, and was defended with claims of first amendment rights.[46]

Until 1967, it was left to the states to regulate flag desecration. However, in response to increased incidents of flag burning and concern for the detrimental effect it had upon United States troops, Congress enacted the first national flag statute.[47] The modern cases, which began in response to the Vietnam War, created the basis for the constitutional issues raised in *Texas v. Johnson*. The next section will set the first amendment constitutional stage and examine the significant flag cases that arose during this era.[48]

III. FIRST AMENDMENT BACKGROUND AND APPLICATION TO MODERN FLAG DESECRATION CASES

A. Symbolic Speech

The first amendment provides that "Congress shall make no law . . . abridging the freedom of speech."[49] Courts have subsequently

41. *Id.* at 630.
42. *Id.* at 639.
43. *Id.* at 640, 642.
44. *Compare* State v. Peacock, 138 Me. 339, 25 A.2d 491 (1942) (holding that a defendant pretending to tear and trample an American flag in his home in the presence of another person commits a private action which is not prosecutable) *with* Johnson v. State, 204 Ark. 476, 481, 163 S.W.2d 153, 154 (1942) (holding public verbal abuse, "it's only a rag," a criminal act because it evinces contempt for the flag).
45. *See infra* notes 98-138 and accompanying text.
46. *See infra* notes 104-14, 125-38 and accompanying text.
47. 18 U.S.C. § 700(a) (1979). The statute states that "[w]hoever 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." *Id.*
48. *See infra* notes 49-138 and accompanying text.
49. U.S. CONST. amend. I.

construed "speech" to include conduct which is "sufficiently imbued with elements of communication."[50] Such conduct is called "symbolic speech,"[51] and is afforded the same first amendment protection as verbal speech.[52]

The Supreme Court has recognized that conduct associated with flag misuse is not always imbued with elements of communication and, therefore, the Court must look to the context of the action to determine if it is symbolic speech.[53] The test for symbolic speech is determined by the party's intent to convey a particularized message through his actions.[54] In *Spence v. Washington*,[55] for example, the Court found that superimposing a large peace symbol on the United States flag and displaying it upside down out of an apartment window as a political protest was conduct that had communicative intent and was thus symbolic speech.[56] Flag misuse cases that have dealt with this issue, including *Johnson*, have held that such acts had communicative intent and were protected expression.[57]

B. Restricting Speech

Generally, first amendment issues are based on competing interests: an individual's right to freedom of speech versus a state's interest in regulating speech to promote some public good.[58] An assumption exists that the individual's rights are absolutely pro-

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50. Spence v. Washington, 418 U.S. 405, 409 (1974).

51. Symbolic speech includes: wearing black armbands to protest the Vietnam War, Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 505 (1969); sit-ins to protest segregation, Brown v. Louisiana, 383 U.S. 131, 141-42 (1966); wearing American military uniforms in a play protesting the Vietnam War, Schacht v. United States, 398 U.S. 58 (1970); picketing for causes, United States v. Grace, 461 U.S. 171, 176 (1983), Amalgamated Food Employees Union Local 390 v. Logan Valley Plaza, Inc., 391 U.S. 308, 313-14 (1968); displaying a red flag to promote communist ideology, Stromberg v. California, 283 U.S. 359 (1931).

52. *See Brown*, 383 U.S. at 142 (first amendment rights "are not confined to verbal expression [but] embrace appropriate types of action").

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

54. *Spence*, 418 U.S. at 410-411.

55. *Id.* at 405.

56. *Id.* at 415; *see also* Smith v. Goguen, 415 U.S. 566, 588 (1974) (sewing small flag on seat of pants); West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (1943) (pledge of allegiance and saluting the flag); Stromberg v. California, 283 U.S. 359, 368-69 (1931) (displaying a red flag).

57. *See, e.g., Johnson*, 109 S. Ct. at 2540; *Spence*, 418 U.S. at 415.

58. Konigsberg v. State Bar of Cal., 366 U.S. 36 (1961). The *Konigsberg* Court stated:

> [W]e reject the view that freedom of speech and association . . . as protected by the First and Fourteenth Amendments, are 'absolutes' . . . [G]eneral regulatory statutes . . . have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress to pass, when they have been found justified by subordinating valid governmental interests, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved.

Id. at 49-51.

tected,[59] and the state must prove that its regulations are justified.[60] In reconciling these competing interests, the Court first looks to the kind of speech that the individual has employed. There are different levels of protection depending upon the nature of the speech.[61] Certain speech, whether verbal or symbolic, receives a very limited level of constitutional protection because of its negligible value.[62] Examples of such speech include obscenity,[63] commercial speech,[64] fighting words,[65] and child pornography.[66] Additionally, the Court has slowly developed well-recognized exceptions to the absoluteness of first amendment guarantees.[67] For example, an individual is not free to speak words which encourage crime,[68] incite revolutionary action,[69] or expressly incite violence.[70] Other exceptions include misrepresentation and false advertising,[71] libel,[72] and undue pretrial publicity.[73]

If the speech is *not* one of the unprotected or specially carved cate-

59. *See* Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 48 (1987) (even restricted speech occupies a position on the scale of first amendment values according speech absolute protection).

60. Boos v. Barry, 485 U.S. 312, 317 (1988) (Court required the state to show that its regulation was necessary to serve a state interest).

61. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 194 (1983). "[T]he Court begins with the presumption that the first amendment protects all communication and then creates areas of nonprotection only after it affirmatively finds that a particular class of speech does not sufficiently further the underlying purposes of the first amendment." *Id.*; *see also* Rosenblatt, *supra* note 23, at 219 ("[W]here there is expression combined with some act that is disruptive of public order, the first amendment will not be inducted into service.").

62. Stone, *supra* note 61, at 194 (certain speech has "low" first amendment value, thus entitling it to only limited constitutional protection).

63. Miller v. California, 413 U.S. 15, 24 (1973) (obscenity is unprotected speech); *see also* Roth v. United States, 354 U.S. 476 (1957).

64. Ohralik v. Ohio Bar Ass'n, 436 U.S. 447, 456 (1978) (commercial speech is afforded limited constitutional protection); *see also* Virginia State Bd. of Pharmacy v. New Hampshire, 315 U.S. 568 (1942).

65. Chaplinsky v. New Hampshire, 315 U.S. 568, 574 (1942) (fighting words that are inherently likely to provoke retaliation can be restricted by the state).

66. *See* New York v. Ferber, 458 U.S. 747, 774 (1982) (distributors of child pornography are not protected by the first amendment.)

67. Rosenblatt, *supra* note 23, at 218.

68. Fox v. Washington, 236 U.S. 273 (1915).

69. Yates v. United States, 354 U.S. 298 (1957); Dennis v. United States, 341 U.S. 494 (1951).

70. Brandenberg v. Ohio, 395 U.S. 444 (1969) (expression that is directed at inciting imminent lawless action and is likely to cause such action can be regulated by the state); *see also* Dennis v. United States, 341 U.S. 494, 544-46 (1951).

71. Konigsberg v. State Bar of Cal., 366 U.S. 36, 49 n.10 (1961).

72. New York Times Co. v. Sullivan, 376 U.S. 488 (1964) (defamation of public officials is given a high level of protection); *see also* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

73. Sheppard v. Maxwell, 384 U.S. 333 (1966).

gories which carry their own analytical guidelines, the Court will then turn to the statute to determine the validity of the governmental interest. The Court must decide whether the statute is "content-based"[74] or "content-neutral"[75] in order to determine the proper test to use in analyzing the competing interests.

1. Content-Based Statutes

The first amendment protects the individual against suppression of free expression. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[76] If a law expressly restricts the communication of a particular message or expressly restricts speech because of others' reactions to the content of the message, it is related to the suppression of free expression.[77] Such laws are "content-based."

Content-based statutes limit communication on the basis of the message conveyed by the individual.[78] If the statute's purpose in regulating speech is to impede the communicative impact of the expression, it is content-based.[79] For example, a law that forbids individuals from carrying signs in the Senate gallery criticizing a member of the Senate is content-based because it expressly restricts the communication of a particular message—the criticism of Senators.[80] Another example is a law that forbids individuals from carrying signs in the Senate gallery that would offend members of the Senate. Even though this law does not restrict a particular message, it is nevertheless content-based because its application will depend upon the reaction of others to the message expressed.[81] Other examples of content-based restrictions include laws prohibiting seditious libel, banning the publication of secret information, forbidding the employment of teachers who advocate violent overthrow of the government, or outlawing the exhibition of the swastika in certain neighborhoods.[82]

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74. *See infra* notes 76-87 and accompanying text.
75. *See infra* notes 88-97 and accompanying text.
76. Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95 (1972).
77. G. Stone, *supra* note 16, at 3.
78. *See* Stone, *supra* note 59, at 47.
79. *See* Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing First Amendment Analysis*, 88 HARV. L. REV. 1482, 1497 (1975); Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 116 (1981). "The critical question would therefore seem to be whether the harm that the state is seeking to avert is one that grows out of the fact that the defendant is communicating, and more particularly out of the way people can be expected to react to his message . . . ." Ely, *supra*, at 1497.
80. G. Stone, *supra* note 16, at 4.
81. *Id.*
82. *See* Stone, *supra* note 59, at 47.

If the Court finds that the statute is content-based, the state must meet a stringent compelling state interest test.[83] To meet this test, the state must show that a compelling governmental interest justifies the restriction.[84] As a result of the Court's concern for protecting the individual against the suppression of free expression, almost every content-based statute over the last twenty-five years has been found unconstitutional under this test.[85] The Court is concerned that if the government is permitted to restrict only some messages and not others, it can distort the content of public debate and destroy the thought processes of the community.[86] Therefore, such laws are presumptively unconstitutional.[87]

2. Content-Neutral Statutes

Statutes that limit expression without regard for the expression's communicative impact or content are content-neutral.[88] For example, a law forbidding an individual from carrying a sign in the Senate gallery which blocks the view of spectators is not related to the suppression of free speech because it is not directed at speech. It applies "without regard to the content of any particular message."[89] Other examples of content-neutral restrictions include laws restricting loud speeches near a hospital, banning billboards in residential communi-

83. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (requiring the state to prove that the "regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end"); *accord* Cornelius v. NAACP Legal Defense and Educ. Fund, 473 U.S. 788, 800 (1985); United States v. Grace, 461 U.S. 171, 177 (1983).

