FIRST REPORTS

VOL. 6, NO. 1 JULY 2005

# Implementing a Flag-Desecration Amendment to the U.S. Constitution

*An end to the controversy … or a new beginning?*

BY ROBERT CORN-REVERE

A FIRST AMENDMENT CENTER PUBLICATION

FIRST AMENDMENT CENTER
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## EXECUTIVE SUMMARY

Two important Supreme Court decisions striking down flag-desecration laws as violations of the First Amendment — *Texas v. Johnson* in 1989 and *United States v. Eichman* in 1990 — set off an emotional national debate about whether to amend the U.S. Constitution. That debate continues today as one of the most polarized disputes in the nation's history. Those proposing a constitutional amendment argue passionately about the need to restore the government's ability to protect our unique national symbol. Opponents assert with equal force that doing so would elevate an emblem of freedom over its substance.

This is not a conflict that emerged only after 1989, but has its roots in three distinct periods in American history:

- The period between 1897 and World War I, when most states adopted their initial flag-desecration laws;
- The period around World War II, when laws requiring schoolchildren to salute the flag were tested in court;
- And the period from the Vietnam War to the present, when the first federal flag-desecration law was enacted and the Court issued decisions holding that the First Amendment protects various uses of the flag as a form of protest.

## TIMELINE: History of Flag Protection

Before the Civil War, the few references to protecting the American flag centered mostly on the flag in its official capacity, such as flying at the bow of an American vessel or above a government building or American embassy. With the outbreak of the Civil War, the flag gained popularity and was frequently displayed in the North as a symbol of the nation.

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| 1862 | **Gen. Benjamin Butler,** military governor of New Orleans, issues a decree prohibiting the display of any symbol representing an authority other than the United States and demands that "the American ensigns … be treated with the utmost deference and respect by all persons, under pain of severe punishment." |
| 1878 | **Congress considers and rejects** a proposal, H.R. 4305, introduced by Rep. Samuel S. Cox of New York, to ban the use of the flag for commercial advertising. The measure failed because party leaders feared they wouldn't be able to use the flag in their political campaigns. |
| 1890 | **The House of Representatives** passes a bill, H.R. 10475, aimed at commercial advertising, "to prevent desecration of the United States flag." |
| 1896 | **Prominent use of the flag** highlights a heated McKinley-Bryan presidential campaign that occasionally sparked violence. |
| 1897 | **The American Flag Association** forms to promote flag-protection legislation. Other groups heavily involved in flag-protection measures include the Daughters of the American Revolution and the Sons of the American Revolution. |
| 1897 | **Illinois, Pennsylvania and South Dakota** are the first states to pass flag-desecration laws. Eventually, every other state except Alaska and Wyoming would follow suit. Congress rejects more flag-protection proposals. |

This history will largely determine how any constitutional amendment would be interpreted and applied.

In recent years, the House of Representatives overwhelmingly has approved a constitutional amendment on flag desecration six times. But in the Senate, proposals have either failed to reach the floor for a vote or have fallen just short of the 67 votes needed. In the current 109th Congress, flag-amendment resolutions introduced in both the House and the Senate (and approved in the House as of July 1, 2005) would provide that:

> **The Congress shall have power to prohibit the physical desecration of the flag of the United States.**

Given the changed composition of the Senate following the 2004 election, the amendment appears to be within a couple of votes of the two-thirds majority needed for passage. If the amendment should pass the Senate, approval by three-fourths of the state legislatures would be needed for ratification. It is worth noting here that all 50 states have passed resolutions supporting a flag protection amendment.

Without taking a position on whether such an amendment should or should not be adopted, this report analyzes the legal and practical implications of a constitutional amendment to prohibit the physical desecration of the U.S. flag. It examines the process by which an amendment to the First Amendment would be adopted and interpreted. It also assesses the probable impact of a flag-desecration amendment in light of historical experience, basic constitutional principles and practical considerations.

## FINDINGS

Passage of a constitutional amendment permitting Congress to ban flag desecration would terminate the immediate dispute about whether to change the Constitution, but it would not end the ongoing debate about the limits of governmental authority in this area. *Johnson* and *Eichman*, the two most recent Supreme Court decisions on flag desecration, are part of a well-developed body of law on symbolic speech and on the use (and misuse) of flags. It will not be easy just to blot out those decisions with a constitutional amendment, since any resulting law must conform to established norms of due process and First Amendment scrutiny.

The power given to Congress pursuant to a flag-protection amendment would be limited by existing constitutional requirements except for the specific authority granted by the new provision. Any legislation adopted to implement the flag amendment would be subject to judicial review to determine whether it is authorized by the terms of the new constitutional provision and to ensure that it does not exceed the restrictions imposed by other constitutional limits.

Even with a constitutional amendment, Congress would not have unlimited authority to define the terms "physical desecration" and "flag of the United States." Another limitation on the authority that would be created by the change is jurisdictional. While an earlier proposed amendment would have empowered both the federal government and the states to ban flag desecration, the current proposal would create only federal authority to do so.

### TIMELINE: History of Flag Protection

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| 1907 | ***Halter v. Nebraska.*** The U.S. Supreme Court determines that a Nebraska law forbidding the use of the flag for advertising merchandise — in this case, beer — doesn't violate the Constitution. The Court, however, considered the case only on due-process grounds and not in regard to the First Amendment. Nonetheless, the ruling was so broadly worded that a First Amendment defense would have been rejected as well, especially when it is taken into consideration that, prior to 1925, the Court consistently declined to extend First Amendment rights to citizens who challenged state laws. |
| 1917 | **Amid the passions** of World War I, Congress makes the public mutilation of a flag a misdemeanor in the District of Columbia. |
| 1917 | **The National Conference** of Commissioners on Uniform State Laws considered the subject of state flag legislation and adopted the Uniform Flag Act to be submitted to the various state legislatures for adoption. |
| 1917 | **Flag-protection groups** lobby Congress for passage of the Civilian Flag Code, a guideline for displaying the flag and punishing its desecration. The American Legion drafts its Flag Code five years later. |
| 1918 | **Congress enacts legislation** that orders the firing of any federal employee who "when the United States is at war ... in an abusive or violent manner criticizes … the flag of the United States." This legislation also provided for punishment of "whoever" engages in such conduct. |
| 1925 | ***Gitlow v. New York.*** The U.S. Supreme Court suggests for the first time that the First Amendment applies to state laws as well as to federal ones. |

## TIMELINE: History of Flag Protection

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| 1931 | ***Stromberg v. California.*** The U.S. Supreme Court rules that a state law prohibiting the display of a red flag violated the First Amendment. The court said that posting such a flag is symbolic speech and the peaceful display as part of "peaceful and orderly opposition" to government policies is protected. |
| 1940 | ***Minersville School District v. Gobitis.*** The U.S. Supreme Court rules that requiring Jehovah's Witness students to salute the flag and recite the Pledge of Allegiance despite their religious objections did not violate their constitutional rights. |
| 1942 | **Congress passes** a joint resolution to endorse a voluntary common flag etiquette code, which carried no penalties. |
| 1943 | ***West Virginia Board of Education v. Barnette.*** Overruling its own 1940 *Minersville* decision, the U.S. Supreme Court strikes down laws requiring compulsory flag salutes and recitals of the Pledge of Allegiance by American school children. |
| 1943 | ***Taylor v. Mississippi.*** The U.S. Supreme Court determines that the state cannot punish individuals for encouraging students and others who attempt "to create an attitude of stubborn refusal to salute, honor, or respect the national and state flags and governments." |
| 1968 | **Congress passes** a national flag-desecration law that imposes criminal penalties nationwide on anyone who "knowingly casts contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning or trampling upon it." |
| 1969 | ***Street v. New York.*** The U.S. Supreme Court overturns the conviction of veteran and Bronze Star honoree Sydney Street, who burned his flag in protest after learning that activist James Meredith had been shot. |

This report surveys experience with previous constitutional amendments on other issues as well as case law defining protections for symbolic speech. It concludes that any congressional statute enacted to implement a flag-desecration amendment must be interpreted to be consistent with existing protections for expressive conduct, except for the specific change effected by the amendment for "physical desecration" of the "flag of the United States." Reviewing relevant law as well as the practical effects of historic disputes about the U.S. flag, it seems reasonable to assume that a constitutional amendment empowering Congress to prohibit flag desecration could produce the following results:

- After ratification, the way would be cleared for supporters of flag protection in Congress to propose legislation to implement the amendment to prevent "physical desecration of the flag of the United States."
- Instances of flag desecration for political purposes, at least in the short term, could increase dramatically.
- Uncertainty in the law could ensue as courts at various levels struggle to determine what items may be considered the "flag of the United States" and what actions constitute "physical desecration."

- Courts are likely to interpret a flag-protection amendment quite narrowly in the long run, and permit prosecutions only against a limited number of physical acts against official U.S. flags.

- A narrowing process could render a new flag-protection law virtually useless against most examples of flag desecration commonly cited by proponents of a constitutional amendment.

- Because the reach of a new flag-protection statute will be interpreted so as to conform to constitutional commands, there could be some continuing uncertainty as to the law's scope. This could lead to discriminatory enforcement of the law based on prosecutors' reactions to the speakers involved.

If these predictions are correct, then both sides of this polarized debate over amending the Constitution are right — and both are wrong.

Proponents of constitutional change probably are correct when they say that an amendment may not broadly undercut First Amendment values, at least not in the long term. But this means that a resulting flag-protection law will apply far too narrowly to suit most advocates of an amendment, for it will leave as protected speech a broad range of activities involving the flag (and near-flags) that they abhor. But in the near term — a period that could last decades — there is likely to be significant constitutional upheaval as courts work through the

## TIMELINE: History of Flag Protection

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| 1974 | ***Smith v. Goguen.*** The U.S. Supreme Court overturns the conviction of a teenager who wore a flag patch on his pants, determining that a Massachusetts law prohibiting "contemptuous" use of the flag was vague. |
| 1974 | ***Spence v. Washington.*** The U.S. Supreme Court overturns the conviction of a man who taped a peace symbol onto his flag. |
| 1989 | ***Texas v. Johnson.*** The U.S. Supreme Court rules that burning the American flag is a constitutionally protected form of free speech. |
| 1989 | **Congress passes the** Flag Protection Act. The act punishes anyone who "knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any U.S. flag …" |
| 1990 | ***U.S. v. Eichman.*** The U.S. Supreme Court invalidates the Flag Protection Act of 1989. The Court finds that the statute violates free speech. |
| 1990 | **Only 10 days** after the *Eichman* ruling, the House of Representatives votes against an amendment to the Constitution that would prohibit flag desecration. |
| 1995 | **After the House** voted 312-120 for a flag amendment, the measure fails in the Senate by three votes. |
| 1997 | **The House approves** flag amendment with a 310-114 vote. |
| 1998 | **Flag-amendment proposal** dies in the Senate as Senate leaders fail to get unanimous consent to bring the proposal to the floor. |

## TIMELINE: History of Flag Protection

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| **1999** | **Reps. Randy "Duke" Cunningham,** R-Calif., John Murtha, D-Pa., and John Sweeney, R-N.Y., introduce a proposal to amend the Constitution to allow Congress to enact flag-protection laws. House approves bill, 305-124. |
| **2000** | **Flag amendment falls** four votes short of passage in the Senate, 63-37. |
| **2001** | **Reps. Cunningham and Murtha** introduce HJR 36 in the House. Sens. Max Cleland, D-Ga., and Orrin Hatch, R-Utah, introduce SJR 7 in the Senate. HJR 36 passes 298-125. No action is taken on the Senate proposal before the close of the 107th Congress. |
| **2003** | **Reps. Cunningham and Murtha** introduce HJR 4 in the House. Sens. Feinstein and Hatch introduce SJR 4 in the Senate early in the 108th Congress. HJR 4 passes 300-125. Again, no action is taken on the Senate proposal. |
| **2005** | **Reps. Cunningham and Murtha** introduce HJR 10 in the House. Sens. Feinstein and Hatch introduce SJR 12. HJR 10 passes 286-130. |

many factual situations in which the new law can be applied.

It would not be passage of an amendment alone that will determine this outcome; the result will be affected by the implementing laws and judicial decisions applying them. History suggests that lower courts will issue conflicting decisions until the matter is finally presented to the Supreme Court in an appropriate case, or cases. Even then, there is likely to be a residue of uncertainty that could encourage selective prosecutions, just as some law enforcement officials continue to prosecute flag desecration today.

Passage of a constitutional amendment would only be the beginning of a long series of disputes over flag desecration.

By Robert Corn-Revere

SECTION 1

# Flag-Desecration Amendment: Legal and Practical Implications

In 1989 and in 1990, the U.S. Supreme Court handed down two important decisions — *Texas v. Johnson* and *United States v. Eichman*[1] — that struck down state and federal flag-desecration laws as unconstitutional. The decisions touched off an immediate and emotional debate about whether to amend the U.S. Constitution. The question of whether to alter our national charter to permit Congress to prohibit such acts is one of the most polarized disputes in the nation's history.

Advocates of a constitutional amendment argue passionately about the need to restore the government's ability to protect our unique national symbol, while opponents assert with equal force that doing so would elevate an emblem of freedom over its substance. Those favoring action argue that amending the Constitution is essential to restore constitutional balance, while opponents say that such a change would amount to an unprecedented desecration of the Bill of Rights.

The intensity of the debate stems from the fact that the U.S. flag is more than just the emblem of our national sovereignty. Chief Justice William Rehnquist has written of the "almost mystical reverence" that Americans feel toward the flag "regardless of what sort of social, political, or philosophical beliefs they may have."[2] The flag has been described as "the Nation's preeminent symbol,"[3] and "the noblest ensign ever floated."[4] On the other side of the argument, Charles Fried, solicitor general under President Ronald Reagan, wrote that it is extremely dangerous to modify the Bill of Rights, because "[p]rinciples are not things you can safely violate 'just this once.'" In 1990, Fried testified that a flag-desecration amendment would "endanger[] our immortal soul as a nation," adding that "[t]he man who says you can make an exception to a principle, does not know what a principle is; just as the man who says that only this once let's make 2 + 2 = 5 does not know what it is to count."[5]

As Fried's statement attests, this impassioned debate does not cleave along the liberal-conservative or military-civilian lines drawn by conventional wisdom. There is no simplistic red state/blue state divide here. Liberal Supreme Court Justices, including Chief Justice Earl Warren and Justice John Paul Stevens, have written in support of flag-desecration laws, while Justice Antonin Scalia, the champion of interpreting the Constitution according to the original intent of its framers, voted with the 5-4 majorities in *Texas v. Johnson* and *United States v. Eichman*. In fact, First Amendment scholar Ronald Collins has observed that "the majority of justices voting to sustain constitutional challenges to a flag-desecration law were nominated to the Supreme Court by Republican presidents."[6] Likewise, while the proposed amendment has the vocal support of veteran's groups, such as the American Legion, many prominent veterans, including Gen. Colin Powell and Sen. John Glenn, have publicly opposed changing the Constitution to protect the flag.

The American public appears to be equally divided about the wisdom of adopting a constitutional amendment to prohibit flag desecration — depending on how the question is presented. Amendment supporters regularly cite public-opinion surveys that indicate that 75 to 80% of the public supports amending the Constitution to protect the flag. [7] In contrast, a June 2005 survey by New England Survey Research Associates for the First Amendment Center found that 63% of the respondents opposed a constitutional amendment to ban flag desecration, and that number increased to about 67% when respondents were informed that the measure would represent the first time in U.S. history that any of the five freedoms set forth in the First Amendment (speech, press, religion, assembly and petition) would be modified by constitutional amendment.[8] Of course, one possible conclusion that might be drawn from disparate poll results is that public opinion polls may not be the best test regarding the merits of amending the Constitution. [9]

But whatever may be the current status of public opinion on the issue, ever since the Court's *Johnson* and *Eichman* decisions, Congress has repeatedly considered, and all 50 state legislatures have been poised to ratify, a constitutional amendment that would empower the government to prohibit desecration of the U.S. flag. In the current 109th Congress, flag-amendment resolutions have been introduced in both the House of Representatives and the Senate. Two identical House resolutions were introduced in the opening days of the 109th Congress.[10] House Joint Resolution 10, introduced by Rep. Randy Cunningham along with 143 co-sponsors and approved by a vote of 286 to 130 on June 22, 2005, would provide that:

> **The Congress shall have power to prohibit the physical desecration of the flag of the United States.**

On April 14, 2005, Sens. Orrin Hatch, R-Utah, and Dianne Feinstein, D-Calif., along with 50 co-sponsors, introduced an identical resolution in the Senate.[11]

Of more than 11,000 proposed amendments to the Constitution, only 33 have been submitted to the states and 27 have been ratified, or only 17 beyond the first 10 amendments that make up the Bill of Rights. If the flag-protection amendment passes and is ratified, it will become the 28th Amendment to the Constitution.[12]

Given the changed composition of the Senate following the 2004 election, the amendment appears to be within a couple of votes of the two-thirds majority needed for passage. If the amendment should pass the Senate, approval by three-fourths of the state legislatures would be needed for ratification. It is worth noting here that all 50 states have passed resolutions supporting a flag-protection amendment.[13]

Assuming there may be strong possibility of passage, this report analyzes the legal and practical implications of a constitutional amendment to prohibit the physical desecration of the flag. It does not take a position on whether an amendment should or should not be adopted, but analyzes the probable effects on the law and their practical implications assuming the decision is made to amend the Constitution.

