

LEGISLATIVE ATTEMPTS TO BAN FLAG BURNING

The Supreme Court in *Texas v. Johnson*¹ and *United States v. Eichman*² finally resolved the questions it left open in previous flag desecration opinions.³ The Court reversed the convictions of several political protesters for burning American flags, holding that the imposition of criminal penalties on the protesters impermissibly infringed upon their rights to free expression.

In prior criminal prosecutions, the Court stopped short of holding that application to a political protester of a statute proscribing flag desecration is per se unconstitutional. Instead the Court crafted narrower holdings limited to the facts presented.⁴

1. 491 U.S. 397 (1989).

2. 110 S. Ct. 2404 (1990).

3. See *Smith v. Goguen*, 415 U.S. 566 (1974) (wearing a flag replica on the seat of one's pants); *Spence v. Washington*, 418 U.S. 405 (1974) (affixing a peace symbol to a flag displayed in a window); *Street v. New York*, 394 U.S. 576 (1969) (speaking contemptuously about the flag). Two other decisions, though not addressing flag desecration, are important to the analysis of this issue. See *West Virginia Bd. of Educ. v. Barnette*, 310 U.S. 624 (1943) (striking down a statute punishing school children who refused to salute the flag on command); *United States v. O'Brien*, 391 U.S. 367 (1968) (upholding the conviction of a Vietnam War protester for burning his draft card).

4. In *Street v. New York*, 394 U.S. 576 (1969), the Court reversed the conviction of a protester who burned and degraded a flag. The statute at issue prohibited verbal abuse of the flag as well as flag desecration. Absent a clear trial court record, the Court concluded that the lower court may have convicted the defendant improperly on his words alone. *Id.* at 590. If based solely on the defendant's words, the conviction was clearly unconstitutional as a direct, content-based prohibition on political speech expressing a particular point of view—direct because it made the speech itself illegal, content-based because it only punished the speech that cast contempt on the flag. *Id.* at 593. The Court did not decide whether New York could have permissibly prosecuted the defendant solely for flag burning. *Id.* at 594.

In *Smith v. Goguen*, 415 U.S. 566 (1974), the Court reversed a conviction for treating the flag with contempt, a conviction based on the defendant's having worn a flag replica on the seat of his pants. *Id.* at 567-68. Again, the Court stopped short of holding flag desecration to be protected political speech. The Court instead found that the language of the statute—"treats contemptuously"—was void for vagueness. *Id.* at 572-73.

Later that same year, in *Spence v. Washington*, 418 U.S. 405 (1974), the Court reversed the conviction of a college student who displayed an American flag upside down with a peace symbol attached. *Id.* at 406. This time, however, the Court fully conducted a first amendment analysis, holding the statute unconstitutional as applied. *Id.* Such complete analysis was unnecessary in the previous cases because the statutes at issue were facially unconstitutional: the statute in *Street* imposed a direct, content-based restriction on speech; in *Smith* the statute was void for vagueness. See *infra* notes 9-24 and accompanying text.

The *Spence* Court, however, was careful to limit its holding to the facts presented. First, even though Washington had two separate flag statutes, one prohibiting desecration (burning, trampling, etc.) and the other prohibiting the display of an altered flag, the defendant was charged only with

In *Texas v. Johnson*,⁵ the Court for the first time directly addressed the constitutionality of a statute prohibiting flag desecration.⁶ After engaging in a full three-part first amendment analysis, the Court held that a statute that prohibits flag burning only when "the actor knows [it] will seriously offend one or more persons likely to observe or discover his action"⁷ is unconstitutional as applied to a political protester whose actions did not threaten the peace.⁸

First, the Court determined that the defendant's act of flag burning was expressive conduct and therefore deserved the first amendment's protection.⁹ In making this determination, the Court asked "whether an intent to convey a particularized message was present," and whether it was likely that witnesses would understand that message.¹⁰ The Court decided without difficulty that such intent and understanding were present.¹¹

Next, the Court determined whether the state's regulation of flag dese-

violating the latter. *Spence*, 418 U.S. at 406-07. Second, the Court emphasized that the peace symbol was made of removable tape, and did not permanently deface the flag. *Id.* at 415. Finally, the Court stressed that the defendant owned the flag and displayed it on private property. *Id.* at 408-09. The Court's reliance on these factors renders the decision easily distinguishable from future cases.