84. *See* Stone, *supra* note 59, at 48.

85. Stone, *supra* note 61, at 196. *But see supra* note 84 and accompanying text. While most content-based statutes could not withstand the compelling state interest test, the Court has occasionally upheld such statutes. These exceptions seem to fit within two categories: (1) laws that distinguish on the basis of subject matter, and (2) laws that arise in special settings (e.g., prisons and military bases). Stone, *supra* note 61, at 196 n.28; *see, e.g.*, Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119 (1977) (upholding validity of prison regulations); Young v. American Mini-Theatres, 427 U.S. 50 (1976) (plurality opinion) (upholding restrictions on geographic location of sexually explicit speech); Greer v. Spock, 424 U.S. 828 (1976) (permitting statutes regulating military bases); Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (restrictions on all political advertising on public transportation is constitutional).

86. G. Stone, *supra* note 16, at 4.

87. *Id.*

88. *See* Stone, *supra* note 59, at 48; *see also* Boos v. Barry, 485 U.S. 312, 315 (1988) (content-neutral speech restrictions are those that are justified without reference to the content of the regulated speech); Renton v. Playtime Theatres, 475 U.S. 41, 48 (1986); Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 (1976).

89. G. Stone, *supra* note 16, at 4.

ties, limiting campaign contributions, and prohibiting the destruction of draft cards.[90]

Because content-neutral laws are unrelated to the suppression of free expression, they are less likely to harm the thought processes of the community and affect the substantive content of public debate.[91] For this reason, the Court permits a sufficiently important governmental interest in regulating speech to justify some limitations on first amendment rights.[92] In determining how important the governmental interest must be, the Court has applied various tests to content-neutral statutes.[93] One such test is the balancing test formulated in *United States v. O'Brien*.[94] The balancing test is much

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90. Stone, *supra* note 59, at 48; *see also* Ely, *supra* note 79, at 1498. Professor Ely suggests a possible guide for determining if a statute is based on communicative impact: "Had [the] audience been unable to read English, [would there] have been no occasion for the regulation?" *Id.*

91. *See supra* note 86 and accompanying text.

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

93. *See* Stone, *supra* note 59, at 49. In his survey of the Court's rulings on content-neutral statutes, Professor Stone has formulated a list of seven distinct standards of review. The Court has upheld all of the statutes examined on the basis of the first four standards. However, the outcomes of statutes examined on the basis of standards five through seven, a stricter review, were varied. *Id.* at 48-54. The seven standards are:

1. Some content-neutral restrictions do not even "implicate" first amendment concerns [quoting Acara v. Cloud Books, 478 U.S. 697, 707 (1986)].
2. Some content-neutral restrictions are constitutional if they are "reasonable" [quoting U.S. Postal Serv. v. Greensburgh Civic Ass'ns, 453 U.S. 114, 131 n.7 (1981)].
3. Some content-neutral restrictions are constitutional if "they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication" [quoting City of Renton v. Playtime Theatres, 475 U.S. 41, 47 (1986) (the time, place, and manner test)].
4. Some content-neutral restrictions are constitutional, if they are "within the constitutional power of the Government"; they further "an important or substantial governmental interest," the governmental interest is "unrelated to the suppression of free expression," and the restriction is "no greater than is essential to the furtherance of that interest" [quoting United States v. O'Brien, 391 U.S. 367, 377 (1968) (the balancing test)].
5. Some content-neutral restrictions are constitutional depending upon the Court's resolution of "the delicate and difficult task of weighing the circumstances" and appraising "the substantiality of the reasons advanced in support of the regulation" [quoting Schneider v. State, 308 U.S. 147, 161 (1939)].
6. Some content-neutral restrictions are constitutional if they serve "sufficiently strong, subordinating" interests by means of "narrowly drawn regulations designed to serve those interests without unnecessarily interfering with the First Amendment freedoms" [quoting Schaumberg v. Citizens for a Better Env't., 444 U.S. 620, 636-37 (1980)].
7. Some content-neutral restrictions are constitutional if they are "necessitated by a compelling governmental interest" and are "narrowly tailored to serve that interest" [quoting Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982)].

Id. at 48-50 & nn.7-13.

94. 391 U.S. 367 (1968). Professor Stone's fourth formulation is the *O'Brien* balancing test. *See supra* note 93; *see also Johnson*, 109 S. Ct. at 2540 (discussing balancing test).

more lenient than the compelling state interest test, which is applied to content-based laws. The balancing test provides that a statute is constitutional if it is (1) unrelated to the suppression of free expression, and (2) the restriction is no greater than necessary to further an important governmental interest.[95]

Although the balancing test requires the pertinent governmental interest to be important, the Court, in recent cases, has not seriously examined whether that interest is substantial; nor has it explored less intrusive means by which the government could achieve its goals.[96] Because of this lenient level of scrutiny, the trend of the Court has been to find content-neutral statutes constitutional under this test.[97] In sum, for a statute to successfully withstand a constitutional challenge, it almost certainly would have to be content-neutral and judged by the *O'Brien* balancing test.

C. *Flag Desecration Cases*

1. *Street v. New York*[98]

During the height of the civil rights movement, Sidney Street learned that civil rights leader James Meredith had been shot.[99] Distraught by the news, Street took his flag to the street corner and

95. *See O'Brien*, 391 U.S. at 381-82. The *O'Brien* Court upheld a federal statute which forbids a person from knowingly destroying or mutilating a draft card. *Id.* at 386. O'Brien was convicted of publicly burning his draft card as a symbolic act of political protest. *Id.* at 369. The Court ruled that the federal statute was designed to promote the smooth and proper functioning of the draft system, and was not designed to suppress free speech. *Id.* at 381. As such, it was held content-neutral. The Court applied the balancing test, holding that the regulation was not greater than necessary to further the government's interest in running the draft system. *Id.* at 381-82.

Professor Ely observed that the "selective service records . . . would have been equally threatened had O'Brien's destruction of his draft card totally lacked communicative significance." Ely, *supra* note 79, at 1498.

96. *See* Stone, *supra* note 59, at 50-51. One possible reason why the Court is more lenient with content-neutral statutes is that the first amendment is primarily concerned with (1) governmental distortion of public debate, (2) improper governmental motivation in restricting speech because the government disapproves of a particular message, and (3) concern that the government will restrict speech on the basis of how people will react to what the speaker is saying. *Id.* at 54-57. These concerns arise more frequently in content-based statutes than in content-neutral laws. *Id.* at 57.

97. *Id.* at 52 n.23. The Court has applied the *O'Brien* balancing test to only five content-neutral statutes and each was upheld. *See* United States v. Albertini, 472 U.S. 675 (1985); Wayte v. United States, 470 U.S. 598 (1985); Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984); Members of the City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984); *O'Brien*, 391 U.S. at 367.

98. 394 U.S. 576 (1969).

99. *Id.* at 578.

burned it while saying, "We don't need no damn flag."[100] Later, he admitted to police, "Yes; that is my flag; I burned it. If they let that happen to Meredith we don't need an American flag."[101] Street was convicted of violating a New York statute which makes 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]."[102]

Street differs from other flag cases because the statute prohibited casting contempt upon the flag by *words* as well as by acts.[103] Persuaded that Street could have been convicted for his words alone, which would be unconstitutional, the Supreme Court reversed the conviction.[104] Because the lower court did not specify whether Street also was convicted of the physical act of publicly mutilating the flag, the Supreme Court held that "Street's words could have been an independent cause of his conviction and . . . a conviction for uttering such words would violate the Constitution."[105] The dissent was frustrated by the Court's refusal to decide the more controversial issue of the constitutionality of a flag desecration statute in a flag burning context.[106] That issue waited twenty years to be addressed.[107]

In *Street*, the Court first examined whether Street's words fell into a category of speech afforded a lower level of protection.[108] The Court found that Street's words did not come under the class of speech which might incite others to commit unlawful acts[109] because "[a]ppellant's words, taken alone, did not urge anyone to do anything unlawful."[110] The Court also found that Street did not use fighting words that would provoke violent retaliation because his words were not inherently inflammatory.[111] Turning to the applicable New York statute, the Court held that it promoted the state's interest in protecting the sensibilities of passers-by who are likely to be shocked by the appellant's words and thus was content-based.[112] Additionally,

100. *Id.* at 579.

101. *Id.*

102. *Id.* at 578 (citing N.Y. PENAL LAW § 1425(16)(d) (McKinney 1909), *superseded by* N.Y. GEN. BUS. LAW § 136(d) (McKinney 1965)).

103. *See infra* notes 116, 117, 139 and accompanying text.

104. *Street*, 394 U.S. at 586-87.

105. *Id.* at 585.

106. *Id.* at 595 (Warren, C.J., dissenting).

107. *See* Texas v. Johnson, 109 S. Ct. 2533 (1989).

108. *See supra* notes 61-73 and accompanying text.

109. *Street*, 394 U.S. at 591.

110. *Id.*

111. *Id.* at 592; *see also* Chaplinsky v. New Hampshire, 315 U.S. 74 (1942) (holding that calling a person a "damn racketeer" or a "damn fascist" is not likely to provoke a person to retaliate and thereby breach the peace).

