LEGISLATIVE COMMITTEE MINUTES

CACR19

Bill as Introduced

CACR 19 - AS INTRODUCED

2020 SESSION

20-2962
06/08

CONSTITUTIONAL AMENDMENT
CONCURRENT RESOLUTION ***19***

RELATING TO: the American flag.

PROVIDING THAT: no person shall burn an American flag except as a dignified means of disposing of a worn or damaged flag.

SPONSORS: Sen. French, Dist 7; Sen. Morgan, Dist 23; Sen. Reagan, Dist 17; Sen. Giuda, Dist 2; Sen. Birdsell, Dist 19; Sen. Bradley, Dist 3; Sen. Morse, Dist 22; Rep. Baldasaro, Rock. 5

COMMITTEE: Election Law and Municipal Affairs

ANALYSIS

This constitutional amendment concurrent resolution provides that no person shall burn an American flag except as a respectful means of disposing of a worn or damaged flag.

Explanation: Matter added to current law appears in ***bold italics.***
Matter removed from current law appears [~~in brackets and struckthrough.~~]
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type

CACR 19 - AS INTRODUCED

20-2962
06/08

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Twenty

CONCURRENT RESOLUTION PROPOSING CONSITUTIONAL AMENDMENT

RELATING TO: the American flag.

PROVIDING THAT: no person shall burn an American flag except as a dignified means of disposing of a worn or damaged flag.

Be it Resolved by the Senate, the House of Representatives concurring, that the Constitution of New Hampshire be amended as follows:

I. That the first part of the constitution be amended by inserting after article 39 the following new article:

[Art.] 40. [American Flag.] No person shall burn an American flag except as a respectful means of disposing of a worn or damaged flag.

II. That the above amendment proposed to the constitution be submitted to the qualified voters of the state at the state general election to be held in November, 2020.

III. That the selectmen of all towns, cities, wards and places in the state are directed to insert in their warrants for the said 2020 election an article to the following effect: To decide whether the amendments of the constitution proposed by the 2020 session of the general court shall be approved.

IV. That the wording of the question put to the qualified voters shall be:

"Are you in favor of amending the first part of the constitution by inserting after article 39 a new article to read as follows:

[Art.] 40. [American Flag.] No person shall burn an American flag except as a respectful means of disposing of a worn or damaged flag."

V. That the secretary of state shall print the question to be submitted on a separate ballot or on the same ballot with other constitutional questions. The ballot containing the question shall include 2 squares next to the question allowing the voter to vote "Yes" or "No." If no cross is made in either of the squares, the ballot shall not be counted on the question. The outside of the ballot shall be the same as the regular official ballot except that the words "Questions Relating to Constitutional Amendments proposed by the 2020 General Court" shall be printed in bold type at the top of the ballot.

VI. That if the proposed amendment is approved by 2/3 of those voting on the amendment, it becomes effective when the governor proclaims its adoption.

VII. Voters' Guide.

AT THE PRESENT TIME, there is no constitutional prohibition on burning an

American flag.

IF THE AMENDMENT IS ADOPTED, the constitution would prohibit burning an American flag except as a respectful means of disposing of a worn or damaged flag.

Committee Minutes

SENATE CALENDAR NOTICE
Election Law and Municipal Affairs

Sen Melanie Levesque, Chair
Sen Tom Sherman, Vice Chair
Sen Jon Morgan, Member
Sen Regina Birdsell, Member
Sen James Gray, Member

Date: January 8, 2020

HEARINGS

Thursday	01/16/2020
(Day)	(Date)

Election Law and Municipal Affairs	Legislative Office Building 102	10:00 a.m.
(Name of Committee)	(Place)	(Time)

10:00 a.m.	**CACR 19**	relating to the American flag. Providing that no person shall burn an American flag except as a dignified means of disposing of a worn or damaged flag.
10:30 a.m.	**SB 488**	relative to public inspection of absentee ballot lists.
11:00 a.m.	**SB 489**	relative to the absentee ballot application process.

EXECUTIVE SESSION MAY FOLLOW

Sponsors:

CACR 19			
Sen. French	Sen. Morgan	Sen. Reagan	Sen. Giuda
Sen. Birdsell	Sen. Bradley	Sen. Morse	Rep. Baldasaro
SB 488			
Sen. French	Sen. Carson	Sen. Reagan	Sen. Giuda
Sen. Bradley	Rep. Hill	Rep. Plumer	Rep. Forsythe
SB 489			
Sen. French	Sen. Reagan	Sen. Fuller Clark	Sen. Gray
Sen. Giuda	Sen. Bradley	Rep. Hill	Rep. Pearl

Tricia Melillo 271-3077

Melanie Levesque
Chairman

Senate Election Law and Municipal Affairs Committee

Tricia Melillo 271-3077

CACR 19, relating to the American flag. Providing that no person shall burn an American flag except as a dignified means of disposing of a worn or damaged flag.

Hearing Date: January 16, 2020

Members of the Committee Present: Senators Levesque, Sherman, Morgan, Birdsell and Gray

Members of the Committee Absent : None

Bill Analysis: This constitutional amendment concurrent resolution provides that no person shall burn an American flag except as a respectful means of disposing of a worn or damaged flag.

Sponsors:

Sen. French	Sen. Morgan	Sen. Reagan
Sen. Giuda	Sen. Birdsell	Sen. Bradley
Sen. Morse	Rep. Baldasaro	

Who supports the bill: Senator Bob Giuda, Senator Regina Birdsell, Senator Chuck Morse, Senator John Reagan, Senator Jon Morgan, Representative Bob Greene

Who opposes the bill: Jeanne Hruska ACLU-NH, Maureen Ellerman, Dennis Jakubowski, Nancy Brennan, Melissa Hinebauch, Louise Spencer

Summary of testimony presented in support:

Senator French

- This resolution relating to the American flag provides that no one can burn an American flag except as a dignified means of disposing of a worn or damaged flag.
- It is being brought as a constitutional amendment due to the U.S. Supreme Court's ruling a few years ago that you could burn the flag.
- In order to make this law for the State of NH, it has to be brought into the constitution. The voters will be able to decide
- In the past he agreed with the Supreme Court about having a 1st amendment right to burn the flag.
- He realized though, that it is not just a flag, it is a symbol of unity and currently this state and this country lack that unity.
- When citizens look at that flag no matter what party, they all see the same thing and are united.
- That unity is important to every single American.
- There are other things prohibited in law that could be considered freedom of speech issues but are still prohibited.

Summary of testimony presented in opposition:

Jeanne Hruska – ACLU NH

- This bill is unconstitutional.
- The U.S. Supreme Court has ruled consistently that flag burning is a form of speech protected by the First Amendment of the U.S. Constitution.
- If this bill passed it would only exist for the amount of time it took for someone to file a lawsuit, and the State would be on the hook for litigation costs.
- This bill is bad policy, it violates the very values that the American flag represents.
- She has worked in countries where Governments routinely arrested citizens when they spoke out against them.
- When U.S. diplomats go in and engage those governments about free speech it is not U.S. military might that gives them influence. It is the example that the U.S. sets by upholding the first amendment.
- She has heard our diplomats state that the U.S. could not and would not penalize its citizens for speaking out against the government.
- The United States is a beacon on the hill when it comes to free speech. We have stronger protections than our European allies do.
- We are living in divisive times, but it is times like this that we need to recommit to the first amendment.
- This bill would set a precedent that this legislature is willing to carve out exceptions to the First Amendment. She questioned what would stop the legislature from passing bills that prohibit burning other flags, or the constitution, or the bible.
- The First Amendment exists specifically to prevent those in power from prohibiting speech with which they disagree.
- Burning the flag can be hurtful and offensive but the way to counter act it is with speech against it.
- General Colin Powell opposed this kind of legislation in a letter stating "the First Amendment exists to insure that freedom of speech and expression applies not just to that with which we agree or disagree, but also that which we find outrageous. I would not amend that great shield of democracy to hammer a few miscreants. The flag will be flying proudly long after they have slunk away."
- She urged the Committee to oppose this bill.
- Senator Sherman related his family's history fighting and sacrificing for this country in WW II. He added that about two months ago a group of republican lawmakers and others brought in a poster with his face next to a swastika. He finds it abhorrent to burn the American flag as his family has been here since the origin of the nation. He asked if this bill were to pass could he file a constitutional amendment to stop his face from being on this poster as hate speech and if this bill passes and if the supreme court were to uphold it can he file other amendments that prohibit other forms of hate speech.
- Ms. Hruska replied that this is the concern they have, that as soon as the constitution is open for amendments to carve out free speech exceptions there will be many more. The people will burn the flag in protest. They will find a way to get their point across.
- Senator Birdsell stated that she feels the Supreme Court decision was wrong and it is not the diplomats who defend our flag it is the military. She believes burning the flag is a desecration to the military members who fight and die trying to defend it.
- Ms. Hruska stated that she takes issue with the statement that diplomats do not defend the flag. She was a diplomat and she has seen them fight for America.

- Senator Levesque asked if they would believe that the American flag means something to everyone, and our freedom of speech means something to everyone.

Nancy Brennan – Weare, NH

- Freedom of speech is a fundamental right.
- The Supreme Court has ruled that desecration of the flag falls under the First Amendment rights.
- She has no desire to burn it, but she understands that some may feel disenfranchised and want to burn it. She lived through Vietnam and there were many flag burnings in protest.
- The desecration of the flag offends some people but being offended does not give up other people's right to free speech.
- The American flag is a symbol and it is the right of some people to revere the cloth itself, but she is interested in the country that the flag is supposed to represent.
- She is offended when she sees people wearing the flag pin while spouting hate speech.
- We will never all agree but we are all protected under the first amendment.
- The president has suggested putting flag burners in jail or revoking their citizenship, but Mitch McConnell has stated that "there is something larger behind the flag, the constitution and as disgusting as the ideas expressed behind those who would burn the flag are, they remain protected by the First Amendment."
- She sums up her opinion with a quote from the movie *The American President*, "You want to claim this land as the land of the free? Then the symbol of your country can't just be a flag; the symbol also has to be one of it's citizens exercising his right to burn that flag in protest."