It examines the process by which an amendment to the First Amendment would be adopted and interpreted. It also assesses the likely impact of a flag-desecration amendment in light of both basic constitutional principles and practical considerations. Will passage of an amendment end the flag-desecration controversy once and for all, or will the law be subject to numerous and complex uncertainties? More important, would an amendment achieve the objectives of its proponents of reducing incidents of flag desecration and restoring constitutional balance to the law of free expression? Ultimately, will empowering Congress to protect the flag through the use of criminal law engender greater respect for the flag, our nation or its institutions? This analysis explores the legal issues that will arise in interpreting a flag-desecration amendment, and attempts to answer these questions.

## I. THE SYMBOLIC IMPORTANCE OF THE FLAG AND THE ROLE OF CONSTITUTIONAL LAW

Opponents of changing the Constitution say that adopting an amendment would "strike at the heart of the First Amendment"[14] by "undermin[ing] our commitment to freedom of expression" and damaging "the constitutional system set up by our forefathers."[15] Proponents of a constitutional amendment dispute the claim that this approach would adversely affect the Bill of Rights and say it would merely reverse a couple of errant Supreme Court

interpretations of the First Amendment and in the process "simply restore [the] original understanding of the First Amendment."[16]

As the Senate report approving a flag-protection amendment in the 108th Congress put it, "[i]f [a constitutional amendment is] adopted, the effect would be to overturn two Supreme Court decisions which have misconstrued the First Amendment with respect to flag desecration."[17] The corresponding House report similarly said that "[t]he very narrow decision in *Johnson* is all that would be altered by the proposed amendment."[18]

To understand this debate and to assess the probable effects of a constitutional amendment, it is necessary to examine First Amendment decisions on symbolic speech in general, and on flag desecration in particular, as well as congressional debates over the wisdom of a flag desecration amendment.

### A. SYMBOLIC SPEECH AND THE HISTORIC CONTROVERSY OVER FLAG DESECRATION

The idea animating the drive for a constitutional amendment is that respect for the flag is expressive symbolism, but that physical mistreatment of the flag as part of a political protest is not expression at all. This view is summed up in the notion that the U.S. flag is "the visible symbol embodying our Nation" coupled with the belief that the Supreme Court "improperly characterized flag desecration as expressive speech."19 As the 2004 Senate report put it, "acts of disrespect to the flag such as burning it and urinating on it add nothing whatsoever to any debate about our nation's policies, priorities, or direction." [20]

Such statements reveal the paradox presented by this issue: While it is impossible to dispute that the act of proudly displaying the flag carries great meaning for most citizens, proponents of an amendment posit that burning or otherwise desecrating the flag in a political setting expresses nothing, or at least presents ideas that are unworthy of constitutional protection. In this regard, it probably is more accurate to say that proponents of an amendment believe that flag desecration is symbolic expression that does not deserve to be protected by the First Amendment, not that it fails to communicate a message. As the Senate Judiciary Committee noted in 2004, "it cannot be denied that the principal, if not the only purpose, in enacting a facially content neutral statute is to protect the symbolic value of the flag."[21]

For purposes of this analysis, it is neither necessary nor possible to resolve the dispute between people who believe that the destruction of a flag can communicate ideas and those who view it as nothing more than "despicable conduct."[22] But it is important to identify

the scope of First Amendment protection for symbolic acts generally in order to assess the likely impact of a flag-desecration amendment. As explained in more detail below, any congressional statute enacted to implement the amendment would be interpreted to be consistent with existing protections for expressive conduct, except for the change effected by the amendment for "physical desecration" of the "flag of the United States."

### 1. THE SYMBOLIC SPEECH DOCTRINE

First Amendment protection for symbolic expression did not begin with the flag-desecration cases, but it did begin with flags. The first case in which the U.S. Supreme Court upheld any freedom of expression claim involved the act of flying a flag as a symbol of protest. In *Stromberg v. California*, the Court reversed a conviction under a state law that prohibited display of a red flag as an emblem of opposition to organized government or as an aid to anarchistic action.[23] The Court found it unnecessary even to discuss whether the symbolic act in question constituted expression, and found simply that the law was "repugnant to the guaranty of liberty" contained in the First Amendment and applied to the states through the Fourteenth Amendment.[24]

Various forms of non-verbal communication have been recognized over the years as falling within the protections of the First Amendment. The Court held that wearing a black armband to protest the Vietnam War was protected expression,[25] as was wearing an army uniform to criticize the military in a dramatic presentation.[26] The question of symbolic speech was a frequent issue in the struggle for civil rights in cases involving sit-ins at lunch counters, bus stations and other public places.[27] In *Brown v. Louisiana*, for example, the Court held that a silent vigil in a library was protected speech, noting that First Amendment rights "are not confined to verbal expression." As the Court described it, the demonstrators "sat and stood in the room quietly, as monuments of protest against the segregation of the library."[28]

Because symbolic speech necessarily involves conduct, not all examples of it are constitutionally protected. But all forms of communication (except telepathy) involve conduct. The act of speaking involves use of the vocal chords and entails a person moving his mouth, while using a printing press involves a great deal more physical activity. The relevant question is whether the communication, whatever its form, includes non-expressive elements that the government may justifiably regulate.

In *United States v. O'Brien*, the case in which the Supreme Court first used the term "symbolic speech," the Court upheld the conviction of a person who burned his draft card to protest the Vietnam War.[29] The Court tried to address the situation in which "'speech'

and 'nonspeech' elements are combined in the same course of conduct," and held that regulation is allowed when the law is (1) within the constitutional power of government; (2) furthers an important or substantial government interest; (3) the interest is unrelated to the suppression of free expression; and (4) the incidental restriction on First Amendment freedoms is no greater than essential to further the government's interest.[30]

Applying this four-part test, the Court upheld O'Brien's conviction because the law requiring young men to keep their draft cards intact was deemed necessary to the operation of the Selective Service System and the law was not designed to restrict the ideas being expressed by protesters.[31] In doing so, the Court distinguished the symbolic speech found to be protected in *Stromberg*, because "the communication allegedly integral to the conduct [flying a red flag as a message of protest] is itself thought to be harmful." Accordingly, the law at issue in *Stromberg* "could not be sustained as a regulation of noncommunicative conduct" *because* it "was aimed at suppressing communication."[32] By contrast, the draft-card regulations upheld in *O'Brien* were designed not to quell dissent but to assure "the smooth and proper functioning of the system that Congress has established to raise armies."[33]

In other cases involving various forms of conduct where regulations incidentally affected speech, the Court applied the *O'Brien* analysis to find that not all symbolic expression is protected. In *Village of Hoffman Estates v. Flipside*, the Court held that an ordinance banning the sale of drug paraphernalia did not violate constitutional protections for symbolic speech despite the fact that "drug-related designs" or "names on cigarette papers" may subject those items to regulation.[34] Shortly thereafter, the Court held that the District of Columbia could enforce a ban on overnight sleeping in Lafayette Park, notwithstanding the erection of a tent city to protest government policies. In both cases, the Court said the expressive elements could be separated from the conduct that could legitimately be regulated. Such cases are to be distinguished from those in which actions are regulated simply because they communicate something.

The dichotomy between the regulation of conduct and communication was explored in the Supreme Court's most recent symbolic speech case, *Virginia v. Black*. There, the Supreme Court reaffirmed that it does not violate the First Amendment to regulate a symbolic act to the extent it constitutes an "intent to intimidate" another person. Accordingly, the Court denied a facial challenge to a Virginia law that prohibited burning a cross "with the intent of intimidating any person or group of persons."[35]

However, the Court in *Black* also held that the government could not presume the import of the message, and that it violates the First Amendment for the statute to include a presumption that burning a cross, by itself, could be taken as *prima facie* evidence of the

intent to intimidate.[36] In doing so, it observed that "a burning cross is not always intended to intimidate," and, depending on context, such action can be "lawful political speech at the core of what the First Amendment is designed to protect."[37] As a consequence, the law may be applied only to those instances of cross burning where additional evidence beyond the burning itself supports the charge of intimidation.

## 2. SYMBOLIC SPEECH AND THE SPECIAL PROBLEM OF FLAGS

Because the very purpose of flags is to communicate, whether it be a symbol of sovereignty, a message of dissent, or a distress signal, courts have had a difficult time separating the communicative from the non-communicative elements in flag regulations. Most cases addressing this issue analyze laws that restrict use and misuse of the American flag, and highlight the various First Amendment problems that arise from them.

The cases primarily grew out of three distinct periods in American history:

- The period between 1897 and World War I when most states adopted their initial flag-desecration laws;
- The period around World War II, when laws requiring schoolchildren to salute the flag were tested in court; and
- The period from the Vietnam War to the present, when the first federal flag-desecration law was enacted and the Supreme Court issued a series of decisions holding that the First Amendment protects various uses of the flag as a form of protest.

### Early State Flag-Desecration Laws

The flag-protection movement came to fruition in the United States in the late 1890s but had its roots in the Civil War. Before that time, the U.S. flag was not the focus of popular passions and was not widely displayed except at government buildings and installations.[38] The political divisions that culminated in war between the North and South saw abolitionists fly flags upside down or draped in black to protest the Fugitive Slave Act of 1850 and secessionists to pull down or destroy the stars and stripes of the Union and replace it with the stars and bars of the Confederacy.[39] On Jan. 29, 1861, Treasury Secretary John Dix telegraphed a clerk in New Orleans to "shoot on the spot" anyone who attempted to confiscate the flag, and on June 7, 1862, William B. Mumford was hanged for desecrating

a flag that had flown over the federal mint in New Orleans pursuant to an order by Gen. Benjamin Butler.[40] Gen. Butler had issued a decree on May 1 requiring that "American ensigns, the emblem of the United States, must be treated with the utmost deference and respect by all persons, under pain of severe punishment."[41] The overall conflict led both sides to "rally 'round the flag."[42]

Proposals for laws to ban flag desecration began to emerge in the 1890s, and popular passions concerning the U.S. flag erupted in the 1896 presidential contest between William McKinley and William Jennings Bryan. McKinley made the flag the centerpiece of his appeal to the voters, and to a far greater extent than in earlier elections, his campaign featured U.S. flags emblazoned with partisan slogans and images of the candidate. The weekend before the election, campaign officials declared a flag day in McKinley's honor, and parades across the country turned out thousands of U.S. flags in support of his campaign.[43] Bryan supporters took grave exception to the insinuation that their candidate was insufficiently patriotic to be president, and the heated political contest was marred by about 20 incidents of flag destruction and burning.[44] The incidents breathed life into a nascent movement to enact laws to prohibit flag desecration.

The principal focus of the flag-protection movement, especially in its early years, was to prevent commercialization of the flag. The first proposed federal flag-desecration law, introduced in Congress in 1890, sought to make it a crime "to deface, disfigure, or prostitute [the flag] for purposes of advertising" and would have prohibited "printing, painting, or affixing on said flag, or otherwise attaching to the same any advertisement for public display."[45] An 1895 pamphlet advocating a federal flag-desecration law declared that "Old Glory is too sacred a symbol to be misused by any party, creed or faction," and it urged Congress to prohibit attaching the flag or the national coat-of-arms to "any advertisement for private gain." It listed more than 100 ways the flag or its design had been misused "for mercenary purposes" in Chicago alone, ranging from cuff buttons and flag-themed drapery to paper napkins and "war dramas."[46]

Charles Kingsbury Miller, a leader of the flag-protection movement, decried the "mercenary warfare for the capture of the almighty dollar" and decried the fact that "[t]he national flag is converted into grotesque coats for negro minstrels, decorative skirts for ballet dancers, manufactured into picture mats with openings cut to admit different size photographs, and is used as fancy dog blankets and equine fly nets in civic celebrations." He also complained that "[p]olitical parties of every faction use the American flag as a floating signboard, bearing the names of candidates [and] hanging it over the streets."[47] Thus, the early flag-protection movement did not distinguish between purely commercial and political uses of the flag.

Congress considered federal legislation to protect the flag and held a number of hearings on the subject. The Senate, but not the House, passed flag-desecration bills five times between 1904 and 1918.[48] One reason the effort to pass a federal flag-desecration law failed was the concern of policymakers that such a measure would restrict use of the flag in political campaigns.[49]

Proponents of flag protection were far more successful in the states. In 1900, the American Flag Association proposed a model flag-desecration law that subsequently was endorsed by the National Conference of Commissioners on Uniform State Laws and the American Bar Association.[50] Among other things, the AFA's proposed law would prohibit placing "any words or marks or inscriptions or picture or design or device or symbol or token or notice or drawing or advertisement of any nature whatever upon any flag, standard, color, or ensign of the United States."[51] While the main thrust of the model law was to ban use of the flag for advertising, by the time it was endorsed by the NCCUSL and the ABA in 1917 and 1918 respectively, the flag-protection movement also targeted misuse of the flag by immigrants and radicals.[52] A 1913 report of the NCCUSL described "meetings and demonstrations of the labor element" where "[t]he flag has been torn down and the red flag of anarchy run up in its place." Such "malicious outrages" demonstrated the need for a uniform law.[53]

Between 1897 and 1912, more than 30 states and territories passed laws banning flag desecration,[54] and by 1932, almost all of the states had adopted such laws.[55] Most of the reported prosecutions in the early years such laws were on the books involved commercial uses of the flag. Even in this context, however, a number of state courts declared the flag-desecration laws to be unconstitutional. In 1900, for example, the Illinois Supreme Court held that the state flag-desecration law violated the protections of personal liberty in both the state and federal constitutions. Noting that "men of equal honesty and patriotism may differ" about the "taste" and "propriety" of such a display, the court overturned the conviction for placing the image of the U.S. flag on cigar box labels.[56] Similarly, the New York Court of Appeals struck down that state's flag desecration law as an unconstitutional deprivation of property rights.[57]

This early trend in the case law was cut short in 1907, when the Supreme Court voted 8-1 to uphold the Nebraska flag-desecration statute in *Halter v. Nebraska*.[58] The Court took note of both the Illinois and New York cases but disagreed with their findings, holding that no "privilege of American citizenship or . . . any right of personal liberty is violated by a state enactment forbidding the flag to be used as an advertisement on a bottle of beer." Such use was characterized as an insult to the flag, and the court explained that love for the country and for the state in which a person resides "will diminish in proportion as respect for the flag is weakened."[59]

The decision did not touch on political misuse of the flag, but after *Halter* the focus of most flag-desecration prosecutions shifted largely to instances of political dissent. In 1916 in New York, a socialist-pacifist clergyman was convicted of flag desecration and sentenced to 30 days in jail and a $100 fine.[60] Given the temper of the times, there were a number of reports of angry mobs forcing individuals to kiss the flag.[61] During this period, various states greatly increased the penalties for flag desecration. Louisiana increased the jail term for desecration to five years, while Montana and Texas upped the maximum penalty to 25 years in prison.[62] Citing *Halter*, a federal district court upheld the constitutionality of the Montana law, and in the process approved a sentence of 10 to 20 years at hard labor and a $500 fine.[63] The defendant in that case, E.V. Starr, had refused to kiss the flag and violated the state law when he told the assembled mob that it was "nothing but a piece of cotton" with a "little paint" and "some other marks" and that it "might be covered with microbes."[64]

The Montana law was a model for the federal Sedition Act of 1918, which amended the Espionage Act of 1917. The Sedition Act was adopted to give the federal government greater power to quell dissent during World War I, and though it was not a flag desecration law *per se*, it prohibited (among other things) criticism of the U.S. flag.[65] It provided that, during time of war, whoever "shall willfully utter, print, write or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States, or the Constitution of the United States or the military or naval forces of the United States, or the flag of the United States, or the uniform of the Army or Navy of the United States, or any language intended to bring [such] into contempt, scorn, contumely, or disrepute" shall be punished by fines, imprisonment, or both. It also prohibited willfully displaying "the flag of any foreign enemy."[66] There were relatively few prosecutions under the law because it was enacted near the end of the war, [67] and in 1921 Congress repealed the Sedition Act.[68]