112. *Street*, 394 U.S. at 592; *see supra* notes 76-87 and accompanying text. A Court's finding that a statute is content-based is tantamount to finding the statute unconstitutional.

the state's interest in assuring that citizens show respect for the national symbol was dismissed because "no official, high or petty, can prescribe what shall be orthodox in politics, *nationalism*, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[113]

Although Street was decided solely on the basis of the appellant's words, and not on his acts, the Court expressly reserved the broader question of whether a future defendant could be constitutionally convicted for burning a flag.[114]

2. *Smith v. Goguen*

Smith v. Goguen[115] arose at a time when long hair and worn blue jeans were the uniform of the young. Goguen was arrested for wearing a small flag sewn on the seat of his pants, in violation of a Massachusetts flag desecration statute.[116] Unlike *Street* and *Johnson*, this case involved no breach of the peace, no physical act of desecration, and no political protest.[117] Goguen's conviction was based on the clause in the statute making it a misdemeanor to treat the flag contemptuously.[118]

The Court did not address the first amendment issue in this case, but turned instead to the fourteenth amendment's due process clause. The Court voided the Massachusetts statute, which prohibited treating the American flag "contemptuously,"[119] stating that the statute was too vague[120] and failed to draw reasonably clear lines be-

113. *Street*, 394 U.S. at 593 (emphasis added) (citing West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 641-42 (1943) (holding that school children cannot be coerced to pledge allegiance to the flag)).

114. *Id.* at 581; *see also* Texas v. Johnson, 109 S. Ct. 2533, 2554 (1989) (Rehnquist, C.J., dissenting).

115. 415 U.S. 566 (1974).

116. MASS. GEN. LAWS ANN. ch. 264, § 5 (West 1970).

117. *Goguen*, 415 U.S. at 568.

118. *Id.* at 569 n.3; *see infra* note 119 for text of the Massachusetts flag desecration statute.

119. MASS. GEN. LAWS ANN. ch. 264, § 5. The relevant part of the statute reads:

> Whoever publicly mutilates, tramples upon, defaces or *treats contemptuously* the flag of the United States . . . whether such flag is public or private property . . . 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 . . . .

Id. (emphasis added).

120. The "vagueness doctrine" stands for the notion that no statute which punishes conduct can survive if it cannot be understood and obeyed. *See* Rosenblatt, *supra* note 23, at 227; Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970); Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960); *see also* Colautti v. Franklin, 439 U.S. 379, 394-97 (1979); Grayned v.

tween criminal and noncriminal treatment of the flag. The Court also stated that due process requires that "all 'be informed as to what the State commands or forbids.' "[121] The Court was concerned that the standardless language found in the Massachusetts statute would allow law enforcement officers, judges, and juries to make decisions on the basis of their own predilections.[122]

Although the *Goguen* Court did not address the first amendment issues later analyzed in *Johnson*, it did leave open the possibility of the constitutionality of a statute that defines the forbidden treatment of the American flag with substantial specificity. As in *Street*, the Court in *Goguen* expressly reserved that decision for a future case.[123]

3. *Spence v. Washington*[124]

Spence is a political protest case, as are *Street* and *Johnson*. Appellant Spence symbolically[125] expressed his anguish about the domestic and foreign affairs of the government, particularly the Cambodian incursion and the Kent State tragedy.[126] He did so by flying his own American flag upside down out of his own window with a peace symbol, made of removable black tape, affixed to both sides of the flag.[127] Police came to Spence's home and arrested him for violating a Washington State statute prohibiting persons from placing any design or picture on the American flag and thereafter exposing it to the public.[128]

Spence differs from previous flag desecration cases because Spence was prosecuted under an "improper use" statute rather than a flag desecration statute.[129] However, this did not create differing analy-

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City of Rockford, 408 U.S. 104, 108-09 (1972); Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939); Connally v. General Const. Co., 269 U.S. 385, 391 (1926).

121. *Goguen*, 415 U.S. at 574 (quoting *Lanzetta*, 306 U.S. at 453).

122. *Id.* at 575.

123. *Id.* at 581-82.

124. 418 U.S. 405 (1974) (per curiam).

125. *See supra* notes 49-57 and accompanying text discussing symbolic speech.

126. *Spence*, 418 U.S. at 410.

127. *Id.* at 406.

128. *Id.* at 406-07. Spence was charged under the state's "improper use" statute. WASH. REV. CODE § 9.86.020 (West 1988). The statute provides in part:

> 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 (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.

129. Theoretically, improper use statutes might be considered content-neutral because they do not prohibit certain messages from being expressed—Spence could have

ses. In fact, the first part of the Court's ruling in *Spence* paralleled its reasoning in *Street* when the Court invalidated Washington State's interests in: (1) preventing a breach of the peace; (2) protecting the sensibilities of passers-by; and (3) punishing failure to show proper respect for the flag.[130] However, the Court proceeded to examine an additional governmental interest not raised in *Street* that was to become a crucial issue in *Johnson*: the preservation of the flag as a national symbol.[131] The Court in *Spence*, declining to decide the case on this basis, relegated the discussion to dicta.[132] Nevertheless, it is illustrative in light of the future *Johnson* decision.

The *Spence* Court, in dicta, recognized that the flag carries a variety of messages to different people,[133] implying that it is not the government's function to impose and enforce its own viewpoint on its citizens. In addition, the Court hypothesized that if such a state interest were valid, the purpose of the statute would be directly related to expression (*i.e.*, content-based) and, therefore, the *O'Brien* balancing test[134] would be inapplicable,[135] virtually rendering the statute unconstitutional.[136] As will be discussed, this is precisely the reasoning used in the *Johnson* decision.[137] However, the *Spence* Court settled, instead, on a finding that the state had no interest in preserving the physical integrity of a privately owned flag, thus invalidating the conviction.[138]

Street, *Goguen*, and *Spence* set the stage for the *Johnson* decision,

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superimposed *anything* on the flag and still have violated the statute. However, although the state does not care what message the defendant is conveying when he misuses the flag, it *is* concerned that the defendant is interfering with the message conveyed by the flag itself, and indirectly this might be a content-based statute. *See generally* Ely, *supra* note 79, at 1503-08. "[A]lthough improper use statutes do not single out certain messages for proscription, they *do* single out one set of messages, namely the set of messages conveyed by the American flag, for protection." *Id.* at 1506 (emphasis in original). The *Spence* Court, however, did not directly address the question of whether the statute was content-based or content-neutral.

130. *Spence*, 418 U.S. at 412; *see also supra* notes 108-14 and accompanying text. The fact that the *Spence* Court was addressing expressive actions instead of words did not affect the similarity of analysis between *Spence* and *Street* because symbolic speech and verbal speech are given identical protection.

131. *Compare Spence*, 418 U.S. at 412-13 *with* Texas v. Johnson, 109 S. Ct. 2533, 2543-57 (1989) (illustrating additional interests not previously addressed by the Court).

132. *Spence*, 418 U.S. at 413-14.

133. *Id.* at 413 (quoting West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 632-33 (1943) ("[W]hat is one man's comfort and inspiration is another's jest and scorn.")).

134. *See supra* notes 94-97 and accompanying text.

135. *Spence*, 418 U.S. at 414 n.8.

136. *See supra* note 85 and accompanying text.

137. *See infra* notes 159-65 and accompanying text.

138. *Spence*, 418 U.S. at 415.

each contributing to the issues that culminated in that case. By viewing *Johnson* in the wake of these background cases, the ultimate findings are far more predictable.

IV. *TEXAS V. JOHNSON*

A. *Facts of the Case and Procedural History*

During his participation in a political demonstration, Gregory Lee Johnson doused an American flag with kerosene and set it on fire.[139] No one present was physically injured, but several onlookers said that they had been seriously offended by the flag burning.[140] The actual flag burning and the serious offense it caused were sufficient to violate section 42.09(a)(3) of the Texas Penal Code.[141] Johnson was convicted under the statute, sentenced to one year in prison, and fined $2,000.[142] The conviction was affirmed by the Court of Appeals for the Fifth District of Texas,[143] but was reversed by the Texas Court of Criminal Appeals,[144] which held that the State could not punish Johnson for burning the flag under the circumstances presented.[145] The Supreme Court of the United States affirmed the decision of the Texas Court of Criminal Appeals.[146]

B. *Analysis of the Case*

1. Majority Opinion

The crucial question in any first amendment case is the standard of review. Will the state statute be deemed content-based or content-neutral? Will the state win the coveted *O'Brien* balancing test or struggle with, and probably lose, the compelling state interest test?

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139. Texas v. Johnson, 109 S. Ct. 2533, 2536 (1989); *see supra* notes 1-6 and accompanying text.

140. *Johnson*, 109 S. Ct. at 2537.

141. TEX. PENAL CODE ANN. § 42.09 (Vernon 1989). This statute provides:

S 42.09. Desecration of Venerated Object

(a) A person commits an offense if he intentionally or knowingly desecrates:
(1) a public monument;
(2) a place of worship or burial; or
(3) a state or national flag.

(b) For purposes of this section, 'desecrate' means deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action

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

Id.

142. *Johnson*, 109 S. Ct. at 2537.

143. Johnson v. State, 706 S.W.2d 120 (Tex. Ct. App. 1986), *rev'd*, 755 S.W.2d 92 (Tex. Crim. App. 1988), *aff'd*, 109 S. Ct. 2533 (1989).

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

145. *Johnson*, 109 S. Ct. at 2537 (citing *Johnson*, 755 S.W.2d at 97-98).

146. *Id.* at 2548.

Justice Brennan, writing for the five Justice majority in *Johnson*,[147] established that Johnson's act was "symbolic speech,"[148] and then addressed the central question of which test to apply. Finding the Texas statute content-based,[149] the Court applied a compelling state interest standard of review. Once the standard of review was established, the rest of the decision followed predictably: the state's interests simply were not compelling enough to overcome Johnson's first amendment protection.

a. The Content-Based/Content-Neutral Analysis

To determine whether the Texas statute was content-based, the Court examined the interests of the state and the purpose of the statute. The State of Texas asserted that its statute was intended to protect two state interests: (1) preventing a breach of the peace, and (2) preserving the flag as a symbol of nationhood and national unity.[150]

(1) Preventing a Breach of the Peace

The majority held that preventing a breach of the peace was not implicated in the facts of the case because no actual violence occurred.[151] Therefore, the Court did not consider this concern in its content analysis.