TJM
Date Hearing Report completed: January 20, 2020

Speakers

Senate Election Law and Municipal Affairs Committee
SIGN-IN SHEET

Date: January 16, 2020 **Time:** 10:00 a.m.

CACR 19 A RESOLUTION relating to the American flag. Providing that no person shall burn an American flag except as a dignified means of disposing of a worn or damaged flag.

Name/Representing *(please print neatly)*

	Support	Oppose	Speaking?	Yes	No
Senator Bob Giuda SD#2	☑	☐		☐	☑
Sen. Regina Birdsell SD #19	☑	☐		☐	☑
Rep. Bob Greene Hills 37	☑	☐		☐	☑
Jeanne Hruska ACLU-NH	☐	☑		☑	☐
Sen. Chuck Morse SD #22	☑	☐		☐	☑
Maureen Ellermann Concord	☐	☑		☐	☑
Dennis Jaskolowski Loudon	☐	☑		☐	☐
Sen. John Reagan SD #17	☒	☐		☐	☒
Nancy Brennan Weare	☐	☒		☒	☐
Melissa Hinebauch Canaan	☐	☒		☐	☒
Louise Spencer Concord	☐	☒		☐	☒
Senator Morgan	☑	☐		☐	☒
	☐	☐		☐	☐
	☐	☐		☐	☐
	☐	☐		☐	☐
	☐	☐		☐	☐
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	☐	☐		☐	☐

Testimony

To the Members of the Senate Election law and Municipal Affairs Committee:
In opposition to CACR19, relating to the American flag.

Freedom of speech is a fundamental right enjoyed by citizens of this country. The Supreme Court has ruled that desecration of the flag falls under that First Amendment right. Although I have no desire to burn the American flag, I understand why some people might feel so disenfranchised, so angry at something our country has done that they express their outrage by burning or otherwise desecrating the flag. I lived through that volatile and confusing time of the Vietnam war when most of the flag burnings occurred. My husband was drafted and served as a jump master in the 82nd. I did not participate in any flag burnings then, but I understand why some people did.

The desecration of the flag offends some people. I understand that, too. But your being offended does not cancel my right to free speech.

To me the way we dishonor the flag has nothing to do with burning it. I went to Homestead, Florida to stand in witness of the horror of migrant family separation and child detention. Watching the American flag raised over that place sent a chill up my spine and brought tears to my eyes. I thought, "This is not who we are."

The flag is a symbol of our nation. But it's just that - a symbol. Some revere the cloth itself. That is their right. I am more interested in the country the flag is suppose to represent. I am offended when I see someone wearing a flag pin while spouting hateful racist, misogynistic or anti-LGBTQ rhetoric.

We aren't ever all going to agree, certainly, but my pride in this country has to do with what I know it can be. And my right to speak up for those things, by coming here, by standing on the corner with a protest sign, or, yes, by burning the flag if I see fit, are all protected under the first amendment.

The current resident of the White House has suggested putting flag burners in jail or revoking their citizenship. The so-called flag burning amendment has come up several times over the years. Mitch McConnell, in his decision to kill the amendment back in 2006 agreed that although he hated flag burning, "I revere the American flag as a symbol of freedom. But behind it is something larger — the Constitution. The First Amendment, which protects our freedom of speech, is the most precious part of the Bill of Rights. As disgusting as the ideas expressed by those who would burn the flag are, they remain protected by the First Amendment."

My opinion is summed up by the actor Michael Douglas when he played the Commander in Chief in the movie The American President : "You want to claim this land as the land of the free? Then the symbol of your country can't just be a flag; the symbol also has to be one of its citizens exercising his right to burn that flag in protest."

Nancy Brennan, Weare 1/16/20

ACLU
New Hampshire

Statement by Jeanne Hruska, Political Director ACLU-NH
Senate Election Law and Municipal Affairs Committee
CACR19
January 16, 2020

I submit this testimony on behalf of the American Civil Liberties Union of New Hampshire (ACLU)—a non-partisan, non-profit organization working to protect civil liberties throughout New Hampshire for over fifty years. I appreciate the opportunity to testify today in opposition to CACR19. This constitutional amendment violates the First Amendment of the U.S. Constitution and, perhaps more concerning, violates the values for which the flag stands.

The U.S. Supreme Court has ruled consistently that flag burning is a form of speech protected by the First Amendment of the U.S. Constitution. In *Texas v. Johnson* (1989), the Supreme Court held it unconstitutional to apply to a protester a Texas law punishing people who "desecrate" or otherwise "mistreat" the flag in a manner that the "actor knows will seriously offend one or more persons likely to observe or discover his action." The Court found that the law made flag burning a crime only when the suspect's thoughts and message in the act of burning were offensive, thus violating the First Amendment's protections of freedom of the mind and freedom of speech. The next year, in *United States v. Eichman* (1990), the Court reviewed a Congressional statute that attempted to be neutral as to the messages that might be conveyed, prohibiting flag burning except when attempting the "disposal of a flag when it has become worn or soiled." The Court struck down this statute as another attempt to punish offensive thoughts. If passed by this legislature and at the ballot box, this constitutional amendment would exist on the books for exactly as long as it took someone to file a lawsuit, and the government would be on the hook for litigation costs.

This amendment is aimed directly at restricting speech based on viewpoint – exactly what the First Amendment exists to prevent. This legislation does not prevent the flag from being burned, as it specifically states that a flag may be burned "as a respectful means of disposing of a worn or damaged flag." The difference between that and a protest burning is not in what physically happens to the flag. The difference is in the intent of and message sent by the people who carry out the act. This distinction disproves any notion that this legislation is unrelated to speech or political protest, only physical protection of the flag. This amendment is very much about speech and protest, including peaceful protest, since incitement to violence is already illegal. Burning the flag may be offensive speech to many, but that is the kind of speech that is most important to protect if free speech is to retain its meaning. Our country is not so fragile that it cannot survive this kind of free speech. But, our rights to free speech are fragile enough that they may not survive an assault on the Constitution.

This is not about one constitutional amendment. If we open this door, we may not be able to close it. If passed by this legislature, even if it is immediately overturned by the courts, this bill will set a precedent. It will beckon more legislation like it. If this legislature says that people cannot burn the flag, why stop there? What about burning the Declaration of Independence? The Constitution? The Bible? The New Hampshire state flag? Freedom cannot survive if exceptions to the First Amendment are made when someone in power disagrees with an expression. The First Amendment was designed precisely to prevent free speech from being confined to that which the government finds acceptable at any given time.

This amendment would be the beginning, not the end, of the question of how to regulate this specific form of expression. The use of the flag as a symbol is ubiquitous, from commerce, to art, to cigarette lighters, such that the legislature would be in the position of defining broad rules for specific applications. The legislature, the courts, and law enforcement agents would have to judge whether burning artwork, paper products, clothing, and other materials adorned with the flag would be in violation of this constitutional amendment.

There is a distinct difference between real and forced patriotism. The flag is understandably held in high regard by the American people as a representation of patriotism. But, the government does not foster patriotism by weakening the First Amendment. Even if the government could, it would be an unconstitutional attempt at thought control. The government can no more compel speech (or patriotism) than it can prohibit it.

Our country has long stood by the idea that the best way to counter speech with which we disagree is with more speech, not with silence. If you disagree with burning the flag, advocate against it. Forbidding political expression does not eliminate the idea or motivation behind it. If anything, it amplifies the idea and emboldens those expressing it. If CACR19 were to pass, there is a very real chance that it would inspire people to burn the flag in protest of the legislation, defeating its purpose of protecting the flag.

This constitutional amendment is a solution in search of a problem. The expressive act, burning a flag, which this amendment attempts to curtail, is exceedingly rare. Professor Robert Justin Goldstein documented approximately 45 reported incidents of flag burning in the over 200 years between 1777, when the flag was adopted, and 1989, when Congress passed, and the Supreme Court rejected, the Flag Protection Act. About half of these occurred during the Vietnam War.

As members of the Senate, you are entrusted with the privilege and responsibility of defining, drafting and implementing laws that protect our civil liberties. Your upcoming vote on this legislation tests that leadership responsibility at its very core. **We urge you to defend the fundamental liberties that our flag represents by voting *inexpedient to legislate* on CACR19.**

United States v. Eichman

Supreme Court of the United States

May 14, 1990, Argued ; June 11, 1990, Decided *

Nos. 89-1433, 89-1434

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*Together with No. 89-1434, United States v. Haggerty et al., on appeal from the District Court for the Western District of Washington.

Syllabus

After this Court held, in *Texas v. Johnson, 491 U.S. 397* that a Texas statute criminalizing desecration of the United States flag in a way that the actor knew would seriously offend onlookers was unconstitutional as applied to an individual who had burned a flag during a political protest, Congress passed the Flag Protection Act of 1989. The Act criminalizes the conduct of anyone who "knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon" a United States flag, except conduct related to the disposal of a "worn or soiled" flag. Subsequently, appellees were prosecuted in the District Courts for violating the Act: some for knowingly burning several flags while protesting various aspects of the Government's policies, and others, in a separate incident, for knowingly burning a flag while protesting the Act's passage. In each case, appellees moved to dismiss the charges on the ground that the Act [****2] violates the *First Amendment*. Both District Courts, following *Johnson, supra*, held that the Act unconstitutional as applied and dismissed the charges.