### The Flag-Salute Cases

The Supreme Court examined the extent to which the government could require respect for the flag in a pair of cases decided in the years leading up to and during World War II. Specifically, the cases explored whether the state could require students to participate in a flag-salute ceremony as a condition for attending public school. The controversy arose from the refusal by Jehovah's Witnesses to salute the flag because of their belief that the practice violated biblical injunctions against worshipping graven images.[69]

The Court initially declined to consider appeals on the issue, ruling that there was no substantial federal question.[70] However, in *Minersville School District v. Gobitis*, it ultimately

agreed to resolve the matter after the 3rd U.S. Circuit Court of Appeals upheld an injunction barring enforcement of a Minersville, Pa., requirement that both students and teachers participate in a compulsory flag-salute ceremony. In an 8-1 opinion written by Justice Felix Frankfurter, the Court held that "[t]he mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities."[71] The problem was analyzed entirely as a question of the limits of the free-exercise clause of the First Amendment, which guarantees freedom of religion, not the free-speech clause. In answering this question, the Court ruled that sincerely held religious convictions could not excuse a person from performing actions that the government concluded were necessary "in the promotion of national cohesion."[72]

The *Gobitis* Court based its holding on the symbolic importance of the U.S. flag. Noting that "[n]ational unity is the basis of national security," Justice Frankfurter explained that "[w]e live by symbols" and "[t]he flag is the symbol of our national unity, transcending all internal differences, however large, within the framework of the Constitution."[73] Accordingly, he wrote that the Minersville school board could reasonably conclude that compelling all students to salute the flag was necessary, since exempting some conscientious objectors "might cast doubts in the minds of the other children which would . . . weaken the effect of the exercise."[74]

The *Gobitis* decision was solidly in the mainstream of public opinion. At the height of World War II, more than 2,000 children of Jehovah's Witnesses had been expelled from schools across the country for refusing to salute the flag.[75] In fact, sentiment ran so high on the issue that Jehovah's Witnesses were widely subjected to harassment, beatings and arrests. One reportedly was castrated for refusing to salute the flag, and the Jehovah's Witness meeting hall in Kennebunk, Maine, was burned.[76] In Litchfield, Ill., a riot erupted over the issue, resulting in the destruction of a dozen automobiles owned by Witnesses, and 65 members of the sect were jailed.[77] Between May and October 1940, it has been estimated that 1,500 Jehovah's Witnesses were the victims of mob violence in 355 communities in 44 states.[78]

The legal issue appeared to be settled when the Supreme Court remarkably agreed to hear an appeal involving a 1942 West Virginia requirement that public school students and teachers must participate in flag ceremonies. Quoting liberally from the Court's *Gobitis* opinion, the West Virginia Board of Education had adopted a resolution stating that "all teachers and pupils 'shall be required to participate in the salute honoring the Nation represented by the Flag; provided, however, that refusal to salute the Flag be regarded as an Act of insubordination, and shall be dealt with accordingly.'"[79] Pursuant to this provision,

children of Jehovah's Witnesses were expelled from school and threatened with incarceration in reformatories for "criminally inclined juveniles," while parents were prosecuted for causing delinquency.[80]

Three years after upholding an almost identical state policy, however, the Court expressly overruled its *Gobitis* decision and found the West Virginia requirement unconstitutional in *West Virginia State Board of Education v. Barnette*. In a 6-3 opinion written by Justice Robert Jackson, the Court explored the issue of symbolic speech that was central to the case. It described the flag salute as "a form of utterance," and the use of symbolism generally as "a primitive but effective way of communicating ideas." Specifically, "[t]he use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind."[81] The Court cited its earlier holding in *Stromberg* for the proposition that the use of flags as a form of symbolic speech was protected by the First Amendment, even when used to express opposition to organized government, adding that "[a] person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn."[82]

In striking down the West Virginia flag-salute requirement, the Court focused more broadly on freedom of expression and did not confine its analysis to the more narrow question of religious freedom discussed in *Gobitis*. Justice Jackson acknowledged the difficulty of the question "because the flag involved is our own" but explained that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." Accordingly, he concluded that "compelling the flag salute and pledge transcends constitutional limitations on [government power] and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."[83]

### Modern Flag Desecration and 'Misuse' Cases

Congress adopted the first federal flag-desecration law in 1968 in response to Vietnam War protests. It provided fines and/or possible imprisonment for up to one year for anyone who "knowingly casts contempt upon any flag of the United States by publicly mutilating, defiling, burning or trampling upon it." However, the law expressly exempted from the prohibition "any conduct consisting of the disposal of a flag when it has become worn or soiled."[84] Given the general level of political and social unrest of that period, both federal and state flag-desecration laws were subject to a number of judicial challenges.

Some lower courts held initially that the federal law was constitutional.[85] Shortly after passage of the federal statute, however, a series of Supreme Court cases construing state laws began to limit the government's ability to punish flag desecration because of First Amendment and due-process considerations. In *Street v. New York*, the Court voided the conviction under a New York law of an individual who had ignited a flag while protesting an assassination attempt on civil rights leader James Meredith. The Court observed that, while he was in the act, the defendant had said "[w]e don't need no damn flag" and "that is my flag; I burned it. If they let that happen to Meredith, we don't need an American flag."[86] It held that the conviction could not stand because it might have been based solely on the protester's words and therefore barred by the First Amendment.[87]

The holding in *Street* is interesting for a number of reasons. The New York flag-desecration law clearly covered the act in question, making it a misdemeanor for anyone to "publicly mutilate, deface, defile, or defy, trample upon, or cast contempt upon either by words or act (any flag of the United States)."[88] By focusing on verbal insults to the flag, the decision suggested that the First Amendment would not countenance a law that prohibited "defying" or "casting contempt" on the flag using only words, but did not address the question of physical desecration.[89] However, since the decision only addressed how the state law was applied in that case, it only reversed the defendant's conviction and did not articulate particular limitations or otherwise invalidate the law.

Nevertheless, despite its focus on the words used by the defendant, the Court in *Street* based its holding on symbolic-speech precedents. The majority opinion observed that "the case is governed by the rule of *Stromberg*," a decision that established First Amendment protection for the use of flags as a form of protest.[90] It also reasoned that the conviction could not be justified on the theory that the defendant's remarks "failed to show the respect for our national symbol which may properly be demanded of every citizen." Citing *Barnette*, the Court found that the First Amendment encompasses "the freedom to express publicly one's opinions about our flag, including those opinions which are defiant or contemptuous."[91] Notwithstanding the clear import of the cases upon which it relied, the Court tethered its decision to the defendant's use of words, and found it was "unable to sustain a conviction that may have rested on a form of expression, however distasteful, which the Constitution tolerates and protects."[92]

In *Smith v. Goguen*, the Court subsequently held that the Massachusetts flag-misuse statute, which, among other things, prohibited "publicly mutilat[ing], trampl[ing] upon, defac[ing] or treat[ing] contemptuously the flag of the United States," was void for vagueness.[93] The defendant in that case had been convicted under the law for sewing a

small replica of an American flag to the seat of his blue jeans. Focusing on the statutory language about treating the flag "contemptuously," the Court found that the statutory prohibition had "no core" and employed "a standard so indefinite that [the] police, [a] court, [or a] jury [would be] free to react to nothing more than their own preferences for treatment of the flag."[94] It limited its holding to the open-ended definition of "contemptuous" treatment, but the Court also noted significant ambiguities "presented by the concept of [what constitutes] an 'actual' flag."[95] The circuit court had expressed some doubt that "sewing a flag to a background clearly affects 'physical integrity,' "[96] but the Supreme Court did not reach the question of "physical desecration."[97] Nor did it analyze the First Amendment issues, but instead based its holding entirely on due-process grounds, finding that the law was sufficiently unbounded to allow punishment of "any public deviation from formal flag etiquette."[98]

Three months later, the Court similarly reversed a conviction pursuant to the Washington state law in *Spence v. Washington*. The defendant had been convicted of "flag misuse" after a police officer had observed through his apartment window a flag hanging upside down affixed with a peace sign made of removable black tape.[99] In reversing the conviction, the Court observed that the flag was privately owned and had been displayed on private property, so that the case did not involve the mishandling of public property or any potential breach of the peace. Noting that "for decades [we have] recognized the communicative connotations of the use of flags," the Court described the defendant's actions to protest the U.S. invasion of Cambodia and the killings at Kent State University as "the expression of an idea through activity" and "a pointed expression of anguish … about … then-current domestic and foreign affairs of his government."[100]

Given the communicative impact of the display, the Court held that no countervailing governmental interest justified the enforcement action. In particular, it found that there was no potential for a breach of the peace on the facts presented, that ideas could not be prohibited merely because some may find them offensive, and that the defendant could not be punished for "failing to show proper respect for our national emblem."[101] The Court also was not persuaded that the law could be supported by an interest in "preserving the national flag as an unalloyed symbol of our country" because "[i]t might be said that we all draw something from our national symbol, for it is capable of conveying simultaneously a spectrum of meanings."[102] Unlike the burning draft card that the Court said could be punished in *O'Brien*, the Court in *Spence* could identify "no other governmental interest unrelated to expression" that would be served by the flag-misuse law. At the same time, it noted that it was not analyzing the state's flag-desecration statute.[103]

Thus, the decisions in *Street, Goguen* and *Spence* did not decide whether a flag-desecration law could survive First Amendment scrutiny. Rather, they articulated free-

speech and due-process principles that otherwise limited the permissible scope of laws regulating treatment of the flag while assuming, without deciding, that a flag-desecration law would be constitutional.

### The Demise of Flag-Desecration Laws

The Supreme Court did not directly confront the question of the constitutionality of flag-desecration laws until it decided *Texas v. Johnson* in 1989. There, it invalidated the Texas flag-desecration law as applied to the defendant in a case that arose from a protest during the 1984 Republican National Convention.

Gregory Lee Johnson, the defendant, burned a flag that had been stolen from a nearby bank at the culmination of the political demonstration. Johnson was not charged with the theft or with disorderly conduct, but only with violating the state law that prohibited "desecration of a venerated object."[104] He was convicted by the trial court, but that decision was overturned on appeal. The Supreme Court agreed to review the case and to address the question of the law's constitutionality.

By a vote of 5-4, the Court held that the Texas statute violated the First Amendment. Writing for the majority, Justice William Brennan had no difficulty finding that the protest involving the flag was expressive. He noted that "[t]he very purpose of a national flag is to serve as a symbol over our country," and that Johnson was prosecuted "for his expression of dissatisfaction with the policies of this country, expression situated at the core of our First Amendment values."[105] The majority noted that "Johnson was prosecuted *only* for flag desecration — not for trespass, disorderly conduct, or arson,"[106] so that enforcement of the law did not serve an interest that was unrelated to the suppression of speech. For that reason, the Court did not apply the more relaxed intermediate level of review set forth in *O'Brien*, the draft-card burning case, but instead subjected the Texas law to "the most exacting scrutiny."[107]

In doing so, Justice Brennan applied the First Amendment norm that the government "may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable," and he rejected the claim the state's asserted interest in preserving the physical integrity or symbolic value of the flag was content-neutral. Accordingly, the majority found that "nothing in our precedents suggests that a State may foster its own view of the flag by prohibiting expressive conduct relating to it."[108] At the same time, the Court pointed out that the holding did not mean "that one is free to steal a flag so long as one later uses it to communicate an idea."[109]

Chief Justice Rehnquist, joined by Justices O'Connor and White, wrote a strong dissent that traced the history of the U.S. flag and that described its uniqueness as a symbol of nationhood.[110] He disputed the majority's conclusions regarding the communicative nature of the act, observing that "the public burning of the American flag by Johnson was no essential part of any exposition of ideas, and at the same time it had a tendency to incite a breach of the peace."[111] The Chief Justice reasoned that a law to preserve the national symbol served an important purpose but did not infringe on Johnson's rights. The defendant, he wrote, had "a full panoply of other symbols and every conceivable form of verbal expression to express his deep disapproval of national policy."[112] Justice Stevens dissented separately, suggesting that the flag was not "just another species of symbolic speech" and that because of its "special history" it has an "intangible dimension." Adopting measures to preserve its integrity as a symbol, he wrote, imposes only a "trivial burden on free expression."[113]

The *Johnson* decision provoked instant controversy. Within a month, Sen. Robert Dole, R-Kan., joined by several co-sponsors, proposed a constitutional amendment to reverse it. At the same time, others in the Senate introduced the Flag Protection Act to provide a legislative response to the *Johnson* decision rather than a constitutional change.[114] The idea was to address the problems identified by the *Johnson* majority by enacting a content-neutral federal flag-desecration law. The statute applied to anyone who "knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground or tramples upon any flag of the United States."[115] After the Flag Protection Act was enacted into law, the proposed constitutional amendment failed to win Senate passage.[116]

A wave of flag burnings followed in the wake of the law's adoption, in part to test its validity.[117] As a consequence, consolidated cases quickly progressed to the Supreme Court where the Court — again by a 5-4 vote — held that the flag-protection law violated the First Amendment. The thrust of the opinion in *United States v. Eichman* was that the law was not content-neutral because Congress was interested in suppressing a particular message.[118] The majority opinion, again written by Justice Brennan, noted that the government's interest in protecting the "physical integrity" of a privately owned flag "rests upon the perceived need to preserve the flag's status as a symbol of our Nation and certain national ideals."[119] It observed that certain actions considered to represent "disrespectful treatment of the flag" were prohibited while other similar acts "traditionally associated with patriotic respect for the flag," such as burning or burying a soiled banner, were not.[120]

Finding a content-based purpose for the law, the Court reaffirmed the principle that the government cannot restrict ideas simply because many people may find them to be objectionable. It declined to reconsider its recent holding in *Johnson*, despite what the government described as a "national consensus" favoring a prohibition on flag burning.

"Even assuming such a consensus exists," Justice Brennan wrote, "any suggestion that the Government's interest in suppressing speech becomes more weighty as popular opposition to that speech grows is foreign to the First Amendment."[121]

Justice Stevens wrote a dissenting opinion in *Eichman* and was joined by the chief justice and Justices White and O'Connor. The dissenters agreed that a flag burner may intend to send various messages by his action, ranging from contempt for the country to concern about some other pressing issue, and that a desecrater may even wish to convey his love of the United States but his contempt for the hypocrisy of those he believes have forsaken the ideals embodied by the flag.[122] But while the "ideas expressed by flag burners are thus various and often ambiguous" and may depend on the "temporal and political context" in which the act occurs, the government's interest in preserving the flag's symbolic value is a constant.[123] Justice Stevens reasoned that a flag-desecration law does not impair a "speaker's freedom to express his or her ideas by other means," but that failure to protect the flag dilutes its symbolic value.[124]

Justice Stevens' dissent in *Eichman* was far more conciliatory than the disparate and polarized opinions in *Texas v. Johnson*. He acknowledged the legitimate role symbolic expression can play in public discourse, and even ascribed worthy motives to those who employ it in public protests. For example, he described the "protesters who dramatized their opposition to our engagement in Vietnam by publicly burning their draft cards" as engaging in conduct "consistent with affection for this country and respect for the ideals that the flag symbolizes."[125]

The *Eichman* decision revived the demand for a constitutional amendment giving Congress the power to prohibit flag desecration. Shortly after the decision was announced, a Senate resolution to authorize such an amendment failed to pass by a two-thirds vote.[126] Efforts to promote a flag-desecration amendment continued, however, and the House of Representatives approved resolutions in favor of such an amendment in 1995, 1997, 1999, 2001 and 2003.[127] But no corresponding resolutions passed the Senate.[128]

At this point, it remains to be seen whether the proposals for constitutional amendments introduced in the 109th Congress will meet the same fate.

## II. IMPLEMENTATION AND INTERPRETATION OF AN AMENDMENT TO BAN FLAG DESECRATION

### A. THE ARTICLE V AMENDMENT PROCESS

If there is sufficient support for a constitutional amendment to prohibit flag desecration in the 109th Congress, it will then be sent to the states for ratification. The process set forth in Article V of the Constitution provides that amendments must be approved by a two-thirds vote of both Houses of Congress, or by a constitutional convention called by the legislatures of two-thirds of the states. Once proposed, an amendment "shall be valid to all Intents and Purposes, as part of this Constitution" upon ratification by three-fourths of the states.[129] If an amendment empowering Congress to prohibit flag desecration is approved, it would become the 28th Amendment to the U.S. Constitution.