Although the Court dismissed this interest, it continued to discuss other arguments pertaining to it.[152] The Court observed that not all disputes necessarily lead to a breach of the peace.[153] Although speech which is likely to incite violence is not protected by the first

147. Justice Brennan is joined by Justices Marshall, Blackmun, Scalia and Kennedy.

148. *Id.* at 2540. "Johnson's burning of the flag was conduct 'sufficiently imbued with elements of communication' to implicate the First Amendment." *Id.* (quoting Spence v. Washington, 418 U.S. 405, 409 (1974)).

149. *Id.* at 2543 ("Johnson's political expression was restricted because of the content of the message he conveyed.").

150. *Johnson*, 109 S. Ct. at 2541-42.

151. *Id.* at 2541. *But see* Brief for the State of Texas at 33-40, *Johnson* (No. 88-155). The state argued that the requirement of an *actual* breach of the peace does not take into account the prophylactic purpose of the statute, and urges that the Court require, instead, a clear and present danger of *potential* breach of peace. "The state's interest in regulating an act of flagburning is not punishment of a breach of the peace, but rather prevention of a breach of the peace." *Id.* at 33. The state asserted that by requiring the stricter "actual violence" standard, the Court would encourage violence by people who wish to see the desecrators punished—a heckler's veto concept. *Id.* at 39-40.

152. *Johnson*, 109 S. Ct. at 2541.

153. *Id.*

amendment, a governmental assumption that "every expression of a provocative idea will incite a riot"[154] would mean that anything provocative could be suppressed.[155] The Court concluded that an unpopular idea does not always mean that it is directed toward, or likely to produce, imminent lawless action.[156] Furthermore, a dispute is not something to be shunned for fear that a breach of the peace will occur. In fact, an inherent aspect of free speech is that it actually invites dispute.[157] Finally, the Court noted that Texas already had a law prohibiting breaches of the peace, thus enabling Texas to prevent such breaches without punishing an individual specifically for flag desecration.[158]

(2) Preserving the American Flag as a Symbol of Nationhood and National Unity

The majority found that the interest of preserving the American flag as a symbol of nationhood and national unity was content-based,[159] and offered two reasons for its finding. First, the statute's "serious offense" language is contingent upon the communicative impact of the act.[160] The statute only applies to a flagburner who knows that he will seriously offend someone likely to observe or discover his action.[161] It is improbable that an observer would be seriously offended by the sole act of burning any flag, such as burning an

154. *Id.* at 2542.

155. *Id.*

156. *Id.* The Court also held that Johnson did not breach the peace by using "fighting words" that are likely to provoke the average person to retaliate, because Johnson's generalized expression of protest was not directed as a personal insult to anyone in the crowd, nor did he invite anyone to "exchange fisticuffs." *Id.* at 2542. *But see id.* at 2553 (Rehnquist, C.J., dissenting) (the public burning of the flag by Johnson was so inherently inflammatory that it had a tendency to incite a breach of the peace).

157. *Id.* at 2541. "[A] principal 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." *Id.* (quoting Terminiello v. Chicago, 337 U.S. 1, 4 (1949)); *see also* Hustler Magazine v. Falwell, 485 U.S. 46, 55-56 (1988); Coates v. Cincinnati, 402 U.S. 611, 615 (1971); Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 508-09 (1969); Cox v. Louisiana, 379 U.S. 536, 551 (1965).

158. *Johnson*, 109 S. Ct. at 2542 (referring to TEX. PENAL CODE ANN. § 42.01 (Vernon 1989)). The majority's argument is reminiscent of the "less restrictive alternative" clause in the *O'Brien* balancing test, thus giving the impression that the Court is applying the balancing test to this isolated issue in order to determine whether the balancing test should be applied to the entire case.

159. *Id.* at 2543. "We are . . . persuaded that this [government] interest is related to expression in the case of Johnson's burning of the flag . . . and thus [is] related 'to the suppression of free expression' . . . ." *Id.* at 2542 (quoting *O'Brien*, 301 U.S. at 377).

160. TEX. PENAL CODE ANN. § 42.09 (Vernon 1989) provides in pertinent part: "(b) for purposes of this section, desecrate means deface, damage, or otherwise physically mistreat in a way *that the actor knows will seriously offend* one or more persons likely to observe or discover this action." *Id.* (emphasis added).

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

old flag as a means of disposal.[162] Rather, an observer would be offended only if the flag desecration were coupled with a disparaging message concerning the flag. Thus, there is an implication that Johnson was not prosecuted for the expression of just any idea; he was prosecuted for the offensive political views symbolically expressed in his act.[163]

Also, the state's concern that flag burning will lead people to believe that the flag does not stand for nationhood and national unity can only arise when the perpetrator's treatment of the flag communicates a message that the flag stands for less positive concepts.[164] Thus, the concern is intrinsically related to the message of the expression, and is content-based.[165]

b. The Application of the Compelling State Interest Test

Once the Court eliminated the balancing test of the content-neutral standard and held that the statute was content-based, the majority proceeded to apply the compelling state interest test.[166] This test subjects the content-based statute to a "most exacting scrutiny."[167] The state regulation must be "[1] necessary to serve a compelling state interest and . . . [2] narrowly drawn to achieve that end."[168] Ultimately, the majority found that the state's interest was not sufficiently compelling to overcome Johnson's rights.[169]

The majority began its analysis by establishing the first amendment parameters of *Johnson*: the "bedrock principle underlying the First Amendment . . . is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[170] By protecting the flag as a symbol of na-

162. *Id.* "If [Johnson] had burned the flag as a means of disposing of it because it was dirty or torn, he would not have been convicted of flag desecration under this Texas law." *Id.*; *see* 36 U.S.C. § 176(k) (1988) (burning is the preferred means of disposing of a flag "when it is in such condition that it is no longer a fitting emblem of display").

163. *Johnson*, 109 S. Ct. at 2542-43; *see, e.g.*, Boos v. Barry, 485 U.S. 312, 318 (1988).

164. *Johnson* 109 S. Ct. at 2542; *see also supra* notes 130-36 and accompanying text.

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

166. *Id.*

167. *Boos*, 485 U.S. at 317-18 (noting that "content-based restrictions on political speech in a *public forum* . . . must be subjected to the most exacting scrutiny").

168. Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 45 (1983); *accord* Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, 482 U.S. 569, 572 (1987); Cornelius v. NAACP Legal Defense and Educ. Fund, 473 U.S. 788, 800 (1985); United States v. Grace, 461 U.S. 171, 177 (1983).

169. *Johnson*, 109 S. Ct. at 2548.

170. *Id.* at 2544; *see, e.g.*, Hustler Magazine v. Falwell, 485 U.S. 46, 55-56 (1988);

tional unity, the state promoted its own viewpoint about what the flag should symbolize and denied a person's right to have an opposing view.[171] For example, Johnson might have seen the flag as a symbol of repression, not as a symbol of unity. The majority pointed to prior cases in which statutes with viewpoint preferences have been held unconstitutional.[172]

Taking the viewpoint concept a step further, the majority held that the government cannot prohibit flag burning simply because it finds the message offensive.[173] The majority looked to the *Street* and *Barnette* decisions to support the notion that a state cannot be permitted to "foster its own view of the flag by prohibiting expressive conduct relating to it."[174]

While the viewpoint argument was obviously the focal point of the majority's decision, the Court also employed other arguments in its analysis. The majority recognized that the Texas statute lacked discernable boundaries to enable courts to determine which symbols

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Members of the City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984); Bolger v. Youngs Drugs Prods. Corp., 463 U.S. 60, 65, 72 (1983); Carey v. Brown, 447 U.S. 455, 462-63 (1980); F.C.C. v. Pacifica Found., 438 U.S. 726, 745-46, (1978); Young v. American Mini-Theatres, 427 U.S. 50, 63-65, 67-68 (1976) (plurality opinion); Buckley v. Valeo, 424 U.S. 1, 16-17 (1976); Grayned v. Rockford, 408 U.S. 104, 115 (1972); Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95 (1972); Bachellar v. Maryland, 397 U.S. 564, 567 (1970); United States v. O'Brien, 391 U.S. 367, 382 (1968); Brown v. Louisiana, 383 U.S. 131, 142-43 (1966); Stromberg v. California, 283 U.S. 366, 368-69 (1931).

171. James, *Term's Decisions on Expression Confound Many*, Nat'l L.J., Aug. 21, 1989, at S6, col. 1 ("The majority appears to be promoting the view . . . that while the rules in free speech may have started as a way of promoting political opinion, [free speech] is now regarded as a symbol of national tolerance for diverse points of view.").

172. *Johnson*, 109 S. Ct. at 2546 (citing Schacht v. United States, 398 U.S. 58 (1970)). The *Schacht* Court held that a federal statute which forbids an actor to wear the uniform of the armed forces is unconstitutional if the portrayal discredits that armed force. The Court held that the government may not ensure that a symbol be used to express only one view of that symbol or its referents. *Schacht*, 398 U.S. at 63.

173. *Johnson*, 109 S. Ct. at 2544. *But see id.* at 2557 (Stevens, J., dissenting). "The concept of 'desecration' does not turn on the substance of the message the actor intends to convey, but rather on whether those who view the *act* will take serious offense." *Id.* (emphasis in original) (Stevens, J., dissenting). Justice Stevens hypothesized that even if a person wanted to convey respect for the flag by publicly burning it, he would be guilty of the statute if he knew those watching him misperceived his intended message and were seriously offended. *Id.* (Stevens, J., dissenting).

