The Flag Burning Issue: A Legal Analysis and Comment

Eric Alan Isaacson
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I. INTRODUCTION

On June 21, 1989, the United States Supreme Court announced its decision in *Texas v. Johnson*¹ invalidating the conviction under Texas' flag-desecration statute of a political protester who had burned the American flag to denounce the capitalist policies of a republican president and his party.² The Supreme Court's decision triggered a sequence of political activity that has resulted in a proposed amendment to the United States Constitution, and a revision to the federal flag-desecration statute.³

This Article compares the holding of *Texas v. Johnson* with prior flag-desecration decisions issued by the Supreme Court. This Article also comments on the newly-amended federal desecration statute and concludes that it is unlikely to pass constitutional muster. Further, the Article argues that the proposed constitutional amendment may allow state and federal prosecutors the discretion to prosecute only those who desecrate the flag with unpopular political motivations.

Part II of this Article analyzes the Supreme Court case law on flag desecration, and specifically focuses on the holding in *Texas v. Johnson*. The Supreme Court precedents suggest that a statute outlawing desecration of the flag would be held constitutional provided that criminal liability does not turn on communicative aspects of the desecration.⁴ Although the Court has shown a marked unwillingness to strike down desecration statutes on their face, it has repeatedly held that those statutes were unconstitutionally applied.⁵

Part III of this Article analyzes the recent amendment to the federal flag-desecration statute. Although the statute was revised in order to avoid constitutional challenges, and to render a constitutional amendment unnecessary,⁶ this Article concludes that it has failed to achieve either goal. Furthermore, on its face the Flag Code outlaws many common uses of the flag,⁷ and unless the revised statute is neutrally applied to prosecute such violations without regard to political content, its application could be held unconstitutional under *Texas v. Johnson*.⁸ However,

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2. Id. at 2536.
3. See infra notes 130-40 and accompanying text.
6. See infra notes 135-37 and accompanying text.
7. See infra note 231 and accompanying text.
because the new statute has replaced the clarity of the prior law with an ambiguous definition of "flag," neutral application may prove impossible. We may expect prosecutions under the new statutory provision to run afoul of the Constitution.

Part IV of this Article analyzes and comments upon the President's proposed constitutional amendment. On its face, the amendment adds nothing to the legislatures' power, but merely restates what the United States Supreme Court acknowledged in Texas v. Johnson: Congress and the states have an interest in prohibiting desecration of the flag. The proposed amendment does not even hint that it is intended to overturn Texas v. Johnson or to repeal the first amendment's restriction on desecration prosecutions. If the amendment's proponents intend to change the law, the proposed text should reflect that intent.

If the proposed amendment is adopted, its reach will be as broad as its terms. The proposed amendment concerns "physical desecration of the flag of the United States." Part V of this Article analyzes the meaning of these words. The words "flag of the United States" include any recognizable representation of the flag. The term "desecration" is defined as improper treatment of a holy object—in this instance the flag. The words "physical desecration" refer to any nonverbal conduct relative to the flag that is improper in light of its status. The rules of proper conduct are detailed and well defined.

Part V of this Article suggests that the President desires to amend the Constitution in order to permit selective, politically motivated prosecutions. Desecration, as defined above, is commonplace—representations of the flag are used on postage stamps and in advertisements. Therefore, the amendment's proponents surely do not intend to eliminate all desecration through criminal prosecutions. Thus, the author believes

11. Johnson, 109 S. Ct. at 2547. ("We reject the suggestion . . . that the Government lacks 'any state interest whatsoever' in regulating the manner in which the flag may be displayed.")
13. See infra notes 168-80 and accompanying text.
14. Webster's Third New International Dictionary 610 (4th ed. 1976). "To violate the sanctity of by diverting from sacred purpose, by contaminating, or by defiling. To divest of sacred character or treat as unhallowed."
15. See, e.g., Smith v. Goguen, 415 U.S. 566, 603-04 (1974) (Rehnquist, J., dissenting) ("The flag of the United States is not just another 'thing,' . . . [it is] a unique national symbol which has been given content by generations . . . .").
that the proposed amendment can only be designed to abolish the first amendment doctrines prohibiting selective prosecution motivated by political considerations. The Article predicts that if the proposed amendment achieves this goal, it will enable federal or local government prosecutors to use desecration laws to jail political dissidents and religious minorities disapproved of by prosecuting authorities.

Part VI of the Article focuses on the situation of individuals who refuse to salute the flag for religious reasons. These individuals commit "physical desecration" of the flag in its strictest, purest sense because by their conduct they treat the flag as unholy or profane. Jehovah's Witnesses faced legal persecution until the United States Supreme Court held their conduct was protected by the first amendment. In his campaign for the Presidency, Vice President Bush attacked Michael S. Dukakis for honoring judicial precedents prohibiting forced flag salutes. Now the President proposes amending the Constitution to remove the first amendment's prohibitions to prosecution for flag desecration. As a result, Jehovah's Witnesses could be among the first victims under the President's amendment.

Part VII argues that despite the language of the proposed amendment, it apparently would not stop flag burning as a political protest. Proper respect for the flag requires that it be burned when it is no longer fit for display. Under the proposed amendment, anyone capable of reading the Flag Code could successfully denounce and burn the flag with impunity.

Part VIII of this Article notes that the Constitution may limit both the substance of amendments and the procedure by which they may be adopted. The Article argues that if the proposed amendment is intended to overturn the Johnson Court's holding, it amounts to a partial repeal of the first amendment, thus abridging its protections for flag desecrators. Further, the Article argues that the first and fourteenth amendments deprive both Congress and the states of power to pass any law abridging the freedom of speech. Thus, an amendment limiting free speech may be

17. U.S. Const. amend. I.
19. See infra notes 293-97.
22. U.S. Const. amends. I, XIV. The first amendment provides in relevant part, "Congress shall make no law . . . abridging the freedom of speech." Id. amend. I. This language has been made applicable to the states via the fourteenth amendment. See Gitlow v. New York, 268 U.S. 652 (1925); Murdock v. Pennsylvania, 319 U.S. 105, 108 (1943).
proposed and adopted only by United States citizens in a constitutional convention.

II. THE UNITED STATES SUPREME COURT AND THE FLAG

The United States Supreme Court has had several occasions to review cases involving flag-desecration statutes but has never held that Congress or the states may not prohibit non-verbal desecration of the flag. The Court has held statutes unconstitutional because they compel utterances of respect for the flag,23 punish spoken words of disrespect,24 or are void for vagueness.25

The Court has also invalidated convictions under desecration statutes on first amendment grounds without invalidating the statutes themselves by concluding only that the statutes involved were unconstitutional as applied to the defendant.26 Texas v. Johnson27 is the most recent of these opinions. The Supreme Court has been notably unwilling to invalidate on its face or on first amendment grounds any desecration statute which punishes non-verbal desecration of the flag.28 In all

23. See West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("the flag salute is a form of utterance" that may not be compelled).
24. See Street v. New York, 394 U.S. 576 (1969). In Street, the Court held that Street's conviction for desecration of the flag could not stand because it might have been based in part upon his spoken words. Id. at 590-94. The Court remanded for Street to be tried again for his physical actions desecrating the flag. Id. at 594; see also People v. Street, 24 N.Y.2d 1028, 302 N.Y.S.2d 848, 849 (1969) (on remand, New York Court of Appeals ordered defendant to be re-tried solely for his act of burning flag).
26. See Texas v. Johnson, 109 S. Ct. 2533, 2538 n.3 (1989) ("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."); Spence v. Washington, 418 U.S. 405, 414 n.9 (1974) ("[A]s applied to appellant's activity the Washington statute impermissibly infringed protected expression; because we agree with appellant's as-applied argument, we do not reach the more comprehensive overbreadth contention he also advances.").

Those who suggest that even a law appropriately drawn along . . . neutral lines might be struck down by the same Supreme Court majority that reversed Gregory Lee Johnson's conviction have, in my view, misread what that majority had to say. Just as Chief Justice Warren and Justices Hugo Black and Abe Fortas expressed their view twenty years ago that a properly drawn prohibition on flag-burning would not violate the Constitution, so I am convinced that at least some of the Justices in the five-to-four Texas v. Johnson majority would agree with this conclusion, and that those Justices, joined by the four dissenters, would represent a clear majority to up-
likelihood, a majority of the Court would uphold the validity of criminal provisions punishing desecration of the flag, if they are not directed toward punishing political messages. Convictions under such a statute probably would be upheld, provided that it is neutrally applied so that decisions to prosecute are not motivated by ideological considerations.

A powerful argument can be made that desecration statutes necessarily violate the first amendment. The primary rationale behind statutes punishing desecration of the flag is that the flag is a special symbol which merits respectful treatment. For instance, Chief Justice Rehnquist has argued that the flag is a “unique symbol” warranting special protection. However, this contention proves too much. The flag is a “unique symbol” because it represents and communicates a set of ideas that cannot be as effectively represented or communicated in any other way. An effort to regulate the flag’s symbolism is necessarily an effort to regulate communication, for the flag is a symbol only because of what it represents and communicates to those who view it. Additionally, its very uniqueness means that statements made by, or with, the flag cannot be made as effectively in any other way. Arguably, legislation prohibiting desecration of the flag is directed at expressive conduct with the purpose of prohibiting certain disapproved expressions. As such, it cannot easily survive the first amendment’s prohibition of laws to abridge the freedom of speech.

However, the Supreme Court will not likely embrace such an argument. The Court has long recognized a legitimate state interest in preserving the physical integrity of the flag, and it has repeatedly declined to hold a properly drawn law—one making it a crime wilfully to destroy, or substantially mutilate, or trample upon, any American flag.

Id. 29. Johnson, 109 S. Ct. at 2546-47.
31. See Johnson, 109 S. Ct. at 2548 (Rehnquist, C.J., dissenting) (“For more than 200 years, the American flag has occupied a unique position as the symbol of our Nation, a uniqueness that justifies a governmental prohibition against flag burning in the way respondent Johnson did here.”); Spence, 418 U.S. at 423 (Rehnquist, J., dissenting) (state may withdraw flag as “a unique national symbol from roster of materials that may be used as background for communications”); Goguen, 415 U.S. at 603-04 (Rehnquist, J., dissenting, joined by Burger, C.J.) (“The flag of the United States is not just another 'thing,' and it is not just another 'idea'; it is not primarily an idea at all . . . . [It is] a unique national symbol which has been given content by generations . . . .”).
32. Johnson, 109 S. Ct. at 2546 n.11 (noting “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[!]' as those conveyed with it . . . .”).
invalidate desecration statutes on first amendment grounds.\textsuperscript{34} As discussed below, these opinions suggest that the Court regards such statutes as a legitimate exercise of state power if they are applied consistently and without improper prosecutorial discrimination.\textsuperscript{35} The central lessons taught by the Supreme Court precedents are that Congress and the states do have the power to prohibit desecration of the flag, but that this power may not be used to punish the expressive elements of conduct.\textsuperscript{36}

\textbf{A. Historical Overview}

1. \textit{Halter v. Nebraska} establishes the power to outlaw desecration

The leading Supreme Court opinion establishing that government has a legitimate interest in compelling respectful treatment of the flag is \textit{Halter v. Nebraska},\textsuperscript{37} which was decided in 1907. In \textit{Halter}, businessmen had violated Nebraska's flag desecration statute when they had "unlawfully exposed to public view, sold, exposed for sale, and had in their possession for sale a bottle of beer upon which, for purposes of advertisement, was printed and painted a representation of the flag of the United States."\textsuperscript{38} When the businessmen challenged their convictions for desecration of the flag, the Court refused "to hold that the statute of Nebraska, in forbidding use of the flag of the United States for purposes of mere advertisement, infringes any right protected by the Constitution of the United States."\textsuperscript{39} The Court held, to the contrary, that "no one can be said to have the right, secured by the Constitution, to use the country's flag merely for purposes of advertising articles of merchandise."\textsuperscript{40} The \textit{Halter} holding is a ringing endorsement of governmental power to prohibit desecration of the flag of the United States:

One who loves the Union will love the state in which he resides, and love both of the common country and of the state will diminish in proportion as respect for the flag is weakened. Therefore a state will be wanting in care for the well-being of its people if it ignores the fact that they regard the flag as a symbol of their country's power and prestige, and will be impatient if any open disrespect is shown towards it. By the statute in ques-

\begin{itemize}
\item \textsuperscript{34} See \textit{infra} notes 26-28 and accompanying text.
\item \textsuperscript{35} See \textit{infra} notes 37-73 and accompanying text.
\item \textsuperscript{36} See \textit{infra} notes 37-90 and accompanying text.
\item \textsuperscript{37} 205 U.S. 34 (1907).
\item \textsuperscript{38} Id. at 38. It is, of course, a desecration of the flag to use it for advertising. See 36 U.S.C. § 176(h) (1988 Supp.) ("The flag should never be used for advertising in any manner whatsoever"); \textit{see infra} notes 212-25 and accompanying text.
\item \textsuperscript{39} \textit{Halter}, 205 U.S. at 41.
\item \textsuperscript{40} Id. at 45.
\end{itemize}
tion the state has in substance declared that no one subject to its jurisdiction shall use the flag for purposes of trade and traffic,—a purpose wholly foreign to that for which it was provided by the nation. Such a use tends to degrade and cheapen the flag in the estimation of the people, as well as to defeat the object of maintaining it as an emblem of national power and national honor. And we cannot hold that any privilege of American citizenship or that any right of personal liberty is violated by a state enactment forbidding the flag to be used as an advertisement on a bottle of beer. It is familiar law that even the privileges of citizenship and the rights inhering in personal liberty are subject, in their enjoyment, to such reasonable restraints as may be required for the general good.41

Although the Court has subsequently noted that Halter was decided before the Court explicitly held that the first amendment applies to the states through the fourteenth amendment’s Due Process Clause, it has taken pains not to overrule the opinion.42

2. First amendment limitations on the power to prohibit desecration

Subsequent opinions indicate that Halter’s power to prohibit desecration of the flag is a license neither to regulate communicative expression as such, nor to persecute political dissidents on the pretext of compelling proper treatment of the flag. The Supreme Court’s holdings up to, and including, Texas v. Johnson,43 impose limitations on exercise of the power to prohibit desecration of the flag, but do not abrogate or even question the existence of that power itself. The central theme of these opinions is that the power to compel respectful conduct toward the flag cannot be used as a pretext to regulate expressive communication.

In Minersville School District v. Gobitis,44 the Court upheld West Virginia laws used to punish Jehovah’s Witnesses who refused to salute the flag.45 In his dissent Justice Stone noted that the law was used against a “small and helpless minority.”46 The majority nonetheless rejected arguments based on the free speech and the free exercise of reli-

41. Id. at 42-43.
42. See Texas v. Johnson, 109 S. Ct. at 2545 n.10 (“Our decision in Halter v. Nebraska is not to the contrary. . . we continually emphasized in Halter itself that case involves purely commercial rather than political speech.”).
45. Id. at 599-600.
46. Id. at 606 (Stone, J., dissenting).
gion clauses of the first amendment. The decision in *Gobitis* briefly stood for the proposition that the government could compel verbal expressions of respect for the flag. However, the Court overruled *Gobitis* three years later in *West Virginia State Board of Education v. Barnette*, holding that although school boards are “numerous and their territorial jurisdiction often small,” even “village tyrants” are not beyond the reach of the first amendment. The Court’s ruling made clear that although laws promoting patriotism or the flag salute are not unconstitutional, they may not be used to compel religious or ideological minorities to pledge allegiance to the flag. In concurrence, Justices Black and Douglas observed that the flag salute, “when enforced against conscientious objectors, [is] more likely to defeat than to serve its high purpose, [and] is a handy implement for disguised religious persecution. As such it is inconsistent with our Constitution’s plan and purpose.”

Twenty-six years later, in *Street v. New York*, the United States Supreme Court invalidated the conviction of Sidney Street for violating a New York desecration law that made it a crime to “’publicly mutilate, deface, defile, or defy, trample upon, or cast contempt upon [the flag] either by words or act.’” Street was charged with:

the crime of Malicious Mischief in that [he] did wilfully and unlawfully defile, cast contempt upon and burn an American Flag, in violation of [New York’s desecration statute], under the following circumstances: . . . [he] did wilfully and unlawfully set fire to an American Flag and shout, ‘If they did that to Meredith, We [sic] don’t need an American Flag.' Street had been “charged with two acts violative of the statute: burning a flag and publicly speaking defiant or contemptuous words about the

47. *Id.* at 594–95.
49. *Id.* at 637–38.
50. *Id.* at 642. The Court stated that:

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 . . . . We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.

