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IN Texas v. Johnson,1 the United States Supreme Court held that Gregory Johnson’s conviction for burning an American flag in political protest violated his first amendment right to free speech.2 The ruling caused a coast-to-coast uproar;3 hordes of politicians4 immediately began to press for a constitutional amendment and/or statute banning flag desecration,5 while others rallied to defend what they perceived to be the Court’s unqualified defense of political dissent.6

1. 109 S. Ct. 2533 (1989). Johnson was a 5-4 decision. Justices Scalia, Marshall, and Blackmun joined the majority opinion which was written by Justice Brennan. Justice Kennedy concurred “without reservation.” Id. at 2548 (Kennedy, J., concurring); Chief Justice Rehnquist dissented with an opinion in which Justices White and O’Connor joined. Id. at 2548-55 (Rehnquist, C.J., dissenting); Justice Stevens dissented separately. Id. at 2555-57 (Stevens, J., dissenting).

2. Id. at 2548. The first amendment’s provision for freedom of speech has been applied to the states through the fourteenth amendment since the 1920s. See Near v. Minnesota, 283 U.S. 697 (1931); Fiske v. Kansas, 274 U.S. 380 (1927); Gitlow v. New York, 268 U.S. 652 (1925); W. VAN ALSTYNE, INTERPRETATIONS OF THE FIRST AMENDMENT 43 (1984).


4. See N.Y. Times, Oct. 20, 1989, at A16, col. 1 (“The first impassioned days after the Supreme Court’s ruling, lawmakers lined up in the House and the Senate to denounce flag burning and the Court’s decision.”).

5. Even before the Supreme Court ruled in Johnson, one commentator argued that the Court has exceeded its authority in liberalizing the application of the Bill of Rights, thus resulting in an effort by the political majority to “restore” the laws through constitutional amendments. See Markman, The Jurisprudence of Constitutional Amendments, in STILL THE LAW OF THE LAND? ESSAYS ON CHANGING INTERPRETATIONS OF THE CONSTRUCTION 79-96 (J. McNamara & L. Rothe eds. 1987).


6. The following statement appeared in the Miami Herald: “Rather than pass any bill at all, Congress should have defended the Supreme Court decision. . . . [T]he President and the Congress apparently were eager to stand up for the flag, but were unwilling to stand up for the principles that the flag itself stands for.” A Log on the Fire, Miami Herald, Oct. 15, 1989, at C2, col. 2.
Johnson crystallized the conflict between those who would preserve the physical integrity of the flag, even at the cost of narrower first amendment protections, and those who would defend with equal vehemence their first amendment freedom to dissent, even by burning the flag. That so many people would perceive a conflict between the flag and the Constitution it represents is ironic; even more ironic is the popular perception that the controversy between flag sanctifiers and first amendment defenders is a battle between the patriotic and the blasphemous.

The ideal resolution of this clash would be a recognition that the flag represents the freedoms enumerated in the Bill of Rights, but that the right to dissent—even by burning the flag—is one of those freedoms and consequently should be protected. Carving out an exception to first amendment freedom of speech for flag misuse does no honor to the flag; rather, it creates a dangerous precedent likely to spawn further exceptions to an essential freedom. Permitting protesters to burn flags does nothing to destroy the flag’s power as a symbol. Indeed, freedom to burn the flag enhances the flag’s symbolic power, since the government’s refusal to retain absolute control over the use of its symbols underscores its commitment to freedom of thought. The Supreme Court in Johnson said as much: “We are tempted to say, in fact, that the flag’s deservedly cherished place in our community will be strengthened, not weakened, by our holding today.”

Nevertheless, Johnson has resulted in confusion, partly because of the controversy it generated and partly because of the limiting language found in footnote three of the opinion. This language, which has been characterized as a loophole, has led some scholars to claim that Johnson does not protect all instances of the use of the flag in political protest. Until the Supreme Court clarifies its holding, the government will continue to prosecute those who desecrate the flag.

7. Id.
9. Id. at 2547.
10. Id. at 2538-39 n.3. The Court chose to restrict its ruling to the issue of Gregory Johnson’s first amendment rights under the Texas statute. The Court expressly chose not to decide whether persons who desecrated the flag without expressing an idea could be prosecuted. Id. For the text of footnote three, see infra note 148.
11. See Tribe, Give Old Glory a Break: Protect It—And Ideas, N.Y. Times, July 3, 1989, at A18 (“Properly understood, the Court’s decision upheld no right to desecrate the flag, even in political protest, but merely required that Government protection of the flag be separated from Government suppression of detested views.”). Testifying before the House Judiciary Subcommittee, Professor Walter Dellinger stated, “[A] simple act of Congress ‘protecting the physical
This Note demonstrates how, despite the controversy, Johnson fits within a pattern of first amendment jurisprudence established by the Supreme Court, a pattern by which the Supreme Court found Texas' two interests—prevention of breach of the peace and protection of the flag as symbol—insufficient to override Gregory Johnson's first amendment rights. The Note briefly discusses the loophole created by footnote three of Johnson and highlights the controversy and political maneuvering which has resulted in a new federal flag protection statute. Finally, this Note argues that, by failing to state unequivocally in Johnson that the government may not compel respect for the symbols it establishes, the Supreme Court's level of protection fell short of the constitutional standards for protected speech established by the Court.

I. THE FACTS: GREGORY JOHNSON BURNS A FLAG

On August 22, 1984, in Dallas, Texas, Gregory Johnson burned an American flag as part of a demonstration against the Reagan Administration and several Dallas-based corporations. The Republican Party was holding its national convention, so Johnson and his fellow demonstrators were assured of publicity. The flag burning culmi-
nated a march during which the demonstrators chanted, spray-painted buildings, overturned potted plants, and staged "die-ins" calculated to impress onlookers with the consequences of nuclear war.\textsuperscript{16} Johnson took no part in the vandalism; however, he accepted an American flag stolen by another protestors, doused the flag with kerosene, and set it on fire in front of the arena where the Republican National Convention was meeting.\textsuperscript{17}

Approximately one hundred people participated in the various protest activities, but no one was physically injured or threatened with injury.\textsuperscript{18} Only Gregory Johnson was arrested; he was charged not with theft or vandalism, but with desecration of a venerated object in violation of section 42.09 of the Texas Penal Code.\textsuperscript{19}

Johnson was tried, convicted, and sentenced to a year in prison and a $2,000 fine.\textsuperscript{20} He appealed, arguing that the Texas statute was unconstitutionally vague, overbroad, and violative of his right to free speech under the first and fourteenth amendments.\textsuperscript{21} The Texas Court of Appeals affirmed the lower court conviction. It rejected Johnson’s vagueness argument, finding the relevant statutory terms "deface" and "damage" to be well-understood terms.\textsuperscript{22} The court also rejected Johnson’s argument that the statute was overbroad, reasoning that the statute "in no way prohibited legitimate protest activities."\textsuperscript{23} Finding that Johnson’s conduct was indeed the equivalent of political speech, and was likely to be understood by onlookers as a political expression, the court applied first amendment scrutiny to Johnson’s claim.\textsuperscript{24} It concluded that Texas’ interests in preventing breaches of

\begin{footnotesize}
\begin{enumerate}
\item[16.] Id.
\item[17.] Id. An offended spectator retrieved the charred remnants of the flag and buried them in his back yard. Id.
\item[18.] Id. at 2537. However, several witnesses testified that they had been "seriously offended by the flag burning." Id.
\item[19.] Id. The statute under which Johnson was prosecuted reads:

Section 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.

\item[20.] Johnson, 109 S. Ct. at 2537.
\item[22.] Id.
\item[23.] Id.
\item[24.] Id. at 123.
\end{enumerate}
\end{footnotesize}
the peace and protecting the flag as a symbol of national unity justified abridging Johnson's right to dissent. According to the court, such an abridgement was permissible because flag desecration is so inherently inflammatory that a state may forbid it to prevent a breach of the peace. The court held also that a state has a legitimate right to preserve the flag as a symbol of national unity.

On appeal, the Texas Court of Criminal Appeals disagreed with those conclusions, and reversed the trial court and lower appellate court. Addressing Texas' breach of peace interest, the Court of Criminal Appeals found the statute so broad that the state could use it to punish protected conduct not apt to result in a breach of the peace; the court added that Johnson's acts had not threatened such a breach.

The court then rejected Texas' second argument, that the state has a legitimate interest in preserving the flag as a symbol of national unity. Distinguishing the facts of *West Virginia Board of Education v. Barnette*, the Court analogized Texas' interest in the flag as a symbol of national unity to West Virginia's goal of national unity in requiring children to salute the flag. The court noted that *Barnette* requires that a state interest be in "grave and immediate danger" to warrant abridging an activity protected by the first amendment.

25. *Id.* at 123-24.
26. *Id.* at 123. On the same day Johnson burned an American flag, demonstrators elsewhere in Dallas burned a foreign flag; that particular flag burning resulted in a brawl. Johnson v. Texas, 755 S.W.2d 92, 94 n.3 (Tex. Crim. App. 1988), aff'd sub. nom. Texas v. Johnson, 109 S. Ct. 2533 (1989). No one involved in the foreign flag burning, which resulted in violence, was arrested under the Texas statute, *id.*, despite the fact that the Texas statute provides that desecration of any "national flag" is an offense. TEX. PENAL CODE ANN. § 42.09 (Vernon 1989).