5. 491 U.S. 397 (1989).

6. The Texas statute provides:

(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.

TEX. PENAL CODE ANN. § 42.09 (Vernon 1989).

7. *Johnson*, 491 U.S. at 401.

8. *Id.* at 412.

9. *Id.* at 408. The defendant was convicted for his actions, not his words. *Id.*

10. *Id.* (citing *Spence v. Washington*, 418 U.S. 405, 410-411 (1979)).

11. *Johnson*, 491 U.S. at 404. The defendant burned a flag during a protest rally coinciding with the 1984 Republican National Convention. As the flag burned, protestors chanted anti-United States and anti-Republican slogans, clearly indicating that, by burning the flag, the protesters intended to communicate opposition to Reagan Administration policies and to the Republican Party. *Id.*

Of course, one easily can posit a noncommunicative flag burning that would violate the language of the Texas statute. For example, if someone burned a worn-out flag with other trash and innocently failed to afford the flag the usual reverence and ceremony observed when one disposes of a dilapidated flag, and if this burning were witnessed, and if the defendant knew that the witness would be offended by the lack of ceremony, the burning ostensibly would violate the statute. The violation would not garner first amendment protection, however, because the "burner" intended no particular message. Thus, the statute could apply to a flag burning unprotected by the first amend-

cration related to the suppression of free expression.¹² If the state asserts an interest in regulating expression, the Court will subject the regulation to strict scrutiny.¹³ If, however, the asserted interest is primarily non-speech related, but restricts speech only incidentally, the Court will apply the more relaxed test enunciated in *United States v. O'Brien*.¹⁴

The state first attempted to justify the statute on grounds that it prevented breaches of the peace.¹⁵ The Court dismissed this argument because the protestors neither caused nor threatened to breach the peace.¹⁶ Furthermore, as the Court noted, because Texas has a separate breach of the peace statute, it need not prohibit flag burning to maintain peace.¹⁷

The state's second asserted interest was the preservation of the flag as a symbol of national unity.¹⁸ The court found this interest directly related to expression because this interest is implicated only when the flag is desecrated in order to communicate some message.¹⁹ The Court reasoned that any non-critical burning of a flag does not affect the flag's symbolic value; the flag loses its symbolism only when it is treated disrespectfully.²⁰ Thus, preservation of the flag as a national symbol relates directly to the content of the expressive conduct.

ment. *See id.* at 402 n.3. The Court, therefore, denied the defendant's facial challenge to the statute and decided the case on an as-applied basis. *Id.*

12. *Id.* at 404-06.

13. *Id.* at 404.

14. *Johnson*, 491 U.S. at 404-05. The *O'Brien* test requires that: (1) the statute further an important or substantial governmental interest; (2) the governmental interest be unrelated to the suppression of free expression; and (3) the incidental restriction on free expression be no greater than is essential to the furtherance of the interest. 391 U.S. 367 (1968).

15. *Johnson*, 491 U.S. at 404-05.

16. *Id.*

17. *Id.* at 405-06. A similar argument proposes that the "fighting words" doctrine of *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), could prohibit flag burning. The Court restricted this doctrine, however, to situations in which one or more observers would interpret the expression as "a direct personal insult or an invitation to exchange fisticuffs." *Johnson*, 491 U.S. at 406 (citing *Chaplinsky*, 315 U.S. at 572-73). The Court quickly disposed of this argument, because the flag burning started no fights and no reasonable bystander would have interpreted the burning as an attempt to do so.