*Id.* (footnotes omitted).
51. *Id.* at 644 (Black & Douglas, JJ., concurring).
53. *Id.* at 578 (emphasis added) (quoting N.Y. PENAL LAW § 1425, subd. 16(d) (McKinney 1909) (current version at N.Y. GEN. BUS. LAW § 136(d) (McKinney 1988)).
54. *Id.* at 579 (quoting sworn information). Street had “heard a news report that civil rights leader James Meredith had been shot by a sniper in Mississippi.” *Id.* at 578.
flag." As a consequence, his words might have been a basis for his conviction. The Court wrote:

when a single-count indictment or information charges the commission of a crime by virtue of the defendant’s having done both a constitutionally protected act and one which may be unprotected, and a guilty verdict ensues without elucidation, there is an unacceptable danger that the trier of fact will have regarded the two acts as 'intertwined' and have rested the conviction on both together.\footnote{55} Thus, the Court held, “even assuming that the record precludes the inference that appellant's conviction might have been based solely on his words, we are still bound to reverse if the conviction could have been based upon both his words and his act.”\footnote{56} Although the Court purported to avoid the question,\footnote{57} the disposition of the case suggested that a conviction based solely upon physical desecration of the flag may be constitutionally permissible if it is unaffected by communicative statements. Even so, a conviction that might have turned on the communicative aspect of Street’s protest could not stand.\footnote{58} Although the defendant had physically desecrated the flag, his conviction was overturned because it may have been based in part on mere words.\footnote{59}

*Barnette* and *Street* seem to stand for the proposition that the government may not regulate communicative expression regarding the flag, either by compelling utterances of respect for the flag, or by prohibiting expressions of disrespect. In each, the Court’s analysis focused on statutory provisions that violated the Constitution. However, the Constitution’s limitations apply not just to the legislature's lawmaking powers in a narrow sense, but also to how the law is applied by those who interpret and enforce it.\footnote{60}

In 1974, the Court again reached first amendment issues in *Spence v.*

\footnote{55. Id. at 588.}
\footnote{56. Id.}
\footnote{57. Id. at 587. Even after the Supreme Court's decision in *Street*, some courts have still focused attention on verbal utterances of defendants in desecration cases. \*See, e.g., United States v. Crosson, 462 F.2d 96, 98 (9th Cir. 1972) (sustaining conviction of defendant who "uttered a very unladylike expression, threw the flag on the floor . . . sprayed it with fluid from a yellow can," and ignited it).\*}
\footnote{58. Street, 394 U.S. at 587.}
\footnote{59. Id. at 594 ("[W]e are unable to sustain a conviction that may have rested on a form of expression.").}
\footnote{60. Id. at 589-90.}
\footnote{61. As early as 1886, in *Yick Wo v. Hopkins*, the Supreme Court invalidated a San Francisco ordinance because of discriminatory application against a racial minority. 118 U.S. 356, 373-74 (1886).}
Washington. The Court invalidated a Washington state conviction for taping a peace symbol on the flag and displaying it publicly. The Court concluded that Spence had displayed the flag to express his political views and that the case was one of "prosecution for the expression of an idea through activity." As such, the Court held the prosecution unconstitutional.

The Spence decision could be construed as holding that desecration of the flag is constitutionally protected whenever it is done to express a political belief. Yet the Court's qualifications of its holding leave considerable doubt as to its meaning. It emphasized that the flag was not permanently damaged, that it was private property, that the conviction was under an "improper use" statute rather than a "desecration statute," and stated that "[g]iven the protected character of [the] expression and in light of the fact that no interest the State may have in preserving the physical integrity of a privately owned flag was significantly impaired on these facts, the conviction must be invalidated." What is clear is that the state conceded that the appellant engaged in a form of communication. The Court concluded that this was "a case of prosecution for the expression of an idea through activity." The Court invalidated the conviction but allowed the Washington statute to stand. Spence thus seems to stand only for the principal that a valid statute may not be used in order to punish expression.

3. Due process challenges to state flag-desecration statutes

In Smith v. Goguen, the United States Supreme Court invalidated Valerie Goguen's conviction under the Massachusetts desecration law.
because that law's vagueness invited discriminatory prosecution. The Massachusetts statute made it criminal to "treat contemptuously the flag of the United States." Goguen was convicted for wearing the flag sewn to the seat of his pants. The Court recognized that "careless uses of the flag" such as this "constitute unceremonial treatment that many people view as contemptuous." Still, the Court held Goguen's conviction unlawful because of the potential for discriminatory prosecution. The Court stated:

Statutory language of such a standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections. Legislatures may not so abdicate their responsibilities for setting the standards of the criminal law. In Gregory v. City of Chicago, Mr. Justice Black, in a concurring opinion, voiced a concern, which we share, against entrusting lawmaking "to the moment-to-moment judgment of the policeman on his beat." The aptness of his admonition is evident from appellant's candid concession during oral argument before the Court of Appeals regarding state enforcement standards for that portion of the statute under which Goguen was convicted:

"[A]s counsel [for appellant] admitted, a war protester who, while attending a rally at which it begins to rain, evidences his disrespect for the American flag by contemptuously covering himself with it in order to avoid getting wet, would be prosecuted under the Massachusetts statute. Yet a member of the American Legion who, caught in the same rainstorm while returning from an 'America—Love It or Leave It' rally, similarly uses the flag, but does so regrettably and without a contemptuous attitude, would not be prosecuted."

Where inherently vague statutory language permits such selective law enforcement, there is a denial of due process. The Court did not reach the first amendment issue of whether

75. Id. at 567-68. The First Circuit held the Massachusetts statute unconstitutional on grounds of both vagueness and overbreadth. Goguen v. Smith, 471 F.2d 88, 96, 105 (1st Cir. 1972), aff'd, 415 U.S. 566 (1974). The Supreme Court affirmed on the ground of vagueness alone, declining to "reach the correctness of the holding below or other First Amendment grounds." Goguen, 415 U.S. at 567-68.


77. Id. at 568.

78. Id. at 574.

79. Id. at 575-76.

Goguen was in fact prosecuted for the communicative content of his act.81 The potential for discriminatory prosecution led the Court to hold that the statute was void for vagueness as it applied to Goguen.82 The Court held that "insofar as the vagueness doctrine is concerned, [the constitutionality of desecration statutes] will depend as much on their judicial construction and enforcement history as their literal terms."83 The Court did not foreclose even-handed enforcement of clearly written desecration laws.84 Indeed, if the Massachusetts law was used to punish all unceremonial uses of the flag, including those reluctantly committed by rain-afflicted Legionnaires, the statute would have withstood the Court's vagueness analysis. The statute was unconstitutionally vague because it was impossible to tell which unceremonial uses would be punished, and which would not be punished.

In 1974 the Supreme Court summarily affirmed the Second Circuit's opinion in Long Island Vietnam Moratorium Committee v. Cahn.85 Cahn prohibited prosecution under New York's desecration statute of anyone displaying a button or decal featuring a peace sign against a circular background of stars and stripes.86 The Second Circuit agreed with the district court's assertion that the construction placed on the New York law

"would make criminal the possession of all those reproductions of the face of President John F. Kennedy superimposed upon a picture of the American flag which hang on the walls of shops, homes and offices all over the country. And what of the millions of celluloid campaign buttons which for generations, including the time before this statute was enacted, have carried the photographs of the aspiring Presidential and other candidates against a background of one or more American flags in full color?"87

The court found that the state law could not "reasonably be interpreted to be inapplicable to the emblem in question."88 However, since it "vest[ed] local law enforcement officers with too much arbitrary discre-
tion in determining whether or not a certain emblem is grounds for protection,” the statute was found to be overbroad, and therefore, unconstitutional.

B. Texas v. Johnson

*Texas v. Johnson*\(^91\) is best understood as a case involving discriminatory prosecution. Johnson had “raised a facial challenge to Texas’ flag-desecration statute,” and asked the United States Supreme Court to strike the statute down as void on its face under the first amendment.\(^92\) The Court refused.\(^93\) Instead, the Court held that although valid convictions might be had against those who desecrate the flag, Texas had violated the first amendment by improperly using its desecration statute to punish Johnson for communicating unpopular political beliefs.\(^94\)

The *Johnson* Court acknowledged that “Johnson was convicted of flag desecration for burning the flag rather than for uttering insulting words.”\(^95\) However, the Court concluded that he was prosecuted because of the expressive content of his act.\(^96\) This factor was central to the Court’s analysis.\(^97\) The Court stated:

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. If it is, then we are outside of [the] *O’Brien* test, and we must ask whether this interest justifies Johnson’s conviction under a more demanding standard . . . .

[A]lthough we have recognized that where “‘speech’ and ‘non-speech’ 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,” . . . we have limited the applicability of *O’Brien*’s relatively lenient standard to those cases in which

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89. *Id.* at 350.
90. *Id.*
92. *Id.* at 2538 n.3.
93. *Id.* at 2538-39 n.3.
94. *Id.* at 2538 n.3. The flag burning occurred during a demonstration against the Reagan administration. *Id.* at 2536. Literature was distributed by protesters denouncing administration policies and the policies of some Dallas corporations. *Id.*
95. *Id.* at 2538.
96. *Id.* at 2542-43.
97. *Id.*
“the governmental interest is unrelated to the suppression of free expression.” . . . [W]e 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.98

The Court emphasized that the Texas statute does not necessarily apply “only to expressive conduct protected by the First Amendment.”99 As a consequence, the regulation of expressive conduct, so central to the

98. Id. at 2538, 2540-41 (quoting United States v. O’Brien, 391 U.S. 367, 376-77 (1968)) (citations omitted). In United States v. O’Brien the Court upheld a federal statute punishing those who burn their draft cards, publicly or privately. 391 U.S. 367, 386 (1968). The Court’s opinion established a special level of scrutiny, lower than the so-called “strict scrutiny,” for facially neutral governmental regulations that may have an incidental impact on communicative conduct. The Court wrote:

[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. Id. at 377. The third factor is the crucial threshold factor that determines whether O’Brien applies.

A number of opinions have applied O’Brien’s less stringent standard in desecration cases, and thus upheld the conviction. See, e.g., United States v. Crosson, 462 F.2d 96, 100-02 (9th Cir.) (statute prohibiting burning of flag does not interfere with free speech or restrict first amendment freedoms which are not outweighed by national interest), cert. denied, 409 U.S. 106 (1972); Sutherland v. DeWulf, 323 F. Supp. 740, 744-46 (S.D. Ill. 1971) (state statute proscribing mutilation of flag was constitutional under first and fourteenth amendments in view of overriding state interest in preserving public peace and flag as symbol of unity); United States v. Ferguson, 302 F. Supp. 1111, 1113-14 (N.D. Cal. 1969) (burning of flag could not be considered speech merely because burning was intended to express idea; statute prohibiting burning held valid); People v. Sutherland, 9 Ill. App. 3d 824, 826-27, 292 N.E.2d 746, 748-49 (1973) (state interest in preservation of peace and public order is important, as are substantial governmental interests unrelated to suppression of speech, therefore statute prohibiting mutilation of flag is constitutional); State v. Waterman, 190 N.W.2d 809, 810 (Iowa 1971) (state may legitimately punish desecration of flag without running afield of first amendment protections); State v. Royal, 113 N.H. 224, 229, 305 A.2d 676, 680 (1973) (since “state has an interest in protecting the physical integrity of the flag, in promoting patriotism . . . and pride in country” and maintaining peace, statute prohibiting mutilation of flag was held to be constitutional); State v. Saulino, 29 Ohio Misc. 25, 29-30, 277 N.E.2d 580, 583 (Ohio Mun. Ct. 1971) (one may say anything about the flag, but statute prohibiting contemptuous desecration of flag affects conduct only and is constitutional).

99. Johnson, 109 S. Ct. at 2538 n.3 (emphasis in original). The Court wrote:

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 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 2538-39 n.3.
Court's analysis, may not be found in the statute itself. Johnson's prosecution was based on the communicative content of his act; the state selectively prosecuted Johnson for reasons related to expression. By the state's own admission, "Johnson was prosecuted because he knew that his politically charged expression would cause 'serious offense.'" The Court concluded that "Johnson's political expression was restricted because of the content of the message he conveyed." The Court admonished that government may not "proscribe particular conduct because it has expressive elements." The Court continued:

[W]hat might be termed the more generalized guarantee of freedom of expression makes the communicative nature of conduct an inadequate basis for 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.

The Court did not strike down the Texas statute, but reversed Johnson's conviction because "the statute as applied to him violate[d] the First Amendment." The Court thus upheld the notion that one convicted under a valid statute may obtain a reversal of his or her conviction, if prosecution was motivated by improper factors such as race, religion, or political viewpoint. Johnson's conviction was invalidated, not the Texas statute, because Johnson "was prosecuted for his expression of dissatisfaction with the policies of this country, expression situated at the

100. TEX. PENAL CODE ANN. § 42.09 (Vernon 1974) (amended 1989).

§ 42.09 Desecration of Venerated Object
(a) A person commits an offense if he intentionally or knowingly desecrates:
   (1) a public monument;
   (2) a place of worship or burial; or
   (3) a state or national flag.
(b) For purposes of this section, "desecrate" means deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action.
(c) An offense under this section is a Class A misdemeanor.

Id.

101. Johnson, 109 S. Ct. at 2543. The Court observed that the state's asserted interest in condemning Johnson to preserve the flag as a symbol of nationhood and national unity was "related to expression in the case of Johnson's burning of the flag." Id. at 2542.

102. Id. at 2543.

103. Id.

104. Id. at 2540.


106. Id. at 2538 n.3 (emphasis added).

107. Id. at 2539. See also United States v. Steele, 461 F.2d 1148, 1151 (9th Cir. 1972).
core of our First Amendment values."\textsuperscript{108}

In \textit{Johnson}, the Court recognized and carefully preserved the government’s power to enforce desecration laws. It declined to overrule \textit{Halter v. Nebraska},\textsuperscript{109} which upheld criminal convictions of businessmen who desecrated the flag by using it for advertising purposes.\textsuperscript{110} The \textit{Johnson} Court said, "as we continually emphasized in \textit{Halter} itself, that case involved commercial rather than political speech."	extsuperscript{111} The defendants in \textit{Halter} were punished under a statute forbidding the commercial use of the flag, and were not prosecuted for the expression of unpopular political ideas.\textsuperscript{112}

The popular press, however, reacted to the Supreme Court’s decision by erroneously announcing that it had held \textit{desecration statutes} to be unconstitutional.\textsuperscript{113} Certainly, portions of the Court’s opinion could be construed to cast doubt on the constitutionality of the Texas statute. An element to be proved under the Texas statute was that the defendant mistreats the flag in a way that he "knows will seriously offend one or more persons likely to observe or discover his action."\textsuperscript{114} However, the Court did not hold that this provision of the statute was unconstitutional; it objected to the state’s application of the statute which required proof of conduct that “is intentionally designed to seriously offend other individuals.”\textsuperscript{115} By requiring proof of an intent to affect an audience, Texas authorities applied the statute in an unconstitutional fashion: "Whether Johnson’s treatment of the flag violated Texas law thus depended on the likely communicative impact of his expressive conduct."\textsuperscript{116} The Court recognized that the statute itself did not require such an application.\textsuperscript{117} A holding that expressive intent cannot be an element in the prosecution for desecration should have little impact on flag desecration laws generally, since intent is not an element of the crime.\textsuperscript{118}

\textsuperscript{108} \textit{Johnson}, 109 S. Ct. at 2543.
\textsuperscript{109} 205 U.S. 34 (1907).
\textsuperscript{110} \textit{Id.} at 41.
\textsuperscript{111} \textit{Johnson}, 109 S. Ct. at 2545 n.10 (citing \textit{Halter v. Nebraska}, 205 U.S. 34 (1907)).
\textsuperscript{112} \textit{Id.} at 2546-47.
\textsuperscript{113} See, \textit{e.g.}, Isaacson, \textit{O'er the Land of the Free}, \textit{Time}, July 3, 1989, at 14-15. (”The ruling does, however, invalidate laws in 48 states . . . and at the federal level that prohibit the desecration of the flag.”).
\textsuperscript{114} \textit{Id.}
\textsuperscript{115} 110. \textit{Johnson}, 109 S. Ct. at 2543.
\textsuperscript{116} \textit{Id.}
\textsuperscript{117} \textit{Id.} at 2538 n.3.
No doubt some members of the five-Justice majority in *Texas v. Johnson* would have been happy to strike the Texas statute down as unconstitutional on its face. Indeed, Justice Kennedy in his concurrence opined that "we are presented with a clear and simple statute to be judged against a pure command of the Constitution."119 The *Johnson* majority opinion's author, Justice Brennan, previously dissented from denial of certiorari in *Kime v. United States*,20 stating that the federal desecration statute was "flagrantly unconstitutional on its face."121 Justice Brennan stated:

The Government has no aesthetic or property interest in protecting a mere aggregation of stripes and stars for its own sake; the only basis for a governmental interest (if any) in protecting the flag is precisely the fact that the flag has substantive meaning as a political symbol. Thus, assuming that there is a legitimate interest at stake, it can hardly be said to be one divorced from political expression. Hence, the one governmental interest suggested as support for this statute, and these convictions, is one clearly foreclosed by both precedent and basic First Amendment principles.122

He further stated that even a neutral statute "that simply outlawed any public burning or mutilation of the flag, regardless of the expressive intent or nonintent of the actor" would be unconstitutional.123 It is perhaps not surprising that an opinion authored by Justice Brennan would contain hints of his view that any desecration statute is unconstitutional on its face and in every possible application. That, however, is not the holding of *Texas v. Johnson*.124

The slim five-Justice majority in *Johnson* included Justice Blackmun. In *Smith v. Goguen*,125 Justice Blackmun's dissent concluded that "Goguen's punishment was constitutionally permissible for harming the physical integrity of the flag by wearing it affixed to the seat of his pants."126 Justice Blackmun not only disagreed with the *Goguen* Court's holding that the Massachusetts statute was unconstitutionally vague, he

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120. 459 U.S. 949 (1982).
121. *Id.* at 954 (Brennan, J., dissenting).
122. *Id.* (Brennan, J., dissenting).
123. *Id.* at 954-55 & n.7 (Brennan, J., dissenting).
124. See *supra* notes 91-94 and accompanying text.
126. *Id.* at 591 (Blackmun, J., dissenting).
concluded that the statute's provision for punishment of one who treats the flag with contempt did not require punishment of the communicative content, because it had been interpreted by the Massachusetts court to prohibit conduct only, without regard to communicative content. Justice Blackmun wrote:

Having rejected the vagueness challenge and concluded that Goguen was not punished for speech, the Massachusetts court, in upholding the conviction, has necessarily limited the scope of the statute to protecting the physical integrity of the flag. The requisite for “treating contemptuously” was found and the court concluded that punishment was not for speech—a communicative element. I, therefore, must conclude that Goguen's punishment was constitutionally permissible . . . .