28. *Johnson* 755 S.W.2d at 98.
29. *Id.* at 96.
30. *Id.* at 97. The court did not declare that the statute was, on its face, unconstitutionally vague and overbroad, but only that it was unconstitutional as applied to Johnson's first amendment rights. *Id.*; see also Texas v. Johnson, 109 S. Ct. 2533, 2539 (1989).

31. *Johnson*, 755 S.W.2d at 96.
32. 319 U.S. 624 (1943).
33. *Johnson*, 755 S.W.2d at 95.
34. *Id.* at 97. The *Barnette* Court stated:

The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a "rational basis" for adopting. But freedoms of speech and
determine whether the state's interest meets this requirement, the court would examine the propriety of the interest and compare it to the immediacy of the danger to that interest. Finding that no danger was present to the flag as a symbol, the court rejected Texas' second interest, reversed the lower decisions, and held that Texas could not use the flag protection statute to punish flag desecration "when such conduct falls within the protection of the First Amendment."

Warning that the State cannot control expression associated with the flag, the court added:

Recognizing that the right to differ is at the centerpiece of our First Amendment freedoms, a government cannot mandate by fiat a feeling of unity in its citizens. Therefore, that very same government cannot carve out a symbol of unity and prescribe a set of approved messages to be associated with that symbol when it cannot mandate the status or feeling the symbol purports to represent.

The court chose not to address the question of whether the statute could be used to prohibit acts of flag desecration deemed not to be speech under the first amendment.

The Texas statute survived, but the court had severely curtailed its usefulness. Texas appealed and the U.S. Supreme Court granted certiorari; then, to the shock and outrage of many, the Supreme Court affirmed the reversal of Johnson's conviction.

II. THE RELEVANT DOCTRINES

Texas v. Johnson is not the first case in which the Supreme Court has dealt with flag misuse. In each of the previous cases, though, the Court was able to decriminalize the disputed conduct without directly addressing the question of whether flag desecration as protest is constitutionally protected. In 1969, for example, the Court reversed a flag
burner's conviction in *Street v. New York* because of the possibility that he was convicted for *words* he spoke while committing the act. The Court did not address the constitutionality of flag burning in political protest. Five years later, in *Spence v. Washington*, the Court reversed the conviction of a protestor who had displayed a flag upside down with a peace symbol affixed. The Court noted that the appellant had not been charged under the desecration statute, nor had he "permanently" destroyed or disfigured the flag. Finally, in *Smith v. Goguen*, the Court ruled that a person who had worn a small flag sewn to the seat of his pants could not be punished for casting contempt on the flag, on the basis that the proscription was void for vagueness.

In *Texas v. Johnson*, however, the issue of whether burning a flag in protest is protected speech was squarely presented. Many people were shocked by the Supreme Court's decision in *Johnson*; yet, the constitutional standards used by the Court to reverse Gregory Johnson's conviction were neatly in place long before the flagburning occurred. In fact, only by ignoring precedent could the Supreme Court have ruled otherwise. A brief outline of the first amendment doctrines upon which the Supreme Court relied in *Johnson* demonstrates the reasoning behind the Court's decision.

### A. The Pure Speech Standard: Brandenburg v. Ohio

*Brandenburg v. Ohio* established the modern standard for the protection of pure speech: a state may outlaw speech only when that

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41. *Id.* at 590.
42. *Id.* at 594.
44. *Id.* at 415.
46. *Id.* at 582.
47. One commentator predicted in 1975 that flag desecration statutes purporting to prohibit ideological acts would be declared unconstitutional. See Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482, 1502-03 (1975). Another commentator predicted that case law would permit the Court to hold that "all noncommercial, unorthodox use of the flag is protected by the first amendment." See Note, *Flag Misuse and the First Amendment: Spence v. Washington*, 50 Wash. L. Rev. 169, 170 (1974). The actual holding of *Johnson* is not so broad, however, and appears to be consistent with the philosophy of Professor Leahy, who stated that in flag misuse cases the right of free expression clashes with "governmental interests which require protection." Leahy, *Flamboyant Protest: The First Amendment and the Boston Tea Party*, 36 Brooklyn L. Rev. 185, 205 (1970). Professor Leahy exhorts legislators to draw statutes narrowly so as not to unnecessarily infringe upon first amendment rights. *Id.* at 211.
49. Pure speech may be defined as expression which is free of overt actions. As Justice
speech is directed to "inciting or producing imminent lawless action and is likely to produce such action." This stringent test demands not only that the speaker direct his listeners to perform unlawful acts, but that the performance of the unlawful acts be imminent. Unless the conditions of this test are met, the speech is protected under the first amendment. The Brandenburg standard thus presents a nearly insurmountable obstacle to government prosecution for speech. Nevertheless, the Brandenburg strictures can be avoided: under United States v. O'Brien, the government may impose restrictions when the speech is symbolic and the State has a legitimate interest in regulat-

Douglas explained, "The line between what is permissible and not subject to control and what may be made impermissible and subject to regulation is the line between ideas and overt acts." Brandenburg, 395 U.S. at 456 (Douglas, J., concurring). Symbolic speech, however, may be "akin to pure speech" and thus protected under the first amendment. Tinker v. Des Moines Indep. School Dist., 393 U.S. 503, 505-06 (1969) (wearing of armbands in symbolic protest within the protection of the first amendment).

50. Brandenburg, 395 U.S. at 447. This immediacy requirement incorporates the "clear and present danger" requirement articulated by the Court in Schenck v. United States, 249 U.S. 47, 52 (1919) and eloquently defined eight years later by Justice Brandeis as an "incidence of . . . evil so imminent that it may befal before there is opportunity for full discussion." Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). Note, however, that Justice Brandeis' high standards were not incorporated into first amendment jurisprudence until relatively recently. The Court found clear and present danger in Schenck, and upheld the conviction of World War I protesters who distributed pamphlets urging citizens to resist the draft. Schenck, 249 U.S. at 53. In Debs v. United States, 249 U.S. 211, 217 (1919), the Court upheld the conviction of Eugene Debs, a socialist presidential candidate who had merely given an antiwar speech to a general audience. One scholar commented that convicting Debs was "somewhat as though George McGovern had been sent to prison for his criticism of the [Vietnam] war." Kalven, Ernest Freund and the First Amendment Tradition, 40 U. Chi. L. Rev. 235, 237 (1973).

51. In Brandenburg, 395 U.S. at 446, the Court decriminalized the speech of a Ku Klux Klan member who threatened "revengeance" at a filmed rally. The speech was "mere advocacy", id. at 449, and was thus protected by the first amendment, since the threatened violence was not imminent. Id. For further discussion on imminent danger of violence as a restriction on free speech, see infra note 111.

52. For example, in Hess v. Indiana, 414 U.S. 105 (1973), the Court reversed the conviction of a protestor who yelled, as the police cleared the street of demonstrators "We'll take the fucking street later" or "We'll take the fucking street again." Id. at 107. Citing Brandenburg, the Court held that the threatened illegal activity was not imminent: Hess' speech was, "at worst, . . . nothing more than advocacy of illegal action at some indefinite future time." Id. at 108.

Even more strikingly, in NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982), the Court declared that boycott organizer Charles Evers' public statements that boycott violators' "necks would be broken" and that the "sheriff could not sleep with boycott violators at night," id. at 927, were protected by the first amendment, id. at 929, even though violence against boycott violators subsequently occurred, id. at 897. Perhaps Evers would have been liable, the Court said, if "unlawful conduct [had] in fact followed within a reasonable period." Id. at 926. The violence occurred "weeks or months" after Evers' speech. Id. at 928. There was "no evidence—apart from the speeches themselves—that Evers authorized, ratified, or directly threatened acts of violence." Id. at 929.