Held: Appellees' prosecution for burning a flag in violation of the Act is inconsistent with the *First Amendment*. The Government concedes, as it must, that appellees' flag-burning constituted expressive conduct, and this Court declines to reconsider its rejection in Johnson of the claim that flag-burning as a mode of expression does not enjoy the *First Amendment's* full protection. It is true that this Act, unlike the Texas law, contains no explicit content-based limitation on the scope of prohibited conduct. Nevertheless, it is clear that the Government's asserted interest in protecting the "physical integrity" of a privately owned flag in order to preserve the flag's statute as a symbol of the Nation and certain national ideals is related to the suppression, and concerned with the content, of free expression. The mere destruction or disfigurement of a symbol's physical manifestation does not diminish or otherwise affect the symbol itself. The Government's interest is implicated only when a person's treatment of the flag communicates [****3] a message to others that is inconsistent with the identified ideals. The precise language of the Act's prohibitions confirms Congress' interest in the communicative impact of flag destruction, since each of the specified terms -- with the possible exception of "burns" -- unmistakably connotes disrespectful treatment of the flag and suggests a focus on those acts likely to damage the

flag's symbolic value, and since the explicit exemption for disposal of "worn or soiled" flags protects certain acts traditionally associated with patriotic respect for the flag. Thus, the Act suffers from the same fundamental flaw as the Texas law, and its restriction on expression cannot "'be justified without reference to the content of the regulated speech,'" *Boos v. Barry, 485 U.S. 312, 320*. It must therefore be subjected to "the most exacting scrutiny," *id., at 321*, and, for the reasons stated in Johnson, supra, at , the Government's interest cannot justify its infringement on *First Amendment* rights. This conclusion will not be reassessed in light of Congress' recent recognition of a purported "national consensus" favoring a prohibition on flag-burning, since any suggestion that the Government's **[****4]** interest in suppressing speech becomes more weighty as popular opposition to that speech grows is foreign to the *First Amendment*. While flag desecration -- like virulent ethnic and religious epithets, vulgar repudiations of the draft, and scurrilous caricatures -- is deeply offensive to many, the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. Pp. 2-8.

Judges: Brennan, J., delivered the opinion of the court, in which Marshall, Blackmun, Scalia, and Kennedy, JJ., joined. Stevens, J., filed a dissenting opinion, in which Rehnquist, C. J., and White and O'Connor, JJ., joined.

Opinion by: BRENNAN

Opinion

[*312] [*292] [**2406]** *LEdHN[1A]*[↑] [1A]In these consolidated appeals, we consider whether appellees' prosecution for burning a United States flag in violation of the Flag Protection Act of 1989 is consistent with the *First Amendment*. Applying our recent decision in *Texas v. Johnson, 491 U.S. 397(1989)*, the District Courts held that the Act cannot constitutionally be applied to appellees. We affirm.

I

LEdHN[2A][↑] [2A]In No. 89-1433, the United States prosecuted certain appellees for violating the Flag Protection Act of 1989, 103 Stat. 777, *18 U.S.C.A. § 700 (Supp. 1990)*, by knowingly setting **[****5]** fire to several United States flags on the steps of the United States Capitol while protesting various aspects of the Government's domestic and foreign policy. In No. 89-1434, the United States prosecuted other appellees for violating the Act by knowingly setting fire to a United States flag while protesting the Act's passage. In each case, the respective appellees moved to dismiss the flag-burning charge on the ground that the Act, both on its face and as applied, violates the *First Amendment*. Both the **[*313]** United States District Court for the Western District of Washington, F. Supp. (1990), and the *United States District Court for the District of Columbia, 731 F. Supp. 1123 (1990)*, following *Johnson, supra*, held the Act unconstitutional as applied to appellees and dismissed the charges. [1] **[****6]** The United States appealed both decisions directly to this Court pursuant to **[**2407]** *18 U.S.C.A. § 700(d) [***293] (Supp. 1990)*. [2] We noted probable jurisdiction and consolidated the two cases. 494 U.S. (1990).

II

Last Term in Johnson, we held that a Texas statute criminalizing the desecration of venerated objects, including the United States flag, was unconstitutional as applied to an individual who had set such a flag on fire during a political demonstration. The Texas statute provided that "[a] person commits an offense if he intentionally or knowingly desecrates . . . [a] national flag," where "desecrate" meant to "deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action." *Tex. Penal Code Ann. § 42.09* (1989). We first held that Johnson's flag-

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[1] *LEdHN[2B]*[↑] [2B]

The Seattle appellees were also charged with causing willful injury to federal property in violation of *18 U.S.C. §§ 1361* and *1362*. This charge remains pending before the District Court, and nothing in today's decision affects the constitutionality of this prosecution. See n. 5, infra.

[2] "(1) An appeal may be taken directly to the Supreme Court of the United States from any interlocutory or final judgment, decree, or order issued by a United States district court ruling upon the constitutionality of subsection (a).

"(2) The Supreme Court shall, if it has not previously ruled on the question, accept jurisdiction over the appeal and advance on the docket and expedite to the greatest extent possible." *18 U.S.C.A. § 700(d) (Supp. 1990)*.

burning [****7] was "conduct 'sufficiently imbued with elements of communication' to implicate the *First Amendment*." 491 U.S., at (citation omitted). We next considered and rejected the State's contention that, under *United States v. O'Brien, [*314] 391 U.S. 367(1968)*, we ought to apply the deferential standard with which we have reviewed Government regulations of conduct containing both speech and nonspeech elements where "the governmental interest is unrelated to the suppression of free expression." *Id., at 377*. We reasoned that the State's asserted interest "in preserving the flag as a symbol of nationhood and national unity," was an interest "related 'to the suppression of free expression' within the meaning of O'Brien" because the State's concern with protecting the flag's symbolic meaning is implicated "only when a person's treatment of the flag communicates some message." Johnson, supra, at . We therefore subjected the statute to "'the most exacting scrutiny,'" id., at , quoting *Boos v. Barry, 485 U.S. 312, 321 (1988)*, and we concluded that the State's asserted interests could not justify the infringement on the demonstrator's *First Amendment* rights.

After our decision in Johnson, Congress [****8] passed *HN1*[↑] the Flag Protection Act of 1989. [3] The Act provides in relevant part:

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

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

"(b) As used in this section, the term 'flag of the United States' means any flag of the United States, or any part thereof, made of any substance, of any size, in a form that is commonly displayed." *18 U.S.C.A. § 700 (Supp. 1990)*.

[*315] *LEdHN[1B]*[↑] [1B]The Government concedes in this case, as it [****9] must, that appellees' flag-burning constituted expressive conduct. Brief for United States 28; see Johnson, supra, at , but invites us to reconsider our rejection in Johnson of the claim that flag-burning as a mode of expression, like obscenity or "fighting words," does not enjoy the full protection of the *First [**2408] Amendment*. Cf. *Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)*. This we decline to do. [4] The only remaining question is whether the Flag Protection Act is sufficiently distinct from the Texas statute that it may constitutionally be applied to proscribe appellees' expressive conduct.

The Government contends that the Flag Protection Act is constitutional because, unlike the statute addressed in Johnson, the Act does not target expressive [****10] conduct on the basis of the content of its message. The Government asserts an interest in "protecting the physical integrity of the flag under all circumstances" in order to safeguard the flag's identity "'as the unique and unalloyed symbol of the Nation.'" Brief for United States 28, 29. The Act proscribes conduct (other than disposal) that damages or mistreats a flag, without regard to the actor's motive, his intended message, or the likely effects of his conduct on onlookers. By contrast, the Texas statute expressly prohibited only those acts of physical flag desecration "that the actor knows will seriously offend" onlookers, and the former federal statute prohibited only those acts of desecration that "cast contempt upon" the flag.

LEdHN[1C][↑] [1C]Although the Flag Protection Act contains no explicit contest-based limitation on the scope of prohibited conduct, it is nevertheless clear that the Government's asserted interest is "related 'to the suppression of free expression,'" 491 U.S., at , and concerned with the content of such expression. The Government's interest in protecting the "physical integrity" [*316] of a privately owned flag [5] rests upon a

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[3] The Act replaced the then-existing federal flag-burning statute, which Congress perceived might be unconstitutional in light of Johnson. Former *18 U.S.C. § 700(a)* prohibited "knowingly casting contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it."

[4] We deal here with concededly political speech and have no occasion to pass on the validity of laws regulating commercial exploitation of the image of the United States flag. See *Texas v. Johnson, 491 U.S.397, , n. 10 (1989)*; cf. *Halter v. Nebraska, 205 U.S. 34 (1907)*.

[5] *LEdHN[1D]*[↑] [1D]

Today's decision does not affect the extent to which the Government's interest in protecting publicly owned flags might justify special measures on their behalf. See *Spence v. Washington, 418 U.S. 405, 408-409 (1974)*; cf. Johnson,

perceived need to preserve the flag's status [****11] as a symbol of our Nation and certain national ideals. But the mere destruction or disfigurement of a particular physical manifestation of the symbol, without more, does not diminish or otherwise affect the symbol itself in any way. For example, [***295] the secret destruction of a flag in one's own basement would not threaten the flag's recognized meaning. Rather, the Government's desire to preserve the flag as a symbol for certain national ideals is implicated "only when a person's treatment of the flag communicates [a] message" to others that is inconsistent with those ideals. [6] Id., at .

[****12]

[*317] [**2409] *LEdHN[1F]*[↑] [1F]Moreover, the precise language of the Act's prohibitions confirms Congress' interest in the communicative impact of flag destruction. The Act criminalizes the conduct of anyone who "knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag." *18 U.S.C.A. § 700(a)(1) (Supp. 1990)*. Each of the specified terms -- with the possible exception of "burns" -- unmistakably connotes disrespectful treatment of the flag and suggests a focus on those acts likely to damage the flag's symbolic value.