A crucial difference between Goguen and Johnson may be Justice Blackmun's perceptions of how the statute was interpreted and applied—a matter of prosecutorial discretion and interpretation by the courts. In Johnson, with Justice Blackmun's vote, the Court did not hold that desecration of the flag may not be punished, but rather that desecration statutes may not be applied to punish the communicative elements of conduct that might otherwise be more broadly proscribed.

III. THE NEW FEDERAL DESECRATION STATUTE

Press accounts that the United States Supreme Court had struck down desecration statutes and held desecration itself to be constitutionally protected were quickly followed by a political firestorm. Both houses of Congress passed resolutions expressing dismay at the Supreme Court's holding. President George Bush jumped on the bandwagon by calling for a constitutional amendment to remove first amendment protections for flag desecrators. Republican members of Congress drafted

127. Id. at 590-91 (Blackmun, J., dissenting).
128. Id. at 591 (Blackmun, J., dissenting).
129. Johnson, 109 S. Ct. at 2543.
130. Justices Topple Flag-Burning Laws, Boston Globe, June 22, 1989, at 1, col. 3; Court OK's Flag-Burning; Sharply Divided Justices Rule It's Symbolic Free Speech, Newsday, June 22, 1989, at 3, col. 1; Court Nullifies Flag-Desecration Laws; First Amendment is Held to Protect Burnings During Political Demonstrations, Wash. Post, June 22, 1989, at A1, col. 3.
a proposed constitutional amendment to grant a state or the federal government the power to jail flag-burning protesters like Johnson. The President's proposed amendment provides: "The Congress and the States shall have the power to prohibit the physical desecration of the flag of the United States." In Congressional hearings on the proposed amendment, Professors Dellinger and Tribe explained that the Court had not invalidated desecration statutes generally. Professors Dellinger and Tribe suggested that if Congress was concerned about the validity of the federal desecration statute Congress could amend it to delete any reference to communicative elements that under Supreme Court precedent, cannot form the basis of a desecration prosecution. A statutory amendment was promoted as an expedient alternative to the Constitutional amendment demanded by the President.

As a result, Congress revised the existing federal flag-desecration statute to provide protection that was allegedly lacking after Texas v. Johnson. Contending that a constitutional amendment was needed to protect the flag, and finding a statutory amendment insufficient, President Bush refused to sign the bill, but permitted it to become law without

134. See H.R.J. Res. 350, 101st Cong., 1st Sess., 135 CONG. REC. E2447 (1989). On October 19, 1989, the President's proposed amendment came to a vote in the Senate. Senate Rejects Flag-Burning Amendment, L.A. Times, Oct. 20, 1989, at A1, col. 3. Fifty-one senators voted for the proposed amendment, and forty-eight voted against it. Id. Applying the usual rule that a constitutional amendment originating in the Congress must be approved by two-thirds of the members of each house, the vote meant that the measure was defeated. Id.
136. Id.
137. Professor Dellinger testified to his belief that "the United States Supreme Court would sustain legislation 'protecting the physical integrity of the flag in all circumstances,'" and suggested that "such a statute would be far less harmful to basic constitutional values than an amendment to the Constitution." See id. at 209. Professor Tribe advanced a similar view, arguing that enforcement of such a law "need raise no First Amendment problem as long as those who are punished are not singled out because of any message they might intend to convey, or their audience might happen to receive, by their destruction or mutilation of an American flag." Id. at 219. He further stated that "on its 200th birthday, the Bill of Rights deserves a better present than a needless amendment." Id. at 221.
his signature.\footnote{140} The previously existing federal desecration statute provided: “Whoever knowingly casts contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it shall be fined not more than $1,000 or imprisoned for not more than one year, or both.”\footnote{141} The alleged deficiency of this statute lay in the words “casts contempt,” which could be construed to impose an element of intent to communicate disrespect for the flag, so that any prosecutions under the statute would run afoul of Johnson.\footnote{142} Although such a construction of the federal statute was not required, it arguably had been adopted by some federal courts.\footnote{143} In this respect the new statutory language is an improvement, because it reduces the likelihood that the statute unconsti-

\footnote{140. \textit{Bush to Let Flag-Burning Bill Become Law but Won't Sign It,} L.A. Times, Oct. 14, 1989, at A20, col. 1. As reported by the Los Angeles Times, “The President said that he will allow the recently passed bill to become law automatically without his signature but added that he does not think the law will withstand legal challenges.” \textit{Id.}}\footnote{141. 18 U.S.C. § 700(a) (1982) (amended 1989).} \footnote{142. Justice Brennan adopted such an interpretation of the federal statute in \textit{Kime v. United States,} 459 U.S. 949, 954-55 (1982) (Brennan, J., dissenting from denial of certiorari). The trial court apparently had construed the statute otherwise, for the defendants “were forbidden to introduce any evidence or argument at trial as to the purposes of the March 27 demonstration or as to their intent in burning a flag.” \textit{Id.} at 950 n.1.} \footnote{143. See, e.g., \textit{United States v. Crosson,} 462 F.2d 96, 100 (9th Cir. 1972); Joyce v. United States, 454 F.2d 971, 992 (D.C. Cir. 1971), \textit{cert. denied,} 405 U.S. 969 (1972); Hoffman v. United States, 445 F.2d 226, 229-31 (D.C. Cir. 1971) (MacKinnon, J., concurring). In \textit{Smith v. Goguen,} Justice White concurred in the Court’s judgment, not on the vagueness grounds of the majority opinion, but because he believed the state statute’s language punishing one who “treats contemptuously” the flag unfairly implied an element of communicative intent. 415 U.S. 566, 587-88 (1974) (White, J., concurring) (footnote omitted). He observed that “to convict on this basis is to convict not to protect the physical integrity or to protect against acts interfering with the proper use of the flag, but to punish for communicating ideas about the flag unacceptable to the controlling majority in the legislature.” \textit{Id.} at 588 (White, J., concurring) (footnote omitted). Justice Blackmun dissented, noting that he could not agree with

On July 18, 1989, Professor Dellinger testified before the Civil and Constitutional Rights Subcommittee of the House Judiciary Committee: Neither Texas nor the United States has ever enacted a statute designed simply to protect the physical integrity of the flag. Under the existing statutes proof that a defendant had knowingly and deliberately burned an American flag would not constitute proof of a crime. Essential to a Federal prosecution would be the additional evidence that the defendant was expressing an idea of contempt, and essential to a Texas prosecution would be the evidence that the defendant was expressing the idea that the flag was not sacred and that this 'desecration' was done with knowledge that observers would be seriously offended by this message. The flaw in each statute is that the communication of an idea is essential to the commission of the crime. The 'governmental interest' is thus directly related to the message being communicated.


\textit{See, e.g., United States v. Crosson,} 462 F.2d 96, 100 (9th Cir. 1972); Joyce v. United States, 454 F.2d 971, 992 (D.C. Cir. 1971), \textit{cert. denied,} 405 U.S. 969 (1972); Hoffman v. United States, 445 F.2d 226, 229-31 (D.C. Cir. 1971) (MacKinnon, J., concurring). In \textit{Smith v. Goguen,} Justice White concurred in the Court’s judgment, not on the vagueness grounds of the majority opinion, but because he believed the state statute’s language punishing one who “treats contemptuously” the flag unfairly implied an element of communicative intent. 415 U.S. 566, 587-88 (1974) (White, J., concurring) (footnote omitted). He observed that “to convict on this basis is to convict not to protect the physical integrity or to protect against acts interfering with the proper use of the flag, but to punish for communicating ideas about the flag unacceptable to the controlling majority in the legislature.” \textit{Id.} at 588 (White, J., concurring) (footnote omitted). Justice Blackmun dissented, noting that he could not agree with
tutionally includes expression as an element of the federal offense. The amended statute provides: "Whoever knowingly mutilates, defaces, burns, 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." \[144\]

All references to treating the flag with "contempt" are deleted.\[145\]

The new federal statute may actually protect persons who desecrate the flag to denounce American ideals. It provides that the federal law "does not prohibit any conduct consisting of the disposal of a flag when it has become worn or soiled." \[146\] The section does not require that the method of disposal be dignified. Representative Chuck Douglas aptly called the bill the "flag-burner protection act of 1989." \[147\]

However, the revisions do not guarantee that the statute will be constitutionally applied by prosecuting authorities. The revised statute provides that "[a]s 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

Justice White's conclusion "that the words 'treats contemptuously' are necessarily directed at protected speech . . . " \[Id. at 590 (Blackmun, J., dissenting).\]

A construction of the federal statute that requires specific intent to communicate contempt would depart from the usual rule, as expressed in Justice White's concurrence in Goguen, that the desecration offense does not require a showing of specific intent to dishonor the flag. \[Id. at 588-89 (White, J., concurring).\] As Justice White recognized in his Goguen concurrence, the words "casts contempt" need not be interpreted to require any showing of intent to express contempt. Goguen, 415 U.S. at 588-89 (White, J., concurring)(citing State v. Royal, 113 N.H. 224, 305 A.2d 676 (1973)). In State v. Royal the New Hampshire Supreme Court interpreted its state's statute, finding that "[t]he words 'cast contempt' are directed to the effect of the prohibited acts and not at the intention of the actor." \[113 N.H. 224, 227, 305 A.2d 676, 679 (1973).\] Indeed, desecration by definition involves treatment of a venerated object in a fashion that is inconsistent with its revered status. \[See WEBSTER'S NEW INTERNATIONAL DICTIONARY 610 (3d ed. 1966).\] Thus, to treat the flag improperly in any manner is to fail to accord it the reverence which it is due, and thus to "cast contempt" whether or not contempt is specifically intended.


\[145. Furthermore, the previous provision that the desecration be "public" to be criminally sanctioned has been deleted. This revision may be responsive to the Supreme Court's observation in United States v. O'Brien that a statute regulating private conduct is not directed to the suppression of expression. 391 U.S. 367, 375 (1968). The O'Brien Court upheld a federal statute prohibiting destruction of draft cards. The Court observed that "there is nothing necessarily expressive about such conduct. The [law] does not distinguish between public and private destruction, and it does not punish only desecration engaged in for the purpose of expressing views." \[Id.\]

Interestingly, removal of the public/private distinction in the amended federal statute renders the federal statute substantively distinct from many state statutes which require public desecration. \[See infra notes 207-09 and accompanying text.\]


\[147. House Votes, 380 to 38 to Outlaw Flag Burning, N.Y. Times, September 13, 1989, at A1, col. 2.\]
substance, of any size, in a form that is commonly displayed.”

This definition of “flag” dramatically departs from the previous statutory definition, which limited the definition of “flag” to representations that an “average person seeing the same without deliberation may believe the same to represent the flag.” The former statute required that the object desecrated at least be recognizable as a flag—the amended language does not. A violation of the amended statute merely requires that the object desecrated be a flag “or any part thereof” and that it be in a form that is “commonly displayed.”

This meaning is not clear. White stars are a part of the flag, as are red stripes. Are white stars protected from desecration under the statute? Are red stripes? The new definition may run afoul of the holding in Smith v. Goguen that inherently vague statutory language which invites discriminatory law enforcement is a denial of due process.

Although the limits of the amended statute are ill-defined, several common uses of the flag could fall within its broad prohibitions. For example, the American flag is “commonly displayed” on postage stamps. That these flags are small and printed on paper is not an objection, for the statute prohibits physical desecration of flags “made of any substance, of any size, in a form that is commonly displayed.” One who affixes a flag-decorated postage stamp on an envelope to be mailed places it there to be defaced with a postmark, and literally violates the terms of the statute. It hardly seems likely that federal prosecutors will prosecute anyone who so desecrates the flag.

Even if the problem of the statute’s ambiguity can be overcome, it is likely that political considerations will be behind decisions to prosecute only a few violators. For instance, although many state desecration statutes prohibit a wide range of conduct, they are seldom applied unless the desecration is associated with expression of an unpopular political viewpoint.

152. Id. at 575-76.
154. Id. This Article argues that use of the flag on postage stamps is a desecration of the flag, whether or not it is criminally punishable under 18 U.S.C. § 700. See infra note 216 and accompanying text.
155. See infra notes 217-25 and accompanying text.
156. Ely, supra note 33, at 1506 n.98 ("The legislature undoubtedly expects that the major-
The new statute provides for expedited review by the Supreme Court if its constitutionality under the first amendment is questioned.\textsuperscript{157} As a result of the statute's vague language and the probability of discriminatory prosecution, the new federal statute may be held unconstitutional. If Congress maintains its desire to prohibit flag desecration the only available method will be a constitutional amendment.\textsuperscript{158} The remainder of this Article analyzes the currently proposed constitutional amendment.

IV. INTERPRETING THE PROPOSED CONSTITUTIONAL AMENDMENT

A. The Power to Prohibit Physical Desecration as an Implicit Repeal

The proposed constitutional amendment provides: "The Congress and the States shall have the power to prohibit physical desecration of the flag of the United States."\textsuperscript{159} These words cannot reasonably be construed to add anything to the Constitution, since \textit{Texas v. Johnson}\textsuperscript{160} acknowledges that the power to prohibit desecration already exists.\textsuperscript{161} The Court merely held that the power may not be used in ways that violate the first amendment.\textsuperscript{162} The Court left absolutely intact the power to prohibit desecration in a nondiscriminatory fashion.\textsuperscript{163} If the proposed amendment is adopted, the President may contend that it has some meaning beyond what it says. He may earnestly argue that it was meant to do \textit{something}, however vacuous it appears. President Bush may assert that given the context in which this amendment was proposed, it

\textsuperscript{157} The amended statute provides:

157. The amended statute provides:

If the question of constitutionality of this section, under the first article of amendment to the Constitution of the United States, is properly presented in any case before a United States district court, that court shall, if the Supreme Court of the United States has not previously ruled on that question, immediately certify that question to the Supreme Court.


161. \textit{Id.} at 2540.

162. \textit{Id.}

163. \textit{Id.} at 2546-47.
was designed to overrule *Johnson* and to prohibit application of the first amendment to any case involving "physical desecration" of the flag.

Arguments such as this should fail. The proposed amendment says absolutely nothing about repealing the first amendment, and the Constitution's words "are to be taken in their natural and obvious sense ..." Where the text's meaning is, on its face, quite clear and simple—as it is in the proposed amendment—"there is no room for construction and no excuse for interpolation or addition." The proposed amendment's words are indeed stark and simple; its meaning is plain.

B. "Physical Desecration" of the Flag

Assuming the proposed amendment is redrafted to include explicit language limiting first amendment protection, or that a repeal of the first amendment is judicially implied, the reach of the proposed amendment would depend on the meaning of the words: "physical desecration of the flag of the United States." These words define the scope of the amendment's operation.

Discovery of the specific meaning of these words is essential if we are to understand the meaning of the amendment. "Flag of the United States" refers to any flag of the United States or any part thereof that is commonly displayed. "Physical desecration" encompasses any conduct that may be deemed improper in light of the flag's special status as a sacred symbol. This amorphous standard is not then limited to acts which physically damage or mutilate the flag. The term also encompasses any non-verbal breach of etiquette in relation to the flag, whether or not intended as an insult to the flag. "Physical desecration of the flag of the United States" thus encompasses any physical conduct toward any representation of the flag that falls short of the respect to which our flag is entitled.

1. "Flag of the United States"

The flag is more than a piece of cloth. The flag of the United States is an abstract concept, not a mere physical reality. The flag represents our country, our Constitution, our liberty. Physical flags are merely

167. See also infra note 183 and accompanying text.
169. *See Minersville School Dist. v. Gobitis*, 310 U.S. 586, 600 (1940) ("The preciousness of the family relation, the authority and independence which give dignity to parenthood, indeed the enjoyment of all freedom, presuppose the kind of ordered society which is summarized by
representations of these concepts. Of course, only physical representations of our flag may be "physically desecrated" and the proposed amendment is concerned only with conduct toward these physical representations. Thus, for purposes of defining acceptable conduct, any representation of the flag is to be treated as the flag. Although our flag is an abstraction, to behold any representation of it is to stand in its reified presence.

A federal statute directs that "[t]he flag of the United States shall be thirteen horizontal stripes, alternate red and white; and the union of the flag shall be forty-eight stars, white in a blue field."170 "On the admission of a new State into the Union one star shall be added to the union of the flag."171 By executive order, the flag now features fifty stars.172 A flag's material, size, or shape is not dictated by a federal statute. A presidential executive order does prescribe the size and shape of "Flags manufactured or purchased for the use of executive agencies."173 Yet, none of these characteristics define our flag, nor limit the respect to which it or any representation of it is entitled.174

Until amended in 1989, Title 18 of the United States Code, which provides criminal penalties for desecration of the flag, clearly stated that the "flag of the United States" includes "any picture or representation" of the flag, or any part or parts of it, "made of any substance or represented on any substance, of any size" [if an] "average person seeing the same without deliberation may believe the same to represent the flag."175 Most state statutes define the flag similarly.176

our flag.


171. Id. § 2.


173. Id.

174. See, e.g., Joyce, 454 F.2d at 981 (punishing desecration of 3x5 inch flag: "A little American flag is entitled to the same protection as a large one.").

175. 18 U.S.C. § 700(b) (1982) (amended 1989). The recent amendment to this section deleted the requirement that the representation of the flag be recognizable. It may be impossible to tell what a "flag" is under the amended statute. See supra notes 148-52 and accompanying text.