54. Symbolic speech exists when "'speech' and 'nonspeech' elements are combined in the
ing the conduct involved.\footnote{55}{O'Brien, 391 U.S. at 376-77.} Under \textit{Cantwell v. Connecticut},\footnote{56}{310 U.S. 296 (1940).} the government may intervene when listeners or observers react so violently to the message that an uncontrollable breach of peace is imminent.\footnote{57}{Id. at 308.}

\section*{B. The Symbolic Speech Standard: United States v. O'Brien}

\textit{United States v. O'Brien}\footnote{58}{391 U.S. 367 (1967).} permits the states to regulate expressive conduct under the following conditions: (1) the regulation must be within the government's constitutional power; (2) the regulation must further an important or substantial government interest; (3) that interest must not be related to the suppression of free expression; and (4) the resulting restriction of expression must be no greater than necessary to further that interest.\footnote{59}{Id. at 377.}

David O'Brien was convicted for burning his draft card.\footnote{60}{Id. at 370 (O'Brien wished to influence others to "adopt his antiwar beliefs.").} Despite the obvious political message of his act, the Supreme Court affirmed his conviction because the government could establish a legitimate interest—"assuring the continuing availability of issued Selective Service certificates"—that did not relate to the suppression of free expression.\footnote{61}{Id. at 382.} The Court thus separated the \textit{conduct} element of the offense from its \textit{speech} element and declared that O'Brien was convicted for the "noncommunicative element of his conduct, and for nothing else."\footnote{62}{Id. at 382-83.} The Court rejected O'Brien's argument that the actual purpose of the draft card statute was to suppress freedom of speech\footnote{63}{Id. at 383.} and refused to "strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."\footnote{64}{Tex. v. Johnson, 109 S. Ct. 2533, 2542 (1989).}

Burning a flag in protest bears a striking resemblance to burning a draft card in protest; however, the \textit{Johnson} Court did not find that Texas had based its prosecution on any conduct separable from the speech element of Johnson's flag burning. Instead, the Court held that the prosecution of Johnson, unlike the prosecution of O'Brien, was aimed solely at suppressing the expression.\footnote{65}{Texas v. Johnson, 109 S. Ct. 2533, 2542 (1989).}
C. The Breach of Peace Interest as a Limitation on Freedom of Speech

Another way the government may avoid the Brandenburg limitation on the State's authority to restrict speech is by establishing that the speaker was inciting a serious breach of the peace. In Cantwell v. Connecticut,66 the Court held that the State's legitimate interest in preserving order must be weighed against the speaker's right to express himself freely.67 Newton Cantwell, a Jehovah's Witness, had so offended two Catholics by playing a recording of an anti-Catholic diatribe that they were "tempted to strike [him] unless he went away."68 Cantwell obliged them by going away,69 however, and since no "clear and present menace to public peace and order"70 existed, the Court reversed Cantwell's conviction for invoking or inciting others to breach the peace.71

The Court refined the Cantwell balancing test in Terminiello v. Chicago,72 which involved a more explosive situation.73 Terminiello gave a speech in a closed auditorium while a furious mob raged outside.74 Imparting some remarkable tidbits of inflammatory "information," Terminiello said, among other things, that Eleanor Roosevelt and

66. 310 U.S. 296 (1940).
67. Id. at 307. The Court thus introduced a balancing test for situations in which the speaker incites listeners to breach of the peace.

The use of this test in a first amendment context has been roundly criticized. In Dennis v. United States, 341 U.S. 494, 497 (1951), Communist party members were convicted of advocating overthrow of the government. No imminent danger of breach of the peace existed; nevertheless, the Court balanced the weight of a perceived evil—the advocacy of violent overthrow of the government—against the right of the citizens involved to speak freely. Id. at 509. The weight of the perceived evil tipped the scale. Id. at 511. One commentator charged that Dennis ignored central first amendment values by permitting suppression virtually without evidence of any actual or imminent danger. See W. VAN ALSTYNE, supra note 2, at 35. Justice Douglas wrote that Dennis distorted the clear and present danger test beyond recognition. See Brandenburg v. Ohio, 395 U.S. 444, 453 (1969) (Douglas, J., concurring). Professor Ely argued that "balancing tests inevitably become intertwined with the ideological predispositions of those doing the balancing." Ely, supra note 47, at 1501 (citing McKay, The Preference for Freedom, 34 N.Y.U. L. REV. 1182, 1203-12 (1959)). In his dissent to Konigsberg v. State Bar, 366 U.S. 36 (1961), Justice Black declared that the "First Amendment's unequivocal command . . . shows that the men who drafted our Bill of Rights did all the 'balancing' that was to be done in this field." Id. at 61 (Black, J., dissenting).
68. Cantwell, 310 U.S. at 303.
69. Id.
70. Id. at 311.
71. Id. at 303.
72. 337 U.S. 1 (1949).
73. Id. at 14.
74. Id. at 2-3. Terminiello was compared by his admirers to Father Coughlin, a well-known demagogue. Id. at 14 (Jackson, J., dissenting).
Henry Wallace advocated communist revolution, and that the "howling mob outside" wished to instigate rape, murder, and slavery. Despite the danger of the situation and Terminiello's deliberate exacerbation of that danger, the Court reversed his conviction for breach of the peace, declaring that while the freedom to speak is not absolute, it is protected unless shown likely to produce "a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest."

The Terminiello decision was a powerful statement in favor of untrammeled expression. However, only two years later in Feiner v. New York, the Court found that a "clear and present danger" existed when a speaker made derogatory remarks about President Truman and urged African-Americans to fight for their civil rights. The perceived danger there consisted of traffic obstruction, the crowd's mixed reactions, and one man's threat to do violence "if the police did not act." A police officer arrested Feiner when he refused to end his speech. Affirming Feiner's conviction, the Supreme Court cited Cantwell: "When clear and present danger of riot, disorder, interference with traffic upon the public streets or other immediate threat to public safety, peace, or order, appears, the power of the state to prevent or punish is obvious."

A subsequent case, Gregory v. Chicago, involved a school desegregation march. Although the marchers were orderly, the police were

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75. Id. at 18 (Jackson, J., dissenting).
76. Id.
77. Id. at 4.
78. Justice Jackson warned, though, that "if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact." Id. at 37 (Jackson, J., dissenting). Justice Jackson maintained that the choice is not between order and liberty: "It is between liberty with order and anarchy without either." Id.
80. Id. at 317.
81. Id.
82. Id.
83. Id. at 318.
able to restrain, "within decent and orderly bounds," hecklers hostile to the marchers.\textsuperscript{85} After the marchers ignored a police order to disband, they were arrested and convicted of disorderly conduct.\textsuperscript{86} The Court reversed the conviction on narrow grounds, holding that the city had brought the wrong charge.\textsuperscript{87} Despite the narrow ruling, \textit{Gregory} limited the State's perogative under \textit{Cantwell} to restrict speech by requiring a greater showing of potential crowd violence.

In contrast to \textit{Cantwell}, \textit{Terminiello}, and \textit{Gregory}, all of which involved at least some threat of violence, stands \textit{Cohen v. California}.\textsuperscript{88} \textit{Cohen} illustrates the Court's position on speech that lacks such a threat. Cohen expressed his political sentiments in a novel way: he wore a jacket bearing the words "Fuck the Draft."\textsuperscript{89} Rejecting the argument that Cohen's mode of expression was too outrageously offensive to be borne, the Court reversed his conviction and tersely suggested that onlookers might "effectively avoid further bombardment of their sensibilities simply by averting their eyes."\textsuperscript{90}

III. \textit{Texas v. Johnson}: The Supreme Court Opinion

The State attempted to avoid the protective \textit{Brandenburg} standard by arguing, first, that it had a legitimate interest in preventing breaches of the peace,\textsuperscript{91} and second, that it had a legitimate interest in

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    \item his commitment to freedom of speech, but added that "[t]he constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy." \textit{Id.} at 125 (Black, J., concurring) (quoting Cox v. Louisiana, 379 U.S. 536, 554 (1965)).
    \item \textit{Id.} at 117 (Black, J., concurring).
    \item \textit{Id.} at 112.
    \item \textit{Id.} at 112-13. The Court stated that the conviction for disorderly conduct lacked evidentiary support and violated due process. The proper charge would have been "refusal to obey a police officer," the Court said, noting that neither the ordinance nor the charge defined disorderly conduct as the refusal to obey a police officer. Presumably, if either ordinance or charge had so defined disorderly conduct, the conviction might have been affirmed.
    \item In passing, the Court added that the trial judge's charge independently required reversal because it permitted the jury to convict for acts clearly entitled to first amendment protection. \textit{Id.} at 113 (citing Stromberg v. California, 283 U.S. 359 (1931)). The jury had been instructed to "ignore questions concerning the acts of violence committed by the crowd of onlookers and attempts made by the police to arrest those directly responsible for them." \textit{Id.} at 122-23 (Black, J., concurring). The jury was allowed to convict if it found that the marchers had made an "improper noise" or a "diversion tending to a breach of the peace," or had "collect[ed] in bodies or crowds for unlawful purposes, or for any purpose, to the annoyance or disturbance of other persons." \textit{Id.} at 122. The Court could not let such a jury instruction stand. When evidence of onlooker violence is central to the question of whether those who incited it will be prosecuted, a jury cannot be permitted to ignore that evidence.
    \item 403 U.S. 15 (1971).
    \item \textit{Id.} at 16.
    \item \textit{Id.} at 21.
\end{itemize}
preserving the flag as a symbol of national unity. The Supreme Court, like the Texas Court of Appeals, rejected both interests.

The Court first focused on the dichotomy between speech and conduct: under Brandenburg, constitutionally permissible prosecution for pure speech is rare, but conduct, even though it may express an idea, is not so strongly protected. Johnson's conviction, like that of the draft card burner in O'Brien, purportedly resulted from what he did rather than what he said. Texas hoped to establish that its case against Johnson fit into the O'Brien requirements, i.e., that prohibiting flag desecration was legitimately within its power; that the statute was aimed not at suppression of speech, but at the prohibition of conduct; and that the statute was narrowly tailored to achieve that goal. Texas failed. The Court concluded that Texas' interest in preserving the flag as a symbol of national unity was indeed aimed at the suppression of speech and that the O'Brien standard did not apply.