[7] [****13] And the explicit exemption in *§ 700(a)(2)* for disposal of "worn or soiled" flags protects certain acts traditionally associated with patriotic respect for the flag. [8]

As we explained in Johnson, supra, at - : "If we were to hold that a State may forbid flag-burning wherever it is likely to endanger the flag's symbolic role, but allow it wherever burning a flag promotes that role -- as where, for example, a person ceremoniously burns a dirty flag -- we would be . . . permitting a State to 'prescribe what shall be orthodox' by saying that one may burn the flag to convey one's attitude toward it and its referents only if one does not endanger the flag's representation of nationhood and national [***296] unity." Although Congress cast the Flag Protection Act in somewhat broader terms that the Texas statute at issue in Johnson, the Act still suffers from the same fundamental flaw: it suppresses expression out of concern for its likely communicative impact. Despite the Act's wider scope, [*318] its restriction on expression cannot be "'justified without reference to the content of the [****14] regulated speech.'" *Boos, 485 U.S., at 320* (citation omitted); see *Spence v. Washington, 418 U.S. 405, 414*, nn. 8, 9 (1974) (State's interest in protecting the flag's symbolic value is directly related to suppression of expression and thus O'Brien test is inapplicable even where statute declared "simply . . . that nothing may be affixed to or superimposed on a United States flag"). The Act therefore must be subjected to "the most exacting scrutiny," *Boos, supra, at 321*, and for the reasons stated in Johnson, supra, at - , the Government's interest cannot justify its infringement on *First Amendment* rights. We decline the Government's invitation to reassess this conclusion in

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supra, at , n. 8.

[6] Aside from the flag's association with particular ideals, at some irreducible level the flag is emblematic of the Nation as a sovereign entity. Appellant's amicus asserts that the Government has a legitimate non-speech-related interest in safeguarding this "eminently practical legal aspect of the flag, as an incident of sovereignty." Brief for the Speaker and the Leadership Group of the United States House of Representatives [as] Amicus Curiae 25. This interest has firm historical roots: "While the symbolic role of the flag is now well-established, the flag was an important incident of sovereignty before it was used for symbolic purposes by patriots and others. When the nation's founders first determined to adopt a national flag, they intended to serve specific functions relating to our statute as a sovereign nation." Id., at 9; see id., at 5 (noting "flag's 'historic function' for such sovereign purposes as marking 'our national presence in schools, public buildings, battleships and airplanes'") (citation omitted).

LEdHN[1E][↑] [1E]

We concede that the Government has a legitimate interest in preserving the flag's function as an "incident of sovereignty," though we need not address today the extent to which this interest may justify any laws regulating conduct that would thwart this core function, as might a commercial or like appropriation of the image of the United States flag. Amicus does not, and cannot, explain how a statute that penalizes anyone who knowingly burns, mutilates, or defiles any American flag is designed to advance this asserted interest in maintaining the association between the flag and the Nation. Burning a flag does not threaten to interfere with this association in any way; indeed, the flag-burner's message depends in part on the viewer's ability to make this very association.

[7] For example, "defile" is defined as "to make filthy; to corrupt the purity or perfection of; to rob of chastity; to make ceremonially unclean; tarnish; dishonor." Webster's Third New International Dictionary 592 (1976). "Trample" is defined as "to tread heavily so as to bruise, crush, or injure; to inflict injury or destruction; have a contemptuous or ruthless attitude." Id., at 2425.

[8] The Act also does not prohibit flying a flag in a storm or other conduct that threatens the physical integrity of the flag, albeit in an indirect manner unlikely to communicate disrespect.

light of Congress' recent recognition of a purported "national consensus" favoring a prohibition on flag-burning. Brief for United States 27. Even assuming such a consensus exists, 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*.

III

HN2[↑] "'National unity as an end which officials may foster by persuasion and example is not in question.'" Johnson, supra, at , quoting *West Virginia Board of Education [****15] v. Barnette, 319 U.S. 624, 640 (1943)*. Government may create national symbols, promote them, and encourage their respectful treatment. [9] But the Flag Protection Act goes well beyond this by criminally proscribing expressive conduct because of its likely communicative impact.

[**2410] *LEdHN[3]*[↑] [3]We are aware that desecration of the flag is deeply offensive to many. But the same might be said, for example, of virulent ethnic and religious epithets, see *Terminiello v. Chicago, 337 U.S. 1 (1949)*, vulgar repudiations of the draft, see [*319] *Cohen v. California, 403 U.S. 15 (1971)*, and scurrilous caricatures, see *Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988)*.*HN3*[↑] "If there is a bedrock principle underlying the *First Amendment*, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." Johnson, supra, at . Punishing desecration of the flag dilutes the very freedom that [****16] makes this emblem so revered, and worth revering. The judgments are Affirmed.

Questioned
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Tex. v. Johnson

Supreme Court of the United States

March 21, 1989, Argued ; June 21, 1989, Decided

No. 88-155

Reporter
491 U.S. 397 *; 109 S. Ct. 2533 **; 105 L. Ed. 2d 342 ***; 1989 U.S. LEXIS 3115 ****; 57 U.S.L.W. 4770

TEXAS v. JOHNSON

Prior History: [****1] CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS.

Disposition: *755 S. W. 2d 92*, affirmed.

Core Terms

flag, symbol, burning, the First Amendment, desecration, conveyed, message, words, convicted, national unity, preserving, breach of peace, flag desecration, expressive conduct, nationhood, offend, punish, regulation, protest, Street, demonstration, uttering, serious offense, fighting, stars, circumstances, publicly, free expression, suppression, implicated

Case Summary

Procedural Posture

Petitioner State requested a writ of certiorari to examine a decision of the Court of Criminal Appeals of Texas, which reversed the trial court's decision that convicted respondent of desecrating a flag in violation of *Tex. Penal Code Ann. § 42.09(a)(3)* (1989) after he publicly burned an American flag as a means of political protest.

Overview

Respondent participated in a political demonstration where he doused the American flag with kerosene and set it on fire. Respondent was charged and convicted of desecration of the flag. The court of criminal appeals reversed the conviction and held that petitioner could not punish respondent for burning the flag as a part of political speech. Petitioner sought a writ of certiorari to determine whether the conviction was consistent with *U.S. Const. amend. I*. The Supreme Court found that it was not. The Court held that petitioner's interest in preventing breaches of the peace did not support respondent's conviction because his conduct did not threaten to disturb the peace. Additionally, petitioner's interest in preserving the flag as a symbol of nationhood did not justify the criminal conviction for engaging in political expression. The Supreme Court affirmed the decision of the court of criminal appeals.

Outcome

The Supreme Court affirmed the court of criminal appeals' decision when the Court found that petitioner's interest in preventing breaches of the peace did not support respondent's conviction because his conduct did not threaten to disturb peace; petitioner's interest in preserving the flag as a symbol of nationhood did not justify a criminal conviction for engaging in political expression.

Opinion

[*399] [***350] [**2536] JUSTICE BRENNAN delivered the opinion of the Court.

LEdHN[1A][↑] [1A]After publicly burning an American flag as a means of political protest, Gregory Lee Johnson was convicted of desecrating a flag in violation of Texas law. This case presents the question whether his conviction is consistent with the *First Amendment*. We hold that it is not.

I

While the Republican National Convention was taking place in Dallas in 1984, respondent Johnson participated in a political demonstration dubbed the "Republican War Chest Tour." As explained in literature distributed by the demonstrators and [**2537] in speeches made by them, the purpose of this event was to protest the policies of the Reagan administration and of certain Dallas-based corporations. The demonstrators marched through the Dallas streets, chanting political slogans and stopping at several corporate locations [****6] to stage "die-ins" intended to dramatize the consequences of nuclear war. On several occasions they spray-painted the walls of buildings and overturned potted plants, but Johnson himself took no part in such activities. He did, however, accept an American flag handed to him by a fellow protestor who had taken it from a flagpole outside one of the targeted buildings.

The demonstration ended in front of Dallas City Hall, where Johnson unfurled the American flag, doused it with kerosene, and set it on fire. While the flag burned, the protestors chanted: "America, the red, white, and blue, we spit on you." After the demonstrators dispersed, a witness to the flag burning collected the flag's remains and buried them in his backyard. No one was physically injured or threatened with injury, though several witnesses testified that they had been seriously offended by the flag burning.

[*400] Of the approximately 100 demonstrators, Johnson alone was charged with a crime. The only criminal offense with which he was charged was the desecration of a venerated object in violation of *Tex. Penal Code Ann. § 42.09(a)(3)* (1989). [1] After a trial, he was convicted, sentenced to one year in prison, [****7] and fined $ 2,000. The Court of Appeals for the Fifth District of Texas at Dallas affirmed Johnson's conviction, *706 S. W. 2d 120 (1986)*, but the Texas Court of Criminal Appeals reversed, *755 S. W. 2d 92 [***351] (1988)*, holding that the State could not, consistent with the *First Amendment*, punish Johnson for burning the flag in these circumstances.

The Court of Criminal Appeals began by recognizing that Johnson's conduct [****8] was symbolic speech protected by the *First Amendment*: "Given the context of an organized demonstration, speeches, slogans, and the distribution of literature, anyone who observed appellant's act would have understood the message that appellant intended to convey. The act for which appellant was convicted was clearly 'speech' contemplated by the *First Amendment*." *Id., at 95*. To justify Johnson's conviction for engaging in symbolic speech, the State asserted two interests: preserving the flag as a symbol of national unity and preventing breaches of the peace. The Court of Criminal Appeals held that neither interest supported his conviction.

[*401] Acknowledging that this Court had not yet decided whether the Government may criminally sanction flag desecration in order to preserve the flag's symbolic value, the Texas court nevertheless concluded that our decision in *West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943)*, suggested that furthering this interest by curtailing speech was impermissible. "Recognizing that the right to differ is the centerpiece of our *First Amendment* freedoms," the court explained, [****9] "a government cannot mandate by fiat a feeling of unity in its citizens. Therefore, that very same government cannot carve out a symbol of unity and prescribe a set of approved messages to be associated with that symbol when it cannot mandate the status or

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[1] *Texas Penal Code Ann. § 42.09* (1989) provides in full:

"*§ 42.09*. Desecration of Venerated Object

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

"(1) a public monument;

"(2) a place of worship or burial; or

"(3) a state or national flag.