174. *Id.* at 2545; Street v. New York, 394 U.S. 576, 593 (1969) ("[T]he 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." *Id.* (quoting West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).

> [A] government cannot mandate by fiat a feeling of unity in its citizens. Therefore, that very same government cannot carve out a symbol of unity and prescribe a set of approved messages to be associated with that symbol when it cannot mandate the status or feeling the symbol purports to represent.

Johnson, 755 S.W.2d 92, 97 (Tex. Crim. App. 1988), *aff'd*, 109 S. Ct. 2533 (1989).

were sufficiently special to warrant this unique status.[175] The court opined that, without such guidelines, lawmakers might be swayed by political preferences and impose them on the public.[176]

In addition, the Court noted that the flag has neither a special place in the Constitution, nor a separate judicial category.[177] There also are many principles that the nation holds sacred—such as the disdain for racial discrimination—but the first amendment still protects the right of opponents to express their views about these matters. Therefore, the Court declined "to create for the flag an exception to the joust of principles protected by the First Amendment."[178]

The majority expressed the belief that national unity should be fostered by persuasion, not by law.[179] It asserted that dissenters from national unity should not be punished for differing views.[180] On the contrary, the best remedy is "more speech, not enforced silence."[181]

Moreover, the majority was convinced that this single gesture of one unknown man would not change the nation's attitude toward its flag.[182] The Court noted that if burning the flag would incite a breach of the peace, as Texas asserted, it actually shows that people would riot to *defend* the symbol.[183] The majority was convinced that a rally to protect the flag from desecration would demonstrate the national unity surrounding this symbol and prove that the role of our flag is not in danger.[184]

The majority concluded by asserting that the flag is not consecrated by punishing those who desecrate it.[185] "[I]n doing so we dilute the freedom that this cherished emblem represents."[186]

2. Concurring Opinion

In his concurring opinion, Justice Kennedy apologetically echoed

175. *Johnson*, 109 S. Ct. at 2546.
176. *Id.*; *see also* Carey v. Brown, 477 U.S. 455, 466-67 (1980).
177. *Johnson*, 109 S. Ct. at 2546.
178. *Id.*
179. *Id.* at 2547.
180. *Id.*
181. *Id.* (quoting Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).
182. *Id.* (paraphrasing Abrams v. United States, 250 U.S. 616, 628 (1919) (Holmes, J., dissenting)).
183. *Id.*
184. *Id.*
185. *Id.* at 2547-48.
186. *Id.* at 2548.

the sentiments of the majority when he wrote, "[S]ometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result."[187] Justice Kennedy agreed with the dissent that the flag holds a lonely place of honor.[188] However, he was compelled to join with the majority because "[i]t is poignant but fundamental that the flag protects those who hold it in contempt."[189]

2. Minority Decisions

a. Dissent of Chief Justice Rehnquist, joined by Justice White and Justice O'Connor

Chief Justice Rehnquist did not debate the content-neutral or content-based distinctions. He did not discuss which test should apply, nor did he construct a constitutional framework for his argument. He went directly to the heart of the matter—the flag itself. In great detail, the Chief Justice traced the historically unique position that the American flag has occupied for more than 200 years,[190] and concluded that this uniqueness justified a governmental prohibition against flag desecration.[191]

Chief Justice Rehnquist supported his position with additional arguments. First, he claimed that the government possesses a property right over the flag and, thus, has a right to control its abuse.[192] To

187. *Id.* at 2548 (Kennedy, J., concurring).

188. *Id.* (Kennedy, J., concurring).

189. *Id.* (Kennedy, J., concurring).

190. *Id.* at 2548-2552 (Rehnquist, C.J., dissenting) (citing 8 JOURNAL OF THE CONTINENTAL CONGRESS 1774-1789, at 464 (Ford ed. 1907) (after Revolutionary War, the Continental Congress designated the design of the new flag)); G. PREBLE, HISTORY OF THE FLAG OF THE UNITED STATES OF AMERICA 453 (1880) ("The lowering of the American flag at Fort Sumter was viewed as the start of the Civil War.") Texas v. White, 74 U.S. (7 Wall.) 700, 725 (1869) (after the Civil War, the American flag flew over "an indestructible union, composed of indestructible states"); *see also* Proclamation No. 2605, 9 Fed. Reg. 1957 (1944), *reprinted in* 36 U.S.C. § 178 app. at 188 (1988) (President Franklin D. Roosevelt authorized the use of flags on containers exported for lend-lease aid to inform people of United States assistance); *Hearings Desecration of the Flag, on H.R. 271 before Subcommittee No. 4 of the House Committee on the Judiciary*, 90th Cong., 1st Sess. 189 (1967) (Representative L. Mendel Rivers testified that because of the flag burnings, he was receiving an increase in mail from Vietnam troops asking what was happening in America); *id.* (Representative Charles Wiggens stated "[t]he public act of desecration of our flag tends to undermine the morale of American troops"); 10 U.S.C. §§ 1481-1482 (1983) (designated that the flag be placed on the casket of a deceased soldier, and then given to his family); 36 U.S.C. § 175(m) (designated that upon the death of a president, the flag is to be flown at half-mast as a "mark of respect for their memory"); *id.* § 170 ("Star Spangled Banner" designated as the national anthem); *id.* § 157 (Congress designated June 14th as Flag Day); Pub. L. 100-186, 101 Stat. 1286 (1988) (Congress designated "Stars and Stripes Forever" as the national march); 36 U.S.C. § 172 (Congress established the "Pledge of Allegiance to the Flag").

191. *Johnson*, 109 S. Ct. at 2552 (Rehnquist, C.J., dissenting).

192. *Id.* (Rehnquist, C.J., dissenting). The fact that Johnson was not the owner of the flag is not relevant in this case because he was only prosecuted for desecration, not

support this claim, he cited *San Francisco Arts & Athletics v. United States Olympic Commission*,[193] which held that Congress could grant the exclusive use of the word "Olympic" to the U.S. Olympic Committee which, in turn, had the right to restrict other organizations from using it.[194] The Court in *Olympic Commission* reasoned that, "when a word [or symbol] acquires value 'as a result of organization and the expenditure of labor, skill, and money' by an entity, that entity constitutionally may obtain a limited property right in the word [or symbol]."[195] The Chief Justice asserted that under the same reasoning, Congress or the states should be able to obtain a similar interest in the symbol of the flag.[196] "The flag is a national property, and the nation may regulate . . . it."[197]

Chief Justice Rehnquist next considered areas of expression which are unprotected by the first amendment,[198] noting that "the First Amendment does not guarantee the right to employ *every conceivable method* of communication at all times and in all places."[199] He likened Johnson's actions to those in *Chaplinsky v. New Hampshire*,[200] in which Chaplinsky's "fighting words"[201] were not protected because "by their very utterance [they] . . . tend to incite an immediate breach of the peace."[202] Applying the *Chaplinsky* principles to the present case, the Chief Justice contended that the public burning of a flag also had the tendency to incite a breach of the

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trespass or conversion. The majority emphasized that "nothing in our opinion should be taken to suggest that one is free to steal a flag so long as one later uses it to communicate an idea." *Id.* at 2544 n.8.

193. 483 U.S. 522 (1987).

194. *Johnson*, 109 S. Ct. at 2552 (Rehnquist, C.J., dissenting).

195. *Olympic Comm.*, 483 U.S. at 532 (quoting International News Service v. Associated Press, 248 U.S. 215, 239 (1918)).

196. *Johnson*, 109 S. Ct. at 2552 (Rehnquist, C.J., dissenting).

197. *Id.* at 2555 (Rehnquist, C.J., dissenting) (quoting Smith v. Goguen, 415 U.S. 566, 591 (1974) (Blackmun, J., dissenting)).

198. *See supra* notes 61-73 and accompanying text.

199. *Johnson*, 109 S. Ct. at 2554 (Rehnquist, C.J., dissenting) (quoting Members of the City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 812 (1984) (emphasis added)).

200. 315 U.S. 568 (1942).

201. *Id.* at 572. Chaplinsky was convicted for saying to a local Marshall, "[y]ou are a God damned racketeer" and "a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists." *Id.* at 569.

202. *Johnson*, 109 S. Ct. at 2553 (Rehnquist, C.J., dissenting) (quoting *Chaplinsky*, 315 U.S. at 571-72). The *Chaplinsky* Court further held that "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky*, 315 U.S. at 571-75.

peace.[203]

Chief Justice Rehnquist also declared that flag burning was not an essential part of Johnson's expression of ideas since numerous alternatives existed that would be equally effective.[204] The statute was not punishing Johnson because Texas opposed the message he wished to convey; it opposed only the symbol he used.[205] Accordingly, Texas allowed Johnson a "full panoply of other symbols and every conceivable form of verbal expression to express his deep disapproval of national policy."[206] Moreover, because there were alternative means of expression and a probability that his action would cause a breach of the peace,[207] the state's public interest clearly outweighed the slight value of permitting Johnson this particular form of expression.

Chief Justice Rehnquist implied that the American flag is not just another symbol.[208] The government was not responsible for establishing the deep respect people feel for the flag—that was accomplished by 200 years of history.[209] The Chief Justice viewed it inconsistent that a government "may conscript men into the Armed Forces where they might perhaps die for the flag, . . . [but] may not prohibit the public burning of the banner under which they fight."[210]

b. Justice Stevens's Dissent

Justice Stevens's dissent is remarkable because he avoided the usual legal analysis in order to view the issues of *Johnson* from a broader perspective. He concluded that an intangible dimension existed in flag burning cases which rendered the Court's precedent in

203. *Johnson*, 109 S. Ct. at 2553 (Rehnquist, C.J., dissenting). This view also has been confirmed by the highest courts of several states which have upheld statutes prohibiting public flag burning because it is so "inherently inflammatory that it may cause a breach of public order." *Id.* (Rehnquist, C.J., dissenting); *see, e.g.*, State v. Waterman, 190 N.W.2d 809, 811-12 (Iowa 1971); State v. Royal, 113 N.H. 224, 229, 305 A.2d 676, 680 (1973); *see also* State v. Mitchell, 32 Ohio App. 2d 16, 30, 288 N.E.2d 216, 226 (1972).