A. Preventing Breaches of the Peace

The Court then analyzed Texas' claim that its interest in preventing a breach of the peace justified its conviction of Johnson. In keeping with precedent, the Court considered the sufficiency of this interest as a matter of fact rather than declaring that, as a matter of law, the state may not silence speakers to prevent violence by others. This breach of peace exception to the right of free expression is extremely narrow—so narrow, in fact, that it is surprising that Texas even invoked it in this case. The entire breach of peace line of cases since Cantwell stands for the proposition that the state may prohibit speech only when onlooker violence beyond police control is imminent.

92. Id.
93. Texas conceded for the purposes of oral argument that Johnson's conduct was "symbolic speech." Id.
95. Cf. Street v. New York, 394 U.S. 576, 594 (1969) (reversing the appellant’s conviction on the ground that he may have been punished for his words).
96. Johnson, 109 S. Ct. at 2541. The State's concerns arise "only when a person's treatment of the flag communicates some message." Id. at 2542.
97. Id. at 2542 ("We are thus outside of O'Brien's test altogether.").
98. Id. at 2541.
99. See, e.g., Cantwell v. Connecticut, 310 U.S. 296 (1940) (holding that the facts did not justify the conviction of the speaker); Feiner v. New York, 340 U.S. 315 (1951) (holding that the facts justified the speaker's conviction when sufficient disruption was shown).
100. Johnson, 109 S. Ct. at 2541.
101. See Cantwell, 310 U.S. at 296 (discussed supra text accompanying notes 66-71); see also Terminiello v. Chicago, 337 U.S. 1 (1949) (discussed supra text accompanying notes 72-77); Gregory v. Chicago, 394 U.S. 111 (1969) (discussed supra text accompanying notes 84-87).
Texas’ breach of peace argument was a weak one, and the Supreme Court, like the Texas Court of Criminal Appeals, quickly disposed of it.\textsuperscript{102} The only evidence Texas could offer of imminent danger to the public peace was several persons’ testimony that the flag burning had seriously offended them.\textsuperscript{103} Quoting \textit{Terminiello}, the Court declared that “a function of free speech under our system of government is to invite dispute. Free speech may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.”\textsuperscript{104} The Court added that it has not “permitted the Government to assume that every expression of a provocative idea will incite a riot, but [has] instead required careful consideration of the actual circumstances surrounding the expression.”\textsuperscript{105} Unless the State can prove “imminent lawless action,”\textsuperscript{106} it may not legitimately argue that it suppressed speech only to prevent a breach of the peace.\textsuperscript{107}

The Court then ruled that Johnson’s expression did not come within the “fighting words” exception\textsuperscript{108} to the right of free expression since it was not within that small class of fighting words that are likely to provoke the average person to retaliation, thereby causing a breach of the peace.\textsuperscript{109} Johnson’s expression was general, rather than the direct personal insult required by \textit{Chaplinsky v. New Hampshire}.\textsuperscript{110}

\textbf{B. Texas’ Second Interest: Preserving the Flag as a National Symbol}

Having rejected Texas’ attempt to constitutionalize a “heckler’s veto,”\textsuperscript{111} the Supreme Court turned to Texas’ second argument, that

\textsuperscript{102} The Court found it contradictory to conclude \textit{both} that the offensiveness of the speaker’s opinion is a reason for according it constitutional protection and that the government may ban the expression of disagreeable ideas on the presumption that their very disagreeableness will provoke violence. \textit{Johnson}, 109 S. Ct. at 2541.

\textsuperscript{103} \textit{Id.}

\textsuperscript{104} \textit{Id.} (quoting \textit{Terminiello v. Chicago}, 337 U.S. 1, 4 (1949)).

\textsuperscript{105} \textit{Id.} at 2542.

\textsuperscript{106} \textit{Id.} (quoting Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)).

\textsuperscript{107} \textit{Id.; cf. United States v. Cary, No. 88-5458 (8th Cir. 1990) (affirming the conviction of a flag burner on facts which established that the government had a legitimate interest in preserving the peace).}

\textsuperscript{108} Under \textit{Chaplinsky v. New Hampshire}, 315 U.S. 568 (1942), inflammatory words of “personal insult” directed at a specific person are not constitutionally protected.

\textsuperscript{109} \textit{Johnson}, 109 S. Ct. at 2542.

\textsuperscript{110} \textit{Chaplinsky}, 315 U.S. at 569. In \textit{Chaplinsky}, the Court affirmed the conviction of a speaker who had told a local marshal that he was a “God damned Racketeer” and a “damned Fascist.” \textit{Id.}

\textsuperscript{111} In \textit{Brown v. Louisiana}, 383 U.S. 131 (1966), the Supreme Court reversed the breach of peace convictions of five African-Americans who had refused a police order to leave a segre-
the State possessed a legitimate interest in preserving the flag as a symbol of "nationhood and national unity." The Court first determined that this asserted interest ran afoul of O'Brien's requirement that a legitimate government interest in suppressing symbolic conduct be "unrelated to the suppression of free expression." Next, the Court found that the statute restricted expression based on the expression's communicative impact and was therefore "content-based" and unconstitutional under Boos v. Barry.

In Boos, the Court had examined a statute prohibiting, within 500 feet of a foreign embassy, any sign that "tends to bring that foreign government into 'public odium' or 'public disrepute.'" The Boos Court held that the statute was "content-based"—aimed at the suppression of expression—rather than "content-neutral"—aimed at an interest legitimately within government control—because the expression's emotional impact on its audience was not a secondary effect independent of the expression itself. Texas' restriction of Johnson's expression, like the unconstitutional restriction in Boos, depended upon the "likely communicative impact of his expressive conduct." Therefore, Texas' interest in preserving the flag as a symbol by shielding citizens from expression derogatory to the flag was subjected to exacting scrutiny.

Texas' interest was bound to fail this test, since the Court's analysis had exposed the State's purpose in prosecuting Johnson: Texas deemed the message conveyed by flag burning to be harmful; therefore, Texas deemed it suppressible. The Court declared that a state

gated public library. The court noted that orderly demonstrators are "not chargeable with the danger . . . that their critics might react with disorder or violence." Id. at 133 n.1 (citing KALVEN, THE NEGRO AND THE FIRST AMENDMENT 140-60 (1965) (on "the problem of the 'heckler's veto."))); see also Stone, Content-Regulation and the First Amendment, 25 WM. & MARY L. REv. 189, 215 (1983) (discussing the Supreme Court's "reluctance to accept the 'heckler's veto').

112. Johnson, 109 S. Ct. at 2542.
113. Id. at 2541.
114. 485 U.S. 312 (1988). Boos was a plurality opinion written by Justice O'Connor, with two justices concurring and five justices concurring in part. Justice Kennedy took no part in the consideration of the case.
115. Id.
116. Id. at 321.
117. Johnson, 109 S. Ct. at 2543 (footnote omitted). Texas argued that its statute's "serious offense" provision applied to the intent of the desecrator rather than to the reaction of his audience. Id. at 2543 n.7. However, the Court recognized that at trial Texas had not seen the distinction between intent and actual communicative impact. Id. The Court found, in any event, such a distinction "too precious to be of constitutional significance." Id.
118. Id. at 2543 (quoting Boos, 485 U.S. at 321).
119. Id. at 2544; see Baker, Scope of the First Amendment Freedom of Speech, 25 U.C.L.A. L. REv. 964, 998 (1978) (noting that suppression "to protect people from harms that result because the listener adopts certain perceptions . . . disrespects the responsibility of the listener").
cannot prosecute for such a purpose, because "[i]f 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." The flag, it concluded, is not an exception to this principle.

Thus Johnson's expressive conduct was protected by decades of first amendment jurisprudence: given its political context, Johnson's conduct was clearly symbolic speech, and not subject to an exception under O'Brien; Johnson did not use "fighting words," which must bear the character of personal insult, so Chaplinsky did not apply; and there was neither an explosive crowd reaction nor misbehavior on Johnson's part that Texas could offer to justify stepping in to prevent a breach of the peace under Cantwell. The Court concluded that Texas' actual motivation for prosecuting Johnson was that it simply did not like what he had to say, and sought to silence him.

Had the Court accepted as valid Texas' interest in preventing a breach of peace, the statute might have obtained the Cantwell "breach of peace" exception to Brandenburg's direct incitement requirement. Had the Court accepted Texas' interest in preserving the flag as a symbol of national unity, the O'Brien standard, which allows narrowly-tailored restriction of conduct that frustrates a legitimate governmental interest, would have applied, again relieving Texas of the necessity of confronting the Brandenburg limitations. However, the Supreme Court—like the Texas Court of Criminal Appeals before it—accepted neither of Texas' asserted interests as a legitimate basis for prosecuting Johnson.