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

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

feeling the symbol [**2538] purports to represent." 755 S. W. 2d, at 97. Noting that the State had not shown that the flag was in "grave and immediate danger," Barnette, supra, at 639, of being stripped of its symbolic value, the Texas court also decided that the flag's special status was not endangered by Johnson's conduct. 755 S. W. 2d, at 97.

As to the State's goal of preventing breaches of the peace, the court concluded that the flag-desecration statute was not drawn narrowly enough to encompass only those flag burnings that were likely to result in a serious disturbance of the peace. And in fact, the court emphasized, the flag burning in this particular case did not threaten such a reaction. "'Serious offense' occurred," the court admitted, "but there was no breach of peace nor does the record reflect that the situation was potentially explosive. [****10] One cannot equate 'serious offense' with incitement to breach the peace." Id., at 96. The court also stressed that another Texas statute, Tex. Penal Code Ann. § 42.01 (1989), prohibited breaches of the peace. Citing Boos v. Barry, 485 U.S. 312 (1988), the court decided that § 42.01 demonstrated Texas' ability to prevent disturbances of the peace without punishing this flag desecration. 755 S. W. 2d, at 96.

[*402] Because it reversed Johnson's conviction on the ground that § 42.09 was unconstitutional as applied to him, the state court did not address Johnson's argument that the statute was, on its face, unconstitutionally vague and overbroad. We granted [***352] certiorari, 488 U.S. 907 (1988), and now affirm.

II

LEdHN[2A][↑] [2A]LEdHN[3A][↑] [3A]Johnson was convicted of flag desecration for burning the flag rather than for uttering insulting words. [2] This fact [*403] somewhat complicates our consideration of his conviction under the First Amendment. We must first determine whether Johnson's burning of the flag constituted expressive conduct, permitting him to invoke the First Amendment [****11] in challenging his conviction. See, e. g., Spence v. Washington, 418 U.S. 405, 409-411 (1974). If [**2539] his conduct was expressive, we next decide whether the State's regulation is related to the suppression of free expression. See, e. g., United States v. O'Brien, 391 U.S. 367, 377 (1968); Spence, supra, at 414, n. 8. If the State's regulation is not related to expression, then the less stringent standard we announced in United States v. O'Brien for regulations of noncommunicative conduct controls. See O'Brien, supra, at 377. If it is, then we are outside of O'Brien's test, and we must ask whether this interest justifies Johnson's conviction under a more demanding standard. [3] See [***353] Spence, supra, at

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[2] Because the prosecutor's closing argument observed that Johnson had led the protestors in chants denouncing the flag while it burned, Johnson suggests that he may have been convicted for uttering critical words rather than for burning the flag. Brief for Respondent 33-34. He relies on Street v. New York, 394 U.S. 576, 578 (1969), in which we reversed a conviction obtained under a New York statute that prohibited publicly defying or casting contempt on the flag "either by words or act" because we were persuaded that the defendant may have been convicted for his words alone. Unlike the law we faced in *Street*, however, the Texas flag-desecration statute does not on its face permit conviction for remarks critical of the flag, as Johnson himself admits. See Brief for Respondent 34. Nor was the jury in this case told that it could convict Johnson of flag desecration if it found only that he had uttered words critical of the flag and its referents.

Johnson emphasizes, though, that the jury was instructed -- according to Texas' law of parties -- that "'a person is criminally responsible for an offense committed by the conduct of another if acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense.'" *Id.*, at 2, n. 2, quoting 1 Record 49. The State offered this instruction because Johnson's defense was that he was not the person who had burned the flag. Johnson did not object to this instruction at trial, and although he challenged it on direct appeal, he did so only on the ground that there was insufficient evidence to support it. 706 S. W. 2d 120, 124 (Tex. App. 1986). It is only in this Court that Johnson has argued that the law-of-parties instruction might have led the jury to convict him for his words alone. Even if we were to find that this argument is properly raised here, however, we would conclude that it has no merit in these circumstances. The instruction would not have permitted a conviction merely for the pejorative nature of Johnson's words, and those words themselves did not encourage the burning of the flag as the instruction seems to require. Given the additional fact that "the bulk of the State's argument was premised on Johnson's culpability as a sole actor," *Ibid.*, we find it too unlikely that the jury convicted Johnson on the basis of this alternative theory to consider reversing his conviction on this ground.

[3] Although Johnson has raised a facial challenge to Texas' flag-desecration statute, we choose to resolve this case on the basis of his claim that the statute as applied to him violates the First Amendment. Section 42.09 regulates only physical conduct with respect to the flag, not the written or spoken

411. A [*404] third possibility is that the State's asserted interest is simply not implicated on these facts, and in that event the interest drops out of the picture. See 418 U.S., at 414, n. 8.

LEdHN[2B][↑] [2B]

[****12] LEdHN[3B][↑] [3B]

[****13] The First Amendment literally forbids the abridgment only of "speech," but we have long recognized that its protection does not end at the spoken or written word. While we have rejected "the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea," United States v. O'Brien, supra, at 376, we have acknowledged that conduct may be "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments," Spence, supra, at 409.

HN2[↑] In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether "[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it." 418 U.S., at 410-411. Hence, we have recognized the expressive nature of students' wearing of black armbands to protest American military involvement in Vietnam, Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 505 (1969); [****14] of a sit-in by blacks in a "whites only" area to protest segregation, Brown v. Louisiana, 383 U.S. 131, 141-142 (1966); of the wearing of American military uniforms in a dramatic presentation criticizing American involvement in Vietnam, Schacht v. United States, 398 U.S. 58 (1970); and of picketing about a wide variety of causes, see, e. g., Food Employees v. Logan Valley Plaza, Inc., 391 U.S. 308, 313-314 (1968); United States v. Grace, 461 U.S. 171, 176 (1983).

Especially pertinent to this case are our decisions recognizing the communicative [**2540] nature of conduct relating to flags. HN3[↑] Attaching a peace sign to the flag, Spence, supra, at 409-410; refusing to salute the flag, Barnette, 319 U.S., at 632; and displaying a red flag, Stromberg v. California, 283 U.S. 359, 368-369 [*405] (1931), we have held, all may find [***354] shelter under the First Amendment. See also Smith v. Goguen, 415 U.S. 566, 588 (1974) (White, [****15] J., concurring in judgment) (treating flag "contemptuously" by wearing pants with small flag sewn into their seat is expressive conduct). That we have had little difficulty identifying an expressive element in conduct relating to flags should not be surprising. The very purpose of a national flag is to serve as a symbol of our country; it is, one might say, "the one visible manifestation of two hundred years of nationhood." Id., at 603 (Rehnquist, J., dissenting). Thus, we have observed:

> HN4[↑] "[T]he flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design." Barnette, supra, at 632.

Pregnant with expressive content, the flag as readily signifies this Nation as does the combination of letters found in "America."

We have not automatically concluded, however, that any action taken with respect to [****16] our flag is expressive. Instead, in characterizing such action for First Amendment purposes, we have considered the context in which it occurred. In *Spence*, for example, we emphasized that Spence's taping of a peace sign to his flag was "roughly simultaneous with and concededly triggered by the Cambodian incursion and the Kent State tragedy." 418 U.S., at 410. The State of Washington had conceded, in fact, that Spence's

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word, and although one violates the statute only if one "knows" that one's physical treatment of the flag "will seriously offend one or more persons likely to observe or discover his action," Tex. Penal Code Ann. § 42.09(b) (1989), this fact does not necessarily mean that the statute applies only to *expressive* conduct protected by the First Amendment. Cf. Smith v. Goguen, 415 U.S. 566, 588 (1974) (White, J., concurring in judgment) (statute prohibiting "contemptuous" treatment of flag encompasses only expressive conduct). A tired person might, for example, drag a flag through the mud, knowing that this conduct is likely to offend others, and yet have no thought of expressing any idea; neither the language nor the Texas courts' interpretations of the statute precludes the possibility that such a person would be prosecuted for flag desecration. Because the prosecution of a person who had not engaged in expressive conduct would pose a different case, and because this case may be disposed of on narrower grounds, we address only Johnson's claim that § 42.09 as applied to political expression like his violates the First Amendment.

HN1[↑] -

conduct was a form of communication, and we stated that "the State's concession is inevitable on this record." *Id., at 409*.

LEdHN[1B][↑] [1B]The State of Texas conceded for purposes of its oral argument in this case that Johnson's conduct was expressive conduct, Tr. of Oral Arg. 4, and this concession seems to us as **[*406]** prudent as was Washington's in *Spence*. Johnson burned an American flag as part -- indeed, as the culmination -- of a political demonstration that coincided with the convening of the Republican Party and its renomination of Ronald Reagan for President. The expressive, overtly political nature of this conduct was both intentional and overwhelmingly apparent. At his trial, Johnson explained his **[****17]** reasons for burning the flag as follows: "The American Flag was burned as Ronald Reagan was being renominated as President. And a more powerful statement of symbolic speech, whether you agree with it or not, couldn't have been made at that time. It's quite a just position [juxtaposition]. We had new patriotism and no patriotism." 5 Record 656. In these circumstances, Johnson's burning of the flag was conduct "sufficiently imbued with elements of communication," *Spence, 418 U.S., at 409*, to implicate the *First Amendment*.

III

LEdHN[4][↑] [4]*HN5*[↑] The government generally has **[***355]** a freer hand in restricting expressive conduct than it has in restricting the written or spoken word. See *O'Brien, 391 U.S. at 376-377*;*Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984)*;*Dallas v. Stanglin, 490 U.S. 19, 25 (1989)*.It may not, however, proscribe particular conduct *because* it has expressive elements. "[W]hat might be **[**2541]** termed the more generalized guarantee of freedom of expression makes the communicative nature of conduct an inadequate *basis* for **[****18]** singling out that conduct for proscription. A law *directed at* the communicative nature of conduct must, like a law directed at speech itself, be justified by the substantial showing of need that the *First Amendment* requires." *Community for Creative Non-Violence v. Watt, 227 U. S. App. D. C. 19, 55-56, 703 F. 2d 586, 622-623 (1983)* (Scalia, J., dissenting) (emphasis in original), rev'd *sub nom. Clark v. Community for Creative Non-Violence, supra.* It is, in short, not simply the verbal or nonverbal nature of the expression, but the governmental **[*407]** interest at stake, that helps to determine whether a restriction on that expression is valid.