An argument under the "hostile audience" doctrine also fails. This doctrine allows the suppression of speech only if it presents a clear and present danger of an imminent, violent audience response beyond the government's capacity to control. *See, e.g.*, *Feiner v. New York*, 340 U.S. 315, 320-21 (1951); *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940). *See also* G. STONE, L. SEIDMAN, C. SUNSTEIN, & M. TUSHNET, *CONSTITUTIONAL LAW* 997-1017 (1986); Stone, *Flag Burning and the Constitution*, 75 *IOWA L. REV.* 111, 115-16 (1989).

18. *Johnson*, 491 U.S. at 406.

19. *Id.*

20. *Id.*

Finally, the Court considered whether the state's interest was substantial enough to allow direct restrictions on expression.²¹ The Court first noted that the statute prohibited only flag burnings likely to offend others and consequently banned only flag burnings critical of the United States;²² thus, the restriction was content-based and therefore subject to "the most exacting scrutiny."²³ In applying this scrutiny, the Court held that allowing Texas to assert its interest in preserving the symbolic value of the flag would prohibit political speech criticizing the government, the type of speech that enjoys the highest first amendment protection.²⁴

21. *Id.*

22. *Id.* at 407.

23. *Id.*

24. *Id.* at 410. Because *Johnson* was a 5-4 decision with Justices Marshall and Brennan in the majority, the dissenting opinions become important in the wake of their retirement.

Justice Rehnquist wrote a dissenting opinion joined by Justices White and O'Connor. Justice Rehnquist began his dissent with a quotation from Justice Holmes's opinion in *New York Trust Co. v. Eisner*, 256 U.S. 345 (1921): "a page of history is worth a volume of logic." *Id.* at 349, quoted in *Johnson*, 491 U.S. at 412.

He follows this with almost three full pages of patriotic stories and quotations, quoting John Greeleaf Whittier's poem "Barbara Frietchie" and excerpts of the National Anthem, providing accounts of the battles of Iwo Jima and Inchon, and detailing the role of the flag as an important symbol of our country. *Id.* at 413-15.

The "patriotism" section of the opinion is followed by a section on the traditional role of the flag in American culture. *Id.* at 416-17. Justice Rehnquist emphasizes that the flag is the most important of our national symbols, that 48 of the 50 states prohibited flag desecration at the time of the opinion, and that the flag represents Americans as a unified nation, not any particular political party or philosophy. *Id.*

Justice Rehnquist's legal analysis, which begins by developing the theory that the United States government has something of a limited property right in the flag, *id.*, draws an analogy to *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522 (1987), in which the Court upheld Congress' grant to the USOC of the exclusive right to use the word "Olympic." *Johnson*, 491 U.S. at 411. He argues that the United States, which as an entity has given the flag value, as the USOC did to the word "Olympic," has thereby acquired a limited property right in the flag as a symbol. *Id.* This analogy, however, does not explain how a limited property right that protects against appropriation of a symbol's commercial value extends also to protect against the "improper" destruction of a privately owned copy of the symbol.

The Rehnquist dissent next discusses the threat to the peace presented by flag burning. He first cites *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), for the proposition that the first amendment does not protect "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Johnson*, 491 U.S. at 412. He argues that the first amendment does not protect flag burning because it "conveys nothing that could not have been conveyed and was not conveyed just as forcefully in a dozen different ways [and is] of such slight social value as a step to truth that any benefit that may be derived from it is clearly outweighed by the public interest in avoiding a probable breach of the peace." *Id.* From this, he concludes that the statute is content neutral, as *Johnson* was convicted not for what he said, but for how he said it. *Id.* at 413.