Justice Kennedy concurred "without reservation," but wrote separately to emphasize the "painful" nature of the decision. Despite

120. Johnson, 109 S. Ct. at 2544.
121. Id.
122. Where a serious danger of uncontrollable violence exists, the speaker need not have urged the mob to commit violence before the government may restrict his speech; rather, he may be prosecuted if he inflames a mob to the danger point and then refuses a police order to desist from further speech. Feiner v. New York, 340 U.S. 315, 321 (1951) ("[T]he imminence of greater disorder coupled with petitioner's deliberate defiance of the police officers convince us that we should not reverse this conviction in the name of free speech."). But see Gregory v. Chicago, 394 U.S. 111 (1969) (police may not arrest peaceful and orderly demonstrators who refuse to disperse); Terminiello v. Chicago, 337 U.S. 1, 4 (1949) ("[Free speech] may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.").
123. United States v. O'Brien, 391 U.S. 367, 377 (1968) (holding that government may prescribe expressive conduct where: (1) the regulation falls within the constitutional power of the government; (2) it furthers a "substantial government interest" unrelated to the suppression of expression; and (3) the "incidental restriction" on expression is "no greater than is essential" to the furtherance of the government interest).
the "enormity" of Johnson's offense, Justice Kennedy wrote, the first amendment dictated that he go free, for "'[i]t is poignant but fundamental that the flag protects those who hold it in contempt.'"\(^{125}\)

C. The Dissenting Opinions

In his dissent, Chief Justice Rehnquist set the indignant tone of subsequent critics of the majority opinion. He quoted the entire first verse of "The Star Spangled Banner,"\(^{126}\) compared flag burning to "murder, embezzlement, [and] pollution,"\(^{127}\) and quoted line after line of some of the most unabashedly sentimental poetry our nation has produced.\(^{128}\) He chronicled the history of the flag in exhaustive detail and included a jibe at the "civics lesson" in the majority opinion.\(^{129}\) He also paid tribute to the soldiers who have fought under the flag, and cited veterans' horror at the sacrilege of flag burning.\(^{130}\) The Chief Justice would have accepted Texas' interest in protecting the symbolic value of the flag. After all, he declared, when the government enacts flag protection statutes, it is "simply recognizing ... the profound regard for the American flag" that already exists.\(^{131}\)

\(^{125}\) Id.

\(^{126}\) Id. at 2549 (Rehnquist, C.J., dissenting). The first verse of the National Anthem is:

Oh! say can you see by the dawn's early light,
What so proudly we hailed at the twilight's last gleaming?
Whose broad stripes and bright stars, thro' the perilous fight,
O'er the ramparts we watched were so gallantly streaming?
And the rockets' red glare, the bombs bursting in air,
Gave proof through the night that our flag was still there.
Oh! say does that star-spangled banner yet wave
O'er the land of the free and the home of the brave?

Lyrics by Francis Scott Key, melody composed by John Stafford Smith.

\(^{127}\) Johnson, 109 S. Ct. at 2555 (Rehnquist, C.J., dissenting).

\(^{128}\) Id. at 2550 (Rehnquist, C.J., dissenting) (quoting John Greenleaf Whittier's poem, "Barbara Frietchie": "'Shoot if you must, this old grey head,/But spare your country's flag,' she said."). One may convincingly argue that this poem about an old woman courageously waving her flag in the face of a Rebel army is a tribute to the woman, not to the flag. Certainly the Rebel commander who declined to lock horns with Barbara Frietchie admired her courage, but since he chose to continue in his rebellion against the United States, he evidently experienced no change of heart in regard to the flag. Gallantry, not patriotism, won the day for Barbara Frietchie.

\(^{129}\) Id. at 2555 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist's swipe at the Court's "regrettably patronizing civics lecture," id., is remarkable in view of the history and poetry lessons in which his dissent indulges.

\(^{130}\) Id. at 2550-51 (Rehnquist, C.J., dissenting). Some veterans, though, have made it clear that they do not subscribe to Chief Justice Rehnquist's brand of patriotism. To protest the new flag protection statute, a group of Vietnam veterans burned 1,000 flags, citing their loyalty to the first amendment and their opposition to "forced patriotism." Pensacola News J., Oct. 29, 1989, at 3A, col. 1. The veterans' flag burning ceremony was not the only one triggered by the passage of the flag protection statute. Id.

\(^{131}\) Johnson, 109 S. Ct. at 2555.
Justice Rehnquist also would have accepted Texas' breach of peace rationale. Comparing flag burning to the "fighting words" a state may prohibit under *Chaplinsky*, he declared that flag burning is undoubtedly expressive, but, as with fighting words, flag burning is "so inherently inflammatory that it may cause a breach of public order." Therefore, the states should be permitted to prohibit it.\(^{132}\)

Thus, the Chief Justice would construe *Chaplinsky* to cover not only direct personal insult, but also other expression—such as flag burning—that is "inherently" inflammatory, even when, as in *Johnson*, no evidence exists that any breach of the peace was actually threatened.\(^{134}\) Perhaps the Chief Justice meant to limit the recommended proscription of "inherently" inflammatory conduct to flag burning, since the flag, in his view, is not "just another symbol."\(^{135}\) However, his broad reading of *Chaplinsky* would open the door to prosecution of any expression deemed "inherently" offensive, whether or not actual danger threatened, thus eviscerating *Brandenburg* and returning first amendment jurisprudence to the state that existed at the time of *Schenck* and *Debs*.\(^{136}\)

Justice Stevens also dissented, arguing that sanctioning the public desecration of the flag would "tarnish [the flag's] value—both for those who cherish the ideas for which it waves and for those who desire to don the robes of martyrdom by burning it."\(^{137}\) Drawing a line between the message and the medium, he added that the concept of "desecration" does not turn on the substance of the message the actor intends to convey, but rather on whether those who view the act will take serious offense. *Johnson* does not deal with disagreeable ideas, he concluded, but rather with disagreeable conduct that diminishes the value of an "important national asset."\(^{138}\)

Searching for a legitimate government interest to justify Johnson's conviction, the dissenting Justices compared burning a flag to defacing the Lincoln Memorial\(^{139}\) and the Washington Monument.\(^{140}\) Yet,

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132. *Id.* at 2553 (Rehnquist, C.J., dissenting) (emphasis added).
133. *Id.*
134. *Id.* at 2541.
135. *Id.* at 2555 (Rehnquist, C.J., dissenting).
136. *See supra* note 50.
137. *Johnson*, 109 S. Ct. at 2556 (Stevens, J., dissenting).
138. *Id.* at 2557. Justice Stevens also invoked the names of Patrick Henry, Susan B. Anthony, Abraham Lincoln, Nathan Hale, and Booker T. Washington. The invocation of Patrick Henry's name is ironic, since Henry, an Anti-Federalist, fought to defeat the very Constitution that the Court now expounds. L. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* 107-10 (1986). Henry helped delay Virginia's ratification of the Bill of Rights for nearly two years. *Id.* at 86-89.
140. *Id.* at 2556 (Stevens, J., dissenting).
even those uninitiated into the legal intricacies regarding expressive conduct will recognize that this argument is flawed: in protecting monuments, the government has a legitimate interest unrelated to the suppression of speech—the cost and trouble of sandblasting.\textsuperscript{141} Moreover, monuments are government property, whereas the government does not similarly own the innumerable copies of the flag.\textsuperscript{142} The dissent's comparison of a unique public monument to "the" flag simply does not withstand scrutiny. Additionally, Chief Justice Rehnquist's emphasizing that Gregory Johnson burned a flag "stolen from its rightful owner"\textsuperscript{143} fails to make a valid point. Theft was not an issue in this case; Johnson was convicted of desecration.\textsuperscript{144} Texas would not necessarily have foregone prosecuting Johnson had he bought the flag he burned, kept the receipt in his pocket, and produced it for the officials.

Critics of the \textit{Johnson} opinion are motivated by ideological anger at those who do not share their brand of patriotism. These critics, both judicial and political,\textsuperscript{145} have appealed to the hearts of the American people; the resulting emotionalism has led many people to believe that an exception to the first amendment should be made.\textsuperscript{146} And despite the \textit{Johnson} majority's paean to freedom of speech and stated refusal to "dilute the freedom that [the flag] represents,"\textsuperscript{147} the opinion may

\begin{itemize}
  \item 141. Ely, \textit{supra} note 47, at 1504.
  \item 142. \textit{Id.} at 1504-08. Ely has considered the possibility that the State may legitimately assert an interest in controlling messages conveyed by privately owned flags by invoking a principle similar to that used in cases where an audience interrupts a speaker; i.e., since the flag conveys a message, a defacement of it interrupts that message. Ely concluded, however, that such an interest could be analogous only to a law specifically prohibiting the interruption of \textit{patriotic} speeches—a law hardly unrelated to the suppression of free expression. \textit{Id.} at 1508 (footnote omitted).
  \item 143. \textit{Johnson}, 109 S. Ct. at 2553 (Rehnquist, C.J., dissenting).
  \item 144. \textit{Id.} at 2537.
  \item 145. The emotional tenor of the dissents to \textit{Johnson} is unmistakable. See, for example, Chief Justice Rehnquist's quotation from the National Anthem, \textit{id.} at 2549 (Rehnquist, J., dissenting), and Justice Steven's invocation of the names of admired Americans, \textit{id.} at 2557 (Stevens, J., dissenting). Politicians' appeals to the emotions are similarly obvious: President Bush traveled to a powerful symbol of patriotism—the Iwo Jima Memorial—to issue his call for a flag protection amendment. Atlanta J. & Const., July 1, 1989, at A3, col. 2 [hereinafter Iwo Jima speech]. Speaking on the same subject, Sen. Robert Dole, Repub., Kan., praised the "young men who loved the flag and fought to defend it." N.Y. Times, Oct. 20, 1989, at A16, col. 2.
  \item 146. It remains to be seen whether Americans will be willing to sacrifice their rights in order to silence unpopular dissent. Before the village of Skokie, Illinois, was forced to permit Frank Collin and his Nazi supporters the right to demonstrate, the citizens were willing to "give up their own rights rather than see Collin exercise his . . . [W]ithin months a group of Jewish war veterans discovered that they could not demonstrate \textit{against} Frank Collin because of . . . the same ordinance which was drafted to stop Collin himself." D. \textit{HaMlin, The Nazi/Skokie Conflict: A Civil Liberties Battle} 78-79 (1980) (emphasis in original). A similar danger exists in the flag protection context.
  \item 147. \textit{Johnson}, 109 S. Ct. at 2548.
\end{itemize}
have left a loophole large enough to drive a truck—or a flag protection statute—through.