After ratification, however, the amendment's mandate would not be self-executing. Rather, it simply would empower the federal government to enact a new law prohibiting the "physical desecration" of the "flag of the United States." As explained in the 2004 Senate report, the amendment itself "would not make anything illegal," but "would simply restore the ability of Congress to fashion an appropriate statute."[130] The constitutional change merely would set "the parameters for future action by the Congress on this issue,"[131] while the implementing legislation would need to "define terms, set penalties and further define actions that would be proscribed."[132]

The amendment would not, however, similarly empower state legislatures to enact flag-protection laws. Although an earlier version of the proposed amendment approved by the House would have authorized "Congress *and the States* to prohibit the physical desecration of the flag,"[133] that language was dropped without substantive comment after the 104th Congress. The House report supporting a flag amendment in the 105th Congress simply observed in a footnote that the previous proposal would have authorized state flag-desecration laws, but that the new version being considered "permits only the Congress to take such action."[134] Since then, every version of the proposed flag-protection amendment has been limited to federal action, as are the proposals pending in the 109th Congress.[135]

### B. INTERPRETING CONSTITUTIONAL AMENDMENTS

Because implementation of a constitutional amendment on flag desecration requires Congress to enact enabling legislation, any analysis of the amendment's impact necessarily

is speculative. However, it is possible to examine the process by which new amendments are incorporated into existing law, and thereby explore the limits of congressional action pursuant to the new mandate. In this regard, existing constitutional limitations, including the First and Fifth Amendments, would continue to define the outer limits of legislation that could be enacted to implement the flag-desecration amendment.

As a general proposition, new constitutional amendments must be interpreted as if they had originally been incorporated in the Constitution and read to conform to its other provisions. The 16th Amendment, which authorized Congress to create the federal income tax, is a relevant example because it also empowered Congress to adopt legislation to overcome existing constitutional limits.[136] The Supreme Court held in 1885 that Congress lacked the power to adopt a tax on income,[137] which prompted passage of the 16th Amendment in 1913. The amendment provided Congress with the authority that the Court had held that it lacked — "to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states."[138] However, in light of pre-existing constitutional provisions, the amendment did not give Congress unbounded authority to define what constitutes "income."

The Supreme Court explored the scope of the 16th Amendment in *Eisner v. Macomber*, where it struck down extension of the income tax to stock dividends. Reasoning that the amendment "must be construed in connection with the taxing clauses of the original Constitution and the effect attributed to them before the amendment was adopted," it found that the change "did not extend the taxing power to new subjects, but merely removed the necessity which otherwise might exist for an apportionment among the states of taxes laid on income."[139] The Court explained that it was necessary "to distinguish what is and what is not 'income'" in order to give proper effect to the taxing clauses, and it held that Congress was not free to adopt any definition it wished "since it cannot by legislation alter the Constitution."[140]

The constitutional changes associated with alcohol prohibition further illustrate the way amendments are interpreted to conform to the Constitution as a whole. From 1919 until 1933, the 18th Amendment totally prohibited "the manufacture, sale, or transportation of intoxicating liquors" within the United States and its territories.[141] The 21st Amendment, ratified on Dec. 5, 1933, repealed prohibition, but it also delegated power to the states to prohibit commerce in, or the use of, alcoholic beverages within their borders.[142] This gave the states broad regulatory power over liquor, but it did not "license the States to ignore their obligations under other provisions of the Constitution.[143] Thus, the Supreme Court has held that the 21st Amendment does not diminish the force of other constitutional requirements, including the commerce clause,[144] the supremacy clause,[145] the

equal-protection clause of the 14th Amendment,[146] the due-process clause,[147] the establishment clause of the First Amendment,[148] and the free-speech clause of the First Amendment.[149]

For the same reason, the power given to Congress pursuant to a flag-protection amendment would be limited by existing constitutional requirements — including the First Amendment — except for the specific authority granted by the new provision. While such an amendment would authorize Congress to enact a new federal flag-desecration law, "[n]o speech, and no conduct other than physical desecration of the American flag" could be restricted thereunder.[150]

As a consequence, any legislation adopted to implement the flag amendment would be subject to judicial review to determine whether it is (1) authorized by the terms of the new constitutional provision, but (2) does not exceed the restrictions imposed by other constitutional limits. As explained in greater detail below, Congress would not have unlimited authority to define the terms "physical desecration" and "flag of the United States" because of the existing body of constitutional law that would be unaffected by the amendment.

### C. INTERPRETING THE FLAG-PROTECTION AMENDMENT

The proposed flag-protection amendment — only 17 words — has been described as "simple and straightforward." It provides that "Congress shall have the power to prohibit the physical desecration of the flag of the United States."[151] The purpose of the amendment is characterized by its advocates as "very narrow" — to reverse the decisions in *Texas v. Johnson* and *United States v. Eichman* in order to restore "the original meaning of the First Amendment" and to correct "recent 'tampering' by the Supreme Court."[152] Such a change is intended only to reverse precedent that has "misconstrued the First Amendment with respect to flag desecration" and "would not amend or alter any other interpretation of the First Amendment."[153] Opponents, on the other hand, assert that the amendment "would create legislative power of uncertain dimension to override the First Amendment and other constitutional guarantees."[154]

Both sides agree that two key interpretive questions Congress must address will determine whether the amendment will have the corrective surgical precision its advocates envision or the broad censorial effect its opponents fear:

1. What is the "flag of the United States"?

2. What is the meaning of "physical desecration"?

Depending on how these questions are answered by Congress and reviewing courts, it is possible that the ultimate impact of a flag-protection amendment will deviate from the polarized extremes predicted in the legislative debates. It could be that the amendment will be so sharply limited by constitutional interpretations that the law may be applied only in a minority of cases, thus providing broad opportunities for circumvention of its purpose by protesters. Or, as may be more likely, litigation could provide mixed results, leaving the overall impact of the amendment uncertain. This section explores these possible scenarios.

### 1. What Is the Flag of the United States?

After an amendment is ratified and implementing legislation adopted, burning *a* flag as a form of protest still will be protected by the First Amendment, but burning *the* flag will not be. Accordingly, it will be necessary for Congress to define what constitutes the "flag of the United States." Or, as the 2003 House Report put it, Congress will have to decide "what representations of the flag of the United States" are to be protected.[155]

Discussions in the legislative history of the flag amendment suggest that Congress may choose to adopt either a narrow or a broad definition of the U.S. flag. One view is that the flag might be defined "at its narrowest"[156] to encompass "a cloth or other material readily capable of being waved or flown" with the characteristics of the official flag of the United States as described in 4 U.S.C. § 1.[157] On the other hand, proponents of flag-desecration laws have suggested that Congress needs the authority to prevent evasion of the amendment's purpose "whereby a representation of a United States flag with forty-nine stars or twelve red and white stripes" could be burned with impunity.[158] It has been noted that the defendants in *Johnson* and *Eichman* "may have burned flags with fewer than 50 stars or 13 stripes," and that "the reasons we would ban burning, defacing, or mutilating an American flag" nevertheless apply to those situations because "people cannot readily tell the difference between [those flags] and a 50-star flag."[159] Accordingly, another possible definition is "anything that a reasonable person would perceive to be a flag of the United States even if it were not precisely identical to the flag as defined by statute."[160]

This latitude in the definition has prompted endless debates about the potential scope of a new flag-desecration law. Opponents express concern that the law might be brought to bear to restrict the almost infinite examples of American flag imagery that permeate our culture, ranging from flag-themed underwear and neckties to napkins and paper plates. At one hearing, Sen. Russell Feingold, D-Wis., described a commotion at a Capitol Hill

restaurant that occurred when a fellow patron got her "oversized American flag menu" too close to a candle, catching it on fire. Was this a case of flag burning?[161] According to this argument, "[d]o we really want to open a constitutional can of worms, and invite a parade of hairsplitting court cases over whether burning a picture of the flag or putting the flag on the uniforms of our Olympic athletes or stepping on a lapel pin amounts to desecration?"[162]

Proponents of amending the constitution dismiss these examples as an illusory "parade of horribles" that is not supported by history. They note that the states and the federal government enforced flag-desecration laws many years, yet "there were no insuperable problems of administration, enforcement, or adjudication under those statutes."[163] They add that the broad potential applications of the law are no reason for alarm in light of "a string of judicial decisions … extending the first amendment's free speech protection against the actions of the States; requiring substantial specificity in what is made illegal; and effectively prohibiting discrimination between desecrators based on viewpoint." In addition, they point to the "universal understanding" that words alone casting contempt on the flag cannot be penalized.[164] Professor Richard D. Parker of Harvard Law School dismisses what he calls the "wacky hypotheticals" argument as "mean spirited" and a "familiar way of trivializing the amendment's effects."[165]

However, experience with previous flag-desecration laws and the questions they raised suggest that the hypothetical examples may not be so wacky after all. For example, the question of what constitutes "the flag" was explored during the oral argument in *Texas v. Johnson*. Justice Thurgood Marshall asked whether the state could have prosecuted the defendant for burning a 48-star flag.[166] Picking up the same line of questioning, Justice Scalia asked whether the state could punish a person for desecrating a 47-star flag, noting that, although the 48-star flag had once been the nation's flag, there has never been an official flag of the United States containing 47 stars. Counsel for the state said that it was a question for Congress to decide and referred to the federal flag law under which desecration of a banner with "stars and stripes in any number" that a person "without deliberation" thinks is a flag could be sufficient to justify a prosecution.[167]

Previous cases involving flag misuse and flag-desecration statutes similarly suggest any combination of stars and stripes could be the subject of a prosecution. Early state flag misuse laws defined the concept of "flag" broadly, and on July 1, 1899, Chicago authorities arrested more than 1,000 people for various commercial uses of the flag "who did not dream that they had violated this law."[168] During this same period, the chief of police of New York City ordered that all American flags "whether of cotton, silk, printed, painted, illuminated in electric lights, or of any other kind which contain anything in the way of inscription or advertisement will be hauled down by the police." The order included all campaign banners and advertising devices, but excluded barber poles because, it was explained, they "do not

resemble closely enough the National emblem."[169] The expansive definition of the U.S. flag in these early statutes led to the conviction, upheld in *Halter v. Nebraska,* for printing the image of a flag on a beer label.[170]

As laws began to focus more on the political and less on the commercial misuse of the flag, the operative definitions remained quite broad. The 1968 federal Flag Desecration Act (referenced in the *Texas v. Johnson* oral argument) used the following definition:

> [A]ny flag, standard, colors, ensign, or any picture representation of either or of any part or parts of either, made of any substance or represented on any substance, of any size evidently purporting to be either of said flag, standard, colors, or ensign of the United States of America, or a picture or a representation of either, upon which shall be shown the colors, the stars and the stripes, in any number of either thereof, or of any part or parts of either, by which the average person seeing the same without deliberation may believe the same to represent the flag, standard, colors, or ensign of the United States of America.[171]

Under this definition, any flag or flag-like item (or part thereof) that could create the impression of being a U.S. flag could be the subject of a prosecution.

A number of cases brought under the federal flag-desecration law and under similar state laws during the Vietnam War era addressed the question of what constitutes a "flag." In one prominent case, anti-war activist Abbie Hoffman was convicted of violating the federal law when he wore a shirt "that resembled the American flag" as he preparing to testify before the House Un-American Activities Committee.[172] The court found it unnecessary even to discuss whether Hoffman's clothing constituted a "flag" within the meaning of the law and concluded that "the wearing of a shirt which resembles the American flag, under the circumstances of this case, is a physical act which defiles the flag."[173]

The conviction was overturned on appeal, however, because the circuit court concluded that wearing the shirt was not "a physical mutilation, defacement, or defilement of the flag as those words are used in the statute."[174] The appeals court in *Hoffman* assumed without deciding that the shirt with a stars and stripes pattern "came within the statutory definition of a flag of the United States," but added that "the plain fact is the shirt was not a flag." Nevertheless, the court suggested that the broad definition of the law applied, noting that "when the injury is not to the flag itself but to a simulated design, it may well be that the proof of violation must be clearer than if the flag itself were desecrated."[175]

It is fair to say that courts during this period were divided on whether "wearing" a flag, or something that looks like a flag, could be considered desecration. For example, the California Court of Appeals upheld the conviction of a man who wore a vest that had been fashioned from a flag, and the Supreme Court declined to review the case.[176] On the other hand, the U.S. District Court for the Western District of North Carolina in *Parker v. Morgan* overturned the conviction of a college student for wearing a jacket on which had been sewn an American flag, superimposed with the symbol of a hand giving the "peace sign" and the legend "give peace a chance." The court invalidated the state flag-desecration law as being overly broad and vague, calling it "an uncommonly bad statute."[177]

The *Parker* decision addressed directly the definitional problem that would lie at the heart of any dispute regarding the reach of a new flag-desecration law. For a flag-control statute to be constitutional, the court reasoned, "it must precisely define a flag and carefully avoid expropriation of color and form other than the defined emblem itself." In this view, the government may not "appropriate the colors red, white and blue and the depiction of stars and stripes." The court was particularly troubled by a disjunctive clause, like the one in the 1968 federal flag-desecration law, leaving it to the "subjective determination of any person to believe, without deliberation, that a substance or design may represent the flag of the United States."[178]

The court described the statutory definition of a flag as "a manifest absurdity" and "simply unbelievable," noting that "[r]ead literally, it may be dangerous in North Carolina to possess anything red, white and blue." Accordingly, it held that the statute was unconstitutional on its face, and if there remained any doubt about the application of its holding to flag-themed apparel, the court added that "it seems to us that red, white and blue trousers with or without stars are trousers and not a flag and . . . it is beyond the state's competence to dictate color and design of clothing, even bad taste clothing."[179] In this regard, the decision was consistent with various other court decisions regarding flag "patches" worn on trousers and elsewhere, including the Supreme Court's subsequent decision in *Smith v. Goguen*.[180]

The U.S. Court of Appeals for the Second Circuit similarly held in 1974 that the definitions in the New York law restricting use of the flag were overly broad and vague in *Long Island Vietnam Moratorium Committee v. Cahn*.[181] There, the court held that the law could not be applied to the distribution of decals and buttons consisting of a circular representation of the flag with seven stars in the upper left-hand corner and eleven stripes colored red, white and blue, upon which a peace symbol was superimposed. The court expressed no doubt that "anyone looking at the . . . emblems, with their red, white, and blue stars and stripes, must conclude immediately that they are representations of the flag." It nevertheless held that the law was unconstitutional on its face because "traditional First

Amendment activity may be swept within its ambit."[182] The Supreme Court upheld the decision without opinion.[183]

Despite these decisions, other courts upheld the application of the flag-desecration laws as constitutional in various circumstances. In *Joyce v. United States*, for example, the D.C. Circuit upheld the conviction of a demonstrator who tore a three-by-five-inch paper replica of a flag, holding that "[a] little American flag is entitled to the same protection as a large one."[184] At the same time, in *People v. Radich*, the New York Court of Appeals upheld the conviction of an art gallery owner who had displayed various exhibits in which flags were incorporated into works of expressive protest against the Vietnam War.[185] That decision was affirmed without opinion by a 4-4 vote of the Supreme Court.[186] Other courts have reached disparate results on whether photographs of the flag can be prosecuted under flag-desecration laws.[187] And in one state case, the court upheld the conviction of a motorist who painted a replica of a flag on the side of his truck with the face of Mickey Mouse in the field where the stars should be.[188]

The many ways that flag-desecration laws have been applied in the past lend credence to concerns that a new law adopted pursuant to a constitutional amendment could be applied broadly to restrict various types of flags and representations of flags. Many commonplace uses of flag imagery could be subject to such a law. On the other hand, proponents of a constitutional amendment are correct when they point out that the ability of Congress to define what constitutes a flag will be circumscribed by existing First Amendment doctrine. But acknowledging these limits only begs the question of how broadly Congress might be permitted to define the term "flag of the United States."