Justice Stevens' separate dissenting opinion begins by emphasizing the unique character of the

*United States v. Eichman*²⁵ put before the Court a federal statute specifically designed to circumvent the *Johnson* opinion by omitting the Texas statute's unconstitutional language.²⁶ The Court first noted the government's concession that the defendants' conduct was expressive. Second, the Court refused the government's invitation to reconsider *Johnson*'s holding that the regulation of flag burning directly relates to the regulation of expression.²⁷

Finally, the Court rejected the government's assertion that the deletion of the seriously offended language made the statute content-neutral and thus subject to less exacting scrutiny than that used in *Johnson*.²⁸ The Court reasoned that the statute prohibited all flag desecration, except for ceremonial burning for disposal, without regard to the message conveyed or its effect on witnesses.²⁹ The governmental interest justifying the regulation was preservation of the flag as a symbol.³⁰ However, only conduct that expresses a message critical of the United States, its government, or the flag itself implicates this asserted interest.³¹ Accordingly, the Court determined that the regulation was content-based,³² and therefore failed to satisfy "exacting" scrutiny for the same reasons articu-

flag. *Id.* at 415. The immeasurable value of the flag as the pre-eminent symbol of our nation, he argues, calls for treating flag burning differently from other expressive conduct. *Id.*

He then echoes the argument, made by Justice Rehnquist, that because the flag does not represent any particular political ideology the statue is content neutral; Johnson's conviction therefore was based not on the content of his message, but on the means he chose to express it. *Id.* at 415-16.

Justice Stevens concludes his opinion by criticizing the Court for introducing "disparate impact" analysis into first amendment jurisprudence. *Id.* at 416. He hypothesizes that this analysis will have a profound impact on first amendment jurisprudence, requiring the courts to strike down content-neutral regulations because they have a greater impact on the expression of one viewpoint than on the expression of another. *Id.*

25. 110 S. Ct. 2404 (1990).

26. The federal statute provides:

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

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

33 U.S.C. § 700 (Supp. 1990).

27. *Eichman*, 110 S. Ct. at 2407-08.

28. *Id.* at 2408.

29. *Id.*

30. *Id.* at 2409.

31. *Id.* See *supra* note 18 and accompanying text for discussion of conduct that threatens the flag's value as a symbol.

32. 110 S. Ct. at 2409.

lated in *Johnson*.³³

The *Eichman* decision forecloses future attempts to regulate flag burning via statutes focusing on the flag. It is hard to conceive of a statute that could satisfy *Eichman*'s mandate that flag burning prohibitions neither restrict expression nor be content-based. Legislatures would have to draft content-neutral statutes and justify the statutes with a governmental purpose implicated by *any* flag burning, not merely by flag burning that expresses anti-United States political views.³⁴

Obviously, a constitutional amendment would allow such regulation. Alternatively, states may rely on a variety of statutes that do not directly regulate flag burning but instead provide for the punishment of many flag burners. These statutes may include prohibitions on theft of government property, destruction of government property, destruction of stolen property,³⁵ lighting fires in certain areas, burning certain materials (fabrics, coatings, etc.), incitement to riot, and breach of the peace. If Congress and the states relied on these statutes instead of on the more politically popular flag desecration statutes, they might effectively prohibit all but the most carefully orchestrated flag burnings.

The *Eichman* decision also reinforces the Court's standard for the protection of expressive conduct. The opinion makes clear that the Court will look hard not only at the language of statutes restricting expressive conduct, but also at the governmental interests justifying the regulation.

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33. *Id.* at 2409-10.

34. The major impediment of such a statute lies in the fact that proponents of such statutes apparently seek to suppress speech based on its content. Those responsible for the flag burning statute in *Eichman* specifically sought to draft statutes allowing respectful flag burnings for disposal, but prohibiting contemptuous flag burnings. The problem, however, was not the language but rather the intent of the statute and the justifications given for it. Any truly content-neutral justification either would have to prohibit all flag burnings or allow even contemptuous burnings that meet certain requirements. Neither of these alternatives would satisfy proponents of flag protection statutes, who apparently seek a way to allow flag burning they condone while prohibiting flag burning they disdain.

35. The flag involved in *Johnson* was in fact stolen, but the state prosecuted Johnson only under the flag desecration statute. *Johnson*, 419 U.S. at 400-01.