IV. THE LOOPHOLE IN TEXAS v. JOHNSON

Footnote three of the opinion contains a loophole arising from two different sources. The first is the Court's acknowledgement of Congress' right to prescribe proper treatment of the flag as long as the prescription stops short of prosecuting those who misuse the flag as a means of political protest. The second source of the loophole is the Court's language restricting its holding to the constitutionality of the Texas statute as applied to Johnson himself. Although Johnson's expressive conduct was protected, the Court acknowledged in footnote three that in some instances the flag might still be protected by the Texas statute: "the prosecution of a person who had not engaged in expressive conduct would pose a different case." For example, the Court said, a tired person who drags a flag through the mud knowing the act could offend others may have "no thought of expressing any idea." Here is a source of possible confusion as to the

148. Footnote three states:
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 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, 94 S. Ct. 1242, 1254, 39 L.Ed.2d 605 (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 court's 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 we are capable of disposing of this case on narrower grounds, we address only Johnson's claim that § 42.09 as applied to political expression like his violates the First Amendment.

Id. at 2538 n.3 (emphasis in original).

149. Johnson, 109 S. Ct. at 2547 (emphasis added). Van Alstyne has noted that political speech [as Johnson's speech surely was] is of "central importance to the functions of the first amendment." W. VAN ALSTYNE, supra note 2, at 41.

150. Johnson, 109 S. Ct. at 2538 n.3.

151. Id.; see Tribe, supra note 11; Flag Desecration and the Constitution, supra note 11.

152. Johnson, 109 S. Ct. at 2539 n.3. The language of footnote three is inexplicable in view of the fact that any treatment of the flag communicates an idea. Even if the flag desecrator's senses are so dulled by fatigue or by mental incompetence that he does not realize what he is "saying," those who would arrest him clearly understand his "message." That is why they arrest him.
ultimate meaning of Johnson: how can anyone tell whether a person who drags a flag through the mud means to express an idea? Can the government prosecute if it can establish that the person was only "tired," or that the person's mental abilities were so altered by insanity, alcohol, or drugs that his actions were unconscious? Or need the government establish only that it is not prosecuting for any element of expression? Even a "tired person" who drags a flag through the mud may be expressing an idea of sorts: he may not believe that the flag merits the effort required to keep it off the ground. Even this level of disrespect for the flag is offensive to many Americans. Thus, the flag-dragger, like Gregory Johnson, could be prosecuted for expressing an idea that is offensive to other people.

The Johnson opinion thus stopped short of providing a sweeping protection for flag desecrators. The Court failed to hold that the government cannot punish one who mistreats an established symbol; rather, it stated that the Texas law was not designed to protect "the physical integrity of the flag in all circumstances." Here, the Johnson opinion is reminiscent of Schacht v. United States. In Schacht, the Court reversed the conviction of a street actor who had worn a United States military uniform in an antiwar play which tended to "discredit the armed forces." The Court reasoned that although prosecution for a tendency to discredit the armed forces was an unconstitutional restraint on speech, proscribing the wearing of military uniforms without permission was valid. The government may, then, prohibit the wearing of military uniforms—like the flag, a symbol established by the government—as long as the government does not limit such prohibition to those who don the uniform in protest. Similarly, the Johnson decision seems to permit Congress to proscribe misuse of the flag, as long as Congress does not limit such proscription to those who use the flag in protest. Thus, by virtue of the limiting language of footnote three, a flag protection statute which stops short of defining the motive of a flag burner may pass constitutional muster.

153. Id. at 2543.
155. Id. at 60.
156. Id. at 62-63.
157. Id. at 61.
158. In United States v. O'Brien, 391 U.S. 367 (1968), the Court wrote that it would not strike down an otherwise constitutional statute "on the basis of an alleged illicit legislative motive . . . . Inquiries into congressional motives or purposes are a hazardous matter." Id. at 383. Therefore, Robert Bork's statement that the legislative purpose behind the 1989 flag protection statute will automatically doom the statute may not be accurate. See Bork, Legal Times, July 24, 1989, at 18.
Seen in this light, Johnson is more of a compromise between the two extremes of absolute flag protection and absolute first amendment protection than it is a ringing affirmation of the latter. Until the Supreme Court clarifies and/or broadens its holding in Johnson, the government may continue prosecuting flag desecrators while stopping short of basing the prosecution on the content of the protest.159

Nevertheless, by refusing to allow the government to prosecute expressly for political protest communicated through flag misuse, the Court infuriated those who would protect the flag from those who would show contempt for it. Ultimately, then, the Court has produced an opinion which has not proven wholly satisfactory to either of the contending factions. Indeed, in its effort to walk a blurred and untenable line between protection of the flag and protection of expression, the Court may have created an ironic legal situation in which a mother grieving for a son killed in combat can be prosecuted for pinning his medals to the flag.160 The absurdity of such a prosecution illustrates the obvious: the Court cannot rationally protect the physical integrity of the flag while banning prosecution for ideas expressed through treatment of it.

It is highly unlikely, though, that a police officer would arrest the grieving mother. The officer is far more likely to arrest the flag-burning political dissident. Thus, if the new flag protection statute passes constitutional scrutiny, we are back to square one: only those who mutilate the flag to express an offensive idea are likely to be prosecuted. In Spence v. Washington,161 the Court did not reach the appellant's argument that the flag protection statute under which he was convicted was overbroad; the Court did note, though, that the statute had a limitless sweep that forbade, among other things, a veterans'


161. 418 U.S. 405, 414 n.9 (1974). The government's argument that the new flag protection statute is content-neutral has failed in both prosecutions under the statute. In Haggerty, 731 F. Supp. at 415, the Senate argued that the statute is content-neutral because "it protects the physical integrity of the flag . . . regardless of the actor's intent." Id. at 419. The United States District Court for the Western District of Washington replied that such is not the definition of content-neutrality: "[i]f the justification for protecting the flag is related to the suppression of expression, it is not content-neutral even though the Act on its face is applicable to anyone who engages in certain conduct regardless of the actor's intent or the impact of the conduct." Id. at 420. In Eichman, 731 F. Supp. at 1123, the court responded similarly to the same argument: "[a] regulation is not content-neutral . . . merely because on the face of the statute the same rules apply to everyone." Id. at 1129.
group to attach battallion commendations to a United States flag.\textsuperscript{162} Such breadth, said the Court, suggests "problems of selective enforcement."\textsuperscript{163} The new flag protection statute suggests the same problems.

V. CONTROVERSY, CONFUSION, AND THE NEW FLAG PROTECTION STATUTE

The Supreme Court's legal rationale for protecting flag burning as political dissent provided no comfort to Americans who favor prohibiting the mode of expression chosen by Gregory Johnson.\textsuperscript{164} The politicians responded to the public's outrage by passing a federal statute which bans the physical mutilation of the flag.\textsuperscript{165} A movement is also afoot to amend the Constitution itself in order to reverse the Court once and for all.\textsuperscript{166} This crusade is presently stalled, despite attempts by diehards like Senator Robert Dole to jump-start it.\textsuperscript{167} Despite the serious implications inherent in amending the Constitution to limit the first amendment freedom of speech, some politicians imply that they may join the push for an amendment if the new statute does not effectivly ban flag desecration.\textsuperscript{168}

\textsuperscript{162}Spence, 418 U.S. at 414 n.9.
\textsuperscript{163}Id.
\textsuperscript{164}These Americans are not the first to be refused the privilege of silencing those whose views are repulsive to them. The fury and frustration at flag burning, while understandable, is no more compelling than the outrage of Holocaust survivors who had to accept the first amendment right of a splinter group of American Nazis to demonstrate in the survivors' home town. See Village of Skokie v. National Socialist Party of America, 69 Ill. 2d 605, 373 N.E.2d 21 (1978). Nor is it more compelling than the discomfort of Blacks and Jews, who must tolerate the speeches of the Ku Klux Klan. See Brandenburg v. Ohio, 395 U.S. 444 (1969).


\textsuperscript{166}Robert Bork maintains that only a constitutional amendment will effectively protect the flag. See Bork, \textit{supra} note 158, at 17-18 (testimony of Robert Bork to the House Judiciary Subcommittee). Charles J. Cooper, former head of the legal counsel office in the Department of Justice, believes that any statute will be struck down by the Supreme Court, especially if it includes an exception for disposal with "love and respect" when a flag is torn or soiled. Nat'l L.J., Nov. 13, 1989, at 33, col. 2.