As proponents of an amendment have acknowledged, a new flag-protection law may have little effect if protesters may easily evade its proscriptions by altering slightly the pattern of stars and stripes or by making some other subtle change in the design. Accordingly, the House Judiciary Committee suggested that, for purposes of legislation, a flag "could also be defined as anything that a reasonable person would perceive to be a flag of the United States" in order to "prevent a situation whereby a representation of a United States flag with forty-nine stars or twelve red and white stripes was burned in order to circumvent the statutory prohibition." However, it left the more difficult job of coming up with precise statutory language "for a future Congress to address."[189]

The decision in *United States v. O'Brien* helps illustrate the difficulty that some "future Congress" is likely to face in drafting a law that prevents wholesale circumvention while adhering to constitutional requirements. In that case, the Supreme Court held that Congress could prohibit the destruction of draft cards because they were necessary to ensure the efficient functioning of the Selective Service system.[190] But nothing in *O'Brien* suggests

that Congress would have been permitted to prohibit the burning of a replica of a draft card, even if the copy was entirely identical to the original. Any prohibition on the destruction of draft card photocopies would not serve the government's intended purpose (the administration of the Selective Service System), and could not be considered as merely an "incidental restriction on speech" that is "no greater than essential" to promote a legitimate state interest.[191]

The same analysis applies to any definition of the U.S. flag in a new law, especially to the extent the need for protection is predicated on the fact that the flag is a "unique symbol" of nationhood.[192] The more the flag is considered unique, the less the government's interest may be served by the protection of flag-like items, and the more a broader regulation is likely to intrude on First Amendment interests. Courts will face a difficult task in attempting to draw a meaningful line between expression that is protected by the First Amendment, and the physical manifestation of the flag to be protected by the 28th Amendment if Congress seeks to regulate items that give the "impression" or the "idea" of the U.S. flag, but in reality are not flags. As the D.C. Circuit noted in *Hoffman v. United States*, for a flag desecration statute to avoid possible conflict with the First Amendment, "the curtailment of expression goes no further than the language of the statute clearly requires."[193]

The specific language a future Congress may use to define representations of the flag will determine how a new flag-protection law will be treated by reviewing courts. For this reason, it seems quite likely that Congress will need to employ a narrower definition than was used in the Uniform Flag Desecration Act of 1917 or the Federal Flag Desecration Act of 1968. The 1989 Flag Protection Act was narrower than its predecessors, defining "flag of the United States" to mean "any flag of the United States, or any part thereof, made of any substance, of any size, in a form that is commonly displayed."[194] This more recent definition is an improvement over earlier formulations, but it is far from clear that such language would avoid many of the problems that arose under the previous flag-desecration laws.

Would such statutory language apply only to actual "flags" or would it also cover flag-themed material, since the terms include "any flag, or part thereof made of any substance?" What about the qualification that the flag to be protected must be in "a form that is commonly displayed?" Does such language narrow the law's application in a society in which star-spangled imagery is ubiquitous? And what if the resulting legislation contains the language suggested to prevent evasion — that the law may apply to "anything that a reasonable person would perceive to be a flag of the United States?"[195] Such a subjective standard was found to be sufficient to void the statute in *Parker v. Morgan*, where the federal district court found the broad definition to constitute "expropriation of color and

design — not flag protection."[196] As the Supreme Court held in *Goguen*, a flag-desecration statute cannot be so indefinite as to allow the police, a court or a jury to impose their own preferences for treatment of the flag.[197]

None of these questions can be answered until Congress drafts a new flag-protection statute and the courts try to apply it. It is not possible to predict the varied situations in which cases will arise, or what courts in different jurisdictions will decide. But it is possible to project that the range of outcomes will be subject to a tradeoff: The more the law is drafted flexibly to prevent possible circumvention, the more likely the "parade of horribles" will become a reality, and resulting court tests will present a smorgasbord of "wacky hypotheticals." Such a broad definition would present both due process and First Amendment problems. By contrast, to the extent the law is strictly limited to apply to the actual U.S. flag (either by narrow statutory language or judicial decree), the law may be easily evaded and have little practical effect.

### 2. What Is Physical Desecration?

The second key phase that must be defined by legislation implementing the flag-protection amendment is "physical desecration." The House Judiciary Committee has suggested that the amendment's chosen language "requires physical contact with the flag" and that "mere words or gestures directed at the flag, regardless of how offensive they were" could not be punished.[198] The Senate Judiciary Committee added that "Americans will continue to have the right to express their views in public, in private, in newspapers, on the Internet, and through broadcast media."[199] Thus, proponents describe the scope of the amendment as "simple and narrow" and limited so as to permit pure speech criticizing the flag as well as "virtual" acts of desecration. At the same time, according to the legislative history, "the word 'desecration' was selected because of its broad nature in encompassing many actions against the flag," including "burning, shredding, and similar acts of defilement of the flag."[200]

Opponents of the amendment suggest that "the definition of 'desecration' will invite a literally infinite catalogue of possible disputes."[201] History suggests that courts will be required to determine what types of actions may be deemed a physical desecration, such as attaching symbols to a flag,[202] displaying flags in art or photographs,[203] or wearing flag-patterned clothing.[204] But in this regard, the central questions that are likely to arise under a new flag-protection law are not so much which signs of disrespect toward the flag are "physical," but which physical acts in fact "defile" the flag. The essence of the crime is to "violate the sanctity of the flag," to put it to an "unworthy use," or to treat the flag "irreverently or contemptuously, often in a way that provokes outrage on the part of others."[205] In short, desecration is in the mind of the beholder.

This subjective element could lead to a significant number of thorny disputes, since identical physical acts, depending on their context, might be considered either contemptuous or the ultimate expression of respect. Burning a flag in protest would be defined as a criminal act under a new flag-protection law, while burning a flag respectfully to dispose of a soiled or worn flag is approved by the U.S. Flag Code.[206] In sorting out one act from the other, the First Amendment does not permit the government to presume in a blanket way which are acts of desecration as distinct from acts of consecration, just as the government cannot assume that all cross burnings are performed with an intent to intimidate.[207] As a consequence, the law, and the courts that must apply it, will be required to draw lines.

Doing so may be harder than it seems at first blush. Justice Stevens discussed the difficult nature of the inquiry in his *Johnson* dissent. The concept of desecration, he wrote, "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."[208] Thus, he noted, even a person who intends "to convey a message of respect for the flag by burning it in a public square might nonetheless be guilty of desecration if he knows that others — perhaps simply because they misperceive the intended message — will be seriously offended." Such a person might run afoul of the law even if he knows "that all possible witnesses will understand that he intends to send a message of respect" if some of the observers would nonetheless take offense.[209]

Justice Stevens expanded upon the subjective nature of "desecration" in his *Eichman* dissent, this time joined by the other three dissenting justices. He wrote that the idea to be expressed necessarily depends on "the temporal and political context in which it occurs."[210] At the same time, he observed that the symbolic value of the flag can be undermined even by those who profess to love it. Harkening back to the 19th century flag-protection movement that had opposed excessive flag displays promoting various commercial and political causes, he wrote:

> [T]he integrity of the symbol has been compromised by those leaders who seem to advocate compulsory worship of the flag even by individuals whom it offends, or who seem to manipulate the symbol of national purpose into a pretext for partisan disputes about meaner ends. [211]

Given the complex meanings that different people ascribe to the flag, it is not difficult to imagine a variety of situations in which an observer may take serious offense at otherwise respectful uses of the flag.[212]

Reviewing courts seeking to determine what physical acts constitute "desecration" may find that their analyses create a serious tension with the pre-*Johnson* body of law on flag misuse and desecration. For example, the Court in *Barnette* held that citizens cannot be compelled to show respect for the flag, yet a new desecration law may permit respectful flag burnings while prohibiting disrespectful ones. The Court in *Street* held that the government could not punish flag burning when it was intertwined with words of protest, yet the words of dissent may be the evidence necessary to distinguish an act of defilement from one of respect in any prosecution under a new flag-desecration law. Various cases in the past held that attaching something to a flag might constitute "desecration," yet the Court in *Spence* held that taping a peace symbol to a flag was constitutionally protected. Other precedents may well create further tensions with a new flag-desecration law, such as decisions limiting the government's ability to impose content-based and viewpoint-based restrictions.[213]

At this point, it is not possible to know how reviewing courts will resolve these doctrinal riddles. If the term "physical desecration" is interpreted broadly, as the legislative history suggests it should be, and if courts uphold an expansive definition, the amendment will have a significant impact that extends far beyond simply overturning the *Johnson* and *Eichman* decisions. On the other hand, if the meaning of "physical desecration" is found to be limited by the existing body of First Amendment doctrine, then the scope of a new flag-desecration law may be restricted significantly. Given the vagaries of litigation, courts may be expected to reach mixed results, just as they did under previous state and federal flag-desecration laws. Accordingly, the amendment may spawn confusion about the state of the law and the complex interplay between constitutional commands.

## III. PRACTICAL IMPLICATIONS OF A CONSTITUTIONAL AMENDMENT TO PROHIBIT FLAG DESECRATION

Apart from the effects of a flag-protection amendment on constitutional law, what would be the real-world impact of changing the Constitution? Would the amendment attain the goals its proponents seek? Making predictions about the future is always a risky enterprise, but experience from the past provides some basis by which to assess what might happen if the Constitution is changed to permit banning flag desecration. These projections focus on the stated goals of the proponents of a constitutional amendment, including the promotion of patriotism, the reduction of flag burning as a form of protest and bringing flag desecrators to justice.

### Promoting Patriotism and Respect for the Flag

Those who support a flag-protection amendment often frame their argument in terms of the need to promote greater respect for the nation and its symbols. The House Judiciary Committee Report on the proposed amendment quoted former Justice John Marshall Harlan for the proposition that flag-protection laws are necessary because "love both of the common country and of the State will diminish in proportion as respect for the flag is weakened."[214] In this vein, Major General Patrick Brady, head of the Citizens Flag Alliance, testified in support of the amendment in 2004 that "[i]t should be obvious that demanding — indeed, forcing — patriotism is the bedrock of our freedom."[215]

Opponents of the amendment, including some prominent veterans, disagree that the law can be used to compel patriotism. Former Sen. Bob Kerrey, D-Neb., has argued that "real patriotism cannot be coerced. It must be a voluntary, unselfish, brave act to sacrifice for others." Similarly, the late Sen. John Chafee, R-R.I., who served in both World War II and the Korean conflict, observed that "[w]e cannot mandate respect and pride in the flag. In fact, in my view taking steps to require citizens to respect the flag, sullies its symbolism and significance."[216]

It is unnecessary to choose sides in the debate over whether the law *should* be used to command respect for the flag to conclude that it is highly problematic to determine whether the law *can* achieve this result. One reason this question is difficult is that the act of flag burning, even as a form of protest, does not necessarily suggest a lack of patriotism. As the four dissenting justices noted in *Eichman*, a flag burner may be suggesting that those who would punish his action have forsaken "America's collective commitment to freedom and equality" and that such compelled "respect for the flag is nothing more than hypocrisy." They added: "Such a charge may be made even if the flag burner loves the country and zealously pursues the ideals that the country claims to honor."[217] In short, the issue is complicated by the fact that there is no single view of the flag and what it means.

This was a principal question the Supreme Court addressed in *Barnette*, although that case dealt with an affirmative requirement that schoolchildren pledge respect for the flag, and not a prohibition against showing disrespect via certain specified acts, like flag burning. This difference is significant to the constitutional analysis, but both situations speak to the same ultimate issue — whether the law can be used to generate respect for the flag and the nation. In answering this question, the Court in *Barnette* found that it was appropriate to foster national unity by means of persuasion, but that "[t]he problem is whether under our Constitution compulsion … is a permissible means for its achievement." The opinion by Justice Robert Jackson concluded that "[t]hose who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard."[218]

Ultimately, it probably is impossible to measure whether a flag protection amendment would generate more or less respect for the flag, even if agreement could be reached on what it would mean to do so. The concept of patriotism is far too intangible to measure in this way. Instead, it may only be possible to determine after ratification whether the number of physical acts that are defined as flag desecration has increased or decreased. This is not the same thing as measuring patriotism or respect for the flag, but it at least can be counted.

### Reducing the Incidence of Flag Burning

One of the recurring arguments in the flag-desecration debates involves the magnitude of the problem — how often does flag desecration occur? Opponents of an amendment argue that instances of flag burning have been far too rare in U.S. history to justify taking the drastic step of amending the Constitution. They cite research by Professor Robert J. Goldstein indicating that there were only 45 incidents of flag burning between 1777, when the design for the flag was adopted, until 1989, when the Supreme Court decided *Texas v. Johnson*.[219] Advocates of constitutional change, by contrast, claim that there have been "countless acts" of flag desecration in our nation's history, and they cite data collected by the Citizens Flag Alliance showing "over 115 reported incidents of flag desecration in 35 states, the District of Columbia, and Puerto Rico" since 1994.[220]

Regardless of the actual numbers, amendment proponents argue that the number of flag desecrations does not matter "so much as the actual act of flag desecration itself." They maintain that an amendment would be justified even if "there had only been one act of flag desecration in the more than 200 years since our country's founding."[221] Whatever the total may be, at least one member of Congress characterized the purpose of a constitutional amendment would be "to basically stop the desecration of the American flag in this country."[222]

People can and do differ on how many incidents of flag burning it would take to justify a constitutional amendment — if at all. But one thing seems indisputable based on the historical record: Changing the Constitution and passing a new law will not stop flag desecrations in America. To the contrary, adopting a flag-protection amendment is likely to increase the use of flag burning as a form of protest in the United States. Goldstein has observed that the 1989 flag-desecration law was intended to end flag burnings, but "its immediate impact was to spur perhaps the largest single wave of such incidents in American history."[223] Passage of the 1989 law led to a wave of flag burnings in more than a dozen cities. Prosecutions in two cases that followed the law's passage led to the Supreme Court decision in *Eichman*.[224]

Indeed, in his *Eichman* dissent, Justice Stevens lamented the fact that "a formerly dramatic expression of protest is now rather commonplace." He and the other dissenters argued that the flag had already been damaged as a symbol "as a result of this Court's decision to place its stamp of approval on the act of flag burning" in *Johnson*. But they also agreed that the "symbolic value of the American flag is not the same today as it was yesterday" for other reasons as well. They cited events "during the last three decades [that] have altered the country's image in the eyes of numerous Americans" and leaders who undermine the flag's integrity by advocating "compulsory worship of the flag" or by manipulating "the symbol of national purpose into a pretext for partisan disputes."[225]

An amendment may have an even greater impact on the number of flag burnings than did the previous laws, as those who oppose it seek to test its boundaries. Professor Goldstein found that there were twice as many flag-burning incidents between the 1989 *Johnson* decision and March 1998 than in all of U.S. history before that point. The peak number occurred between June 1989 and June 1990, "when the first attempts were made to overturn *Johnson* by amending the Constitution." Accordingly, opponents of a flag-protection amendment argue that ratification "will likely lead to another spike in the number of flag-burning incidents . . . as well as increase the variety of distasteful acts involving the flag which no doubt would be committed to test the vague and uncertain boundaries of any new law."[226] Ironically, a constitutional amendment designed to end flag desecration could have the opposite effect than what is intended.

#### Permitting Prosecutions of Flag Desecraters

Even if a constitutional amendment would not promote patriotism in any measurable way, and might instead increase incidents of flag burning, proponents argue that the measure should be adopted to vindicate the sanctity of the nation's emblem by allowing the government to punish desecraters where previously it could not. One central theme underlying proposals for a constitutional amendment has been a sense of powerlessness in the aftermath of *Texas v. Johnson* and *United States v. Eichman*.[227] Indeed, the Senate Judiciary Committee found it "painfully ironic to most Americans that, although the government can fine a person for urinating on a public street, the Supreme Court has determined that the government cannot increase that fine by even a dollar if the act takes place on the cherished symbol of our country rather than the bare pavement."[228]

As a practical consideration, this argument for constitutional change raises the question whether it is necessary to amend the Constitution in order to punish individuals who destroy the flag. In this regard, the Supreme Court made clear in *Johnson* that First Amendment protections for symbolic speech do not bar the government from bringing

prosecutions where the act of burning a flag is incidental to some other crime, such as theft, arson, or destruction of property.[229] No change in the Constitution is needed to enable the government to punish such actions involving the flag. Accordingly, to assess the practical impact of a constitutional amendment on the government's ability to penalize instances of flag destruction, it is necessary to separate the examples that include some underlying crime from those where the destruction of a flag is proscribed solely "*because* it has expressive elements."[230]

Applying this calculus, it appears that most reported instances of flag destruction involve some type of common crime that could be prosecuted under current law without any change in the Constitution. In this regard, CFA compiled more than 100 examples of flag destruction between 1994 and 2004 to support its bid for a constitutional amendment.[231] Of this total, however, almost two-thirds of the reported cases involved acts of simple vandalism or theft, and in many cases the perpetrators were unknown. The following example of flag desecration is fairly representative of those on the list:

> March 24-25, 2003. Windsor Locks, Conn.: First Selectman Edward Ferrari was angered over the burning of the flag that flew over town hall. A vandal or vandals burned a hole in the blue field of 50 stars on the flag and then ran it back up the flagpole. The damage was done sometime Monday night or early Tuesday morning. Two residents donated their flags to the town hall to replace the desecrated flag.[232]

In cases such as this, passage of a constitutional amendment would have no effect on the government's ability to make an example of flag desecraters, assuming it can locate them. Opponents of a flag-protection amendment have said that CFA's list "suggests that a large percentage of flag desecration acts are perpetrated by misguided teenagers," and that no change in law is needed to apply statutes relating to theft, vandalism, destruction of property, breach of the peace, or arson to such cases.[233]

Nevertheless, is it sufficient to justify an amendment that some subset of the total universe of flag desecraters would be subject to heightened penalties? This is a hard question to answer, even from the perspective of the amendment's supporters. For example, the Senate Judiciary Committee in 2004 rejected a narrowly crafted approach to flag protection based on the "fighting words" doctrine because "it would reach only a tiny percentage of situations in which individuals desecrate the flag."[234] Opponents of an amendment had argued that a "fighting words" flag-protection statute could be upheld on constitutional grounds and supplant the need for constitutional change. One reason the committee report discounted this approach is because the courts had applied the First

Amendment so as to limit the scope of the fighting words doctrine "even in the most incendiary circumstances."[235] Since the First Amendment and other constitutional limits are likely to be interpreted to limit the scope of legislation implementing any flag-protection amendment, and given that only a portion of the examples of flag destruction will be covered by the new law, it is difficult to believe that the supporters of the amendment would be satisfied with the net result.