176. See, e.g., ARIZ. REV. STAT. ANN. § 13-3703.C.2 (1989) (" 'flag' means any emblem, banner or other symbol, of any size, composed of any substance or represented on any substance that evidently purports to be the flag of the United States or of this state."); ARK. STAT. ANN. § 5-51-207(b) (1987) ("The words 'flag,' 'colors,' 'coat of arms,' or 'insignia' used herein include also any picture or representation or simulation of the same."); CAL. MIL. & VET.
Generally, for purposes of desecration law, any physical representation of the flag is considered to be the flag. If a miscreant manufactures a flag with fifty-one stars, then abuses and defiles it, he commits a desecration of the flag. The fifty-first star does not change the nature of the offense. Similarly, abuse and defilement of a flag with orange and cream stripes and a turquoise union is no less a desecration of the flag because it is discolored. If the object is recognizable as a representation of the flag, it must be treated with the respect it deserves.

2. “Physical desecration”

Desecration is a broad concept. The word “desecrate” is based on the Latin root *sacram* and literally means to treat as, or to render, unholy
that which is sacred.\footnote{181} As a matter of common English usage, “to desecrate” an object means “[t]o take away its consecrated or sacred character,” “to treat [it] as not sacred or hallowed, to profane” it, or “to divert [it] from a sacred to a profane purpose.”\footnote{182} “To profane” the flag is “[t]o treat (what is sacred) with irreverence, contempt, or disregard,” or to misuse or abuse it.\footnote{183} A profane purpose is one “[n]ot pertaining or devoted to what is sacred or biblical.”\footnote{184} Commercial advertising and political fundraising are two examples of profane purposes to which a truly holy object ought not be diverted.

Obviously, no one can take from the flag its consecrated or hallowed status.\footnote{185} The proposed amendment’s reference to “physical desecration” can comprehend no such offense. Physical representations of the flag may be treated with “disregard” for the flag’s special status, and thus to treat it as “not sacred” or hallowed. The flag may also be misused for worldly purposes, or otherwise abused. Since any image of our flag is to be considered the flag itself, and must be treated with absolute respect, frivolous representations of it must be thought of as desecrations.\footnote{186} 


\footnote{182} IV Oxford English Dictionary 514 (2d ed. 1989) (a. “trans. To take away its consecrated or sacred character from (anything); to treat as not sacred or hallowed; to profane. b. To divert from a sacred to a profane purpose . . . “); see also Oxford American Dictionary 173 (1980) (“to treat (a sacred thing) with irreverence or disrespect”); Random House Dictionary of the English Language 390 (Unabridged Ed. 1983) (“1. to divest of sacred or hallowed character or office. 2. to divert from a sacred to a profane use or purpose. 3. to treat with sacrilege; profane.”); Webster’s Third New International Dictionary 610 (Unabridged 1966) (“1a: to violate the sanctity of by diverting from sacred purpose, by contaminating, or by defiling . . . b: to divest of sacred character or treat as unhallowed . . . .”).

\footnote{183} XII Oxford English Dictionary 570 (2d ed. 1989) (1a “trans. To treat (what is sacred) with irreverence, contempt, or disregard; to desecrate, violate. b. To misuse, abuse (what ought to be held in reverence or respect); to violate, defile, pollute.”).

\footnote{184} Id. (“1. Not pertaining or devoted to what is sacred or biblical, esp. in \textit{profane history, literature}; unconsecrated, secular, lay, common; civil, as distinguished from ecclesiastical.”).

\footnote{185} See Hertzberg, supra note 168, at 4.

\footnote{186} As one California court observed:

Three out of thousands of American-flag-depicted articles will suffice as illustrations: (1) The decals on the back windows of the automobiles of motorists, (2) a martini toothpick mounted with a flag designed to spear an olive, and (3) a picnic napkin decorated with a flag and intended for the garbage can after use. All of these come within the unequivocal, unambiguous terms of section 611 [defining “flag”] as acts made punishable by section 614, subdivision (d) [punishing desecration].

"Physical desecration" literally refers to any conduct in relation to the flag that is not proper in light of its hallowed status. A physical representation of the flag need not actually be physically damaged in order for the flag to be desecrated.

3. Legal usage

Legal usage does not narrow the import of the word "desecration" as it appears in the President's proposed amendment. The Constitution's words and phrases are to be taken at "their normal and ordinary as distinguished from technical meaning." If legal usage placed a special, technical meaning on the word "desecration," that fact would have little relevance to construction of the word in a constitutional sense. Even if reference to legal usage is made, it does not serve to narrow the concept of desecration. The law does not provide a generally accepted technical meaning of "desecration" that is any different from the ordinary one.

Although statutes prohibiting abuse or misuse of the flag often carry the word "desecration" in their titles, the operative provisions of those desecration statutes usually omit the word "desecration" and generally do not purport to define it. The few state statutes that provide a special definition of desecration that clearly limits the word's meaning, rec-
ognize that the word could encompass a much broader range of conduct.\textsuperscript{191} The conduct which could be described as "desecration" does not have a legal meaning uniformly different from its ordinary meaning.

Conduct that is prohibited and punished under the rubric of desecration varies widely from state to state. The limited reach of certain state laws cannot be relied on to redefine and narrow the concept of desecration as it appears in the proposed amendment. Several states have chosen to punish virtually the total range of conduct comprehended by the concept of desecration.\textsuperscript{192} Even within a single state, the reach of desecration statutes changes from time to time to either broaden or narrow their reach. For example, California and Texas amended their statutes in 1970\textsuperscript{193} and 1989\textsuperscript{194} respectively.

An attempt to limit the meaning of the word "desecration" as a constitutional term by reference to what a plurality of states choose to punish under the designation of desecration would be an exercise in semantics rather than a principled decision of law.

Particular desecration statutes have been given narrow constructions based upon their specific language.\textsuperscript{195} This largely stems from the general rule that criminal statutes, including desecration statutes, must

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  \item 191. See, e.g., Ariz. Rev. Stat. Ann. § 13-3703.C.1 (1989) ("For the purposes of this section: 1. 'Desecrate' means defacing, damaging, polluting or otherwise doing a physical act in a manner likely to provoke immediate physical retaliation.").
  \item 192. See infra notes 217-25 and accompanying text.
  \item 193. Act of 1970, ch. 1364, 1970 Cal. Stat. 2531 § 2. Section 614 narrowed the amendment which had read:
    A person is guilty of a misdemeanor who:
    \begin{itemize}
      \item (a) In any manner for exhibition or display, places or causes to appear any work, figure, mark, picture, design, drawing, or any advertisement of any nature upon any flag of the United States or of this State.
      \item (b) Exposes to public view any such flag upon which is printed, painted, or placed or to which is attached, appended, affixed or annexed any word, figure, mark, picture, design, drawing, or any advertisement of any nature.
      \item (c) Exposes to public view, manufactures, sells, exposes for sale, gives away, or has in possession for sale or to give away or for use for any purpose any article or substance being an article of merchandise or a receptacle of merchandise or article or thing for carrying or transporting merchandise upon which is printed, painted, attached or placed a representation of any such flag, standard, color, or ensign to advertise, call attention to, decorate, mark or distinguish the article or substance on which so placed.
      \item (d) Publicly mutilates, defaces, defiles, or tramples any such flag.
    \end{itemize}

    The statute now reads: "A person is guilty of a misdemeanor who knowingly casts contempt upon any Flag of the United States or of this state by publicly mutilating, defacing, defiling, burning, or trampling upon it." Cal. Mil. & Vet. Code § 614 (West 1988).
  \item 195. See, e.g., Hoffman v. United States, 445 F.2d 226, 229 (D.C. Cir. 1971); State v. Kool,
be strictly construed.\textsuperscript{196} Constitutional provisions, such as amendments, however, must be broadly construed unless doing so would produce conflict within the constitutional text.\textsuperscript{197} The narrow limitations of statutory construction cannot be applied when constitutional provisions are interpreted.\textsuperscript{198}

State courts have limited the reach of some desecration statutes through strict construction of the language of the statutes or by eliminating words which would otherwise make the statute overbroad, in order to avoid first amendment concerns.\textsuperscript{199} Legislatures, too, have redrafted desecration statutes and narrowed their scope to respond to first amendment objections.\textsuperscript{200} In Texas, for example, the statute was revised in light of three first amendment cases.\textsuperscript{201}

Reliance on desecration laws narrowed to meet or avoid first amendment objections would be contrary to the currently unarticulated, but probable, fundamental purpose of the proposed amendment: to overrule first amendment objections. It would be absurd to interpret such an amendment by referring to state laws that reflect efforts by legislatures or

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197. E. Chemerinsky, Interpreting the Constitution xii (1987) (protecting cherished values “can be best achieved by a judiciary with broad discretion in interpreting the Constitution”).

198. Broad interpretation of constitutional provisions is one of the most basic principles of our jurisprudence. In Justice John Marshall’s words:

A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. . . . [W]e must never forget, that it is a constitution . . . we are expounding.


199. See, e.g., Jones v. Wade, 479 F.2d 1176, 1179 (5th Cir. 1973), reaaff’d, 504 F.2d 427 (1974) (“The Texas courts have substantially narrowed the scope of this statute to remove constitutional defects.”); People v. Cowgill, 274 Cal. App. 2d Supp. 923, 926, 78 Cal. Rptr. 853, 855 (1969) (adopting narrow construction of “defile” to avoid constitutional objections), cert. denied, 396 U.S. 371 (1970). See also State v. Liska, 32 Ohio App. 2d 317, 318, 291 N.E.2d 498, 499 (1971) (adopting narrow construction of Ohio’s statutory language because “it is our duty to avoid constitutional issues if the questions presented can be disposed of on any other basis”). In order to uphold desecration statutes against charges of facial overbreadth many courts have stricken words from the statute that might otherwise suggest that criminal liability may turn on the utterance of words. See, e.g., Van Slyke, 489 S.W.2d at 592; State v. Royal, 113 N.H. 224, 305 A.2d 676, 678 (1973).

200. See, e.g., TEX. PENAL CODE ANN. \& 42.09 (Vernon 1989).

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courts to come within the bounds of the first amendment. Since state laws would no longer be limited by the first amendment, any reliance on them would subvert the unarticulated purpose of the proposed amendment.

4. State laws, injury and intent

Consideration of state flag-desecration laws confirms several important points which foreshadow the great breadth that the word "desecration," as a constitutional concept, invites. Legal usage generally does not require the flag to be damaged in any way to be desecrated. It does not require the desecration be public, nor does it require intent to insult or damage the flag.

First, many states have made clear that the flag may be desecrated without suffering any tangible physical injury. The proposed amendment's use of the words "physical desecration" reflects this distinction. Although the proposed amendment does not purport to reach non-physical desecration, such as verbal abuse or untoward thoughts, its words do not suggest that the flag must be physically damaged to be desecrated. Even if limited to physical acts, the word "desecration" encompasses far more than mutilation or destruction of the flag. One who spits on the flag desecrates it, even if the saliva does no physical damage; one who

202. See infra note 205.
203. See infra note 209 and accompanying text.
204. See infra note 211 and accompanying text.

“flips the bird” at the flag physically desecrates it without even touching it.

Second, although many states concern themselves primarily with “public” desecration when drafting their criminal laws, desecration as a legal term is not limited to conduct performed in public. The desecration statutes of several states clearly prohibit private desecration.

Third, the desecrator’s intent is typically not an element of the offense. However, a few states require that an evil intention must underlie an act of desecration before it may be criminally punished.

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207. See e.g., ALA. CODE § 13A-11-12 (1982); ARK. STAT. ANN. § 5-51-207(4) (1987); CAL. MIL. & VET. CODE § 614 (West 1988); COLO. REV. STAT. § 18-11-204 (1986); CONN. GEN. STAT. ANN. § 53-258a (West 1985); DEL. CODE ANN. tit. 11, § 1331 (1987); FLA. STAT. ANN. §§ 256.06, 876.52 (West 1973); HAW. REV. STAT. § 711-1107(c) (1985); IDAHO CODE § 18-3401 (1987); ILL. REV. STAT. ch. 1, para. 3351 (Smith-Hurd 1980); IND. CODE § 35-45-1-4 (Burns 1983); KAN. STAT. ANN. § 21-4114(b) (Vernon 1986); KY. REV. STAT. ANN. § 525.110(b) (Michie/Bobbs-Merrill 1985 & Supp. 1988); LA. REV. STAT. ANN. § 116 (West 1986); ME. REV. STAT. ANN. tit. 1, §§ 253.2, 254 (1987); MD. PUB. SAFETY CODE art. 27, § 82 (1987); MASS. GEN. LAWS ANN. ch. 264, § 5 (West 1970); OHIO REV. CODE ANN. § 162.720(4) (Anderson 1987).

In addition several states prohibit desecration only if it is likely to provoke immediate physical retaliation, which apparently permits private desecration. See, e.g., ARIZ. REV. STAT. ANN. § 13-3703.C.1 (1989). This may reflect a doctrine developed by several courts that a prosecution for desecration does not violate the first amendment where there is a risk of breach of the peace. See, e.g., Monroe v. State Court, 739 F.2d 568, 575 (11th Cir. 1984) (“imminence of public unrest or a clear and present danger of breach of the peace... is required under the constitution”); People v. Lindsay, 51 Ill. 2d 399, 406-07, 282 N.E.2d 431, 435 (1972).

Several opinions address the public/private distinction. See Peacock, 138 Me. at 342, 25 A.2d at 492 (“[T]he very essence of this offense is its publicity.”); Robey v. State, 76 Misc. 2d 1032, 351 N.Y.S.2d 788, 793 (Cl. Ct. 1973) (no punishable desecration because flag on interior wall of van was not exposed to public view); Claxton, 7 Wash. App. at 599, 501 P.2d at 193 (reversing conviction because, under Section 9.86.030 of the Washington Code, desecration is punishable only if “done in public”).

Several state statutes outlawing desecration contain no requirement that the prohibited conduct be public. See, e.g., GA. CODE ANN. § 50-3-9 (1982); UTAH CODE ANN. § 76-9-601 (1978).

208. Some courts have held that the first amendment was violated if the desecration punished did not create an immediate danger of a breach of the peace. See, e.g., Monroe, 739 F.2d at 575; United States ex rel. Radich v. Criminal Court, 385 F. Supp. 165, 180-82 (S.D.N.Y. 1974); Cline v. Rockingham County Superior Court, 367 F. Supp. 1146, 1152 (D.N.H. 1973) (New Hampshire law unconstitutional because “not limited to ‘public’ desecration”), aff’d, 502 F.2d 789 (1st Cir. 1974); State v. Farrell, 209 N.W.2d 103, 106-07 (Iowa 1973), vacated, 418 U.S. 907 (1974); State v. Kool, 212 N.W.2d 518, 521 (Iowa 1973).


eral rule, courts hold that such intent is not an element of the offense of desecration.\textsuperscript{211} In some states, desecration and malicious desecration are punishable under separate statutes.\textsuperscript{212}

Even where statutes require that, to be punishable, the desecration must be "knowing" or "intentional," courts usually hold that only the acts committed must have been done intentionally; the defendant need not have been aware that they were improper.\textsuperscript{213} Therefore, "specific intent" is not an element of desecration. Only objective actions are considered; specific intent to desecrate or show disrespect is legally irrelevant so long as the improper actions are themselves intended.\textsuperscript{214} Therefore, desecration as a legal term is not more restrictive than desecration in its ordinary sense. Cases holding that specific, malicious intent is an ele-

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\item \textsuperscript{211} State v. Hodsdon, 289 A.2d 635, 638 (Del. Super. Ct.) (1972) ("The conduct prohibited cannot be defined in terms of attitudes."); State v. Waterman, 190 N.W.2d 809, 813 (Iowa 1971) (specific intent to desecrate need not be proved); State v. Royal, 113 N.H. 224, 227, 305 A.2d 676, 679 (1973) (words "cast contempt" in flag desecration statute refers to effect of prohibited acts, and not to intention of actor), \textit{writ denied}, 397 F. Supp. 260 (D.N.H. 1975); State v. Schlueter, 127 N.J.L. 496, 499, 23 A.2d 249, 250-51 (1946) (desecration proved if actions are intended, and have effect of publicly mutilating, trampling upon or otherwise defacing or defiling flag even if committed without malice or evil intent); People v. Radich, 26 N.Y.2d 114, 125, 257 N.E.2d 30, 36, 308 N.Y.S.2d 846, 854 (1970) ("[E]ven if we assume that defendant had an honest political intent . . . or that he had no intent at all, that element is not essential to a conviction of violating a statute which is \textit{malum prohibitum}.") aff'd sub nom. Robey v. State, 76 Misc. 2d 1032, 351 N.Y.S.2d 788 (Ct. Cl. 1973) (desecration is \textit{malum prohibitum} and no criminal intent is required); People v. Keough, 38 A.D.2d 293, 295, 329 N.Y.S.2d 80, 82 (1972) (intent is not an element of the offense), \textit{rev'd on other grounds}, 31 N.Y.2d 281, 283-84, 290 N.E.2d 819, 820, 338 N.Y.S.2d 618, 619 (1972); Mitchell, 32 Ohio App. 2d at 21, 288 N.E.2d at 221 (desecration \textit{malum prohibitum} and offense need not be knowingly committed); Bunch, 32 Ohio App. 2d at 163, 288 N.E.2d at 856 ("R.C. section 2921.05 does not require that intent be proven"); State v. Sinniger, 6 Or. App. 145, 149, 486 P.2d 1303, 1304-05 (1971) (desecration \textit{malum prohibitum} and specific intent to defile flag need not be shown); State v. Spence, 81 Wash. 2d 788, 792, 506 P.2d 293, 297 (1973), \textit{rev'd}, 481 U.S. 405 (1974) (evil intent or design not element of desecration). \textit{See also} Texas v. Johnson, 109 S. Ct. 2533, 2557 (1989) (Stevens, J., dissenting) ("[D]esecration does not turn on the substance of the message the actor intends to convey"). \textit{But see} Franz, 212 Va. at 589, 186 S.E.2d at 72; \textit{id.} at 73 (Carrico, J., dissenting) ("The majority holds, without so saying that the statute in question is \textit{malum in se} rather than \textit{malum prohibitum} . . . . [I]t must appear not only that the defendant committed some act which cast contempt upon the flag but also that he intended the flag should thereby be debased.");
\item \textsuperscript{212} Compare \textit{TENN. CODE ANN.} section 39-5-845 (1982) (applies where defendant has a specific intent to desecrate the flag and imposes minimum fine or sentence) \textit{with} section 39-5-845 (provides penalties for crimes of desecration \textit{not} involving malicious intent).
\item \textsuperscript{213} \textit{See} Franz, 212 Va. at 587, 588-89, 186 S.E.2d 71, 72 (1972); State v. Kasnett, 34 Ohio St. 2d 193, 198 n.3, 297 N.E.2d 537, 540 n.3 (1973); State v. Turner, 78 Wash. 2d 276, 281, 474 P.2d 91, 94-95 (1970).
\item \textsuperscript{214} \textit{See e.g.}, Royal, 113 N.H. at 227-28, 305 A.2d at 678-79.
\end{itemize}
ment of the crime of desecration, do so based on specific statutory lan-
guage not because intent is included within the ordinary concept of
desecration. However, in terms of statutory analysis, some of these
opinions may be flawed.