\textsuperscript{167}President Bush called for a flag protection amendment in a speech given in front of the monument memorializing the flag-raising on Iwo Jima. See Iwo Jima speech, \textit{supra} note 145.

\textsuperscript{168}Sen. Joseph Biden Jr., Dem., Del., noted that the constitutional remedy is available even if the statute is ineffective. Cong. Q., October 7, 1989, at 2649, col. 3. Rep. Chuck Doug-
The most palatable argument of the statute's supporters—since it at least recognizes a first amendment right to expression—is that denying the right to protest by such flamboyant and offensive means as flag burning does not close all avenues of dissent. Robert Bork, for example, argued before the House Judiciary Subcommittee that "[s]imply... putting out of bounds a few means of expression in no way threatens the American system of freedom of speech." Bork compared the Johnson holding to a proscription of the government's power to "punish such actions as... expressing a political viewpoint from a sound truck at two o'clock in the morning in a residential neighborhood." Such overstatement ignores the O'Brien exception, which permits the State to prohibit conduct for a legitimate state interest unrelated to the suppression of speech. The State's interest in preserving the right of its citizens to sleep at night is unrelated to any desire to prevent the expression of ideas.

Justice Harlan espoused this "alternative mode of expression" doctrine in his concurrence to O'Brien: "O'Brien manifestly could have conveyed his message in many ways other than by burning his draft card." This opinion is notably at odds with Justice Harlan's majority opinion protecting dissident expression in Cohen v. California.

las, Repub., N.H., a proponent of the amendment, declared that "[t]hose who vote against the amendment are only delaying the pain. It's going to be back, and it will either be back next year or the year after." Tallahassee Democrat, October 13, 1989, at A17, col. 3.


169. See Texas v. Johnson, 109 S. Ct. 2533, 2553 (1989) (Rehnquist, C.J., dissenting) (stating that Johnson was denied only one of many means of symbolic speech). Justice Stevens found that requiring protesters to choose an alternative mode of expression is but a "trivial burden" on expression. Id. at 2566 (Stevens, J., dissenting). Chief Justice Rehnquist declared in his dissent that Johnson's actions conveyed nothing that could not have been conveyed just as forcefully in a dozen different ways. Id. at 2553 (Rehnquist, C.J., dissenting).

170. Bork, supra note 158, at 17.


172. Id. at 389 (Harlan, J., concurring).

173. 403 U.S. 15 (1971). It is difficult to reconcile Justice Harlan's conflicting views in O'Brien, 391 U.S. at 389, and Cohen. In Cohen, he wrote that the Court addressed only "a conviction resting solely upon speech, not upon any separately identifiable conduct." Cohen, 403 U.S. at 18.

Three Justices, Burger, C.J., Black and Blackmun, JJ., dissented. Id. at 27. Justice Blackmun stated, "Cohen's absurd and immature antic, in my view, was mainly conduct and little speech." Id. (Blackmun, J., dissenting). Justice Black joined Justice Blackmun's dissent. In Street v. New York, 394 U.S. 576 (1968), Justice Black made it clear that in his view, prosecution for flag burning does not violate the first amendment. Id. at 610 (Black, J., dissenting).
Nowhere in *Cohen* did Justice Harlan write that the dissident should have been required to choose a means of expression other than wearing a patently offensive message on his jacket. Rather, he wrote that "[w]e cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive junction which, practically speaking, may often be the more important element of the overall message sought to be communicated."175

In decriminalizing Cohen's mode of expression, the Court cited the "premise of individual dignity and choice upon which our political system rests,"176 and noted, memorably, that "one man's vulgarity is another man's lyric."177 Flag burning, like wearing a jacket imprinted with an obscenity, is undoubtedly socially unacceptable to a great number of Americans; however, the focus should not be upon the relative popularity of the idea. What may appear to one person to be an act of destruction may appear to another person to be an ideological act of creation.178

Johnson's act assured attention to his expression precisely because it was outrageous.179 Chief Justice Rehnquist's characterization of flag burning as an "inarticulate" form of protest180 is belied by the fact that Johnson's "inarticulate" form of protest has been noted, remarked upon, and fought over in newspapers and living rooms across the nation as well as in the Congress and the Supreme Court of the United States.

In the last analysis, though, successful prosecution under the new statute depends upon whether the Court finds the law content-neutral or content-based.181 At this writing, the battle between first amend-
ment absolutists and flag protectors is on hold, as the nation awaits the Supreme Court’s decision on the 1989 flag protection statute. Before amending the statute, Congress provided criminal punishment for “[w]hoever knowingly casts contempt” upon any United States flag.\textsuperscript{182} Evidently Congress hoped that the removal of these emotive words in the amended statute would render the statute content-neutral, and thus constitutional. The game apparently is one of semantics.\textsuperscript{183}

But word games are unlikely to render the flag desecration statute content-neutral, for content neutrality is a substantive, rather than merely a verbal, concept. For example, the Court found the ordinance at issue in \textit{Renton v. Playtime Theatres, Inc.} to be content neutral.\textsuperscript{184} The ordinance was found to be aimed not at the content of films shown in adult theatres, but at the secondary effects such theatres would have on the surrounding business and residential community.\textsuperscript{185} Thus the Court held that the \textit{Renton} regulation, like the statute at issue in \textit{O'Brien},\textsuperscript{186} accomplished a legitimate government objective and did not merely suppress speech.

In contrast, the Court found the statute at issue in \textit{Boos v. Barry}\textsuperscript{187} unconstitutional because it permitted prosecution based on the speech content of the signs it proscribed. As stated previously, the principles of \textit{Boos} defeated the Texas statute in \textit{Johnson}: Texas’ law was in-

\begin{itemize}
\item 415 (W.D. Wash. 1990), that the government’s purpose, unrelated to expression, was to “shield the flag from harm as an incident of sovereignty.” The court responded that, since use of the flag to indicate sovereignty is itself a symbolic use, flag misuse is also expressive conduct since it shows disrespect for that sovereignty. \textit{Id.} at 420.
\item In United States v. Eichman, 731 F. Supp. 1123 (D.D.C. 1990), the government advanced the interest of protecting the flag “for everyone’s use and no one’s destruction.” The court noted, though, that if the government wished only to protect the flag as a symbol of “something,” then its interest was not even implicated when a protestor destroyed the flag, since the protestor’s use of it was part and parcel of what the government claimed to protect. \textit{Id.} at 1129. The court added, though, that the government’s “true purpose” is to “preserve the flag as a symbol only for those who would not damage or destroy it.” \textit{Id.} Such an interest is invalid, for it entails proscription of dissent. \textit{Id.}
\item 182. 18 U.S.C. § 700 (1968) (emphasis added).
\item 183. Sen. Joseph R. Biden Jr., Dem., Del., worried that the word “defiles” “connotes that there is a communicative, a verbal injury that you can inflict upon someone or something.” \textit{Cong. Q.}, Oct. 7, 1989, at 2646, col. 1. Before the word “defiles” was added on the Senate floor, the statute was tailored as carefully as possible to adhere to the standards announced in \textit{Johnson}. \textit{Id.}
\item 184. 475 U.S. 41, 44 (1986). The ordinance, Resolution No. 2368, imposed a moratorium on the licensing of “any business . . . which . . . has as its primary purpose the selling, renting or showing of sexually explicit materials.” \textit{Id.}
\item 185. \textit{Renton}, 475 U.S. at 47.
\item 187. 485 U.S. 312 (1988).
\end{itemize}
tended to regulate conduct that "seriously offends" others; a court may not consider the impact of the expression unrelated to the expression itself. The new flag protection statute makes no reference to the reaction of onlookers, if the emotive impact of the word "defiles" is discounted. Nevertheless, this omission alone probably does not guarantee the success of any prosecution under the statute. According to Boos, O'Brien, and Renton, a simple omission of any mention of the expression's impact upon others is not enough; the law must have some effect unrelated to the suppression of expression. It is virtually impossible to conceive of any potential purpose of a flag protection statute other than regulation of the content of the message the flag conveys.

To those who believe that the coexistence of protections for both interests—the physical integrity of the flag and freedom of expression—is constitutionally possible, the logical answer is that it is legal sophistry to suggest that prosecution for flag desecration could be unrelated to prosecution of any idea expressed thereby. Flag desecration is clearly an insult to the nation. An insult is expression. That fact is irrebuttable. Since the flag itself is a symbol, any treatment of it is necessarily symbolic, and communicates an idea. Certainly, those who would protect the mother who pins her son's medals to the flag yet jail the dissident who burns it must admit outright that they are prosecuting for expression.