In at least one sense a constitutional amendment would achieve its proponents' objectives. It would permit the government to impose heightened penalties for instances of flag destruction even if certain acts are already illegal under other criminal laws. However, the ability to assess heightened penalties has a dark side. The data compiled by CFA suggests that localities have continued to bring flag-desecration prosecutions despite the fact that such laws have been unconstitutional since 1989.[236] One Web site that opposes a constitutional amendment lists various examples of arrests for flag desecration, and describes the typical pattern as follows: "the sheriff arrests you, you spend a few nights in jail, the prosecutor drops the charges, and you get to go home."[237] To the extent such reports accurately describe examples in which invalid laws were employed to harass disfavored speakers, it suggests that a new flag desecration law could give law enforcement more "arbitrary discretion" to permit "only that expression which local officials will tolerate."[238]

## CONCLUSIONS

Passage of a constitutional amendment permitting Congress to ban flag desecration would terminate the immediate dispute about whether to change the Constitution, but it would not end the ongoing debate about the limits of governmental authority in this area.

Based on principles of constitutional analysis and judging by the history of judicial review in cases involving the flag, a constitutional amendment empowering Congress to prohibit flag desecration could produce the following results:

- **After ratification, the way would be cleared for supporters of flag protection in Congress to propose legislation to implement the amendment to prevent "physical desecration of the flag of the United States."**

- **Instances of flag desecration for political purposes could increase dramatically, at least in the short term.** Such an outcome would be consistent with experience following passage of the 1989 Flag Protection Act. This spike in the number of incidents could continue for years as demonstrators test the law and courts seek to interpret the limits of legislation enacted to implement the flag-protection amendment.

- **A period of uncertainty in the law could ensue as courts at various levels struggle to determine what items may be considered the "flag of the United States" and what actions constitute "physical desecration."** Based on the history of state flag-desecration and flag-misuse laws, as well as experience with the federal Flag Desecration Act, this will likely produce a series of cases where the government seeks to apply the law to various items that appear to be flags, and to actions where the issue of "desecration" is debatable.

- **Ultimately, courts are likely to interpret a flag-protection amendment quite narrowly and to permit prosecutions only against a limited number of physical acts against official U.S. flags.** Such an interpretation would restrict the possible scope of a new flag-protection law based on First Amendment and due-process requirements. However, it would also make such a law easy to circumvent through the use of items that have the appearance of U.S. flags.

- **As a result of this narrowing process, a new flag-protection law may not apply to most examples of flag desecration commonly cited by proponents of a constitutional amendment.**

- **Because the reach of a new flag-protection statute will be interpreted so as to conform to constitutional commands, there will be some continuing uncertainty as to the law's scope.** This could lead to discriminatory enforcement of the law based on prosecutors' reactions to the communication involved.

If these predictions are correct, then both sides of this polarized debate over amending the Constitution are right — and both are wrong.

Proponents of constitutional change probably are correct when they say that an amendment may not broadly undercut First Amendment values, at least not in the long term. But this means that a resulting flag-protection law will apply far too narrowly to suit most advocates of an amendment, for it will leave as protected speech a broad range of activities involving the flag (and near-flags) that they abhor. But in the near term — a period that could last decades — there is likely to be significant constitutional upheaval as courts work through the many factual situations in which the new law can be applied.

Passage of an amendment will not alone determine this outcome; the result will be affected by the implementing laws and judicial decisions applying them. History suggests that lower courts will issue conflicting decisions until the matter is finally presented to the Supreme Court in an appropriate case, or cases. Even then, there is likely to be a residue of uncertainty that could encourage selective prosecutions, just as some law enforcement officials continue to prosecute flag desecration today.

Adopting a constitutional amendment would only be the beginning of a long series of disputes over flag desecration.

**ENDNOTES**

1 *Texas v. Johnson*, 491 U.S. 397 (1989). See also *United States v. Eichman*, 496 U.S. 310 (1990).

2 *Johnson,* 491 U.S. at 429 (1989)(Rehnquist, C.J. dissenting).

3 Constitutional Amendment to Prohibit Physical Desecration of U.S. Flag, S. Rpt. 108-334, 108th Cong. 2d Sess. 17 (July 22, 2004) ("2004 Senate Report").

4 *The Misuse of the Flag of the United States: An Appeal to the Fifty-Fourth Congress of the United States* (Chicago: National Flag Committee of the Society of Colonial Wars in the State of Illinois, 1895).

5 "Measures to Protect the American Flag, 1990: Hearing Before the Senate Comm. on the Judiciary," 101st Cong., 2d Sess. 113 (June 21, 1990) (statement of Charles Fried).

6 Ronald K.L. Collins, "Supreme Court Justice Voting Record in Flag-Desecration Cases." See pp. 51-57 of this report.

7 See Citizens Flag Alliance, www.cfa-inc.org. See also Flag Protection Constitutional Amendment, H. Rpt. 108-131, 108th Cong. 1st Sess. 2 n.2 (June 2, 2003) (dissenting views) ("2003 House Report") (75% of Americans support a flag-protection amendment).

[8] 2004 Senate Report at 52 n.10 (minority views). See First Amendment Center, State of the First Amendment 2005 survey (June 27, 2005) (11% of respondents who favored an amendment changed their minds when told it would represent the first modification of the First Amendment in 200 years). Similarly, a 1995 poll of registered voters indicated that 64% favored a constitutional amendment to ban flag desecration, but that number dropped to 38% when respondents were told that it would be the first constitutional amendment to limit freedom of speech and political protest. See 2003 House Report at 59 n.26 (dissenting views).

[9] The 2004 Senate Report observed that "Americans' understanding of their government, or lack thereof, has become a popular object of ridicule." It cited surveys of fourth-grade students in which 75% failed to correctly identify which branch of government is responsible for passing laws, and less than one-third could name the Constitution as the document that sets forth the basic rules for running the government. See 2004 Senate Report at 26. Similarly, in the First Amendment Center survey of adults, 58% named freedom of speech as a right protected by the First Amendment, but only 15% of the public could identify freedom of the press as well. A mere 17% identified freedom of religion, 10% identified freedom of assembly and only 1% were aware of the right to petition as First Amendment freedoms. State of the First Amendment 2004 survey, supra note 8.

[10] See H.J. Res. 5, 109th Cong., 1st Sess. (introduced Jan. 5, 2005) and H.J. Res. 10, 109th Cong., 1st Sess. (introduced Jan. 25, 2005).

[11] S.J. Res. 12, 109th Cong., 1st Sess. (introduced April 14, 2005).

[12] 2003 House Report at 5.

[13] See 2003 House Report at 2 ("Today, all fifty states have passed resolutions calling on Congress to approve a constitutional amendment to protect the flag and to send it to the states for ratification.").

[14] See 2004 Senate Report at 46 (minority views).

[15] See 2003 House Report at 63 (dissenting views). In this view, such a constitutional change would put the United States in the ranks "with countries such as China and Iran and the regimes of the former Soviet Union and South Africa."

[16] See 2004 Senate Report 22. See also 2003 House Report at 2.

[17] See 2004 Senate Report at 22.

[18] See 2003 House Report at 6.

[19] See 2003 House Report at 3, 6 (citation omitted).

[20] See 2004 Senate Report at 2. Chief Justice Rehnquist compared flag burning to "an inarticulate grunt or roar that, it seems fair to say, is most likely to be indulged in not to express any particular idea, but to antagonize others." Johnson, 491 U.S. at 432 (Rehnquist, C.J., dissenting).

[21] 2004 Senate Report at 19.

[22] Id. at 22.

[23] *Stromberg v. California*, 283 U.S. 359 (1931). The decision predated by two weeks the Court's landmark decision in *Near v. Minnesota*, 283 U.S. 697 (1931), the first case in which it articulated First Amendment protections that apply to newspapers.

[24] *Stromberg*, 283 U.S. at 369.

[25] *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 505 (1969).

[26] *Schacht v. United States*, 398 U.S. 58, 60-61 (1970).

[27] E.g., *Garner v. Louisiana*, 368 U.S. 157, 201-202 (1961) ("We would surely have to be blind not to recognize that petitioners were sitting at these counters, where they knew they would not be served, in order to demonstrate that their race was being segregated in dining facilities in this part of the country."); *Taylor v. Louisiana*, 370 U.S. 154 (1962) (bus station sit-in).

[28] *Brown v. Louisiana*, 383 U.S. 131, 139, 142 (1966).

[29] *United States v. O'Brien*, 391 U.S. 367 (1968).

[30] Id. at 377.

[31] Id. at 378-382.

[32] Id. at 382.

[33] Id. at 381-382.

[34] 455 U.S. 489, 496 (1982).

[35] 538 U.S. 343, 362 (2003).

[36] Id. at 364.

[37] Id. at 365-366. See also *R.A.V. v. City of St. Paul*, 505 U.S. 377, 402 n.4 (1992) ("[b]urning a cross at a political rally would almost certainly be protected expression").

[38] See, e.g., Michael Welch, *Flag Burning* 17 (2000); Robert Justin Goldstein, *Desecrating the American Flag* 1 (1996); Robert Justin Goldstein, *Flag Burning and Free Speech* 1-6 (2000).

[39] See *Flag Burning* at 21.

[40] *Desecrating the American Flag* at 1-4. See *Flag Burning* at 21-22.

[41] Decree of May 1, 1862, reprinted in *Desecrating the American Flag* at 2.

[42] The phrase comes from the popular Civil War-era song *The Battle Cry of Freedom,* published by George Frederick Root in 1862.

[43] See *Desecrating the American Flag* at 6.

[44] Id.; *Flag Burning* at 22-23. See 2004 Senate Report at 13; *Desecrating the American Flag* at 17 ("In Chicago, a large number of the flags bearing pictures of political candidates were spread over the floor of the headquarters of an opposing party and ostentatiously used for wiping muddy boots, and for the reception of tobacco juice. . .") (quoting 1897 petition to Congress organized by the Milwaukee Daughters of the American Revolution).

[45] See Report accompanying H.R. 10475, *To Prevent Desecration of the United States Flag,* 51st Cong., 1st Sess. (1890).

[46] *The Misuse of the Flag of the United States: An Appeal to the Fifty-Fourth Congress of the United States,* supra note 4.

[47] Address by Charles Kingsbury Miller, Illinois Sons of the American Revolution Banquet, November 2, 1898, reprinted in *Desecrating the American Flag* at 17-19.

[48] See *Desecrating the American Flag* at 9.

[49] 1 Alan Brinkley, *Old Glory: The Saga of a National Love Affair* in *The Flag and the Law: A Documentary History of the Treatment of the American Flag by the Supreme Court and Congress* xxii (compiled by Marlyn Robinson and Christopher Simoni, 1993).

[50] See *Desecrating the American Flag* at 10-11.

[51] See 1900 Circular of Information of the American Flag Association, reprinted in *Desecrating the American Flag* at 24-25.

[52] Most of the state statutes included the provision of the Uniform Flag Law of 1917, which provided that "[n]o 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." See 9B Uniform Laws Ann. 52-53 (1966).

[53] See Proceedings of the 23rd Annual Conference of the NCCUSL, 1913, pp. 157-74, reprinted in *Desecrating the American Flag* at 35-36.

[54] See *Desecrating the American Flag* at 9.

[55] 2003 House Report at 3.

[56] *Ruhstrat v. People,* 185 Ill. 133, 147-148 (1900).

[57] *People ex rel. McPike v. Van De Carr,* 70 N.E. 965, 966 (NY Ct. App. 1904).

[58] 205 U.S. 34 (1907).

[59] Id. at 40-42.

[60] See *Desecrating the American Flag* at 42, 53-56.

[61] Id. at 42 and articles cited at 56-59.

[62] Id. at 42.

[63] Ex Parte Starr, 263 F. 145, 146-147 (D. Mont. 1920). Although the court held that the law's constitutionality was settled by *Halter v. Nebraska,* Judge Bourquin described the sentence as "horrifying."

[64] Id. at 145.

[65] See generally Geoffrey R. Stone, *Perilous Times: Free Speech in Wartime* 184-191 (2004).

[66] 40 Stat. 553 (1918). The Sedition Act also provided for immediate dismissal for any employee or official "who commits any disloyal act or utters any unpatriotic or disloyal language, or who, in an abusive and violent manner criticizes the Army or Navy or the flag of the United States."

[67] Stone, supra note 65 at 191. But see *Abrams v. United States,* 250 U.S. 616 (1919) (prosecution under Sedition Act upheld). Taking the Espionage and Sedition Acts together, there were more than 1,900 prosecutions during World War I. Zechariah Chafee Jr., *Free Speech in the United States* 3 (2d ed. 1941).

[68] 60 Cong. Rec. H293-294 (Dec. 13, 1920). In 1931, President Franklin Delano Roosevelt granted amnesty to all those who had been convicted under the Espionage and Sedition Acts. Stone, *supra* note 65 at 232.

[69] The refusal stemmed from a literal interpretation of Chapter 20 of the Book of Exodus, which states that "[t]hou shalt have no other gods before me," "[t]hou shalt not make unto thee any graven image" and "[t]hou shalt not bow down thyself to them, nor serve them."

[70] In three cases the Supreme Court declined to hear appeals from flag-salute cases, holding that they did not present a substantial federal question. See *Gabrielli v. Knickerbocker,* 306 U.S. 621 (1939); *Hering v. State Board of Education,* 303 U.S. 624 (1938); *Leoles v. Landers,* 302 U.S. 656 (1937). In a fourth case, the Court summarily affirmed a district court decision upholding a Massachusetts flag-salute law. *Johnson v. Deerfield,* 306 U.S. 621 (1939).

[71] 310 U.S. 586, 594-595 (1940).

[72] Id. at 594-595.

[73] Id. at 595-596.

[74] Id. at 600.

[75] *Flag Burning* at 6.

[76] See Nat Hentoff, "A Frenzy of Flag Waving," *The Washington Post*, July 1, 1989 at A17; Leora Harpaz, *Justice Jackson's Flag Salute Legacy: The Supreme Court Struggles to Protect Intellectual Individualism*, 64 *Texas L. Rev.* 817, 830 (1986). See generally, Shawn Francis Peters, *Judging Jehovah's Witnesses: Religious Persecution and the Dawn of the Rights Revolution* (2000).

[77] See T. Lavin, "The Litchfield Riot," *The State Journal-Register,* Springfield, Ill., June 24, 1990 at 33.

[78] See 2004 Senate Report at 57 n.17 (minority views).

[79] *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 626 (1943).

[80] Id. at 630.

[81] Id. at 632.

[82] Id. at 633-634.

[83] Id. at 642.

[84] 18 U.S.C. § 700(a).

[85] *United States v. Crosson*, 462 F.2d 96 (9th Cir.), cert. denied, 409 U.S. 1064 (1972); *Joyce v. United States*, 454 F.2d 971 (D.C. Cir. 1971), cert. denied, 405 U.S. 969 (1972).

[86] *Street v. New York*, 394 U.S. 576, 579 (1969).

[87] Id. at 588-590.

[88] Id. at 578.

[89] Id. at 594 ("we have no occasion to pass upon the validity of this conviction insofar as it was sustained by the state courts on the basis that Street could be punished for his burning of the flag, even though the burning was an act of protest").