Consideration of a few state laws is helpful to demonstrate the
breadth of conduct various states have outlawed as desecration. In New
Jersey, punishable desecration of the flag consists of “defacing, damaging
or polluting it.” In Ohio, the offense proscribes actions that “pur-
posely deface, damage, pollute, or otherwise physically mistreat” the
flag. In Arizona, unlawful desecration encompasses “defacing, dam-
aging, polluting or otherwise doing a physical act in a manner likely to
provoke immediate physical retaliation.”

The New Mexico statute defines the offense more broadly by includ-
specific commercial uses of the flag. Oklahoma makes it unlawful
to use the flag for any “trademark or label.” The desecration statute

215. See supra note 210. In United States v. Crosson, the Ninth Circuit wrote:
It is argued that 18 U.S.C. § 700(a) makes it a crime for burning a flag, while 36
U.S.C. § 176 authorized burning of the same flag. The distinction lies in the pur-
pose and intent of the actor. The flag may be destroyed under § 176(j) only when it
is in 'such condition that it is no longer a fitting emblem for display', while § 700(a)
requires the actor to cast 'contempt' upon the flag by publicly burning it.

462 F.2d 96, 100 (9th Cir. 1972). See also Hoffman v. United States, 445 F.2d 226, 229-31
(D.C. Cir. 1971) (MacKinnon, J., concurring) (suggesting that specific intent to desecrate is
element of desecration under federal criminal statute); Joyce, 454 F.2d at 992 (“Knowing”
language under federal criminal statute requires defendant to be aware that he is casting con-
tempt upon flag by his acts).

216. In a prosecution for violation of the federal statute, defendants, “over their own ob-
jection, were forbidden to introduce any evidence or argument at trial as to the purposes of the
[demonstration at which the flag was desecrated] or as to their intent.” Kime v. United States,
459 U.S. 949, 950 n.1 (1982) (Brennan, J., dissenting from denial of certiorari). The defend-
ants were convicted and imprisoned; the Fourth Circuit affirmed, and the Supreme Court de-
 nied certiorari. Id. at 949. See also People v. Vaughan, 183 Colo. 40, 514 P.2d 1318 (1973);
Lindsay, 282 N.E.2d at 435, 51 Ill. 2d at 406 (1972).

Moreover, legislative history suggests that the federal statutes prohibit only intentionally
willful acts of desecration. See S. REP. No. 1287, 90th Cong., 1st Sess. 3. But see Royal, 113
N.H. at 227, 305 A.2d at 679 (“The words ‘cast contempt’ are directed to the effect of the
prohibited acts and not to the intention of the actor.”).


220. N.M. STAT. ANN. § 30-21-4 (1984). The statute states:
A. the use of the state or national flags for any purpose other than the pur-
poses for which it was designed by law;
B. offering any insult by word or act to the state or national flags; or
C. using the state or national flags for advertising purposes by painting, print-
ing, stamping or otherwise placing thereon or affixing thereto any name or object not
connected with the patriotic history of the nation or the state.

Id.

221. OKLA. STAT. ANN. tit. 21, § 371 (West 1983).
also prohibits any other public conduct which "brings shame or disgrace upon any flag of the United States by its use for unpatriotic or profane purpose." The Montana statute places a comprehensive ban on use of the flag for commercial purposes.  

Several other states make it a crime to violate the federal Flag Code's rules of flag etiquette. Essentially, these state statutes and cases codify the rules of respect for the flag promulgated in the United States Code. Consideration of these statutes demonstrates the pervasiveness of flag desecration and indicates why the proposed amendment could permit selective prosecution of a few offenders.

V. SELECTIVE PROSECUTION

By focusing attention on "physical desecration," the proposed constitutional amendment appears to incorporate as constitutional doctrine the general rule that intent to show disrespect for the flag is not an element of the offense of desecration. The remaining question will be whether the physical conduct was objectively "proper." The amendment's focus on physical conduct suggests that Congress and the states shall not have the power to criminalize either verbal abuse of the flag, or evil thoughts about it. Thus, on its face, the proposed amendment appears to leave intact constitutional protection of what a citizen says or thinks about the flag.

Nonetheless, if the proposed amendment is construed as overruling Texas v. Johnson, its true thrust must be that where a physical desecra-
tion has been committed, the first amendment should not bar prosecution even if the prosecution is based on purely political factors such as the communicative content of the act, political views or social status of the person committing the desecration.

Furthermore, selective prosecution is likely because disrespectful treatment of the flag is so prevalent that if the government were to root out physical desecration through legal action, we could expect thousands of prosecutions. Evenhanded application of the desecration laws would jam the courts. Although under Texas v. Johnson\(^\text{228}\) most physical desecration of the flag can be outlawed and prosecuted, laws requiring proper treatment of the flag are rarely enforced. Occasionally, however, individuals are prosecuted under flag-desecration statutes. These prosecutions are often pursued when the individual has made politically unpopular statements while desecrating the flag.\(^\text{229}\) Thus, there is a history of selective prosecution.

**A. Provisions of the Flag Code**

To fully appreciate how widespread desecration is, and why the proposed amendment may permit prosecution of only a few special cases, one must be familiar with the rules requiring respectful conduct in relation to our nation's flag. Some of these rules are codified in the "Flag Code."\(^\text{230}\) The Flag Code's provisions indicate the broad range of conduct regarded as desecration. Section 176 of the Flag Code commands "[n]o disrespect shall be shown to the flag of the United States of America,"\(^\text{231}\) and provides an extensive list of measures which should be observed in order to avoid abuse of the flag.

Other sections of the Flag Code provide additional rules of respectful conduct involving the flag, including discussion of how and when the

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231. Id. § 176. Section 176 further provides as follows:
   (a) The flag should never be displayed with the union down, except as a signal of dire distress in instances of extreme danger to life or property.
   (b) The flag should never touch anything beneath it, such as the ground, the floor, water, or merchandise.
   (c) The flag should never be carried flat or horizontally, but always aloft and free.
   (d) The flag should never be used as wearing apparel, bedding, or drapery. It
flag should be displayed. Moreover, other provisions of law require respectful conduct toward the flag when it is hoisted or lowered, when the pledge of allegiance is recited, and when the national anthem is played.

These laws regulate the flag's treatment as a sacred symbol; to breach the laws is to treat the flag improperly. Any failure to show the flag proper respect, as defined in the Flag Code and other state laws, may be regarded a desecration of the flag because desecration encompasses any treatment that is inconsistent with the flag's status as a sacred symbol.

Although the Flag Code itself provides no penalties, violations of it can be criminally punished under state laws. For example, violations of the Flag Code may be prosecuted under a state's general flag-desecra-

should never be festooned, drawn back, nor up, in folds, but always allowed to fall free. . . .

(e) The flag should never be fastened, displayed, used, or stored in such a manner as to permit it to be easily torn, soiled, or damaged in any way.

(f) The flag should never be used as a covering for a ceiling.

(g) The flag should never have placed upon it, nor on any part of it, nor attached to it any mark, insignia, letter, word, figure, design, picture, or drawing of any nature.

(h) The flag should never be used as a receptacle for receiving, holding, carrying, or delivering anything.

(i) The flag should never be used for advertising in any manner whatsoever. It should not be embroidered on such articles as cushions or handkerchiefs and the like, printed or otherwise impressed on paper napkins or boxes or anything that is designed for temporary use and discard. Advertising signs should not be fastened to a staff or halyard from which the flag is flown.

(j) No part of the flag should ever be used as a costume or athletic uniform. . . .

(k) The flag, when it is in such condition that it is no longer a fitting emblem for display, should be destroyed in a dignified way, preferably by burning.

Id.


233. See id. § 177.

234. See id. § 172.

235. See id. § 171.

236. In Texas v. Johnson, Justice Brennan termed the Flag Code’s provisions “precatory.” 109 S. Ct. 2533, 2547 (1989). A related case, Delaware v. Hodsdon, held that the Flag Code’s rules by themselves compel no obedience, but that they give free reign to states to prosecute violations of the Code under the State’s own criminal laws. 265 F. Supp. 308, 310 (1967). See also Commonwealth v. Lorenc, 220 Pa. Super. 64, 67 n.2, 281 A.2d 743, 744 n.2 (1971). In Lappolla v. Dullaghan, a New York trial court enjoined flying the flag at half-staff to memorialize students shot at Kent State, noting that “the United States code provisions are not to be accorded the full weight of statutory proscription but . . . are an expression of custom and usage which is designed for and should be used by civil authorities, including school districts.” 63 Misc. 2d 157, 159, 311 N.Y.S.2d 435, 438 (N.Y. Sup. Ct. 1970). The court held that “[t]he flag should not be a vehicle for the expression of political, social or economic philosophy,” and prohibited its display at half-staff to honor the Kent State dead. Id. at 162-63, 311 N.Y.S.2d at 440-41.
tion statute that provides criminal penalties. In Ohio, violation of the Flag Code’s provisions can be the basis for a criminal conviction under the state desecration law, although the state statute does not specifically refer to the Flag Code. Tennessee has adopted the provisions of section 176 of the Flag Code, and made violations of any of its terms a criminal offense. In Delaware, a federal court held that the state could prosecute a citizen for criminal desecration of the flag. The defendant had violated section 175(c) of the Flag Code by “flying the flag of the United Nations above and to the right of the American flag in front of his residence.” Similarly, Maine’s statute provides that “flying the United States flag in any manner in violation of the Federal United States Flag Code” is a crime. In Pennsylvania, a citizen was convicted of desecrating the flag by flying it beneath the flag of the Soviet Union.


238. Id. at 163, 268 N.E.2d at 832. In Bunch, the defendant was convicted under Ohio’s flag-desecration statute for his intentional violation of sections 176 (a), (d), and (h) of the Flag Code. In State v. Liska, an Ohio court referred to the Flag Code to interpret provisions of its own desecration law. 26 Ohio Misc. 9, 268 N.E.2d 824 (1970), rev’d on other grounds, 32 Ohio App. 2d 317, 291 N.E.2d 498 (1971). However, State v. Kasnett casts some doubt on these holdings by stating that wearing the flag on clothing cannot be said to fall within the prohibitions of Ohio’s desecration statute. 34 Ohio St. 2d 193, 198, 297 N.E.2d 537, 540 (1973). The court failed to note that the Flag Code provides clear directions as to wearing the flag, and reversed a conviction because it could find no basis for “the judicial line-drawing” required. Id. at 197, 297 N.E.2d at 539. Whether reference to the Flag Code would have produced a different result is open to question.


240. Hodsdon, 265 F. Supp. at 308. In Hodsdon, the State of Delaware sued its citizen in federal court, seeking a federal injunction preventing him from flying the flag of the United Nations above and to the right of the American flag. Id. The federal court dismissed the case, holding that the Flag Code itself gave the state no right of action against its citizen in federal court. Id. at 310. The court further stated:

This does not mean that the State is remediless; merely that it has misconceived its remedy. If the State wishes to vindicate what it conceives of as an “irreparable harm to the citizens of Delaware” it need look no farther that [sic] its own statutory law to find authorization for such an action.

... The proper arena for the vindication of the patriotic sensibilities of the citizens of Delaware is the courts of that State. And, the proper mechanism to sanction behavior offensive to the citizenry of Delaware is the duly enacted statutory law of that State.

Id. The state obtained a criminal indictment based on the violation of the Flag Code. State v. Hodsdon, 289 A.2d 635, 638 (Del. Super. Ct. 1972). However, a Delaware Superior Court entered a judgment of acquittal, holding that even if flying the American flag in a manner subordinate to the United Nations flag is unlawful under 36 U.S.C. § 175 it would at most, constitute a breach of flag etiquette or civil duty, rather than a violation of state law. Id.


242. Commonwealth v. Lorene, 220 Pa. Super. 64, 281 A.2d 743 (1971) (per curiam). A concurring opinion acknowledged that “[t]here is no state statute dealing with the display of
Several state courts have held that violation of the federal Flag Code is not automatically a violation of a state’s criminal desecration laws. This is not surprising, since the breadth of desecration statutes vary from state to state. Every state could outlaw the full range of conduct under the Flag Code, but some choose not to. What they have chosen to outlaw still encompasses a considerable amount of conduct that is commonplace, however improper it may be.

B. Widespread Desecration

Recently, in anticipation of the July 4th holiday, banks, department stores, record stores, discount houses, fast food chains, auto parts stores, clothing stores, real estate brokerage houses, newspapers, magazines, and lumber yards physically desecrated the flag. The flag was draped over merchandise in department stores. It appeared on packaging for fireworks, garden hoses, sound recordings, irons and cleaners. The flag was even printed upside down on labels inside “Batman” caps. It was used on other articles of clothing including T-shirts and bathing suits. It has also been printed on bumper stickers. Commercial enterprises have transformed the flag into an advertising medium. According to the Flag Code, the flag is cheapened and desecrated by placing it on merchandise, commercial packaging, or clothing.

All these uses are disrespectful and could be classified as physical desecrations of the flag. The flag has also been desecrated in innumerable newspapers and magazines. For the most part, newspapers and magazines are intended for brief use, then disposal, so that placing images of the flag in them is a willful violation of the Flag Code, and is a desecration of the flag. Consequently, several states have enacted laws specifically exempting newspapers and magazines from criminal liability for publishing photographs or other representations of our flag, provided their use of the flag is not connected with any advertising purpose.
Thus, in those states, the press is privileged to engage in limited desecration of the flag. Massachusetts, for example, provides that criminal punishments for desecration shall not apply to representations of the flag in periodicals. The exemption requires that the desecration is “not connected with any advertisement and not used for advertising purposes,” and further provides that “no words, figures, designs, or other marks shall be placed upon the flag.”

Some publications, however, have exceeded the bounds these exemptions are intended to permit. In reporting the Supreme Court’s Texas v. Johnson decision, a national news magazine printed its article on a photograph of Old Glory. The magazine intentionally marked the flag with its journalistic prose. Atlantic magazine's July 1989 issue superimposed a crossword puzzle over the stars and stripes, inviting its readers to participate in the desecration by scrawling across its face.

Although statutes granting the press a privilege to desecrate the flag do not specifically protect advertising uses, our flag appears in magazine and newspaper advertisements across the country. This occurs despite the Flag Code’s clear command—backed up by state criminal laws—that “the flag should never be used for advertising purposes in any manner whatsoever.” For instance, Natural History magazine, published by the American Museum of Natural History, featured no fewer than four advertisements using the flag in its August 1989 issue. Even the official journal of the American Bar Association publishes advertise-
ments displaying the flag for commercial promotion.\textsuperscript{257} In short, desecration is rampant, but prosecution is virtually nonexistent.

Use of the flag for advertising is widely considered desecration. Many states, and the District of Columbia, specifically prohibit use of the flag in advertising.\textsuperscript{258} New York's highest court sustained criminal convictions of businessmen who desecrated the flag by posting it on a commercial vehicle.\textsuperscript{259} The Attorney General of Texas advised that it would

\textsuperscript{257} See, e.g., 75 A.B.A. J. 83 (1989).