188. Tex. Penal Code Ann. § 42.09(b) (Vernon 1969); see supra note 19 for the relevant text of the statute.
190. The inclusion of this word worried Senator Joseph Biden Jr., Dem., Del., the sponsor of the statute. See supra note 183. For the text of the statute, see supra note 12.
192. Perhaps prosecutors will advance the argument that the State has an interest in conserving cloth and the red, white, and blue dye. These are, after all, the physical components of the flag. Erwin N. Griswold, former Solicitor General and former dean of the Harvard Law School, says that he tried "very hard" to write a flag protection statute that would not threaten first amendment values, but failed. Cong. Q., Sept. 2, 1989, at 2255.
193. See West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 632-33 (1943) (the flag is a "short cut from mind to mind"); see also Iwo Jima speech, supra note 145, at col. 2 ("This flag is one of our most important ideas. If it is not defended, it is defamed.") (emphasis added).
194. Walter Berns argues that the founders' view of which ideas to protect was limited. W. Berns, The First Amendment and the Future of American Democracy 144 (1976). Berns fears that cultivation of virtues necessary to successful self-government "is not readily accomplished in a liberal democracy, and it cannot even be attempted until the Supreme Court is persuaded to forgo its doctrinaire attachment to 'freedom of expression' and to complete separation of religion and state." Id. at 237; see also Meese, The Moral Foundations of Republican Government, in Still the Law of the Land? Essays on Changing Interpretations of the Constitution 63-77 (McNamara & Rothe eds. 1987). Meese charges that "secular liberalism often
VI. CONCLUSION

There are, then, at least three problems left in the wake of Johnson: the problem of interpreting the opinion, as evidenced by the scholarly debate over how (not to mention whether) the ruling can be circumvented; the frightening possibility that dissenters who burn the flag can still be punished under Johnson, at least if the government is cunning enough to craft its reasons for prosecution narrowly; and the ironic fact that the prosecution of a mother who pins her son’s medals to the flag must remain possible on the face of any statute that can ban flag mutilation and still have a chance, however slim, of receiving affirmation from the Supreme Court. All three problems stem from the Court’s failure to state unequivocally that the government of a free people has no legitimate business in establishing symbols for which the government in any way may compel respect. Such a ruling would protect mother and dissenter—not to mention any hapless tired person who should happen to drag a flag through the mud—from prosecution. Such a ruling also would be consistent with the philosophy underlying West Virginia Board of Education v. Barnette. In Barnette, the Court held that the individual is free not to take part in prescribed rituals surrounding government-established symbols. Recognizing the dignity of the individual, the Court declared that the.

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driven by the expansive egalitarian impulse has threatened . . . to blow out the moral lights around us.” Id. at 75.

Berms and Meese seem quite confident that they know these “moral lights” when they see them. Robert Bork seems similarly confident; he would protect only that speech perceived by the majority as political truth. See generally Bork, Neutral Principles and Some First Amendment Problems, 47 IND. L.J. 1 (1971). Bork would permit suppression of speech that has “no political value within a republican system of government.” Id. at 33. For example, speech advocating violent overthrow of the government would not be “political speech,” because it has no value in the Madisonian system of government approved by Bork. Id. at 31.

195. See supra notes 165-66.

196. It can be persuasively argued that the Court has already said this, in Barnette. See supra note 13; see also Spence v. Washington, 418 U.S. 405, 412 (1974) (The State cannot prosecute for failure to “show proper respect for our national emblem.”); Street v. New York, 394 U.S. 576, 593 (1968).

197. 319 U.S. 624 (1943). Writing during World War II, when the world was forced to confront the harsh realities of fascism, the Court couched its opinion in terms of the ideal of free choice for the individual. While the Court did not question “[n]tional unity as an end which officials may foster by persuasion and example,” id. at 640, it remained cognizant of the evils of the coerced unity of the “totalitarian enemies” of the United States, id. at 641. “Compulsory unification of opinion achieves only the unanimity of the graveyard,” the Court declared, adding that the American Constitution was designed to avoid such danger. Id. Moreover, the Court stated that “freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.” Id. at 642. The first amendment was meant, the Court said, to reserve from all official control the “sphere of intellect and spirit.” Id.

198. Id.
Bill of Rights "grew in soil which also produced the philosophy that the individual was the center of society, that his liberty was attainable through mere absence of government restraint." 199

The Supreme Court's opinion in Texas v. Johnson, however, lacks the vision that permeates Barnette. It does not dwell on the ideal that the individual is the "center of society" and has a natural right "to be let alone" by the government. Instead, the Johnson opinion dwells upon the power that accrues to the majority when it tolerates criticism—"our toleration of criticism is a sign and source of our strength"; the opinion appeals to majority prejudice when it reminds us that Johnson's gesture is unlikely to change our minds about our flag; and it exhorts us to "persuade [flag desecrators] that they are wrong." Such language is like the siren's song: attractive, because we all like to believe that we have found the "truth," and dangerous, because we may cease to tolerate "wrong" ideas when we begin to perceive them as a threat to that "truth." A focus upon the

199. Id. at 639.
200. Id.
203. Id.
204. Id.
205. A majority's assumption that it has found the "truth" is an incredibly arrogant assumption of infallibility, as well as a convenient justification for suppression. Both the "liberty" and the "skepticism" approaches to first amendment jurisprudence eschew such an assumption. For a full discussion of the liberty theory and its superiority to the "marketplace of ideas" and "market failure" models, see generally Baker, supra note 119. For a comprehensive treatment of the skepticism model, see generally Gey, The Apologetics of Suppression: The Regulation of Pornography as Act and Idea, 86 MICH. L. REV. 1564 (1988). The skepticism and liberty theories diverge slightly in their focus: skepticism focuses primarily upon the inability of any group legitimately to declare truth. See Gey, supra, at 1624. The liberty theory focuses upon the natural right of the individual to declare his version of truth freely without fear of reprisals by the State. See Baker, supra note 119, at 966. Still, the end result of these approaches is the same: the government has no legitimate right to impose given "truths" upon the populace. Such given truths include symbols that represent those truths, such as the flag.

The expansive freedom that would be conferred by these models is hardly a product of twentieth century radicalism. John Stuart Mill wrote in 1859 that "[a]ll silencing of discussion is an assumption of infallibility." Mill, On Liberty, in PROSE OF THE VICTORIAN PERIOD 251-53 (W. Buckler ed. 1958). "Those who desire to suppress [an opinion] of course deny its truth; but they are not infallible. They have no authority to decide the question for all mankind." Id. Mill's statement bears more than a passing resemblance to Gey's explication of skepticism, which is characterized by a suspicion of "state endorsed certainty as the basis for regulating expression." Gey, supra, at 1624; see also Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes and Brandeis, J.J., dissenting) ("[T]he only meaning of free speech is that [ideas] should be given their chance and have their way.").

206. "Tolerance theory breaks down once it accepts that the state can identify and protect a set of essential moral verities. It is inevitable that a state in that situation will abandon the tolerance theory when its moral essence is threatened." Gey, supra note 205, at 1620.
individual's right to self expression, rather than upon the tolerance of dissent in order to preserve the status quo, forestalls this danger.\footnote{207}

Moreover, a belief that the founding fathers refused to grant the British government the right to foist the Union Jack upon them,\footnote{208} but reserved to themselves the right to foist the flag of their choosing upon others, does no honor to the founders. Their collective view of liberty was expansive,\footnote{209} and they left to each of us the decision whether to embrace or discard any and all ideas and symbols. That Gregory Johnson exercised his freedom to discard the flag and everything it represents is Gregory Johnson's business.\footnote{210} It is not ours, for he is unable to destroy the flag for the rest of us. He burned only one copy of a material manifestation of ideals to which we are as free as ever to adhere.

But the deliberate weakening of the freedom of expression by the government itself is everyone's business. Unlike Gregory Johnson, the government has the physical—if not the constitutional—power to coerce every citizen in the United States. Only by refusing to exercise that power to crush individual differences can the government remain true to the ideals that gave it its existence.

\footnote{207}{"Liberties in a nation—any nation—are constantly in jeopardy . . . . Frequently, freedoms are threatened or denied by those in government, in associations, or individuals in society, who act in the belief that they are preserving democracy." R. Cord, Protest, Dissent and the Supreme Court 1 (1971). The "market place of ideas" theory, with its focus on the ultimate good of society, falls short of providing the protection necessary against such danger, for it diverts attention from the right of the individual to speak. Ingber, The Marketplace of Ideas: A Legitimizing Myth, 1984 Duke L.J. 1, 4-5. Baker would place the focus on individual right: "Speech is protected not as a means to a collective good but because of the value of speech conduct to the individual." Baker, supra note 119, at 966.}

\footnote{208}{In Texas v. Johnson, 109 S. Ct. 2533, 2546 (1989), the Court commented upon the founders' lack of reverence for the Union Jack. Id. at 2546. The Court might also have commented upon the founders' lack of reverence for any government that infringed upon basic liberties. At least one of the founders—Thomas Jefferson—threatened nullification when Congress passed the Alien and Sedition Laws. W. Berns, supra note 194, at 104. As Berns observes, no one should be surprised at Jefferson's radical threat; after all, he had already participated wholeheartedly in the dissolution of one union. Id.}

\footnote{209}{"Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty." Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).}

\footnote{210}{We have neither a constitutional nor a moral right to silence his dissent. "If all mankind minus one, were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind." Mill, supra note 205, at 252. Mill's defense of individual autonomy is as valid today as it was in 1859. Ingber urges the United States legal system to expand its limited adoption of Mill's theory: "Instead of merely embracing [Mill's] theory of the liberty of thought and discussion, our courts should emphasize his view of limited societal authority over the individual, a theory of freedom of conduct." Ingber, supra note 207, at 86-87 (emphasis added). "[W]e may have done too little to free the hearts of men and women so that we can live in an open society and not merely talk of it." Id. at 91 (emphasis in original) (footnote omitted).}