[90] Id. at 586-587.

[91] Id. at 593.

[92] Id. at 594.

[93] *Smith v. Goguen*, 415 U.S. 566 (1974).

[94] Id. at 578.

[95] Id. at 579. For example, the Court contrasted a 1915 opinion of the Massachusetts attorney general stating that the statutory ban on engravings of the flag could be read to prohibit displaying the flag "in many of its cheaper and more common forms," with a 1968 opinion advising that a flag depiction painted on a door was not a "flag of the United States" within the meaning of the law. Id. at 580-581 n.29.

[96] *Goguen v. Smith*, 471 F.2d 88, 91 n.4 (1st Cir. 1972).

[97] *Goguen*, 415 U.S. at 581. However, in a concurring opinion, Justice White wrote that punishing a person for affixing a flag to his trousers would convict the defendant "not to protect the physical integrity or to protect against acts interfering with the proper use of the flag, but to punish [him] for communicating ideas unacceptable to the controlling majority in the legislature." Id. at 588 (White, J., concurring).

[98] Id. at 575.

[99] *Spence v. Washington*, 418 U.S. 405, 406 (1974) (per curiam). Spence was charged with improper use of the flag and not flag desecration. Washington law treated the two offenses separately, with "flag misuse" arising from the concerns over commercial uses of the flag. The law prohibited placing "any word, figure, mark, picture, design, drawing or advertisement of any nature upon any flag, standard, color, ensign or shield of the United States." Id. at 407.

[100] Id. at 408-411.

[101] Id. at 412.

[102] Id. at 414.

[103] Id. at 415. The Court observed that the defendant had not permanently disfigured or damaged the flag so that no governmental interest in protecting the physical integrity of the nation's symbol was implicated in the case.

[104] *Johnson*, 491 U.S. at 399-400. The statute specifically protected public monuments, places of worship or burial, and state or national flags. Id. at 400 n.1.

[105] Id. at 405, 411.

[106] Id. at 413 (emphasis in original).

[107] Id. at 406-407, 412.

[108] Id. at 414-416.

[109] Id. at 413.

[110] Id. at 421-435 (Rehnquist, C.J., dissenting).

[111] Id. at 430.

[112] Id. at 432.

[113] Id. at 436-437 (Stevens, J., dissenting).

[114] See 2004 Senate Report at 3.

[115]18 U.S.C. § 700(a). The statute excepted from its reach "conduct consisting of the disposal of a flag when it has become worn or soiled."

[116]See 2004 Senate Report at 4.

[117]2003 House Report at 57 (dissenting views) ("Following passage of the Flag Protection Act, a wave of flag burnings took place in over a dozen cities."); Senate Report at 39 (minority views).

[118]*United States v. Eichman*, 496 U.S. 310, 315-316 (1990).

[119]Id.

[120]Id. at 317.

[121]Id. at 318.

[122]Id. at 320 (Stevens, J., dissenting).

[123]Id. at 321.

[124]Id. at 322.

[125]Id. at 320. Justice Stevens noted that those who burned draft cards were punished for doing so.

[126]See 2004 Senate Report at 4.

[127]See H.J. Res. 4, 108th Cong., 1st Sess. (passed June 6, 2003, 300-125); H.J. Res. 36, 107th Cong., 1st Sess. (passed July 17, 2001, 298-125); H.J. Res. 33, 106th Cong., 1st Sess. (passed June 24, 1999, 305-124); H.J. Res. 54, 105th Cong., 1st Sess. (passed June 12, 1997, 310-114); H.J. Res. 79, 104th Cong., 1st Sess. (passed June 28, 1995, 312-120).

[128]See S.J. Res. 4, 108th Cong., 2nd Sess. (report filed by the Senate Committee on the Judiciary July 20, 2004); S.J. Res. 7, 107th Cong., 1st Sess. (referred to the Senate Committee on the Judiciary March 13, 2001); S.J. Res. 14, 106th Cong., 2nd Sess. (rejected March 29, 2000, 67 yea-37 nay); S.J. Res. 40, 105th Cong., 2nd Sess. (report filed by the Senate Committee on the Judiciary Sept. 1, 1998); S.J. Res. 31, 104th Cong., 1st Sess. (rejected Dec. 12, 1995 , 63 yea-36 nay).

[129]U.S. Const., art. V.

[130]2004 Senate Report at 21.

[131]2003 House Report at 13.

[132]S.J. Res. 40 and H.J. Res. 54 — Proposing an Amendment to the Constitution of the United States Authorizing Congress to Prohibit the Physical Desecration of the Flag of the United States, Rpt. 105-298, 105th Cong., 2d Sess. 35 (September 1, 1998) ("1998 Senate Report"). See Id. at 36 ("all the flag protection amendment does is authorize Congress to enact implementing legislation").

[133]H.J. Res. 79, 104th Cong., 1st Sess. (passed June 28, 1995) (emphasis added).

[134]To Prohibit the Physical Desecration of the Flag of the United States, H. Rpt. 105-121, 105th Cong., 1st Sess. 2 n.1 (June 5, 1997) ("1997 House Report"). See *also* 2004 Senate Report at 58 (minority views) ("Unlike earlier proposals for a constitutional amendment prohibiting flag desecration, S.J. Res. 4 may be implemented by Congress only, not by the states.").

[135]The Congressional Budget Office has noted that the proposed amendment contains no intergovernmental mandates and therefore would "impose no costs on State, local, or tribal governments." E.g., 2003 House Report at 13 (quoting CBO cost analysis).

[136]See 1998 Senate Report at 34 ("the 16th amendment . . . is remarkably similar to the flag amendment in that it says, without more, that a legislative body, 'shall have the power' to do something" subject to other constitutional limitations).

[137]*Pollack v. Farmers' Loan & Trust Co.,* 158 U.S. 601 (1885). The Court held that a direct tax on real estate rents and profits and on investment returns violated the constitutional requirement that direct taxes must be apportioned among the states according to population. See U.S. Const., art. I, § 2, cl. 3.

[138]U.S. Const., amend. XVI.

[139]*Eisner v. Macomber,* 252 U.S. 189, 192-193 (1920).

[140]Id. at 206.

[141]U.S. Const., amend. XVIII. The 18th Amendment expressly gave the federal government and the states concurrent power to enforce the alcohol prohibition, something the proposed flag-protection amendment does not do.

[142]U.S. Const., amend. XXI.

[143]*Capital Cities Cable, Inc. v. Crisp,* 467 U.S. 691, 712 (1984) (Twenty-first Amendment does not empower state to restrict interstate cable television transmissions that contain alcohol advertisements).

[144]*Granholm v. Heald,* 125 S. Ct. 1885, 1890 (2005) ("state laws that violate other provisions of the Constitution are not saved by the Twenty-first Amendment").

[145]*Capital Cities Cable,* 467 U.S. at 712; *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.,* 445 U.S. 97, 112-114 (1980) (Twenty-first Amendment does not preclude application of Sherman Act to California wine pricing scheme).

[146]*Craig v. Boren,* 429 U.S. 190, 209 (1976) (Twenty-first Amendment does not permit state to engage in gender-based discrimination in violation of equal protection of the laws).

[147]*Wisconsin v. Constantineau,* 400 U.S. 433 (1971) (Twenty-first Amendment does not empower state to summarily impose penalties without due process).

[148]*Larkin v. Grendel's Den, Inc.,* 459 U.S. 116, 122 n.5 (1982) (Twenty-first Amendment does not permit states to use religious criteria in regulating alcoholic beverages).

[149]*44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 514-516 (1996) (First Amendment bars restrictions on alcohol advertising notwithstanding the 21st Amendment).

[150]2004 Senate Report at 25.

[151]2004 Senate Report at 21.

[152]2003 House Report at 6-7 ("H.J. Res. 4 simply seeks to remove the physical flag as a mode of communication, without regard to the content of such speech or the particular viewpoint attempting to be expressed.").

[153]2004 Senate Report at 22.

[154]Id. at 37 (minority views) (quoting former Solicitor General Walter Dellinger).

[155]2003 House Report at 14.

[156]Senate Joint Resolution 31, S. Rpt. 104-148, 104th Cong. 1st Sess. 32 (September 27, 1995) (flag could be defined "at its narrowest" to mean only the U.S. flag as defined in the U.S. Code); 1998 Senate Report at 37 (same).

[157]2003 House Report at 14. The U.S. Code provides: "The flag of the United States shall be thirteen horizontal stripes, alternate red and white; the union of the flag shall be forty-eight stars, white in a blue field." 4 U.S.C. §1, This definition was codified in 1947, before Alaska and Hawaii were admitted to the union. Section 2 provides that one star will be added to the union of the flag on the admission of a new state into the United States. 4 U.S.C. § 2.

[158]2003 House Report at 14.

[159]1998 Senate Report at 37.

[160]2003 House Report at 14.

[161]2004 Senate Report at 59-60 (minority views).

[162]Id. at 65.

[163]1998 Senate Report at 38.

[164]Id.

[165]"Letting the People Decide: The Constitutional Amendment Authorizing Congress to Prohibit Physical Desecration of the Flag of the United States," hearings before the Senate Committee on the Judiciary, March 10, 2004 p. 2 (statement of Professor Richard D. Parker).

[166]*Texas v. Johnson*, No. 88-155 (oral argument at http://www.oyez.org/oyez/resource/case/379/audioresources).

[167]Id. See generally Steven G. Gey, *This is Not a Flag: The Aesthetics of Desecration*, 1990 WIS. L. REV. 1549 (1990).

[168]"Flag Law a Hardship — One Thousand Citizens Arrested for Alleged Violations," *Chicago Daily Inter-Ocean*, October 20, 1899, reprinted in *Desecrating the American Flag* at 43-44.

[169]"Flag Must be Respected — Advertising on National and State Emblems to be Stopped," *The New York Times*, July 22, 1900, reprinted in *Desecrating the American Flag* at 44-45.

[170]205 U.S. at 38.

[171]18 U.S.C. § 700 (b) (prior to amendment of October 28, 1989, Pul. L. 101-131, 103 Stat. 777).

[172]*Hoffman v. United States*, 256 A.2d 567 (Ct. App. D.C. 1969), rev'd, 445 F.2d 226 (D.C. Cir. 1971).

[173]Id. at 570.

[174]*Hoffman v. United States*, 445 F.2d 226, 229 (D.C. Cir. 1971).

[175]Id. at 229.

[176]*People v. Cowgill*, 274 Cal. App.2d Supp. 923, 78 Cal. Rptr. 853 (Cal. Super. 1969), appeal dismissed sub nom. *Cowgill v. California*, 396 U.S. 371 (1970). *But* see *Franz v. Commonwealth*, 212 Va 587, 186 S.E.2d 71 (Va. 1972) (defendant who wore vest made from U.S. flag did not violate flag desecration statute).

[177]*Parker v. Morgan*, 322 F. Supp. 585 (W.D.N.C. 1971).

[178]Id. at 588.

[179]Id.

[180]415 U.S. at 1250. As described in more detail above, the Court in *Goguen* held the statutory term in the Massachusetts law about treating the flag "contemptuously" was vague. The Court also noted "the ambiguities presented by the concept of an 'actual' flag." Id. at 579. See also e.g., *State v. Kasnett*, 34 Ohio St.2d 193, 297 N.2d 537 (1973) (the sole act of wearing the flag on clothing does not fall within the terms of the flag-desecration law); *People v. Vaughan*, 183 Colo. 40 (Colo. 1973).

[181]*Long Island Vietnam Moratorium Committee v. Cahn*, 437 F.2d 344 (2d Cir. 1970), aff'd mem., 418 U.S. 906 (1974).

[182]Id. at 348. The court noted that the New York law "prohibits in clear language a myriad of uses of the flag, including not only the displaying of the emblems which plaintiffs have been distributing, but also the displaying of flags or flag-type buttons with patriotic slogans or pictures on them. It prohibits on its face all kinds of posters, buttons, symbols, slogans, and emblems such as have been used for many years in election campaigns, patriotic movements, and so forth."

[183]418 U.S. 906 (1974).

[184]*Joyce v. United States*, 454 F.2d 971, 981 (D.C. Cir. 1971).

[185]*People v. Radich*, 26 N.Y.2d 114, 257 N.E.2d 30 (Ct. App. NY 1970).

[186]*Radich v. New York*, 401 U.S. 531 (1971). Justice William O. Douglas did not participate in the decision.

[187]*State v. Jackson*, 143 Ga. App. 88, 237 S.E.2d 533 (Ga. 1977) (prosecution allowed for display of photograph in shop window portraying flag desecration); *People v. Keough*, 61 Misc.2d 762, 305 NYS 2d 961 (1969) (publication of flag with nude model in college periodical may violate flag-desecration law). But see *People v. Von Rosen*, 13 Ill. 2d 68, 147 N.E.2d 327 (1958) (reversing convictions for flag desecration based on publication in magazine of a U.S. flag with a nude model).

[188]*State v. Saulino*, 29 Ohio Misc. 25, 277 N.E.2d 580 (1971). But see *State v. Zimmelman*, 62 N.J. 279, 301 A.2d 129 (1973) (flag-desecration conviction for placing flags with peace signs on the side of an ice cream truck reversed).

[189]2003 House Report at 14.

[190]*O'Brien*, 391 U.S. at 381-382.

[191]Id. at 377.

[192]2004 Senate Report at 24-25 ("The flag protection amendment is limited to authorizing the Federal Government to prohibit physical desecration of only the American flag. It does not serve as precedent for any other legislation or constitutional amendment on any other subject or mode of conduct, precisely because the *flag is unique*.") (emphasis added).

[193]*Hoffman*, 445 F.2d at 228.

[194]18 U.S.C. § 700(b).

[195]2003 House Report at 14.

[196]*Parker*, 322 F. Supp. at 588.

[197]*Goguen*, 415 U.S. at 578.

[198]2003 House Report at 13.

[199]2004 Senate Report at 2.

[200]2003 House Report at 13.

[201]2004 Senate Report at 60 (minority views).

[202]See, e.g., *People v. Verch*, 63 Misc. 2d 477, 311 NYS2d 637 (1970) (conviction upheld for getting paint on flag). But see *Commonwealth v. Janoff*, 439 Pa 212, 266 A.2d 657 (1970) (printing words such as "make love not war" and "the new American revolutionaries" as part of a war protest is not flag desecration).

[203]E.g., *People v. Keough*, 61 Misc.2d 762, 305 NYS 2d 961 (1969) (publication of flag with nude model in college periodical may violate flag-desecration law). But see *People v. Von Rosen*, 13 Ill. 2d 68, 147 N.E.2d 327 (1958) (reversing convictions for flag desecration based on publication in magazine of a U.S. flag with a nude model).

[204]E.g., *Hoffman*, 445 F.2d at 229 (wearing a flag-themed shirt is not physical desecration); *Royal v. Superior Court of New Hampshire*, 531 F.2d 1084 (1st Cir.), cert. denied, 429 U.S. 867 (1976); *Miami v. Wolfenberger*, 265 So. 2d 732 (Fla App. 1972) (flag-desecration law cannot be applied to flag-themed motorcycle helmet). But see *State v. Waterman*, 190 N.W.2d 809 (Iowa 1971) (wearing an American flag-themed poncho violates flag-desecration law).

[205]2003 House Report at 13.

[206]4 U.S.C. § 8(k). See 18 U.S.C. § 700(a)(2).

[207]*Virginia v. Black*, 538 U.S. at 364 (First Amendment does not permit the state to assume criminal intent).

[208]*Johnson*, 491 U.S. at 438 (Stevens, J. dissenting) (emphasis in original). Justice Stevens would have upheld the Texas flag-desecration law, and was making the point that in his view the law was content-neutral. But his analysis suggests that the inquiry into what may be considered desecration is complex.

[209]Id.

[210]*Eichman*, 496 U.S. at 320 (Stevens, J., dissenting).

[211]Id. at 323.

[212]See, e.g., *Parker*, 322 F. Supp. at 588 ("If the flag says anything at all … we think it says everything and is big enough to symbolize the variant viewpoints of a Dr. Spock and a General Westmoreland. With fine impartiality the flag may head up a peace parade and at the same time and place fly over a platoon of soldiers assigned to guard it … . Sometimes the flag represents government. Sometimes it may represent opposition to government.").

[213]*R.A.V. v. City of St. Paul*, 505 U.S. at 377 (government cannot impose viewpoint-based restrictions on speech that is otherwise unprotected by the First Amendment); *Boos v. Barry*, 485 U.S. 312 (1988) (government generally cannot imposed content-based restrictions on political speech unless the measure can survive strict First Amendment scrutiny).