204. *Johnson*, 109 S. Ct. at 2553 (Rehnquist, C.J., dissenting). Alternatives available to Johnson included: public effigies of officials, verbal denunciation, the burning of other symbols, even burning the American flag privately. *Id.* (Rehnquist, C.J., dissenting). Contrary to this position, the majority points out that the dissent's assertion that there are equally effective alternatives available to Johnson is inconsistent with the dissent's other assertion that the flag occupies a *unique* position in our society. *Id.* at 2546 n.11. If the flag is unique, messages conveyed without the flag's use cannot be as forceful. *Id.*

205. *Id.* at 2554 (Rehnquist, C.J., dissenting).

206. *Id.* (Rehnquist, C.J., dissenting).

207. In his analysis, Chief Justice Rehnquist addressed a "potential" breach of the peace. *Id.* at 2553 (Rehnquist, C.J., dissenting). Conversely, the majority required an "actual" breach of the peace. *Id.* at 2548.

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

209. *Id.* (Rehnquist, C.J., dissenting).

210. *Id.* (Rehnquist, C.J., dissenting).

prior first amendment cases inapplicable.[211]

Justice Stevens reasoned that because the flag is a unique symbol, the precedent involving a host of other symbols should not apply.[212] Justice Stevens viewed the flag as symbolizing more than "nationhood and national unity."[213] He saw the flag as a "symbol of freedom, of equal opportunity, of religious tolerance, and of good will for other peoples who share our aspirations"[214]—ideas that characterize this society.[215]

In balancing the state's interest in preserving the value of the flag as a symbol against an individual's first amendment rights, Justice Stevens found the state's interest sufficiently compelling. He apprehended that "[t]he value of the flag as a symbol cannot be measured"[216] and that preserving this value is legitimate and significant.[217] He was unpersuaded by the majority's argument that the symbol's value will be enhanced by a commitment to free expression.[218] Instead, Justice Stevens felt that "sanctioning the public desecration of the flag will tarnish its value."[219] Justice Stevens then considered Johnson's first amendment rights and concluded that his rights were not unreasonably restricted by this "trivial burden on free expression" because Johnson's protest easily could have been satisfied by using another mode of expression, including uttering words critical of the flag.[220]

Justice Stevens contested the majority's opinion that Johnson was convicted for his "disagreeable ideas."[221] Rather, Justice Stevens argued Johnson was convicted for "disagreeable *conduct* that . . . diminishes the value of an important national asset."[222] In Justice Stevens's view, Johnson was prosecuted for the method he selected to "express his dissatisfaction."[223] Yet, Justice Stevens observed, had

211. *Id.* at 2556 (Stevens, J., dissenting).
212. *Id.* (Stevens, J., dissenting).
213. *Id.* (Stevens, J., dissenting).
214. *Id.* (Stevens, J., dissenting).
215. *Id.* (Stevens, J., dissenting).
216. *Id.* (Stevens, J., dissenting).
217. *Id.* (Stevens, J., dissenting).
218. *Id.* (Stevens, J., dissenting). Justice Stevens refers to the majority's statement that "the flag's deservedly cherished place in our community will be strengthened, not weakened, by our holding today." *Id.* at 2547.
219. *Id.* at 2556 (Stevens, J., dissenting).
220. *Id.* (Stevens, J., dissenting).
221. *Id.* at 2557 (Stevens, J., dissenting). For a discussion of the majority's opinion on this point, see *supra* notes 173-74 and accompanying text.
222. *Johnson*, 109 S. Ct. at 2557 (Stevens, J., dissenting) (emphasis added).
223. *Id.* (Stevens, J., dissenting).

Johnson expressed his views by spray painting the Lincoln Memorial, the government could undeniably prohibit that particular means of expression because of its legitimate interest in preserving an important national asset.[224] Applying this logic to the present case, Justice Stevens indicated that even though the national asset was intangible, "the same interest supports a prohibition on the desecration of the American flag."[225]

In his conclusion, Justice Stevens concurred with the observations of Chief Justice Rehnquist that "[t]he ideas of liberty and equality have been an irresistible force in motivating leaders"[226] of our nation. "If those ideas are worth fighting for,"[227] then the flag that uniquely symbolizes their power is certainly "worthy of protection from unnecessary desecration."[228]

V. THE IMPACT OF THE *JOHNSON* DECISION

Public opinion and legislative responses reveal *Texas v. Johnson*'s serious impact on the United States. What began as public outrage has led the executive and legislative branches of government to join forces in finding ways to circumvent this controversial decision of the judicial branch. Although the people wanted to make flag desecration illegal, the Supreme Court said "no," and, thus, elected officials came up with creative solutions.[229] These solutions and their inherent constitutional problems will be discussed in the following analysis of *Johnson*'s impact. If the solutions can pass Supreme Court muster, they will set important guidelines for future first amendment interpretation.

A. Public Response

While constitutional scholars might have anticipated the *Johnson* ruling,[230] the general public did not, and they responded vehemently against it.[231] A Harris poll found that the number of Americans with

224. *Id.* (Stevens, J., dissenting).
225. *Id.* (Stevens, J., dissenting).
226. *Id.* (Stevens, J., dissenting).
227. *Id.* (Stevens, J., dissenting).
228. *Id.* (Stevens, J., dissenting).
229. *See infra* notes 238, 246-47 and accompanying text.
230. G. Stone, *supra* note 16, at 1. Dean Stone testified that "for those who are familiar with the basic precedents and doctrines that have evolved over the past seventy years, *Johnson* was hardly surprising. To the contrary, *Johnson* followed quite sensibly from some of the most basic, most firmly established and most well-reasoned precepts of American constitutional law." *Id.*
231. Simpson, *Decision Unravels Flag's Very Fabric*, INSIGHT, July 24, 1989, at 8. Americans throughout the country expressed deep distress at the Court's decision. For example: (1) the City Council in Columbus, Georgia, voted to fly the flag upside down (a sign of international distress) to protest the decision; (2) the citizens of Findlay, Ohio, rallied to petition their U.S. Congressional representative to support a constitu-

"high confidence" in the Supreme Court dropped from twenty-eight percent to seventeen percent between June and July of 1989.[232] In a poll conducted by *Newsweek Magazine*, seventy-one percent of the Americans questioned said that they would support an amendment to ban flag burning, and sixty-five percent disagreed with the *Johnson* decision.[233] Eighty-six percent of those surveyed in a regional poll conducted by the University of Connecticut strongly disapproved of burning the flag to make a political point, while only four percent said they approved.[234] A report in the *Los Angeles Business Journal* noted that sales of flags in local shops increased significantly soon after the decision.[235] The new commander-in-chief of the Veterans of Foreign Wars of the United States, armed with a petition containing one-million signatures, spoke to a Senate Committee seeking a constitutional amendment against desecration of the American flag.[236] One commentator suggested that the Supreme Court "can best preserve their reputation as experts by avoiding subjects everyone understands."[237] A significant majority of the American people rallied

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tional amendment; (3) four teenagers in Mesa, Arizona, had a barber sculpt the flag into their hair; (4) country musician Merle Haggard wrote a new, pro-flag song; and (5) an entrepreneur in Great Barrington, Massachusetts, began selling flags treated with flame retardant. *Id.*

232. Guest, *The New Supreme Court Term May Disappoint Conservatives*, U.S. NEWS & WORLD REP., Oct. 2, 1989, at 31 n.13 (citing the Harris poll, a national public opinion survey).

233. Dillon, *Bush's Call Sparks Ardent Debate: Defenders of Old Glory May Undermine First Amendment Guarantees, Cautious Voices Warn*, Christian Sci. Monitor, July 6, 1989, at 8, col. 1 (citing the *Newsweek* poll).

234. *Poll Finds Support for Flag Amendment*, Proprietary to the United Press Int'l, Aug. 13, 1989 (citing the University of Connecticut's Institute for Social Inquiry poll, which queried 500 state residents). In the same survey, 64 percent of the people polled said they opposed the Supreme Court decision, while only 32 percent said they supported it and 4 percent expressed no opinion. The Connecticut survey also found that "74 percent of the respondents said they believed that flag burning should be against the law, while 22 percent said it should not. Two percent said that it would depend on why the flag was burned and 2 percent had no opinion." *Id.* Fifty-nine percent of those surveyed supported an amendment to make flag burning a criminal offense, 35 percent opposed such an amendment, and 6 percent had no opinion. *Id.*

235. Curtis, *Burning Issue Ignites Flag Sales*, L.A. Bus. J., Aug. 14, 1989, § 1, at 1. Soon after the *Johnson* decision, a small storefront shop in Pasadena was jammed with customers seeking flags. The owner said, "We didn't expect the crowds . . . [t]his year was like the bicentennial." *Id.*

236. *New VFW Head Vows to Fight Flag Desecration*, Proprietary to the United Press Int'l, Sept. 10, 1989 (reporting on Walter G. Hogan, Commander in Chief of the Veterans of Foreign Wars of the United States).

237. *Burn, Baby, Burn; Flag Burning Case*, 41 NAT'L REV. 13 (1989). "This time the Justices ventured to contradict plain common sense about a venerated object, and were greeted with such angry contempt as might greet an archbishop who declared baseball immoral." *Id.*

in favor of preserving the flag as a national symbol and, consequently, many of the politicians who represent them did the same.