\textsuperscript{258} See, e.g., 4 U.S.C. § 3 (1988); ARIZ. REV. STAT. ANN. § 13-3702.A.2(b) (1989) (prohibiting advertising only if likely to provoke immediate physical retaliation); ARK. STAT. ANN. § 5-51-207(a)(3) (1987) (punishing "whoever shall in any manner display, place, or cause to be placed, in or in connection with any advertisement of any kind, any representation of the flag"); GA. CODE ANN. § 50-3-8(a) (1982) ("It shall be unlawful . . . to copy, print, publish, or otherwise use the flag of the United States . . . for the purpose of advertising, selling, or promoting the sale of any article of merchandise whatever within this state."); ILL. REV. STAT. ch. 1, paras. 3351(b), (c) (Smith-Hurd 1980); KAN. STAT. ANN. § 21-4114(b) (1986); LA. REV. STAT. ANN. §§ 116(2), (3) (West 1986); ME. REV. STAT. ANN. tit. 1, § 253.2 (1964); MD. PUB. SAFETY CODE ANN. §§ 82(b), (c) (1987); MASS. GEN. LAWS ANN. ch. 264, § 5 (West 1970 & Supp. 1989); MICH. COMP. LAWS § 750.245 (1968); MINN. STAT. ANN. §§ 609.40.2(3), (4) (West 1987) (punishing whoever "(3) Manufactures or exposes to public view an article of merchandise or a wrapper or receptacle for merchandise upon which the flag is depicted; or (4) Uses the flag for commercial advertising purposes."); MISS. CODE ANN. § 97-7-39 (1973); MONT. CODE ANN. §§ 45-8-215(2)(c), (d) (1987) ("A person commits the offense of desecration of flags if he purposely or knowingly: . . . (c) Manufactures or exposes to public view an article of merchandise or a wrapper or receptacle for merchandise upon which the flag is depicted; or (d) Uses the flag for commercial advertising purposes."); NEV. REV. STAT. ANN. § 201.290(1) (Michie 1986); N.H. REV. STAT. ANN. § 646:1 (III) (1986) (punishing whoever "[f]or purposes of advertising a product or service for sale or free distribution, affixes a representation of the flag of the United States . . . to such product or on any display wherein such product or service is advertised"); N. Y. GEN. BUS. LAW §§ 136(a), (b) (McKinney 1988); PA. CONS. STAT. ANN. § 2102(a)(3) (Purdon 1983) (punishing whoever "manufactures, sells, exposes for sale, gives away, or has in his possession for any such purposes any article which uses the flag for the purposes of advertisement, sale or trade"); R.I. GEN. LAWS § 11-15-2 (1981); S.C. CODE ANN. § 16-17-220 (Law. Co-op 1985); TENN. CODE ANN. §§ 39-5-842, 39-5-845 (1982) (outlawing and punishing use of flag "for advertising purposes in any manner whatsoever"); UTAH CODE ANN. § 76-9-601(c) (1978) (punishing whoever "for purposes of advertising a product or service for sale or for distribution, affixes a representation of the flag of the United States . . . to the product or on any display wherein the product or service is advertised"); VT. STAT. ANN. tit. 13, §§ 1902(2), (3) (1974); VA. CODE ANN. § 18.2-487(2) (1988); WASH. REV. CODE ANN. §§ 9.86.020(2), (3) (1988); W. VA. CODE § 61-1-8 (1989); WIS. STAT. ANN. §§ 946.06(c), (d) (West 1982) (punishing individual who "(g) [m]anufactures or exposes to public view an article of merchandise or wrapper or receptacle for merchandise upon which the flag is depicted; or (d) [u]ses the flag for commercial advertising purposes"); P.R. LAWS ANN. tit. 13, § 1325 (1984). Although California does not specifically call advertising with the flag an offense, the California statute exempts from prosecution certain uses only if "not connected with any advertisement." See CAL. MIL. & VET. CODE § 615 (West 1988).

be unlawful for an advertisement to depict Betsy Ross sewing the flag.260

Use of the flag on merchandise or its packaging is specifically outlawed by criminal statutes in most states.261 In 1907, the Supreme Court in Halter v. Nebraska262 upheld the validity of laws prohibiting use of the flag “for purposes of trade and traffic” because such purposes were “wholly foreign to that [purpose] for which it was provided by the Nation.”263 The Court held that such use “tends to degrade and cheapen the flag in the estimation of the people, as well as to defeat the object of maintaining it as an emblem of National power and National honor” and may thus be criminally punished.264

In Halter, the defendants were properly convicted because they had “unlawfully exposed to public view, sold, exposed for sale, and had in their possession a bottle of beer, upon which was printed and painted a representation of the flag of the United States.”265 Johnson does nothing to overturn these interpretations of law. To the contrary, in Johnson the Supreme Court reaffirmed the holding of Halter.266

Perhaps the most crass misuse of the flag for advertising purposes was committed by the national Republican Party. Even as President Bush denounced the Supreme Court’s holding in Johnson,267 the national Republican Party mailed an advertisement promoting the “MEMBERSHIP BENEFITS FOR GEORGE BUSH’S REPUBLICAN PRESIDENTIAL TASK FORCE.”268 It featured prominent photographs of the flag and promised that if the reader would send the national Republican Party enough cash, Republican Senator Don Nickles from Oklahoma would, at the President’s request, send the reader a specially “dedicated” flag.269 Thus, even the President has been involved in ex-

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262. 205 U.S. 34 (1907).
263. Id. at 42.
264. Id.
265. Halter, 205 U.S. at 38.
266. Johnson, 109 S. Ct. at 2545 n.10 (affirming Halter v. Nebraska, 205 U.S. 34 (1907)). The Court stated that [its decision] is consistent with Halter because “that case involved purely commercial rather than political speech.” Id.
269. Id. A glossy flyer explained:
President Bush has commissioned Senator Don Nickles to dedicate this unique full-size American flag to you as a symbol of your special love for America at an official ceremony in the rotunda of our nation’s Capitol Building. This flag is a replica of the
ploitation of our flag in direct mail advertising. Additionally, Barbara Bush has appeared in public with the flag emblazoned upon her handkerchief or scarf. Those actions are technically violations of the Flag Code, and in several jurisdictions would amount to unlawful desecrations. However, it is highly improbable that the President or the First Lady will be sent to jail, even if the proposed amendment is adopted.

Even the United States Postal Service, an “independent executive agency” of the United States Government, desecrates the flag. According to the Flag Code, the flag should never be “printed or otherwise impressed on anything that is designed for temporary use and discard.” The Postal Service, however, continues to place our nation’s holiest symbol on millions of postage stamps. Stamps sold will be affixed to envelopes that will be exposed to dirt and soiling in the mails and that, for the most part, will be discarded.

Additionally, the Postal Service physically defiles the flag by defacing its image as it appears on those stamps. By law, “the flag should never have placed upon it, nor on any part of it, nor attached to it any one presented to Ronald Reagan upon his stepping down from the Presidency of the United States.

The additional benefits to be obtained for contributing a patriotic $120 include: (1) “The President's Medal of Merit . . . awarded exclusively to Charter Members of George Bush's Task Force”; (2) a lapel pin “to signal your special relationship with President Bush”; (3) an embossed membership card; (4) inscription “on the President's Honor Roll” to be “archived with his official Task Force Papers and kept on permanent display at the new world-wide headquarters of the Task Force, the Ronald Reagan Republican Center . . . in Washington, D.C.”; (5) “THE NEW FORCE,” which “goes only to Task Force members and will help you tell friends and neighbors the truth about major events”; (6) special personal letters from President Bush and Task Force Chairman Senator Don Nickles. Id.


274. In his Texas v. Johnson dissent, Chief Justice Rehnquist wrote: “The flag has appeared as the principal symbol on approximately 33 United States postal stamps and in the design of at least 43 more, more times than any other symbol.” 109 S. Ct. 2533, 2551 (1989) (Rehnquist, C.J., dissenting) (quoting United States Postal Service, Definitive Mint Set 15 (1988)). Chief Justice Rehnquist acknowledged that “[b]oth Congress and the States have enacted numerous laws regulating misuse of the American flag.” Id. (Rehnquist, C.J., dissenting). The Chief Justice then discusses both criminal provisions and section 176’s respect for the flag requirement, yet does not clearly state the conclusion that placing the flag on stamps is unlawful. Id. at 2551-55.
mark.” Nonetheless, the Postal Service smears the flag with indelible ink when it postmarks the mail.

C. Unprecedented Prosecutorial Discretion

Under current law, a citizen who is selected for prosecution pursuant to a valid statute may challenge the action if he or she can demonstrate that selection for prosecution was based solely on their exercise of first amendment rights. Defendants are permitted to use statistical evidence that proves that unlawful conduct generally goes unpunished unless the conduct was committed by vocal opponents of the government. Since Gregory Johnson was selected for prosecution on this basis, his conviction was voided. Few defendants, however, manage to make the necessary showing that “others are generally not prosecuted for the same conduct” and that “[t]he decision to prosecute . . . was based upon impermissible grounds such as . . . the exercise of constitutional rights.”

The President, however, is not likely to urge prosecution of republican politicians who use the flag in their political advertising, even though they should know that according to common decency and prevailing law “[t]he flag should never be used for advertising purposes in any manner whatsoever . . .” Nor is it likely that the President will urge federal prosecution of large corporations or mainstream publications that desecrate the flag. State authorities also show little desire to pursue such prosecutions.

Even-handed enforcement, without regard to political viewpoint, is allowed under Texas v. Johnson. The proposed amendment, on the
other hand, could place unprecedented discretion in the hands of prosecu-
tors who will be able to choose their victims on the basis of political
considerations or religious belief. However, neither federal nor state au-
thorities intend to launch an all out attack on desecration. Instead, the
President may encourage application of the law only against unpopular
political minorities. Only communists, anarchists, or non-Christian
religious fundamentalists will be hauled off to the federal penitentiary. If
the amendment were adopted, it would enable prosecutors to use the des-
ecration laws as a pretext for political prosecution.

VI. THE FLAG VERSUS RELIGION

The first victims of selective prosecution under the proposed amend-
ment may be religious minorities such as Jehovah's Witnesses.

A. Salute or Desecrate

A salute to the flag involves physical conduct, and the proposed

firmed that “nothing prevents a legislature from defining with substantial specificity what con-

282. Before our Constitution was graced with a Bill of Rights protecting our religious and
political liberties, a Baptist minister, the Rev. John Leland, wrote to our nation's first Presi-
dent, “[I]f religious liberty is rather insecure in the Constitution, the Administration will cer-
tainly prevent all oppression; for a Washington will preside.” See R.A. RUTLAND, THE BIRTH

283. Federal law provides that the Pledge of Allegiance
should be rendered by standing at attention facing the flag with the right hand over
the heart. When not in uniform men should remove their headdress with their right
hand and hold it at the left shoulder, the hand being over the heart. Persons in
uniform should remain silent, face the flag, and render the military salute.
36 U.S.C. § 172 (1982). Federal law also calls for physical gestures of respect for the flag
during the playing of the National Anthem and during hoisting and lowering of the flag. Id.
§§ 171, 177. See also Texas v. Johnson, 109 S. Ct. 2533, 2551 (1989) (Rehnquist, C.J., dissent-
ing).

In Bolling v. Superior Court, Jehovah’s Witnesses' children had “refused to repeat the
pledge of allegiance contained in the statute, stating that according to their religious belief, the
repetition of words constituting the pledge, together with accompanying gestures, are acts
which are against their religious convictions.” 16 Wash. 2d 373, 375, 133 P.2d 803, 805 (1943)
(emphasis added).

The Supreme Court discussed the dispute over physical aspects of the flag salute in Bar-
nette. 319 U.S. at 627-28 & n.3. See also Minersville School Dist. v. Gobitis, 310 U.S. 586,
Initially, the flag salute involved a stiff-arm gesture. The Barnette Court observed that
although the physical manner of the flag salute was altered in response to objections that the
salute was too similar to that of the Nazis “no concession was made to Jehovah’s Witnesses.”
Barnette, 319 U.S. at 627-28. The Court further stated:

The National Headquarters of the United States Flag Association takes the position that
the extension of the right arm in this salute to the flag is not the Nazi-Fascist
salute, “although quite similar to it. In the Pledge to the Flag the right arm is ex-
tended and raised, palm UPWARD, whereas the Nazis extend the arm practically
amendment opens the way for contentions that refusal to salute the flag is physical disrespect or desecration. Jehovah's Witnesses will not salute the flag because of their interpretation of the Second Commandment: "Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; thou shalt not bow down thyself to them nor serve them." Jehovah's Witnesses manifestly regard the flag as a profane and unholy image; their interpretation of the Bible denies the flag's sacred status. Their conduct is thus a "desecration" of the flag in the strictest and purest sense of the word: they treat the flag as though it were not sacred.

Only a few decades ago, Jehovah's Witnesses were prosecuted for violating flag salute laws, or even denouncing them. West Virginia, for example, expelled several Jehovah's Witness children from a public school for refusing to salute the flag, and then prosecuted their parents for causing juvenile delinquency. Mississippi and Arkansas prosecuted and convicted Jehovah's Witnesses as criminals for speaking their beliefs, because their utterances of faith "tend[ed] to create an attitude of stubborn refusal to salute, honor, or respect the flag or government of the United States." In the state of Washington, the government took Je-

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284. Exodus 20:4-5 (King James).
286. The beliefs of Jehovah's Witnesses are, of course, a non-physical desecration of the flag. As such, these beliefs would not be criminal under the proposed amendment. But, if intent to desecrate the flag is not an element of the offense, Jehovah Witnesses' beliefs will be utterly irrelevant at trial unless intentional refusal to salute the flag becomes one form of desecration.

288. See Taylor v. State, 194 Miss. 1, 11 So. 2d 663, 667 (1942), rev'd, 319 U.S. 583 (1943); Cummings v. State, 194 Miss. 59, 11 So. 2d 683 (1942), rev'd, 319 U.S. 583 (1943); Benoit v. State, 194 Miss. 74, 11 So. 2d 689 (1942), rev'd, 319 U.S. 583 (1943). The Supreme Court of Arkansas, too, held that a Jehovah's Witness' explanation of his refusal to salute the flag was a
hovah's Witness children away from their parents under the provisions of flag-salute laws, and placed the children in state custody because the children "refused to repeat the pledge of allegiance contained in the statute, stating that according to their religious belief, the repetition of words constituting the pledge, together with accompanying gestures, are acts which violate their religious convictions."  

Only the first amendment, as interpreted by the courts, put an end to such practices. In the landmark opinion West Virginia State Board of Education v. Barnette, the United States Supreme Court held that the first amendment protected Jehovah's Witnesses persecuted under the flag-salute laws of the state of West Virginia. That same year the Supreme Court of Washington upheld the first amendment liberties of Jehovah's Witnesses against the command of the flag-salute laws. The United States Supreme Court reversed convictions of Mississippi's Jehovah's Witnesses.

During his campaign for the Presidency, George Bush condemned
his opponent, Michael S. Dukakis, for supporting the Court's decision in *Barnette.* In the presidential campaign of 1988, Mr. Bush suggested that because Mr. Dukakis respected the *Barnette* precedent, he was unfit to be President. Once again, President Bush is confronted with *Barnette* since that decision was the basis of the Texas Court of Criminal Appeals' opinion which ordered Gregory Johnson's release. In *Texas v. Johnson,* the Supreme Court affirmed that opinion, relying again on *Barnette.*

If President Bush eventually secures ratification of the proposed amendment, the amendment could be interpreted as overruling *Barnette* and *Johnson,* thereby removing constitutional objections to prosecution of religious minorities and others who refuse to salute the flag. Although the proposed amendment focuses on physical actions, the government could not force these individuals to utter the words of the pledge of allegiance. This is a small consolation to citizens prosecuted for following their consciences and religious convictions.

**B. No Exemption for Religion**

Judges hearing cases under the proposed amendment might try to soften its impact by implying a religion-based exemption under the proposed amendment. However, if the proposed amendment is interpreted as removing first amendment objections to prosecution for physical desecration of the flag, no judge, in good faith could grant the Jehovah's Witnesses, or any other non-flag-saluting religious group, a special exemption.

One can imagine the public outrage if the courts did grant an ex-

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293. *Barnette* was at the root of the great "Pledge of Allegiance" issue which helped propel George Bush into the White House. When the Massachusetts Legislature proposed a measure requiring teachers to lead all students in a flag salute, the Supreme Judicial Court of Massachusetts, upon certification of the question to it, declared the measure to be unconstitutional under *Barnette.* *Opinions of the Justices to the Governor,* 372 Mass. 874, 879, 363 N.E.2d 251, 254-55 (1977). Governor Dukakis vetoed the measure, explaining "my oath of office requires me to uphold the Constitution of the United States. I cannot sign any bill that violates the Constitution, as the bill has been declared to do." *Why Dukakis Deep-sixed the Pledge of Allegiance,* L.A. Herald Examiner, June 22, 1988, at A13, col. 1.


295. See Johnson v. State, 755 S.W.2d 92, 97 (Tex. 1988) (citing West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943)), aff'd, 109 S. Ct. 2533 (1989). *But see* Monroe v. State Court, 739 F.2d 568, 574 (11th Cir. 1984) ("[T]here is no significant difference between *Barnette,* in which the government sought to compel the expression of respect toward the flag and this case, in which the government seeks to prevent the expression of disrespect.").


297. *Id.* at 2545 (citing West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943)).
emption for conduct related to religious beliefs. For example, under the exemption the court would be compelled to jail political dissidents who desecrate the flag but allow Shiite Islamic fundamentalists who desecrate the flag for the greater glory of Allah to go free. The proposed amendment contains no such distinctions. Under the proposed amendment, Shiite Islamic fundamentalists and Jehovah's Witnesses have no special status based upon religion. 298

The Free Exercise Clause of the first amendment does not grant religious minorities a special license to violate criminal laws. 299 The Establishment Clause of the first amendment 300 prohibits legal distinctions based upon religious doctrine. 301 Any court-made distinction between Jehovah's Witnesses and Shiites would be unconstitutional under the Establishment Clause. Indeed, any court-made distinction created to permit religious desecration of the flag may well be unconstitutional.

VII. BURNING THE FLAG

Even if the proposed constitutional amendment is adopted, political activists like Gregory Johnson could easily burn the flag to denounce our country and its ideals, and could do so with complete legal impunity. Federal law requires that "[w]hen [the flag] is in such condition that it is no longer a fitting emblem for display, it should be destroyed in a dignified way, preferably by burning." 302

If the flag has become torn or soiled, it cannot be tossed in the garbage, or run through the wash cycle; it should be burned. 303 Any other disposition would desecrate the flag through disrespectful conduct.