HN6[↑] Thus, although we have recognized that where "'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on *First Amendment* freedoms," *O'Brien, supra, at 376*, we have limited the applicability of *O'Brien*'s relatively lenient standard to those cases in which "the governmental interest **[****19]** is unrelated to the suppression of free expression." *Id., at 377*; see also *Spence, supra, at 414, n. 8*. In stating, moreover, that *O'Brien*'s test "in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions," *Clark, supra, at 298*, we have highlighted the requirement that the governmental interest in question be unconnected to expression in order to come under *O'Brien*'s less demanding rule.

LEdHN[1C][↑] [1C]In order to decide whether *O'Brien*'s test applies here, therefore, we must decide whether Texas has asserted an interest in support of Johnson's conviction that is unrelated to the suppression of expression. If we find that an interest asserted by the State is simply not implicated on the facts before us, we need not ask whether *O'Brien*'s test applies. See *Spence, supra, at 414, n. 8*. The State offers two separate interests to justify this conviction: preventing breaches of the peace and preserving the flag as a symbol of nationhood and national unity. We hold that the first interest is not implicated **[****20]** on this record and that the second is related to the suppression of expression.

A

LEdHN[1D][↑] [1D] *LEdHN[5A]*[↑] [5A]Texas claims that its interest in preventing breaches of the peace justifies Johnson's conviction **[***356]** for flag desecration. [4] **[*408]** However, no disturbance of the

[4] Relying on our decision in *Boos v. Barry, 485 U.S. 312 (1988)*, Johnson argues that this state interest is related to the suppression of free expression within the meaning of *United States v. O'Brien, 391 U.S. 367 (1968)*. He reasons that the violent reaction to flag burnings feared by Texas would be the result of the message conveyed by them, and that this fact connects the State's interest to the suppression of expression. Brief for Respondent 12, n. 11. This view has found some favor in the lower courts. See *Monroe v. State Court of Fulton County, 739 F. 2d 568, 574-575 (CA11 1984)*. Johnson's

peace actually occurred or threatened to occur because of Johnson's burning of the flag. Although the State stresses the disruptive behavior of the protestors during their march toward City Hall, Brief for Petitioner 34-36, it admits that "no actual breach of the peace occurred at the time of the flagburning or in response to the flagburning." *Id., at 34*. The State's emphasis on the protestors' disorderly actions prior to arriving at City Hall is not only somewhat **[**2542]** surprising given that no charges were brought on the basis of this conduct, but it also fails to show that a disturbance of the peace was a likely reaction to *Johnson's* conduct. The only evidence offered by the State at trial to show the reaction to Johnson's actions was the testimony of several persons who had been seriously offended by the flag burning. *Id.*, at 6-7.

LEdHN[5B][↑] [5B]

[**21]** The State's position, therefore, amounts to a claim that an audience that takes serious offense at particular expression is necessarily likely to disturb the peace and that the expression may be prohibited on this basis. [5] Our precedents do not countenance such a presumption. On the contrary, they recognize that *HN7*[↑] a principal "function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or **[*409]** even stirs people to anger." *Terminiello v. Chicago, 337 U.S. 1, 4 (1949)*. See also *Cox v. Louisiana, 379 U.S. 536, 551 (1965)*; *Tinker* v. *Des Moines Independent Community School Dist. 393 U.S., at 508-509*; *Coates v. Cincinnati, 402 U.S. 611, 615 (1971)*; *Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55-56 (1988)*. It would be odd indeed to conclude *both* that "if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional **[****22]** protection," *FCC v. Pacifica Foundation, 438 U.S. 726, 745 (1978)* (opinion of Stevens, J.), *and* that the government may ban the expression of certain disagreeable ideas on the unsupported presumption that their very disagreeableness will provoke violence.

HN8[↑] Thus, we have not permitted the government to assume that every **[***357]** expression of a provocative idea will incite a riot, but have instead required careful consideration of the actual circumstances surrounding such expression, asking whether the expression "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)* (reviewing circumstances surrounding rally and speeches by Ku Klux Klan). To accept Texas' arguments **[****23]** that it need only demonstrate "the potential for a breach of the peace," Brief for Petitioner 37, and that every flag burning necessarily possesses that potential, would be to eviscerate our holding in *Brandenburg*. This we decline to do.

Nor does Johnson's expressive conduct fall within that small class of "fighting words" that are "likely to provoke the average person to retaliation, and thereby cause a breach of the peace." *Chaplinsky v. New Hampshire, 315 U.S. 568, 574 (1942)*. No reasonable onlooker would have regarded Johnson's generalized expression of dissatisfaction with the policies of the Federal Government as a direct personal insult or an invitation to exchange fisticuffs. See *id., at 572-573*; *Cantwell v. Connecticut, 310 U.S. 296, 309 (1940)*; *FCC v. Pacifica Foundation, supra, at 745* (opinion of Stevens, J.).

[*410] We thus conclude that the State's interest in maintaining order is not implicated on these facts. The State need not worry that our holding will disable it from preserving the peace. We do not suggest that the *First* **[****24]** *Amendment* forbids a State to prevent "imminent lawless action." *Brandenburg, supra, at 447*. And, in fact, Texas already has a statute specifically prohibiting breaches of the peace, *Tex. Penal Code Ann. § 42.01* (1989), which tends to confirm that Texas need not punish this flag desecration in order to keep the peace. See *Boos v. Barry, [**2543] 485 U.S., at 327-329*.

B

The State also asserts an interest in preserving the flag as a symbol of nationhood and national unity. In *Spence*, we acknowledged that the government's interest in preserving the flag's special symbolic value "is directly related to expression in the context of activity" such as affixing a peace symbol to a flag. *418 U.S., at 414, n. 8*. We are equally persuaded that this

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theory may overread *Boos* insofar as it suggests that a desire to prevent a violent audience reaction is "related to expression" in the same way that a desire to prevent an audience from being offended is "related to expression." Because we find that the State's interest in preventing breaches of the peace is not implicated on these facts, however, we need not venture further into this area.

[5] There is, of course, a tension between this argument and the State's claim that one need not actually cause serious offense in order to violate *§ 42.09*. See Brief for Petitioner 44.

interest is related to expression in the case of Johnson's burning of the flag. The State, apparently, is concerned that such conduct will lead people to believe either that the flag does not stand for nationhood and national unity, but instead reflects other, less positive concepts, or that the concepts reflected in the flag do not in fact exist, that is, [****25] that we do not enjoy unity as a Nation. These concerns blossom only when a person's treatment of the flag communicates some message, and thus are related "to the suppression of free expression" within the meaning of *O'Brien*. We are thus outside of *O'Brien*'s test altogether.

IV

It remains to consider whether the [***358] State's interest in preserving the flag as a symbol of nationhood and national unity justifies Johnson's conviction.

LEdHN[1E][↑] [1E]LEdHN[6][↑] [6]As in *Spence*, "[w]e are confronted with a case of prosecution for the expression of an idea through activity," and "[a]ccordingly, we must examine with particular care the interests [*411] advanced by [petitioner] to support its prosecution." *418 U.S., at 411*. Johnson was not, we add, prosecuted for the expression of just any idea; he was prosecuted for his expression of dissatisfaction with the policies of this country, expression situated at the core of our *First Amendment* values. See, *e. g., Boos v. Barry, supra, at 318; Frisby v. Schultz, 487 U.S. 474, 479 (1988)*.

Moreover, Johnson was prosecuted because he knew that his politically [****26] charged expression would cause "serious offense." If he had burned the flag as a means of disposing of it because it was dirty or torn, he would not have been convicted of flag desecration under this Texas law: federal law designates burning as the preferred means of disposing of a flag "when it is in such condition that it is no longer a fitting emblem for display," HN9[↑] 36 U. S. C. § 176(k), and Texas has no quarrel with this means of disposal. Brief for Petitioner 45. The Texas law is thus not aimed at protecting the physical integrity of the flag in all circumstances, but is designed instead to protect it only against impairments that would cause serious offense to others. [6] Texas concedes as much: "*Section 42.09(b)* reaches only those severe acts of physical abuse of the flag carried out in a way likely to be offensive. The statute mandates intentional or knowing abuse, that is, the kind of mistreatment that is not innocent, but rather is intentionally designed to seriously offend other individuals." *Id., at 44*.

[****27] LEdHN[1F][↑] [1F]LEdHN[7A][↑] [7A]Whether Johnson's treatment of the flag violated Texas law thus depended on the likely communicative impact of his expressive conduct. [7] Our decision in *Boos v. Barry, [**2544] supra*, [*412] tells us that this restriction on Johnson's expression is [***359] content based. In *Boos*, we considered the constitutionality of a law prohibiting "the display of any sign within 500 feet of a foreign embassy if that sign tends to bring that foreign government into 'public odium' or 'public disrepute.'" *Id., at 315*. Rejecting the argument that the law was content neutral because it was justified by "our international law obligation to shield diplomats from speech that offends their dignity," *id., at 320*, we held that HN10[↑] "[t]he emotive impact of speech on its audience is not a 'secondary effect'" unrelated to the content of the expression itself. *Id., at 321* (plurality opinion); see also *id., at 334* (Brennan, J., concurring in part and

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[6] Cf. *Smith v. Goguen, 415 U.S., at 590-591* (Blackmun, J., dissenting) (emphasizing that lower court appeared to have construed state statute so as to protect physical integrity of the flag in all circumstances); *id., at 597-598* (Rehnquist, J., dissenting) (same).