[214]2003 House Report at 8-9 (quoting *Halter v. Nebraska*, 205 U.S. at 41-42).

[215]2004 Senate Report at 33 (minority views).

[216]2004 Senate Report at 33 (minority views).

[217]*Eichman*, 496 U.S. at 320 (Stevens, J., dissenting).

[218]*Barnette*, 319 U.S. at 641.

[219]2003 House Report at 61 (dissenting views) (citing Robert J. Goldstein, *Two Centuries of Flagburning in the United States,* 163 FLAG BULL. 65 (1995)).

[220]2003 House Report at 3. CFA is one of the principal groups that has strongly advocated passage of a flag-protection amendment. It has kept track of reported instances of flag destruction during the past decade and has collected news reports from across the United States. Its Web site currently lists 118 examples of flag desecration during the years 1994-2004. (See www.cfa-inc.org/?section=issues &subsection=issues_acts&content=issues_acts04) (visited April 22, 2005).

[221]Id. at 3 n.8.

[222]Id. at 50 (markup transcript) (statement of Rep. Chabot, R-Ohio).

[223]Robert J. Goldstein, *Saving 'Old Glory': The History of the American Flag Desecration Controversy* 215 (1995).

[224]2003 House Report at 57 (dissenting views).

[225]*Eichman,* 496 U.S. at 323 (Stevens, J., dissenting).

[226]2004 Senate Report at 39 (minority views).

[227]2003 House Report at 3.

[228]2004 Senate Report at 8.

[229]*Johnson,* 491 U.S. at 412 n.8 ("[N]othing 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. We also emphasize that Johnson was prosecuted *only* for flag desecration — not for trespass, disorderly conduct, or arson.") (emphasis in original).

[230]Id. at 406 (emphasis in original).

[231]The CFA list is a compilation of news reports from around the country. As a consequence, the reports vary significantly in terms of completeness and are not independently verified.

[232]See www.cfa-inc.org/?section=issues&subsection=issues_acts&content=issues_acts03 (visited April 22, 2005).

[233]2004 Senate Report at 40-42 & n.5 (minority views).

[234]Id. at 20. Such a "fighting words" law would apply narrowly only to circumstances in which acts of flag desecration are accompanied by words that are intended to cause an immediate breach of the peace and are likely to have that effect.

[235]Id.

[236]On Oct. 21, 2001, three teenage boys cut an American flag with a pocket knife and set it on fire at a park in Bethlehem, Pa. According to CFA's Web site, "[e]ach boy faces a charge of insults to the national flag, police said. According to the Pennsylvania criminal code, it is a misdemeanor." See www.cfa-inc.org/?section=issues&subsection=issues_acts&content=issues_acts01 (visited April 22, 2005). The examples listed by CFA suggest that there have been approximately 10 such arrests for flag desecration since 1994.

[237]See The Flag Burning Page, www.esquilax.com/flag/index2.html (visited June 6, 2005).

[238]Cahn, 437 F.2d at 350. See *Goguen*, 415 U.S. at 575-576.

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SECTION 2

# Supreme Court Justices' Voting Records in Flag-Desecration Cases

Since 1907, the U.S. Supreme Court had decided seven different flag-desecration cases, writing opinions in six of them and sustaining the constitutional challenges in five of those six; and by a 4-4 vote in *Radich v. New York* (1971), the Court upheld the lower court's denial of the First Amendment claim. In another case, *Cahn v. Long Island Vietnam Moratorium Committee*, 418 U.S. 906 (1974), the Supreme Court summarily affirmed a lower court decision (437 F.2d 344 (2nd Cir., 1970)) that voided a New York law for vagueness and overbreadth.

Of the 54 votes cast in which the Supreme Court rendered opinions, 28 justices voted to sustain a constitutional rights claim while 26 voted to deny it. When the due-process challenges in the *Halter* and *Smith* cases are excluded, a clear majority of the justices voted to sustain a First Amendment claim: 21 justices voting to sustain such a claim, with 15 voting to deny it. The Supreme Court has never rendered a judgment denying a First Amendment challenge to a flag-desecration law.

Interestingly, no chief justice of the United States has ever voted to sustain a constitutional challenge to a flag-desecration law: Melville Fuller, Earl Warren, Warren Burger and William Rehnquist all voted to deny either First Amendment or due-process claims.

### VOTING RECORD OF REPUBLICAN AND DEMOCRATIC NOMINEES

Historically and in more recent times, the majority of justices voting to sustain constitutional challenges to a flag-desecration law were nominated to the Supreme Court by Republican presidents.

The justices voting to deny the due-process challenge in the 1907 *Halter* case were: John M. Harlan I nominated by Republican President Hayes; William Day, Oliver Wendell Holmes and William Moody by Republican President Theodore Roosevelt; Edward White by Republican President Taft; Joseph McKenna by Republican President McKinley; and David Brewer and Chief Justice Melville Fuller nominated by Democratic President Cleveland. Justice Rufus Peckham, nominated by Cleveland, voted to sustain a due-process challenge to the flag-desecration law.

Likewise, in more modern times the majority of justices voting to sustain a First Amendment challenge to a flag-desecration law were nominated to the Supreme Court by Republican presidents: John M. Harlan II, Potter Stewart and William Brennan were nominated by Eisenhower; Harry Blackmun[1] and Lewis Powell by Nixon; and Antonin Scalia and Anthony Kennedy by Reagan. Those voting to sustain such a claim and nominated by Democratic presidents were William O. Douglas by Franklin D. Roosevelt; Thurgood Marshall by Johnson; and Byron White by Kennedy.[2]

The Republican-nominated justices voting to deny a First Amendment claim were: Earl Warren, nominated by Eisenhower; Warren Burger and Blackmun by Nixon; and William Rehnquist by Nixon as an associate justice and by Reagan as chief justice; John Paul Stevens by Ford; and Sandra Day O'Connor by Reagan. The Democratic-nominated justices voting to deny a First Amendment claim were: Hugo Black by Franklin D. Roosevelt; Byron White by Kennedy (see endnote 2); and Abe Fortas by Johnson.

### FEDERAL AND STATE PROSECUTIONS

Of the seven flag-desecration cases that the Supreme Court has reviewed, six involved constitutional challenges to state laws and one (*Eichman*) involved a challenge to a federal law. Two of the cases (*Radich* and *Street*) were from the same state, New York.

### JUSTICES WHO CHANGED THEIR VOTES

Justice White first voted to sustain a due-process challenge to a flag-desecration law in *Smith v. Goguen* but thereafter voted to deny a First Amendment claim in four other cases. By contrast, Justice Blackmun first voted to deny a due-process claim in *Smith v. Goguen* but then voted to sustain a First Amendment claim in three other cases.

The Supreme Court's conference notes in *Street v. New York* indicate that Justice Abe Fortas had originally voted to sustain the First Amendment challenge but thereafter changed

his vote, noting that he was losing his "enthusiasm for symbolic speech." (*The Supreme Court in Conference: 1940-1985,* Del Dickson editor (Oxford University Press, 2001), p. 349)

### FLAG-DESECRATION CASES REMANDED

Following its 1974 decisions in *Spence v. Washington* and *Smith v. Goguen,* the Supreme Court remanded two cases back to the states to be considered in light of *Spence*. Chief Justice Burger and Justices Rehnquist, Blackmun and White dissented from that remand order. The two remanded cases were: *Sutherland v. Illinois* and *Farrell v. Iowa,* 418 U.S. 907 (1974). The free-speech claims in those cases were sustained on remand in *People v. Sutherland,* 329 N.E. 2d 820 (Ill., 1975) and *State v. Farrell,* 223 N.W.2d 270 (Iowa). Review was subsequently denied in *Farrell*, 421 U.S. 1007 (1975).

### ***United States v. Eichman,***[3] *496 U.S. 310 (1990)*

5-4 sustaining First Amendment claim

Shawn Eichman was convicted of knowingly setting fire to several U.S. flags on the steps of the U.S. Capitol while protesting various aspects of the government's domestic and foreign policy. Mark Haggerty and others were also convicted for violating the act by knowingly setting fire to a United States flag in Seattle while protesting the passage of the Flag Protection Act of 1989. Federal district courts in Washington, D.C., (731 F. Supp. 1123 (1990)) and in the Western District of Washington state (731 F. Supp. 415 (1990)) held the act unconstitutional and dismissed the charges against the various defendants. In the Supreme Court, the two cases were consolidated. Solicitor General Kenneth Starr argued the cause for the United States. William M. Kunstler, who had represented the flag-burners in *Texas v. Johnson,* argued the cause for Eichman and Haggerty. Less than a month after the case was argued, the Supreme Court affirmed the lower court judgments and ruled parts of the Flag Protection Act of 1989 unconstitutional under the First Amendment.

| ***Sustaining First Amendment Claim*** | ***Denying First Amendment Claim*** |
|---|---|
| William Brennan Jr. (majority opinion) | William Rehnquist, C.J. |
| Anthony Kennedy | John Paul Stevens |
| Antonin Scalia | Byron White |
| Thurgood Marshall | Sandra Day O'Connor |
| Harry Blackmun | |

***Texas v. Johnson,*** *491 U.S. 397 (1989)*
5-4 sustaining First Amendment claim

During the Republican National Convention in Dallas, hundreds of people protested the polices of President Reagan and some Dallas-based corporations. As the demonstrators marched toward the Dallas City Hall, Gregory Lee Johnson doused an American flag with kerosene and then lit it on fire. No violence occurred, though several bystanders said they were "seriously offended." Johnson was arrested and then convicted of desecration of a venerated object in violation of a Texas statute. The state court of appeals affirmed (706 S. W. 2d 120 (1986)) though the Texas Court of Criminal Appeals reversed (755 S. W. 2d 92 (1988)), holding that the state, consistent with the First Amendment, could not punish Johnson for burning the flag in these circumstances. In the Supreme Court, Gregory Johnson was represented by William M. Kunstler, who later argued *United States v. Eichman*. The Supreme Court affirmed the lower court judgment sustaining Johnson's First Amendment claim.

| *Sustaining First Amendment Claim* | *Denying First Amendment Claim* |
|---|---|
| William Brennan Jr. (majority opinion) | William Rehnquist, C.J. |
| Anthony Kennedy | John Paul Stevens |
| Antonin Scalia | Byron White |
| Thurgood Marshall | Sandra Day O'Connor |
| Harry Blackmun | |

***Spence v. Washington,*** *418 U.S. 405 (1974)*
6-3 sustaining First Amendment claim

Harold Spence was convicted under Washington state's "improper use" statute for displaying a U.S. flag upside down with a peace symbol taped to it from his apartment window. The Washington law prohibited the exhibition of a flag to which is attached or superimposed figures, symbols, or other extraneous material. Spence displayed his flag as a protest against then-recent actions in Cambodia and killings at Kent State University. He argued that his purpose was to associate the American flag with peace instead of war and violence. The Washington Court of Appeals reversed his conviction (490 P.2d 1321 (1971)) but the Washington Supreme Court thereafter reinstated it (506 P.2d 293 (1973)). The U.S. Supreme Court reversed.

| *Sustaining First Amendment Claim* | *Denying First Amendment Claim* |
|---|---|
| Per Curiam (majority opinion) | Warren Burger, C.J. |
| Harry Blackmun | Byron White |
| William Brennan Jr. | William Rehnquist |
| Potter Stewart | |
| Thurgood Marshall | |
| William O. Douglas | |
| Lewis Powell | |

***Smith v. Goguen,*** *415 U.S. 566 (1974)*
6-3 sustaining due-process-vagueness claim

Valarie Goguen was prosecuted and convicted for wearing a small flag sewn to the rear of his blue jeans in violation of a provision of a Massachusetts flag-misuse statute that subjected to criminal liability anyone who "publicly … treats contemptuously the flag of the United States." The Massachusetts Supreme Judicial Court affirmed his conviction. In a *habeas corpus* action, a federal district court found the "treats contemptuously" phrase of the Massachusetts statute unconstitutionally vague and overbroad (343 F. Supp. 161 (1971)). The Court of Appeals for the First Circuit affirmed (471 F.2d 88 (1972)). The Supreme Court affirmed: "We affirm on the vagueness ground. We do not reach the correctness of the holding below on overbreadth or other First Amendment grounds."

| *Sustaining Due-Process Claim* | *Denying Due-Process Claim* |
|---|---|
| Lewis Powell (majority opinion) | Warren Burger, C.J. |
| William O. Douglas | Harry Blackmun |
| William Brennan Jr. | William Rehnquist |
| Potter Stewart | |
| Thurgood Marshall | |
| Byron White | |

***Radich v. New York,*** *401 U.S. 531 (1971)*
4-4 affirming denial of First Amendment claim

In 1967, Stephen Radich, a New York art gallery proprietor, was convicted by a New York City Criminal Court for violating a New York flag-desecration law. Radich's gallery displayed 16 anti-war paintings and sculptures by the artist Marc Morrell. The exhibits

included a second-floor window display of a flag stuffed into a cadaver-like form hanging from a noose, and an inside-gallery display of an erect phallus covered with material from a small flag. Radich was ordered to pay a $500 fine or serve a 60-day jail term. In 1968, his conviction was upheld by the New York Supreme Court (294 N.Y.S.2d 285) and thereafter by the New York Court of Appeals (308 N.Y.S.2d 846 (1970)).

In *Radich*, a divided Supreme Court issued a *per curiam* order affirming the lower court judgment. Justice William O. Douglas recused himself because in his impeachment hearings he had been represented by the same law firm that represented Radich. (Bob Woodward and Scott Armstrong, *The Brethren* (1979), p. 147) Given Douglas' voting record, had he participated in the case the vote would have been 5-4 to sustain the First Amendment challenge. Three years after *Radich v. New York,* a federal district court quashed Radich's conviction. *United States ex rel Radich v. Criminal Court,* 385 F. Supp. 165 (SDNY, 1974).

***Street v. New York,*** *394 U.S. 576 (1969)*
5-4 sustaining First Amendment claim

When Sydney Street heard news of the shooting of James Meredith, a civil rights leader, he went to a street corner near his home in New York and ignited a flag he owned. He was subsequently arrested and charged with malicious mischief for violating a New York … penal law that made it a crime to mutilate or "publicly [to] defy or cast contempt upon [any American flag] either by words or act." Street was tried for burning an American flag and using defiant or contemptuous words about that flag. He was convicted and that conviction was upheld by the Appellate Term, Second Department, without opinion and thereafter affirmed by the New York Court of Appeals (229 N.E.2d 187 (1967)). The Supreme Court reversed.

| *Sustaining First Amendment Claim* | *Denying First Amendment Claim* |
|---|---|
| John M. Harlan II (majority opinion) | Earl Warren, C.J. |
| William O. Douglas | Hugo Black |
| William J. Brennan Jr. | Byron White |
| Potter Stewart | Abe Fortas |
| Thurgood Marshall | |

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

8-1 denying due process claim

The state of Nebraska prosecuted Nicholas Halter and Harry Hayward for selling bottled beer with a picture of an American flag on its label in contravention of a state statute entitled "An Act to Prevent and Punish the Desecration of the Flag of the United States." The defendants were found guilty by a jury and ordered to pay a fine of $50 and the costs of the prosecution. The judgment was affirmed by the Supreme Court of Nebraska (*Halter v. State*, 74 Neb. 757; 105 N.W. 298 (1905)). Subsequently, the U.S. Supreme Court upheld that judgment.

| ***Sustaining Due-Process Claim*** | ***Denying Due-Process Claim*** |
|---|---|
| Rufus Peckham | John M. Harlan I (majority opinion)<br>William Day<br>Oliver Wendell Holmes Jr.<br>William Moody<br>Melville Fuller, C.J.<br>Edward White<br>Joseph McKenna<br>David Brewer |

**ENDNOTES**

[1] Justice Blackmun voted to sustain First Amendment claims in three cases — *Spence v. Washington*, *Texas v. Johnson* and *United States v. Eichman* — while voting to deny such a claim in one case, *Smith v. Goguen* (due process).

[2] White voted to sustain a constitutional claim in only one case (*Smith v. Goguen)* while denying the First Amendment claims in four other cases: *Street v. New York*, *Spence v. Washington*, *Texas v. Johnson* and *United States v. Eichman*.

[3] The companion case was *United States v. Haggerty et al*, which was combined with the *Eichman* appeal.

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### ADDITIONAL RESOURCES

For more information on flag desecration, flag laws and current controversies involving the flag see: firstamendmentcenter.org — Topic Section: Flag Burning.

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

—First Amendment to the U.S. Constitution

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Publication #013-F05-FAC | 7/05 | 2.5k | BL