B. Political Response

In a remarkable bipartisan effort, the United States Senate voted ninety-seven to three to register "profound disappointment" with the *Johnson* decision.[238] As angry protesters burned judicial robes outside the Supreme Court, the House of Representatives spoke out in an all-night session against the ruling.[239] The House and Senate joined in overwhelmingly passing a resolution condemning the Court's decision.[240] At the site of the Marine Corps Memorial at the Arlington National Cemetery, President Bush announced a proposed constitutional amendment[241] declaring that "this flag is one of our most cherished ideas."[242] The full legislature in at least five states passed separate resolutions supporting the amendment,[243] while at least one chamber in ten other states did the same.[244] Even assemblyman Tom Hayden of California, a radical political protester in the 1960s, voted for the amendment.[245]

Congressional republicans and democrats joined in an effort to protect the flag in a manner that the Supreme Court would find constitutionally acceptable. The two solutions considered were: (1) a constitutional amendment,[246] or (2) a new federal anti-flag burning statute with wording designed to circumvent the first amendment problems enunciated in *Johnson*.[247] The constitutional issues raised by both of these "solutions," and the resulting arguments among scholars,[248] demonstrate the broad impact of *Texas v. Johnson*. The issue is whether these solutions will be constitutionally acceptable to a majority of the United States Supreme Court.

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238. *A Fiery Furor Over the Flag; Why the Court's Decision Was Incendiary*, LIFE, Aug. 1989, at 106.

239. *Id.*

240. Simpson, *supra* note 231, at 9.

241. *Id.* at 12. The text of the proposed amendment is: "The Congress and the states shall have the power to prohibit the physical desecration of the flag of the United States." *Id.*

242. *Id.* at 9.

243. *Id.*

244. *Id.*

245. Crovitz, *On the Flag, the Justices Make Dukakis's Mistake*, Wall St. J., July 6, 1989, at A12, col. 2. "Anti-war activist Tom Hayden, now a California legislator, last week voted for a constitutional amendment against flag burning because such actions incite violence—and he should know." *Id.*

246. *See infra* notes 249-69 and accompanying text.

247. *See infra* notes 270-96 and accompanying text.

248. *See infra* notes 253-96 and accompanying text.

1. The Amendment:

The constitutional amendment sought by President Bush[249] was rejected by the Senate,[250] which decided that an amendment was a radical response. Although they postponed it in favor of a new federal statute,[251] the issue is not yet over. If the statute is challenged and ruled unconstitutional, then the amendment issue probably will be revived.

A leading proponent of the amendment is former federal Judge Robert H. Bork. Speaking before the House Judiciary Committee's Subcommittee on Civil and Constitutional Rights, Judge Bork expressed the view that the flag is the one symbol that stands above partisan ideological dispute and, as such, should be preserved inviolate.[252] "If a multitude of individuals are also to be a community, they must have symbols by which they live, symbols that express their identity as a community."[253] It was Judge Bork's belief that a statute would be unconstitutional by the *Johnson* reasoning[254] and, therefore, would only delay the amendment process.

The Senate Committee also heard the testimony of other proponents of a constitutional amendment. Stephen B. Presser and ArLynn Leiber Presser[255] acknowledged that the Court was compelled to reach the result it did in *Johnson* based on the precedent of its previous first amendment decisions.[256] Moreover, such logic probably would prohibit a neutrally crafted flag desecration statute.[257] They asserted, therefore, that the only way the *Johnson* result could be

249. *See supra* note 241 and accompanying text.

250. Eaton, *Senate Rejects Flag-Burning Amendment*, L.A. Times, Oct. 20, 1989, at A1, col. 3. "The 51-48 vote was well short of the two-thirds needed to approve changes in the Constitution." *Id.*

251. L.A. Times, Oct. 6, 1989, § 1, at 24, col. 1. In a 91 to 9 vote, the Senate overwhelmingly passed a bill making it a federal crime to burn the American flag. Wall St. J., Sept. 13, 1989, at A20, col. 3 (House of Representatives voted 380 to 38 to approve the flag burning bill).

252. Bork, *Flag Burning Should Be Unconstitutional*, Newsday, Aug. 9, 1989, (Viewpoint), at 63 (testimony of Robert H. Bork, a John M. Olin Scholar in legal studies at the American Enterprise Institute for Public Policy Research, before the House Judiciary Committee's Subcommittee on Civil and Constitutional Rights.)

253. *Id.*

254. *See infra* notes 278-80 and accompanying text for Judge Bork's reasoning.

255. S. Presser & A.L. Presser, *Rights, Responsibilities and the Flag*, Chi. Tribune, Sept. 27, 1989, § C (Perspective), at 19. Stephen B. Presser is a professor at the Northwestern University School of Law, and ArLynn Leiber Presser is a lawyer and freelance writer. They presented their arguments before the Senate Judiciary Committee.

256. *Id.*

257. *Id.*

changed was either by a new Supreme Court decision or a constitutional amendment.[258] They supported an amendment because there are times when concepts of decency and taste—sometimes referred to as the prejudices of the majority of people—deserve some deference.[259]

Constitutional scholars opposing the amendment[260] also spoke before the Senate Judiciary Committee. Geoffrey R. Stone, Dean of the University of Chicago Law School, argued that the Constitution should not be tampered with because:

> [s]uch a practice would clutter, trivialize and, indeed, denigrate the Constitution and the broad principles for which it stands. We should recognize the flag issue for what it is—a profoundly controversial and inflammatory dispute over what in the grand scheme of constitutional government is ultimately a matter of secondary importance. It does not warrant resort to the most profoundly solemn act our nation can pursue—amendment of the Constitution of the United States.[261]

Walter Dellinger argued that the Bill of Rights controls later amendments as well as the original Constitution.[262] For example, even though the fourteenth amendment was added later, it is constrained by the first amendment. Thus, the proposed amendment could not override the first amendment.[263] Professor Dellinger also was concerned that quick resort to an amendment, without sober reflection, would create a dangerous precedent.[264] "Proposal of this amendment would dangerously 'lower the threshold' at which amending the Constitution is seen as a proper response to a perceived problem. Not only dissidents are at risk. Rights like freedom of the press, which now seem secure, would not necessarily be so in the future."[265]

Laurence H. Tribe, Tyler Professor of constitutional law at Harvard Law School, speaking before the House Judiciary Committee, testified that "if a goal may be achieved without constitutional difficulty through the normal legislative process, surely it is folly to reach for the heavy artillery of the amending process to achieve that goal."[266] In a letter to the Editor of the *New York Times*,[267] Burt

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258. *Id.*

259. *Id.*

260. A letter signed by 511 constitutional law professors arrived at the office of Senator Joseph Biden, head of the Judiciary Committee, urging the committee to oppose a constitutional amendment. Marcus & Wermeil, *Legal Beat*, Wall St. J., Sept. 22, 1989, at B6, col. 3.

261. G. Stone, *supra* note 16, at 2.

262. W. Dellinger, Testimony before the Senate Committee on the Judiciary Concerning Constitutional and Statutory Responses to Texas v. Johnson 8 (Sept. 14, 1989). Walter Dellinger is a professor of law at Duke University Law School.

263. *Id.* "Congress may not, for example, exercise its fourteenth amendment 'power' to enforce the equal protection clause by legislation requiring all newspapers to promote equality daily in their editorials." *Id.*

264. *Id.* at 14.

265. *Id.* at 14-15.

266. L. Tribe, Testimony before the House Judiciary Committee on Civil and Con-

Neuborne, Professor at the New York University School of Law, said that it was a mistake to "tinker" with the constitution.[268] "[T]he First Amendment ain't broke, and attempts to 'fix' it by amending its meaning are a lot like 'fixing' Shakespeare by taking out the big words."[269]

Ultimately, Congress was persuaded by the arguments of the amendment's opponents. However, if the statutory solution proves to be inadequate, it is likely that a renewed debate on the amendment issue will ensue.

2. The Statute:

The Texas flag desecration statute had little chance for judicial success because the *Johnson* Court judged it by a compelling state interest test.[270] Congress recognized that for a new flag protection statute to withstand the *Johnson* ruling, it would have to be written so that, if challenged, it would be judged by the more lenient *O'Brien* balancing test.[271] Therefore, Congress was obliged to write a statute that was content-neutral.[272] Whether or not Congress succeeded is debated by the scholars and, ultimately, will be decided by the courts.

For the new statute[273] to be content-neutral, it must be unrelated to free expression, and neutral with respect to content. The new statute provides: "Whoever knowingly mutilates, defaces, burns, maintains on the floor or ground, or tramples upon any flag of the United States shall be fined not more than $1,000 or imprisoned for not more than one year, or both."[274] Unlike the Texas law invalidated by *Johnson*, this federal statute makes no reference to "desecration" and does not turn on whether the proscribed conduct "will seriously offend" others.[275] Dean Stone maintained that the wording

stitutional Rights Concerning Statutory and Constitutional Responses to the Supreme Court Decision in Texas v. Johnson 18 (July 18, 1989).

267. N.Y. Times, July 19, 1989, at A22, col. 4.

268. *Id.*

269. *Id.*

270. *See supra* notes 85-87 and accompanying text.

271. *See supra* note 95 and accompanying text.

272. *See supra* notes 88-97 and accompanying text.