Under the proposed amendment, a person wanting to burn the flag as a protest need only burn a soiled or torn flag. That individual cannot be found guilty of desecration for burning the flag because the person has a duty to burn it under the Flag Code. 304 Furthermore, "pure speech,"

298. See supra note 159.
299. See Reynolds v. United States, 98 U.S. 145 (1878). Wisconsin v. Yoder, which prohibited application to the Amish of a Wisconsin law penalizing parents who refused to send their children to school beyond the eighth grade, created a very limited exception to this doctrine. 406 U.S. 205, 234 (1972).
300. U.S. CONST. amend. I.
301. See Everson v. Board of Educ., 330 U.S. 1, 15 (1947) (neither state nor federal government "can pass laws which aid one religion, aid all religions, or prefer one religion over another").
304. Id.
even if accompanied by physical desecration, is protected.\(^\text{305}\) This illustrates that but for a protestor's words and contemptuous state of mind, the protestor's actions are identical to those of the American Legion's members when they respectfully "retire" flags by burning them, as they regularly do.\(^\text{306}\)

Protesters can easily obtain flags that need to be burned.\(^\text{307}\) For example, republican Congressman Chuck Douglas recently obtained a soiled flag for a televised publicity stunt in the District of Columbia designed to embarrass democrats who were not enthusiastic supporters of the proposed amendment.\(^\text{308}\) Although it is a crime in the District of Columbia to "in any manner, for public exhibition or display" to place any mark on the flag, or to "expose or cause to be exposed to public view" a flag bearing any mark "of any nature,"\(^\text{309}\) because of the fifth amendment's protection against self-incrimination, we will never be able to demand answers from Representative Douglas regarding who soiled the flag, or why. It is enough to observe that, once he obtained the soiled flag, Congressman Douglas committed a criminal desecration—he publicly displayed the flag \textit{without} burning it.


\(^{306}\) See Nation Shows Its Love of Flag on 4th of July, L.A. Times, July 5, 1989, Part I, at 13, col. 1. The Attorney General of Florida has advised that flags no longer fit for display may be burned either privately or in public. See Op. Att’y Gen. Fla. 059-275 (1959). In his dissent in \textit{Johnson}, Justice Stevens suggested that the Legionnaires \textit{should} be prosecuted:

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 \textit{act} will take serious offense. Accordingly, one intending to convey a message of respect for the flag by burning it in a public square might nonetheless be guilty of desecration if he knows that others—perhaps simply because they misperceive the intended message—will be seriously offended. Indeed, even if the actor knows that all possible witnesses will understand that he intends to send a message of respect, he might still be guilty of desecration if he also knows that his understanding does not lessen the offense taken by some of those witnesses.

\textit{Johnson}, 109 S. Ct. at 2557 (Stevens, J., dissenting). Justice Stevens' interpretation of "desecration" ignores the word's fundamental meaning, which focuses attention on improper conduct toward the flag not on mistaken emotional reactions. Justice Stevens has misconstrued the basic legal principle that the offense of desecration does not depend upon intent to desecrate. See supra notes 181-88 and accompanying text for a discussion of "desecration".

\(^{307}\) Gregory Johnson himself is pictured in a national news magazine holding such a flag. See \textit{Newsweek}, July, 1989, at 20. In the photograph, the flag is visibly tattered. \textit{Id.} Under the Flag Code, Mr. Johnson had a duty to burn it. See 36 U.S.C. § 176(k) (1982).

\(^{308}\) See House Judiciary Panel Passes Flag Bill in Heated Debate, L.A. Daily J., July 28, 1989, § 1, at 6, col. 2. Douglas "protested what he suggested were Democratic strong-arm tactics with props for the television cameras, including a gag over his mouth and a pair of flags, one dirty and one clean." \textit{Id.}

In many states a would-be protester may tear or soil the flag privately and then burn it publicly without subjecting himself or herself to criminal liability.310 Some state desecration statutes focus on public desecration only.311 A few states appear to outlaw desecration whether or not the desecration is committed in public.312

Even where the law prohibits private desecration, it will be easy to obtain flags that need to be burned. Congressman Douglas apparently had no problem acquiring a soiled flag. One could just go to a department store, and buy a T-shirt with the flag on it.

Assuming passage of the proposed amendment would stop stores, manufacturers, advertisers, and all others from illegally depicting the flag, it would be virtually impossible to obtain a conviction for flag burning under laws enacted pursuant to the proposed amendment. There would be an almost perfect defense to the charge: flags often become faded, soiled or torn, without any wrongdoing.

Not surprisingly, most desecration prosecutions do not involve the burning of a flag. For the most part, they involve placing a mark on a flag,313 placing articles on a flag,314 tearing a flag,315 using a flag for advertising purposes,316 wearing a flag as an article of clothing,317 speaking


311. See statutes cited supra note 207.

312. See statutes cited supra notes 207-09 and accompanying text.


314. See, e.g., Cincinnati v. Bunch, 26 Ohio Misc. 161, 268 N.E.2d 831 (1970), aff'd, 32 Ohio App. 2d 161, 288 N.E.2d 854 (1971) (“He was charged and convicted of defiling the flag by using it as a rug to display his personal property.”).


316. See, e.g., Halter v. Nebraska, 205 U.S. 34 (1907) (use of flag for advertising purposes on beer bottles); People v. Picking, 263 A.D. 366, 366, 33 N.Y.S.2d 317, 317-18 (1942) (“the car on which appeared at six different places the defendants' name, emblem and appeal to 'Travel America' constituted one advertisement to which the flag was affixed in violation of the statute.”), aff'd, 288 N.Y. 644, 42 N.E.2d 741 (1942), cert. denied, 317 U.S. 632 (1942).

ill of the flag, or otherwise abusing a flag.

Cases involving convictions for flag burning generally do not mention the fact that the flag should be burned if soiled or torn. In many of these cases it is apparent that the flag did not need to be burned. In *Texas v. Johnson*, for example, Gregory Johnson burned a flag that flew above a bank just moments before. Since the flag was still fit for public display it was not a legitimate candidate for burning.

In other cases, intent is treated as a crucial element of the desecration offense. The Court of Appeals for the Ninth Circuit has held that someone who possessed an evil intent may be convicted of desecration even if burning was required because the flag was soiled or torn. However, such a holding is contrary to the general rule that intent is irrelevant to desecration, and conflicts with the proposed amendment's focus on physical desecration. The proposed amendment's terms do not permit conviction on the basis of evil thought alone. Furthermore, even when evil thought is coupled with a flag burning, no conviction can result if the burning was an objectively lawful act.

Under the proposed amendment, the President could only stand by helplessly, as Old Glory goes up in flames to the jeers of those like Gregory Johnson. If Congress is going to amend the Constitution, Congress should draft something more effective than the proposed amendment.

VIII. POSSIBLE LIMITS ON CONGRESS' AMENDMENT POWER

When Congress proposes an amendment to the Constitution the process is a particularly powerful exercise of Congress' law-making authori-
authority. When Congressional power appears to threaten the established guarantees of the first amendment, we may search for limits on this power inherent in the Constitution itself. By its own terms the first amendment is an exceptional and broad withdrawal of power from Congress. Read literally, the language “Congress shall make no law” limits the process by which an amendment can be proposed under article V. The history of the first amendment reflects the Framers’ direct intent to withdraw power from Congress and to prevent Congress from acting within the broad field covered by the first amendment. Although amendments are not mere statutory “law,” the meaning of law in first amendment jurisprudence may be broad enough to reach Congress’ law-making authority when the substance of a proposed amendment abridges the freedom of speech.

The Constitution contains rules for adopting amendments, and limits the power of Congress and the states to make some kinds of laws. In particular, the Constitution affords four alternative procedures for adopting amendments, all but one of which involve the law-making powers of Congress or state legislatures. At the same time, the first amendment unambiguously commands, “Congress shall make no law . . . abridging the freedom of speech,” which also applies to the states by the fourteenth amendment. The Supreme Court’s holding in Texas v. Johnson that the first amendment may protect a defendant charged with desecrating the flag is founded on the first amendment’s freedom of speech, so that an amendment overturning Texas v. Johnson would be a law abridging the freedom of speech. If such an amendment were proposed by Congress or ratified by state legislatures, the courts might have been compelled by the first amendment’s simple words to hold it invalid. The constitutional limits on the amendment power must be respected.

327. U.S. CONST. art. V.
328. See id.
329. Id. amend. I.
330. See Gitlow v. New York, 268 U.S. 652, 666 (1925). To the extent that legislative ratification is not an act of state legislative power but of a federal power exercised by Congress, as suggested in Hawke v. Smith, 253 U.S. 221, 230-31 (1920), reference to the fourteenth amendment need not be made: The first amendment’s limitation on federal power applies directly.
332. U.S. CONST. art. V. Article V of the Constitution states:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be
A. The Amendment Power Generally

The Constitution imposes absolute limitations on both the procedures for adopting amendments and the substance of permissible amendments. Two of the substantive limitations on the permissible content of amendments appear in article V.\(^3\) One of those limitations prohibits any alteration to the clauses in article I which deal with the slave trade and with direct taxation.\(^3\) The other limitation prohibits any amendment from depriving a state of equal suffrage in the Senate without the state’s consent.\(^3\)

Article V allows only four possible procedures for amending the Constitution. The four procedures are: (1) approval by two-thirds of each house of Congress and ratification by three-fourths of the state legislatures; (2) approval by two-thirds of each house and ratification by constitutional conventions in three-fourths of the states; (3) approval by a national constitutional convention and ratification by three-fourths of the state legislatures; and (4) approval by a national constitutional convention and ratification by constitutional conventions in three-fourths of the states.\(^3\)

In all of these procedures but the fourth, an amendment is ratified by the federal or state governments acting as sovereign legislatures.\(^3\)

Under the fourth procedure, the people of the United States may amend the Constitution,\(^3\) and the state and federal legislatures do not participate in ratifying the amendment. If Congress’ and the states’ power to

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\(^{333}\) U.S. CONSTIT. art. V.

\(^{334}\) Id.

\(^{335}\) See id. See also United States v. Dennis, 183 F.2d 201, 206 (2d Cir. 1950), aff’d, 341 U.S. 494 (1951).

\(^{336}\) U.S. CONST. art. V.

\(^{337}\) Id. It is idle to argue that Congress does not participate in making an amendment law because article V states that Congress shall “propose” an amendment and that only ratification makes it law. Id. Article V requires the so-called “proposal” to be approved by “two thirds of both Houses.” Id. If only a simple majority in each House “proposed” a constitutional amendment it would never become law, even if “ratified” in every state. Id.

When Congress “proposes” an amendment it takes a substantive legislative step in making constitutional law. The fact that the act is not by itself sufficient to make an amendment constitutional law does not change its character. Also, Congress and the states, together, can make constitutional law, subject only to explicit limitations imposed by the Constitution. Id.

It is clear that the exercise of the amendment power does involve the law-making capacity of Congress and the state legislatures.

\(^{338}\) Id.
make law abridging the freedom of speech is limited by the first amendment's literal terms, approval by a national constitutional convention and ratification by the voters of the states in constitutional convention may be the only permissible method of restricting first amendment rights.

Any proposed amendment that does not comply with the substantive and procedural provisions of article V is void. Thus, a proposed amendment which is not ratified in three-fourths of the states will fail to become part of the Constitution. Similarly, an amendment is void if it


Article V of the Constitution, which confers limited powers for amending fundamental law, went through several drafts and was the subject of considerable debate between the Framers. See Dellinger, supra at 1624-30. Its ultimate form reflects the Framers' distrust of both Congress and the state legislatures. Id. at 1626-30. They rejected proposals that would have vested the amendment power in either the Congress or the state legislatures, or in both of them together. Id. at 1625-26. The best concise review of article V's history is found in Dellinger, supra.


The argument that the structure of a constitution may imply limits on a legislature's amendment power has never been sustained in the history of American jurisprudence. However, other constitutional systems have recognized such a limitation.

In Harris v. Donges, the Supreme Court of South Africa struck down as unconstitutional a racist attempt to amend a so-called "entrenched" section of its constitution without meeting the necessary procedural requirements. 1 T.L.R. at 1245. The constitutional provision prohibited any Parliamentary law to

disqualify any person . . . in the province of the Cape of Good Hope who, under the laws existing in the Colony of the Cape of Good Hope at the establishment of the Union, is or may become capable of being registered as a voter from being so registered in the province of the Cape of Good Hope by reason of his race or colour only . . . unless the Bill embodying such disqualification or alteration be passed by both Houses of Parliament sitting together, and a the third reading be agreed to by not less than two-thirds of the total number of members of both Houses.

Id. at 1246-47.

Another provision authorized constitutional amendments by Parliament, but provided a purported amendment to the foregoing provision would be invalid "unless the Bill embodying such repeal or alteration shall be passed by both Houses of Parliament sitting together, and at the third reading be agreed to by not less than two-thirds of the total number of members of both Houses." Id. at 1247. Parliament, sitting bicameral, and with bare majorities, purported to provide for separate representation of "European" and "non-European" voters. Id. at 1246. The Supreme Court of South Africa voided this attempt to change the law without the required two-thirds vote of Parliament sitting unicameral. Id. at 1266.
purports to deprive any state of its equal suffrage in the Senate without its consent.\textsuperscript{341} An amendment abridging the freedom of speech may also be void if it is proposed by Congress and ratified by state legislatures rather than by the people in a Constitutional Convention.

\textbf{B. The First Amendment May Be a Special Case Where the Amendment Power Is Limited}

A literal interpretation of the first amendment’s broad withdrawal of power from Congress to reach freedom of speech, a fundamental liberty, would limit Congress’ amendment power.\textsuperscript{342} By choosing the words “Congress shall make \textit{no law} \ldots abridging the freedom of speech,”\textsuperscript{343} the Framers may have intended to foreclose Congress from making any alterations to the basic law or the constitutional law designed to abridge the freedom of speech. Unquestionably, the Constitution is our fundamental law. In article VI, the Constitution declares itself “the supreme Law of the Land,”\textsuperscript{344} and the Framers referred to the Constitution as law.\textsuperscript{345} Moreover, because the first amendment’s limitation on the power to make law is fully applicable to the state governments through the Due Process Clause of the fourteenth amendment.\textsuperscript{346} Thus, neither Congress nor the state legislatures may circumvent the amendment process to pass any constitutional amendment to abridge the freedom of speech.

The Framers of our Constitution, working in Philadelphia during the summer and fall of 1787, did not include a bill of rights because they believed that it was unnecessary.\textsuperscript{347} Rather, the Framers believed that the government they were creating would lack the power to legislate re-

\textsuperscript{341} See U.S. Const. art V. See also H.L.A. Hart, The Concept of Law, 70-76 (1961). The United States Supreme Court has held that practical details of the amendment procedure are “political questions” not appropriate for judicial review if the constitutional text does not lay down a clear rule. See Coleman v. Miller, 307 U.S. 433 (1939). However, the Court has never hesitated to decide questions relating to the permissible substantive content of an amendment. See Leser v. Garnett, 258 U.S. 130 (1922); National Prohibition Cases, 253 U.S. 350 (1920); Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378 (1798).

\textsuperscript{342} U.S. Const. amend. I.

\textsuperscript{343} Id. (emphasis added).

\textsuperscript{344} U.S. Const. art. VI, cl. 2.

\textsuperscript{345} See, e.g., The Federalist, No. 78, at 525 (A. Hamilton) (J. Cooke ed. 1961) (“A constitution is, in fact, and must be regarded by judges, as a fundamental law.”).

\textsuperscript{346} See Everson v. Board of Educ., 330 U.S. 1 (1947); Gitlow v. New York, 268 U.S. 652 (1925). To the extent that legislative ratification is not an act of state legislative power but of a federal power exercised at the discretion of Congress, as suggested in Hawke v. Smith, reference to the fourteenth amendment need not be made, because the first amendment’s limitation on power applies directly. 253 U.S. 221, 230-31 (1920).

garding speech, the press, or religion since the Constitution conferred no power to do so.\textsuperscript{348}

The states desired more definite limitations. Several state ratifying conventions recommended specific amendments to the Constitution; the North Carolina representative proposed amendments but refused to ratify the Constitution until a bill of rights was adopted.\textsuperscript{349} Shortly after the Constitution was ratified, a bill of rights was drafted and proposed by the first Congress.\textsuperscript{350} In this historical context, the first amendment of the Bill of Rights was enacted to place certain fundamental liberties beyond the law-making powers of Congress.\textsuperscript{351}

Most provisions in the Bill of Rights do not speak directly to the power to make law but affirm rights of the people that are to be respected. For example, the second amendment advises that “the right of the people to keep and bear Arms, shall not be infringed.”\textsuperscript{352} The fourth amendment similarly provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.”\textsuperscript{353} The seventh amendment states that “in suits at common law, where the value in controversy shall

\textsuperscript{348} The state delegations attending the convention unanimously rejected the notion of a Bill of Rights on September 12, 1787. J. Madison, \textit{supra} note 359, at 630. When Messrs. Pinckney and Gerry proposed insertion of a declaration “that the liberty of the Press should be inviolably observed,” Mr. Sherman retorted, “It is unnecessary. The power of Congress does not extend to the Press.” \textit{Id.} at 640. With that said the proposal was rejected. \textit{Id.} at 640.

Promoting the proposed Constitution as ‘Publius’ in \textit{The Federalist Papers}, Alexander Hamilton defended these decisions. He argued, “[F]or why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?” \textit{The Federalist} No. 84, at 579 (A. Hamilton) (J. Cooke ed. 1961).

Mr. Pinckney explained why the Bill of Rights had been rejected when he defended the Constitution before the South Carolina House of Representatives on January 18, 1788:

[W]e had no bill of rights inserted in our Constitution; for, as we might perhaps have omitted the enumeration of some of our rights, it might hereafter be said we had delegated to the general government a power to take away such of our rights as we had not enumerated; but by delegating express powers, we certainly reserve to ourselves every power and right not mentioned in the Constitution.

3 M. Farrand, \textit{The Records of the Federal Convention of 1787} app. A, CLXXIII at 256 (1911); see also id. app. A, CXCVIII at 297-98 (Letter of George Washington of April 28, 1788 to LaFayette). \textit{See also} L. Tribe, \textit{American Constitutional Law} (2d ed. 1988) § 8-1, at 560 (“[G]overnment as a whole had no power to act outside its rightful jurisdiction to intrude upon the ‘natural rights’ reserved to the people within the private domain . . .”).