[7] Texas suggests that Johnson's conviction did not depend on the onlookers' reaction to the flag burning because *§ 42.09* is violated only when a person physically mistreats the flag in a way that he "*knows* will seriously offend one or more persons likely to observe or discover his action." *Tex. Penal Code Ann. § 42.09(b)* (1989) (emphasis added). "The 'serious offense' language of the statute," Texas argues, "refers to an individual's intent and to the manner in which the conduct is effectuated, not to the reaction of the crowd." Brief for Petitioner 44. If the statute were aimed only at the actor's intent and not at the communicative impact of his actions, however, there would be little reason for the law to be triggered only when an audience is "likely" to be present. At Johnson's trial, indeed, the State itself seems not to have seen the distinction between knowledge and actual communicative impact that it now stresses; it proved the element of knowledge by offering the testimony of persons who had in fact been seriously offended by Johnson's conduct. *Id., at 6-7*. In any event, we find the distinction between Texas' statute and one dependent on actual audience reaction too precious to be of constitutional significance. Both kinds of statutes clearly are aimed at protecting onlookers from being offended by the ideas expressed by the prohibited activity.

concurring in judgment).

LEdHN[1G] [1G] LEdHN[7B] [7B]

[****28] According to the principles announced in *Boos*, Johnson's political expression was restricted because of the content of the message he conveyed. HN11 We must therefore subject the State's asserted interest in preserving the special symbolic character of the flag to "the most exacting scrutiny." *Boos v. Barry, supra, at 321*. [8]

[****29] [*413] Texas argues that its interest in preserving the flag as a symbol of nationhood and national unity survives this close analysis. Quoting extensively from the writings of this Court chronicling the flag's historic and symbolic role in our society, the State emphasizes the "'special place'" reserved for the flag in our Nation. Brief for Petitioner 22, quoting *Smith v. Goguen, 415 U.S., at 601* (Rehnquist, J., dissenting). The State's argument is not that it has an interest simply in maintaining the flag as a symbol of *something*, no matter what it symbolizes; indeed, if that were the State's position, it would be difficult to see how that interest is endangered by highly symbolic conduct such as Johnson's. Rather, the State's claim is that it has an interest in preserving the flag as a symbol of *nationhood* and *national unity*, a symbol with a determinate range of meanings. Brief for Petitioner 20-24. According to Texas, if one physically treats the flag in a way that would tend to cast doubt on either the idea that nationhood and national unity are the flag's referents or that national unity actually exists, the message conveyed [****30] thereby is a harmful one and therefore may be prohibited. [9]

[*414] [***360] [**2545] LEdHN[8] [8] HN12 If there is a bedrock principle underlying the *First Amendment*, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. See, *e. g., Hustler Magazine, Inc. v. Falwell, 485 U.S., at 55-56*; [****31] *City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984); Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 65, 72 (1983); Carey v. Brown, 447 U.S. 455, 462-463 (1980); FCC v. Pacifica Foundation, 438 U.S., at 745-746; Young v. American Mini Theatres, Inc., 427 U.S. 50, 63-65, 67-68 (1976)* (plurality opinion); *Buckley v. Valeo, 424 U.S. 1, 16-17 (1976); Grayned v. Rockford, 408 U.S. 104, 115 (1972); Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95 (1972); Bachellar v. Maryland, 397 U.S. 564, 567 (1970); O'Brien, 391 U.S., at 382; Brown v. Louisiana, 383 U.S., at 142-143; Stromberg v. California, 283 U.S., at 368-369*.

We have not recognized an exception to this principle even where our flag has been involved. In *Street v. New York, 394 U.S. 576 (1969)*, [****32] we held that a State may not criminally punish a person for uttering words critical of the flag. Rejecting the argument that the conviction could be sustained on the ground that Street had "failed to show the respect for our national symbol which may properly be demanded of every citizen," we concluded that "the constitutionally guaranteed 'freedom to be intellectually . . . diverse or even contrary,' and the 'right to differ as to things that touch the heart of the existing order,' encompass the freedom to express publicly one's opinions about our flag, including those opinions which are defiant or contemptuous." *Id., at 593*, quoting *Barnette, 319 U.S., at 642*. Nor may the government, we have held, compel conduct that would evince respect for the flag. "To sustain the compulsory flag salute we are required to say that a *Bill of Rights* which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind." *Id., at 634*.

[8] Our inquiry is, of course, bounded by the particular facts of this case and by the statute under which Johnson was convicted. There was no evidence that Johnson himself stole the flag he burned, Tr. of Oral Arg. 17, nor did the prosecution or the arguments urged in support of it depend on the theory that the flag was stolen. *Ibid.* Thus, our analysis does not rely on the way in which the flag was acquired, and nothing in our opinion should be taken to suggest that one is free to steal a flag so long as one later uses it to communicate an idea. We also emphasize that Johnson was prosecuted *only* for flag desecration -- not for trespass, disorderly conduct, or arson.

[9] Texas claims that "Texas is not endorsing, protecting, avowing or prohibiting any particular philosophy." Brief for Petitioner 29. If Texas means to suggest that its asserted interest does not prefer Democrats over Socialists, or Republicans over Democrats, for example, then it is beside the point, for Johnson does not rely on such an argument. He argues instead that the State's desire to maintain the flag as a symbol of nationhood and national unity assumes that there is only one proper view of the flag. Thus, if Texas means to argue that its interest does not prefer *any* viewpoint over another, it is mistaken; surely one's attitude toward the flag and its referents is a viewpoint.

[*415] LEdHN[9][↑] [9]In holding in *Barnette* that the Constitution did not leave this course open to the government, [****33] Justice Jackson described one of our society's defining principles in words deserving of their frequent repetition: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id., at 642*. In *Spence*, we held that the same interest asserted by Texas here was insufficient to support a criminal conviction under a flag-misuse statute for the taping of a peace sign to an American flag. "Given the protected character of [Spence's] expression [***361] and in light of the fact that no interest the State may have in preserving the physical integrity of a privately owned flag was significantly impaired on these facts," we held, "the conviction must be invalidated." *418 U.S., at 415*. See also *Goguen, supra, at 588* (White, J., concurring in judgment) (to convict person who had sewn a flag onto the seat of his pants for "contemptuous" treatment of the flag would be "[t]o convict not to protect [****34] the physical integrity or to protect against acts interfering with the proper use of the flag, but to punish for communicating ideas unacceptable to the controlling majority in the legislature").

LEdHN[1H][↑] [1H]In short, HN13[↑] nothing in our precedents suggests that a State may foster its own view of the flag by prohibiting expressive conduct [**2546] relating to it. [10] To bring its argument outside our [*416] precedents, Texas attempts to convince us that even if its interest in preserving the flag's symbolic role does not allow it to prohibit words or some expressive conduct critical of the flag, it does permit it to forbid the outright destruction of the flag. The State's argument cannot depend here on the distinction between written or spoken words and nonverbal conduct. That distinction, we have shown, is of no moment where the nonverbal conduct is expressive, as it is here, and where the regulation of that conduct is related to expression, as it is here. See *supra, at 402-403*. In addition, both *Barnette* and *Spence* involved expressive conduct, not only verbal communication, and both found that conduct protected.

[****35] LEdHN[10][↑] [10]Texas' focus on the precise nature of Johnson's expression, moreover, misses the point of our prior decisions: their enduring lesson, that the government may not prohibit expression simply because it disagrees with its message, is not dependent on the particular mode in which one chooses to express an idea. [11] If we were to hold that a State may forbid flag burning wherever it is likely to endanger the [***362] flag's symbolic role, but allow it wherever burning a flag promotes that role -- as where, for example, a person ceremoniously burns a dirty flag -- we would be saying that when it comes to impairing the flag's physical integrity, the flag itself may be used as [*417] a symbol -- as a substitute for the written or spoken word or a "short cut from mind to mind" -- only in one direction. We would be permitting a State to "prescribe what shall be orthodox" by saying that one may burn the flag to convey one's attitude toward it and its referents only if one does not endanger the flag's representation of nationhood and national unity.

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[10] Our decision in *Halter v. Nebraska, 205 U.S. 34 (1907)*, addressing the validity of a state law prohibiting certain commercial uses of the flag, is not to the contrary. That case was decided "nearly 20 years before the Court concluded that the *First Amendment* applies to the States by virtue of the *Fourteenth Amendment*." *Spence v. Washington, 418 U.S. 405, 413, n. 7 (1974)*. More important, as we continually emphasized in *Halter* itself, that case involved purely commercial rather than political speech. *205 U.S., at 38, 41, 42, 45*.

Nor does *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee, 483 U.S. 522, 524 (1987)*, addressing the validity of Congress' decision to "authoriz[e] the United States Olympic Committee to prohibit certain commercial and promotional uses of the word 'Olympic,'" relied upon by The Chief Justice's dissent, *post*, at 429, even begin to tell us whether the government may criminally punish physical conduct towards the flag engaged in as a means of political protest.

[11] The Chief Justice's dissent appears to believe that Johnson's conduct may be prohibited and, indeed, criminally sanctioned, because "his act . . . conveyed nothing that could not have been conveyed and was not conveyed just as forcefully in a dozen different ways." *Post*, at 431. Not only does this assertion sit uneasily next to the dissent's quite correct reminder that the flag occupies a unique position in our society -- which demonstrates that messages conveyed without use of the flag are not "just as forceful[l]" as those conveyed with it -- but it also ignores the fact that, in *Spence, supra*, we "rejected summarily" this very claim. See *418 U.S., at 411, n. 4*.