273. Biden-Roth-Cohen Flag Protections Act of 1989, 18 U.S.C. § 700(a) (Supp. 1989).

274. *Id.*

275. The former federal statute punished "[w]hoever knowingly casts contempt upon any flag of the United States by publicly . . . defacing it. . . ." 18 U.S.C. § 700(a) (1976). By deleting the "casts contempt" language of the former federal statute, and replacing it with language extending to anyone who intentionally defaces the flag regardless of his motive, Congress hopes to achieve neutrality. The "contempt" language

of the new legislation is content-neutral because it "applies without regard to whether the conduct takes place in public or in private, without regard to whether it is undertaken for expressive or for other purposes, without regard to whether it offends others, and without regard to the particular message any individual may seek to convey."[276] Therefore, Dean Stone concluded that the statute's language is not "directly related to the suppression of free expression."[277]

Former federal Judge Robert H. Bork does not believe that the statute can undo *Texas v. Johnson* because, no matter how neutrally worded, "the legislative history of the statute would reveal that it was designed to prevent the expression of an idea."[278] He contended that Congress could not articulate any reason for the statute other than to prohibit an act that is an offensive mode of expression.[279] Thus, Judge Bork thinks that a court will recognize that Congress merely attempted to alter the result of *Johnson* by changing the statute's wording without changing the intent behind the Code.[280]

Dean Stone joined with Judge Bork in questioning whether the government's interest in protecting the physical integrity of the flag might be directly related to the suppression of free expression, thereby rendering the neutrally worded statute content-based.[281] If the governmental interest is to preserve the flag as a symbol of national unity, then by the reasoning of *Street*[282] and *Spence*,[283] the law

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of the former federal statute caused the statute to be content-based, just as the "seriously offend" language caused the Texas statute to be content-based.

276. G. Stone, *supra* note 16, at 7; *accord* L. Tribe, *supra* note 266, at 5. "The fundamental approach of [the] statute is to treat American flags as the very special objects they are, and to protect them all from destruction and defacement regardless of any message the actor might intend to convey." *Id.*

277. G. Stone, *supra* note 16, at 7.

278. *Flag Desecration and the Constitution; Bork: Desecration Akin to Obscenity, Indecent Behavior*, Legal Times, July 24, 1989, at 17 (testimony of Robert Bork before the House Judiciary Subcommittee) [hereinafter *Bork: Desecration Akin to Obscenity*]; *accord Loophole Patriotism; Democrats' Legislative Alternative to 'Flag Burning Amendment'*, NEW REPUBLIC, Aug. 7, 1989, at 4 [hereinafter *Loophole*].

> But who's kidding whom, Senator Biden? The reason you want to ban flag burning is that it offends people. It offends you, you say, because the flag 'embodies cherished values.' Burning the flag therefore dissents from those values. You want to ban flag burning because it conveys an offensive message—an offensive political message. Political messages offensive to the majority are the heart of what the First Amendment protects. It doesn't matter how you phrase the law.

Id.

279. *Bork: Desecration Akin to Obscenity*, *supra* note 278, at 7. "[T]he lawyer defending the statute would be required to articulate a compelling governmental interest. He would be unable to do so since the only governmental interest would be in preventing flag-burning as a means of expression, and that is precisely what *Johnson* held unconstitutional." *Id.*

280. *Id.*

281. G. Stone, *supra* note 16, at 11-12.

282. *See supra* notes 112-13 and accompanying text.

applies only to people who undermine that governmental interest with acts which present an inconsistent message.[284]

Dean Stone also addressed Judge Bork's concern for impermissible legislative motivation[285] by saying that if Congress passed this act as a "cynical effort to circumvent" *Johnson*, it might be invalidated by the Court because it was enacted for constitutionally impermissible reasons.[286] However, Dean Stone indicated that, historically, the Court has looked to the underlying motivation only in decisions by the executive and administrative branches of government.[287] Thus far, the Court has been reluctant to inquire into congressional motivation.[288] Therefore, although the Bork argument may be valid, Stone pointed out that the Court may not overturn the new statute on that basis.[289] Thus, the question of the statute's content-neutral status is subject to debate.

Even if the statute did pass the content-neutral hurdle, it still may be unconstitutional if its restriction on free expression outweighs the legitimate governmental interests[290] and, therefore, fails the balancing test. Dean Stone regarded this scenario as unlikely because the Court uses a very lenient standard of review in applying the balancing test,[291] especially when the restriction leaves alternate avenues

283. *See supra* notes 129-38 and accompanying text.

284. G. Stone, *supra* note 16, at 12. Dean Stone offered another possible governmental interest: to establish the flag as a "venerated object." He likened this interest to those of religious groups who are permitted to proscribe the desecration of certain objects without regard to the object's expressive purpose or the purpose of the person who defiles it. *Id.* at 13.

285. *See supra* notes 278-80 and accompanying text for Judge Bork's view.

286. G. Stone, *supra* note 16, at 10.

287. *Id.* at 10; *see, e.g.*, Keyes v. School Dist. No. 1, 413 U.S. 189 (1973) (Court examines racially inspired school board actions); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (Court examines constitutionality of municipal ordinances).

288. G. Stone, *supra* note 16, at 11.

> In *O'Brien*, for example, the Court, largely for prudential reasons, declined to inquire into legislative motivation to determine whether the actual purpose of the draft card statute was not to facilitate the administration of the draft but, rather, to punish those individuals who opposed the draft by burning their draft cards.

Id. at 11; *see, e.g.*, *O'Brien*, 391 U.S. at 383 (stating that "inquiries into congressional motives or purposes are a hazardous matter"). *But see* Wallace v. Jaffree, 472 U.S. 38 (1985); Stone v. Graham, 449 U.S. 39 (1980) (in the area of religion the Court has invalidated laws because of impermissible legislative motivation).

289. G. Stone, *supra* note 16, at 10.

290. *Id.* at 8; *see, e.g.*, Schneider v. State, 308 U.S. 147 (1943) (government's interest in reducing litter is insufficient to outweigh an individual's first amendment right to distribute leaflets in public).

291. *See supra* note 96 and accompanying text.

for the speaker to express his message.[292] For instance, in *United States v. O'Brien*, the Court upheld a federal statute prohibiting the knowing destruction or mutilation of a draft card when O'Brien burned his draft card as a political protest.[293] The Court found that the statute passed the balancing test because the protester could express his views by other means and the statute reasonably furthered an important governmental interest.[294] Dean Stone suggested that if "the government's interest in protecting the physical integrity of the American flag is similarly substantial to the governmental interest"[295] in *O'Brien*, and "if the proposed [flag] legislation is understood to be content-neutral and unrelated to the suppression of free expression, [then] it too would in all likelihood withstand content-neutral review."[296]

There are numerous "if's" in Dean Stone's analysis which would create problems in using *O'Brien* to anticipate what might happen when the new flag protection statute is challenged. In *O'Brien*, it is quite possible that the government's stated interest in the smooth functioning of the draft system was only a cover-up for the real purpose of the law: to punish protesters who burned their draft cards. However, the government at least was able to come up with a neutral interest. Conversely, under the present federal flag desecration statute, the government might have a hard time claiming an important interest, real or feigned, which can be divorced from expressive conduct. Thus, an analogy with *O'Brien* might prove ineffective.

VI. CONCLUSION

Texas v. Johnson is predicated on well-established law interpreting the first amendment. Legal scholars who understand the complicated theories behind content-based and content-neutral distinctions realize the importance of this established precedent. But the average person, who does not understand complex constitutional matters, responds with his heart. Some people join with the majority's view of first amendment rights. As one commentator exclaimed, "Is there no one eloquent enough to make people weep with gratitude that we live in a country where people are free enough to burn the flag?"[297] At the same time, others are more responsive to Justice Stevens's argument that the flag is more than an object, it is a symbol that cannot be measured in tangible terms. Trying to express his feelings about the flag, a retired Special Forces officer sitting near the black

292. G. Stone, *supra* note 16, at 9.
293. United States v. O'Brien, 391 U.S. 367, 386 (1968).
294. *Id.* at 388-89 (Harlan, J., concurring).
295. G. Stone, *supra* note 16, at 10.
296. *Id.*
297. *Loophole*, *supra* note 278, at 4.

granite wall of the Vietnam Veterans Memorial said, "It's very hard to explain. It's like electricity: You can see the results but you can't see the electricity. Know what I mean? It's a nontangible item which is a thought; it's within your heart. I was brought up that way."[298] One teen-age student wrote in the "Students Speak Out" column in the *Washington Post*:[299]

> Anyone who disregards the significance of the flag and what it stands for should not be allowed to rob the country of its symbol. Burning the flag is disrespectful. This crime demeans what our country has worked for so diligently since the founding. If I were the president and had the authority to punish those who commit what is to me an unjustified and ungrateful act, I would not only exile them from the United States, but I would also make sure that they receive psychiatric evaluation.[300]

Flag desecration is not an ordinary first amendment issue. Judging from the polls taken and the vociferous public outcry, many feel that a flag burning statute constitutes one of the rare times when the government's interest is significant enough to outweigh an individual's right of free expression—by any test.[301] Thus, it would appear that the average person embraces Justice Stevens's view: this is one circumstance in which a logical application of first amendment precedent is not appropriate because of the intangible dimension and symbolic significance of the American flag.

EPILOGUE

The Biden-Roth-Cohen Flag Protection Act of 1989 went into effect at 12:01 a.m. on Saturday, October 28, 1989.[302] The next day, flags were burned in protest all over the nation, but no arrests were made.[303] Finally, on October 30, 1989, a group chanting "burn, baby, burn," set fire to a flag in front of the Capitol building in Washington, D.C. They were the first to be arrested under the new statute.[304] Now the scholarly debate surrounding the constitutionality of the new federal statute will be resolved by an actual judicial challenge.

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298. Simpson, *supra* note 231, at 8.

299. *Students Speak Out: What is Your Opinion of the Supreme Court's Decision on Flag Burning?*, Wash. Post, Oct. 5, 1989, at J9.

300. *Id.*

301. *See supra* notes 231-40 and accompanying text.

302. *Protestors Defy New Anti-Desecration Law, Flag Burns*, L.A. Times, Oct. 29, 1989, at A26, col. 1. President Bush allowed the bill to become law without his signature, still preferring a constitutional amendment. *Bush Allows Flag Law, Won't Sign It*, L.A. Times, Oct. 13, 1989, at P2, col. 3.

303. L.A. Times, Oct. 29, 1989, at A26, col. 1-2.

304. L.A. Daily News, Oct. 31, 1989, at A13, col. 2.

And who was among those arrested on the Capitol building steps? That Johnson boy.[305]

PATRICIA LOFTON

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305. *Id.*