351. U.S. CONST. amend I.

352. \textit{Id.} amend. II.

353. \textit{Id.} amend. IV.
exceed twenty dollars, the right of trial by jury shall be preserved." 354

By contrast, the first amendment uses very different language to preserve our most fundamental rights from potential political incursions. The Speech and Religion clauses do not speak of "rights" at all. Instead, the first amendment commands:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. 355

Congress shall make no law is the crucial phrase. It is far more restrictive than any other limitation contained in the Bill of Rights. No other provision in the Bill of Rights operates by withdrawing from Congress the power to make any law. 356 Thus, the first amendment is radically different from the rest of the Bill of Rights; its only analogue may be found in the absolute disabilities to act imposed by article V. 357

The difference in language between the first amendment and the other provisions of the Bill of Rights was not accidental. 358 Rather, the specific terms were the result of careful consideration and revision.

Early drafts addressing religion, speech and the press affirmed these rights, but did not explicitly withdraw the power to make law. 359 James Madison's first draft, which he read to the House of Representatives on June 8, 1789, merely declared:

The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be

354. Id. amend. VII.
355. Id. amend. I (emphasis added).
356. Some provisions of article I, section 9 bear a superficial similarity to the first amendment's deprivation of law making power. The third clause, for example, provides that "no Bill of Attainder or ex post facto law shall be passed." U.S. Const. art. I, § 9, cl. 3. Obviously, however, an amendment to repeal this clause would not itself be an ex post facto law or bill of attainder and, thus, is not prohibited. By contrast, any amendment that amputates some portion of the first amendment's liberty for speech is necessarily a law abridging the freedom of speech.
357. U.S. Const. art. V.
358. Professor Van Alstyne has pointed out that the other provisions of the Bill of Rights are framed in much weaker terms. He stated, "It requires no arcane learning to understand the clear and plain meaning of 'Congress,' 'no law,' 'abridging,' or 'speech.'" W. Van Alstyne, Interpretation of the First Amendment 23 (1984). Edwin Meese advises us that, "those who framed the Constitution chose their words carefully; they debated at great length the most minute points. The language they chose meant something." Address by Edwin Meese III, A.B.A. (July 19, 1985), reprinted in S. Macedo, The New Right V. The Constitution 14 (1986).
359. 2 B. Schwartz, supra note 349, at 1026-28.
established, nor shall the full and equal rights of conscience be in any manner, or on any pretext infringed.

The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable.

The people shall not be restrained from peaceably assembling and consulting for their common good; nor from applying to the Legislature by petitions, or remonstrances, for redress of their grievances. Madison made a speech introducing the Bill of Rights. Notes for that speech indicate that he may have intended to do more: He intended to “limit and qualify pow[er] by except[ing] from [the] grant [of legislative power to Congress] cases in wh[ich] it shall not be exercised or ex[pressed] in a particular manner.” The amendments he proposed, however, were not yet framed in terms that reflected Congress’ powerlessness to make laws in the area of first amendment protections.

On July 21, 1789, the House sent Madison’s draft to a select committee consisting of one member drawn from each of the eleven states that had ratified the Constitution and who were represented in the House of Representatives. Although the draft reaffirmed the importance of religious and political freedom, this language still did not clearly prohibit Congress from making law. On August 15, 1789, Madison explained to the House that under this draft, “Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience.”

Representative Samuel Livermore of New Hampshire objected to the amendment. A judge whose efforts were crucial to obtaining the Constitution’s ratification in New Hampshire, Livermore advocated the more restrictive language proposed by New Hampshire’s ratifying con-

360. 2 B. SCHWARTZ, supra note 349, at 1026.
361. 5 THE WRITINGS OF JAMES MADISON 389-90 (1904), reprinted in 2 B. SCHWARTZ, supra note 349, at 1008. These notes indicate that Madison appreciated and drew attention to the difference between the “natural rights[sic] retained [such as speech],” and the “positive rights result[ing]” only from positive governmental recognition, such as “trial by jury.” See id. Madison may well have regarded basic “natural rights” to be rights beyond the jurisdiction of any human government. Thus, matters such as speech and religion would be absolutely beyond the power of any government while trial by jury, or the like, would be conditional.
362. 2 B. SCHWARTZ, supra note 349, at 1050. North Carolina and Rhode Island had not yet ratified the Constitution and were not represented. Id.
363. Id. at 1051 (emphasis added).
364. Id. at 1052.
vention. The House Reporter tells us, "He thought it would be better if it was altered, and made to read in this manner, that Congress shall make no laws touching religion, or infringing the rights of conscience." Mr. Livermore's motion "passed in the affirmative, thirty-one for, and twenty against it." By August 20, 1789, the House had settled on a text which, on August 24, 1789, it resolved should be added to the Constitution:

Congress shall make no law establishing religion, or prohibiting the free exercise thereof; nor shall the rights of conscience be infringed.

The freedom of speech, and of the press, and the right of the people peaceably to assemble, and consult for their common good, and to apply to the government for redress of grievances, shall not be infringed.

Thus, through the first amendment, the House proposed to disable the Congress from acting in relation to religious interests, a precaution it did not take with regard to the remainder of the Bill of Rights. The Senate extended Congress' disability reserving to the people the basic political liberties encompassing freedom of speech, the press, and the right to assemble and petition for redress of grievances. The Senate first rejected the suggestion that the Constitution should recognize freedom of speech and press only "in as ample a manner as hath at any time been secured by the common law." Subsequently, the Senate adopted

365. Id. at 1089. The Constitution, of course, provides that "[t]he Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution." U.S. Const. art. VII. In addition to ratifying the Constitution, the New Hampshire convention recommended twelve amendments to it, the eleventh of which was that "Congress shall make no Laws touching Religion, or to infringe the rights of Conscience." 2 Documentary History of the Constitution of the United States 141-42 reprinted in 2 B. Schwartz, supra note 349, at 761. Professor Schwartz writes that this was the "first official state recommendation of the freedom of conscience guaranteed by the First Amendment and, most important, the first use of the actual prohibitory language with which the First Amendment starts—a vast improvement, from a legal point of view, in the language of the freedom of religion guarantee." 2 B. Schwartz, supra note 349, at 758.

366. 2 B. Schwartz, supra note 349, at 1089 (emphasis added).

367. Id.


369. See 2 B. Schwartz, supra note 349, at 1148.

370. Id. at 1146.

371. Id. at 1148. The Senate also rejected an attempt to establish more extensive jurisdictional limitations that would extend Congress' disability to act far beyond the core rights relating to religion, speech, the press, and political action:
the language which, arguably, withholds from Congress any power whatever to legislate regarding the fundamental political liberties: "That Congress shall make no law abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and consult for their common good, and to petition the government for a redress of grievances."372

On September 9, 1789, the Senate sent its amendments to the House,373 and on September 20, 1789, the House called a committee of conference with the Senate.374 On September 23, 1789, Madison made the conference report to the House, and on the following day Mr. Ells-

It was then moved to add the following clause to the articles of amendment: "That there are certain natural rights, of which men, when they form a social compact, cannot deprive or divest their posterity; among which are the enjoyment of life and liberty, with the means of acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety." This motion was determined in the negative.

Id. at 1151. Constitutional recognition that certain spheres are entirely outside the government's jurisdiction could not be pushed that far.

372. Id. at 1149. This is not to claim that these rights are "absolute" in the sense that they are infinite and possess no discernable defining boundaries. Clearly, they are not. See L. Tribe, supra note 348, at 792-94.

Congress may pass laws directed to other legitimate goals, which have an incidental impact on speech, but are not directed to controlling speech or to punishing its content. United State v. O'Brien, 391 U.S. 367, 376-77 (1968).

To be meaningful, the phrase "freedom of speech" must be definable or, in other words, limited. Significantly, the proposed amendment does not provide that "Congress shall make no law abridging speech." Instead, the first amendment only withdraws legislative power to abridge "the freedom of speech" which addresses a narrower concept than the notion of speech itself. W. Van Alstyne, supra note 358, at 25. In providing that "Congress shall make no law . . . abridging the freedom of speech or of the press," the Framers certainly did not conceive that any regulation affecting speech or the press would necessarily abridge the first amendment guarantees.

Desecration statutes may be an example of regulation, still permissible after Texas v. Johnson which has a mere incidental impact on speech or addresses less-protected speech, i.e. commercial speech. 109 S. Ct. 2533, 2538 n.2, 2545 n.10 (1989). Similarly, reasonable regulation of the "time, place and manner" of speech does not violate the first amendment, provided the legislature's object is not to prohibit or punish communication of ideas it dislikes. See, e.g., Cox v. New Hampshire, 312 U.S. 569 (1941); Sellers v. Regents of Univ. of California, 432 F.2d 493 (9th Cir. 1970), cert. denied, 401 U.S. 981 (1971). Breach of the peace with fighting words, fraudulent misrepresentation, slander and obscenity, and incitement to riot, perhaps, are more problematic, because liability turns upon the content of a communication. However, the Supreme Court has conclusively held that such speech is not the speech protected under the first amendment. Congress retains power to legislate in these limited spheres and within the narrow bounds determined by the Supreme Court. See Miller v. California, 413 U.S. 15 (1973) (obscenity); Brandenburg v. Ohio, 395 U.S. 444 (1969) (incitement); New York Times v. Sullivan, 376 U.S. 254 (1964) (defamation); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (fighting words). Analysis of these matters is beyond the scope of this Article. A good discussion of these issues can be found in W. Van Alstyne, supra note 358.

373. 2 B. Schwartz, supra note 349, at 1147.
374. Id. at 1157-59.
worth made the conference report to the Senate. The conference consolidated the provisions disabling Congress from action directed toward religion and the core political liberties, producing the language of the first amendment.

C. The Amendment Power Before the Supreme Court

The Supreme Court’s precedents do not foreclose an application of the first amendment to limit Congress’ power to make constitutional law. The United States Supreme Court has twice rejected contentions that the Bill of Rights places implicit limits on the procedure for adopting constitutional amendments. In both cases the eighteenth amendment, which established the national Prohibition, was challenged and upheld. Neither case involved the express limitations imposed by the first amendment, and neither gives any basis to now restrict the first amendment.

In the National Prohibition Cases, the Supreme Court rejected a challenge to the eighteenth amendment based on contentions that article V amendment power is limited to “fine-tuning” the Constitution to correct errors or oversights. The eighteenth amendment, it was argued, went beyond the bounds of the Constitution, in imposing the national prohibition. One of the eminent attorneys advancing this view, Elihu Root, argued:

Article V of the Constitution should not be construed to confer unlimited legislative power upon the amending authorities. . . . The framers undoubtedly regarded the power to amend only as authorizing the inclusion of matter of the same general character as the instrument or thing to be amended . . .

[The] people can adopt any amendment to the Constitution they see fit. No doubt an amendment of any sort could be adopted by the same means as were employed in the adoption of the Constitution itself. In that manner alone do or can the people themselves act . . . . The people could by appropriate proceedings amend the Constitution so as to impair such vital rights as freedom of religion, but it is inconceivable that any

375. Id. at 1159.
376. Id. at 1162.
378. Sprague, 282 U.S. at 734; National Prohibition Cases, 253 U.S. at 386.
379. 253 U.S. 350 (1920).
380. Id. at 354.
381. Id. at 365.
such unlimited power has been delegated to the amending agents [Congress and the State legislatures], who may represent but a minority of the people.\textsuperscript{382}

The Supreme Court rejected contentions that article V amendment powers are generally limited to trivial corrections of the Constitutional text.\textsuperscript{383}

In \textit{United States v. Sprague},\textsuperscript{384} another challenge to the eighteenth amendment was struck down.\textsuperscript{385} This time, the amendment’s opponents argued:

\begin{quote}
[T]he Tenth Amendment eliminates any possibility of power of the legislatures to adopt amendments granting the national government any additional powers over the people. . . .
\end{quote}

\begin{quote}
. . . If there were such unlimited powers in a few legislatures they could override every one of the reserved rights covered by the first ten amendments; they could change the government of limited powers into one of unlimited powers; they could declare themselves hereditary rulers; they could abolish religious freedom; they could abolish free speech and even the right of the people to petition for redress; they could not only abolish trial by jury, but even the right to a day in court.\textsuperscript{386}
\end{quote}

The tenth amendment, however, merely provides that the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states or to the people.\textsuperscript{387} The amendment says nothing about whether Congress or the states can make any laws to effect the prohibition.\textsuperscript{388} Thus, the \textit{Sprague} Court held that the tenth amendment "added nothing to the instrument as originally ratified and has no limited and special operation, as is contended, upon the people's delegation by article V of certain functions to the Congress."\textsuperscript{389} On the other hand, the first amendment is \textit{directed} to the ability of Congress and the states to make law, including constitutional law.

\begin{footnotes}
\footnoteref{note182} Id. at 363-64.
\footnoteref{note183} Id. at 386.
\footnoteref{note184} 282 U.S. 716 (1931).
\footnoteref{note185} Id. at 734.
\footnoteref{note186} Id. at 724-25.
\footnoteref{note187} U.S. CONST. amend. X. See also \textit{Sprague}, 282 U.S. at 733.
\footnoteref{note188} \textit{Sprague}, 282 U.S. at 733.
\footnoteref{note189} Id. at 733-34.
\end{footnotes}
D. The Implications for Amending the Constitution in Convention

According to the Constitution's literal terms, an amendment which limits the protection of the first amendment cannot become law based upon approval of two-thirds of each House of Congress or ratification by three-quarters of the state legislatures. Congress and the states, as legislative bodies, under the Constitution, may simply lack the power to make laws whose subject matter restricts the first amendment. The method for adopting such an amendment may be limited to the fourth alternative method provided in article V.\footnote{See supra note 337.} It must be proposed \textit{by the people} of the United States, in constitutional convention, and adopted \textit{by the people} in constitutional conventions in three-fourths of the states.\footnote{U.S. CONST. art V. For a discussion of alternative means of amending the Constitution see \textit{supra} notes 333-36 and accompanying text. The author concedes that it would be unwise "to take the uncharted course of an Article V Convention while the well travelled route of amendment by congressional initiative remains open." Tribe, \textit{Issues Raised by Requesting Congress to Call a Constitutional Convention to Propose a Balanced Budget Amendment}, 10 PAC. L.J. 627, 628 (1979) (emphasis added). However, only the article V convention route can effect any amendment to limit the first amendment; the "well travelled route" is simply not open.}

However, even the people assembled in a constitutional convention may doubt the constitutional propriety of adopting an amendment to abridge the freedom of speech protected by the first amendment. As Professor Tribe wrote:

\begin{quote}
\[\text{[In amending our Constitution, we] may choose to reject some or all of its ideals, to override them, or to recast them, but as long as we retain some commitment to the Constitution—as long as we are amending it instead of discarding it—we cannot simply ignore its fundamental norms. An amendment prohibiting atheists from holding federal office, for example, would clash with the current Constitution’s paramount concern for freedom of conscience no less than a statute to the same effect would run counter to the current establishment clause.}\]
\end{quote}

Thus, a proposal to restrict the first amendment’s protections, even in a noble gesture of respect for the flag, may violate fundamental constitutional norms implied from the structure and literal interpretation of the Constitution itself.\footnote{L. Tribe, \textit{supra} note 340, at 439-40.} However, the proposed amendment is not beyond the power of the people to adopt.

\begin{flushright}
390. \textit{See supra} note 337.
391. \textit{U.S. Const.} art V. For a discussion of alternative means of amending the Constitution see \textit{supra} notes 333-36 and accompanying text. The author concedes that it would be unwise "to take the uncharted course of an Article V Convention while the well travelled route of amendment by congressional initiative remains open." Tribe, \textit{Issues Raised by Requesting Congress to Call a Constitutional Convention to Propose a Balanced Budget Amendment}, 10 PAC. L.J. 627, 628 (1979) (emphasis added). However, only the article V convention route can effect any amendment to limit the first amendment; the "well travelled route" is simply not open.
\end{flushright}
IX. CONCLUSION

The newly amended federal desecration statute may be unconstitutionally vague and probably will not be constitutional when applied. Thus, in order to protect the flag as Congress apparently desires, a constitutional amendment must be proposed and ratified. However, the currently proposed constitutional amendment is poorly drafted and offers little gain and presents great dangers. It may abridge constitutional liberty for religion, and speech, but it will not stop flag burning as political protest.

We could draft a new amendment or we could rely on the wisdom of the Framers and leave the Constitution as it is. American revolutionaries burned King George III and his ministers in effigy. They understood the symbolic effect of such actions. During American revolutionary times burning the symbols of British domination was a very powerful political statement. Today, if an Iranian dissident is jailed for burning either an effigy of the Ayatollah Khomeini, or the Islamic Republic’s flag, we would call him a political prisoner. If a Chinese student is jailed for burning a communist flag in Tien An Men Square, we would again protest that he is a political prisoner. If a subject of Soviet domination in Eastern Europe is jailed for burning the Soviet flag we indignantly complain that he is a political prisoner. If we pass the proposed amendment, American government will also have a weapon against political dissenters.

Under our Constitution and flag, however, American should be different. In Texas v. Johnson Justice Brennan wrote, “Our decision is a reaffirmation of the principles of freedom and inclusiveness that the flag best reflects, and of the conviction that our tolerance of criticism... is a sign and source of our strength.”

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394. See supra notes 141-58 and accompanying text.
395. See supra notes 283-301 and accompanying text.
396. See supra notes 159-65 and accompanying text.
397. See supra notes 302-26 and accompanying text.
398. 3 M.N. ROTHBARD, CONCEIVED IN LIBERTY 30 (1976).
400. Id. at 2547.