[****36] We never before have held that the Government may ensure that a symbol be used to express only one view of that symbol or its referents. Indeed, in *Schacht* v. *United States*, we invalidated a federal statute permitting an actor portraying a member of one of our Armed Forces to "'wear the uniform of that armed force if the portrayal does not tend to discredit that armed force.'" *398 U.S., at 60*, quoting *10 U. S. C. § 772(f)*. This proviso, we held, "which leaves Americans free to praise the war in Vietnam but can send persons like Schacht to prison for opposing it, cannot survive in a country which has the *First Amendment*." *Id., at 63*.

We perceive no basis on which to hold that the principle underlying our decision in *Schacht* does not apply to this case. To conclude that the government may permit [**2547] designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernible or defensible boundaries. Could the government, on this theory, prohibit the burning of state flags? Of copies of the Presidential seal? Of the Constitution? [****37] In evaluating these choices under the *First Amendment*, how would we decide which symbols were sufficiently special to warrant this unique status? To do so, we would be forced to consult our own political preferences, and impose them on the citizenry, in the very way that the *First Amendment* forbids us to do. See *Carey v. Brown, 447 U.S., at 466-467*.

There is, moreover, no indication -- either in the text of the Constitution or in our cases interpreting it -- that a separate juridical category exists for the American flag alone. Indeed, we would not be surprised to learn that the persons [*418] who framed our Constitution and wrote the Amendment that we now construe were not known for their reverence for the Union Jack. The *First Amendment* does not guarantee that other concepts virtually sacred to our Nation as a whole -- such as the principle that discrimination on the basis of race is odious and destructive -- will go unquestioned in the market-place of ideas. See *Brandenburg v. Ohio, 395 U.S. 444 (1969)*. *HN14*[↑] We decline, therefore, to create for the flag an exception to the joust of principles protected by [****38] the *First Amendment*.

LEdHN[1I][↑] [1I]It is not the State's ends, but its means, to which we object. It cannot be gainsaid that there is a special place reserved for the flag in this Nation, and thus we do not doubt that the government has a legitimate interest in making efforts to "preserv[e] the national flag as an [***363] unalloyed symbol of our country." *Spence, 418 U.S., at 412*.We reject the suggestion, urged at oral argument by counsel for Johnson, that the government lacks "any state interest whatsoever" in regulating the manner in which the flag may be displayed. Tr. of Oral Arg. 38. Congress has, for example, enacted precatory regulations describing the proper treatment of the flag, see 36 U. S. C. §§ 173-177, and we cast no doubt on the legitimacy of its interest in making such recommendations. To say that the government has an interest in encouraging proper treatment of the flag, however, is not to say that it may criminally punish a person for burning a flag as a means of political protest. "National unity as an end which officials may foster by persuasion and example is not in question. The problem is whether [****39] under our Constitution compulsion as here employed is a permissible means for its achievement." *Barnette, 319 U.S., at 640*.

We are fortified in today's conclusion by our conviction that forbidding criminal punishment for conduct such as Johnson's will not endanger the special role played by our flag or the feelings it inspires. To paraphrase Justice Holmes, we submit that nobody can suppose that this one gesture of an unknown [*419] man will change our Nation's attitude towards its flag. See *Abrams v. United States, 250 U.S. 616, 628 (1919)* (Holmes, J., dissenting). Indeed, Texas' argument that the burning of an American flag "'is an act having a high likelihood to cause a breach of the peace,'" Brief for Petitioner 31, quoting *Sutherland v. DeWulf, 323 F. Supp. 740, 745 (SD Ill. 1971)* (citation omitted), and its statute's implicit assumption that physical mistreatment of the flag will lead to "serious offense," tend to confirm that the flag's special role is not in danger; if it were, no one would riot or take offense because a flag had been burned.

We are tempted to say, in [****40] fact, that the flag's deservedly cherished place in our community will be strengthened, not weakened, by our holding today. Our decision is a reaffirmation of the principles of freedom and inclusiveness that the flag best reflects, and of the conviction that our toleration of criticism such as Johnson's is a sign [**2548] and source of our strength. Indeed, one of the proudest images of our flag, the one immortalized in our own national anthem, is of the bombardment it survived at Fort McHenry. It is the Nation's resilience, not its rigidity, that Texas sees reflected in the flag -- and it is that resilience that we reassert today.

The way to preserve the flag's special role is not to

punish those who feel differently about these matters. It is to persuade them that they are wrong. "To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, [****41] to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." [***364] *Whitney v. California, 274 U.S. 357, 377 (1927)* (Brandeis, J., concurring). And, precisely because it is our flag that is involved, one's response to the flag [*420] burner may exploit the uniquely persuasive power of the flag itself. We can imagine no more appropriate response to burning a flag than waving one's own, no better way to counter a flag burner's message than by saluting the flag that burns, no surer means of preserving the dignity even of the flag that burned than by -- as one witness here did -- according its remains a respectful burial. We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents.

V

Johnson was convicted for engaging in expressive conduct. The State's interest in preventing breaches of the peace does not support his conviction because Johnson's conduct did not threaten to disturb the peace. Nor does the State's interest in preserving the flag as a symbol of nationhood and national unity justify his criminal conviction [****42] for engaging in political expression. The judgment of the Texas Court of Criminal Appeals is therefore

Affirmed.

GENERAL COLIN L. POWELL, USA (RET)
909 NORTH WASHINGTON STREET, SUITE 767
ALEXANDRIA, VIRGINIA 22314

MAY 18, 1999

The Honorable Patrick Leahy
United States Senate
Washington, DC 10510-4502

Dear Senator Leahy,

Thank you for your recent letter asking my views on the proposed flag protection amendment.

I love our flag, our Constitution and our country with a love that has no bounds. I defended all three for 35 years as a soldier and was willing to give my life in their defense.

Americans revere their flag as a symbol of the Nation. Indeed, it is because of that reverence that the amendment is under consideration. Few countries in the world would think of amending their Constitution for the purpose of protection such a symbol.

We are rightfully outraged when anyone attacks or desecrates our flag. Few Americans do such things and when they do they are subject to the rightful condemnation of their fellow citizens. They may be destroying a piece of cloth, but they do no damage to our system of freedom which tolerates such desecration.

If they are destroying a flag that belongs to someone else, that's a prosecutable crime. If it is a flag they own, I really don't want to amend the Constitution to prosecute someone for foolishly desecrating their own property. We should condemn them and pity them instead.

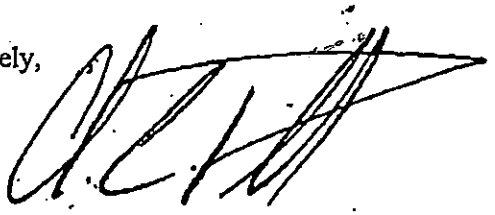
I understand how strongly so many of my fellow veterans and citizens feel about the flag and I understand the powerful sentiment in state legislatures for such an amendment. I feel the same sense of outrage. But I step back from amending the Constitution to relieve that outrage. The First Amendment exists to insure that freedom of speech and expression applies not just to that with which we agree or disagree, but also that which we find outrageous.

I would not amend that great shield of democracy to hammer a few miscreants. The flag will be flying proudly long after they have slunk away.

Finally, I shudder to think of the legal morass we will create trying to implement the body of law that will emerge from such an amendment.

If I were a member of Congress, I would not vote for the proposed amendment and would fully understand and respect the views of those who would. For or against, we all love our flag with equal devotion.

Sincerely,



P.S. The attached 1989 article by a Vietnam POW gave me further inspiration for my position.

Committee Report

General Court of New Hampshire - Bill Status System

Docket of CACR19

Docket Abbreviations

Bill Title: relating to the American flag. Providing that no person shall burn an American flag except as a dignified means of disposing of a worn or damaged flag.

Official Docket of **CACR19.:**

Date	Body	Description
1/8/2020	S	To Be **Introduced** 01/08/2020 and Referred to Election Law and Municipal Affairs; **SJ 2**
1/8/2020	S	**Hearing:** 01/16/2020, Room 102, LOB, 10:00 am; **SC 2**
6/17/2020	S	Removed from the Consent List; 06/16/2020; **SJ 8**
6/16/2020	S	Without Objection, take up at the present time, MA, 06/16/2020; **SJ 8**
6/16/2020	S	Sen. Birdsell Moved Ought to Pass; 06/16/2020; **SJ 8**
6/16/2020	S	Sen. Hennessey Moved Laid on Table, **RC** 13Y-10N, MA; 06/16/2020; **SJ 8**
6/16/2020	S	Pending Motion Ought to Pass; 06/16/2020; **SJ 8**

NH House	NH Senate

Other Referrals

Senate Inventory Checklist for Archives

Bill Number: CACR 19 **Senate Committee:** Election Law + Municipal Affairs

Please include all documents in the order listed below and indicate the documents which have been included with an "X" beside

X Final docket found on Bill Status

Bill Hearing Documents: {Legislative Aides}

X Bill version as it came to the committee

X All Calendar Notices

X Hearing Sign-up sheet(s)

X Prepared testimony, presentations, & other submissions handed in at the public hearing

X Hearing Report

N/A Revised/Amended Fiscal Notes provided by the Senate Clerk's Office

Committee Action Documents: {Legislative Aides}

All amendments considered in committee (including those not adopted):

____ - amendment # _____ ____ - amendment # _____

____ - amendment # _____ ____ - amendment # _____

N/A Executive Session Sheet

N/A Committee Report

Floor Action Documents: {Clerk's Office}

All floor amendments considered by the body during session (only if they are offered to the senate):

____ - amendment # _____ ____ - amendment # _____

____ - amendment # _____ ____ - amendment # _____

Post Floor Action: (if applicable) {Clerk's Office}

____ Committee of Conference Report (if signed off by all members. Include any new language proposed by the committee of conference):

____ Enrolled Bill Amendment(s)

____ Governor's Veto Message

All available versions of the bill: {Clerk's Office}

____ as amended by the senate ____ as amended by the house

____ final version

Completed Committee Report File Delivered to the Senate Clerk's Office By:

T. Mullo
Committee Aide

8/10/20
Date

Senate Clerk's Office _____