

any more than it could punish criticism of this country's policies or ideas. But the statute in this case demands no such allegiance. Its operation does not depend upon whether [the] use of the flag is respectful or contemptuous. [It] simply withdraws a unique national symbol from the roster of materials that may be used as a background for communications. [The] Constitution [does not prohibit] Washington from making that decision.

Is *Spence* consistent with *O'Brien*? Do you agree with the Court that the interests underlying flag misuse statutes are "directly related to expression" and that the *O'Brien* standard thus should not govern? Consider Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482, 1503-1504, 1506-1508 (1975):

[The flag misuse statute is] ideologically neutral on its face, and would proscribe the superimposition of "Buy Mother Fletcher's Ambulance Paint" [as] fully as it would the addition of a swastika. Such "improper use" provisions are [thus] more complicated constitutionally than the ideologically tilted "desecration" provisions. [In the flag misuse context], the state may assert an interest [similar] to that asserted in [defense of a content-neutral law prohibiting any person to interrupt a public speaker]. The state's interest in both of these cases might be characterized as an interest in preventing the [defendant] from interfering with the expression of others. [As with interruption of a public speaker, the] state does not care what message the defendant is conveying by altering the flag: all that matters is that he is interrupting the message conveyed by the flag. [There is, however, an answer to this argument, for] although improper use statutes do not single out certain messages for proscription, they do single out one set of messages, namely the set of messages conveyed by the American flag, for protection. That, of course, is not true of a law that generally prohibits the interruption of speakers. [In reality, then, an improper use statute] is, at best, analogous to a law prohibiting the interruption of patriotic speeches, and that is a law that is hardly "unrelated to the suppression of free expression."

Note that the Court in *Spence* emphasized that "the likelihood was great that [appellant's] message would be understood by those who viewed it." Should that matter? Consider Note, *Symbolic Conduct*, 68 Colum. L. Rev. 1091, 1113-1114 (1968): "If there is to be a doctrine of first amendment protection for symbolic conduct, its cornerstone must be the requirement that others can recognize the conduct as communication. [Otherwise], all conduct might [be] classifiable as speech. [The requirement is thus an effective way to deal with the "imposter problem." ] Moreover, [conduct] which is not reasonably calculated to communicate does not aid the free exchange of ideas."

4. *Flag desecration*. The Court finally confronted the basic issue of flag desecration in *Texas v. Johnson*, 491 U.S. —, 109 S. Ct. 2533 (1989). During the 1984 Republican National Convention, Johnson burned an American flag as part of a political demonstration protesting the policies of the Reagan administration. Johnson was arrested and convicted of violating a Texas flag desecration statute which made it a crime for any person to "deface, damage or otherwise physically mistreat" the flag "in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action." The Court, in a five-to-four decision, overturned the conviction:

In an opinion by Justice Brennan, the Court began by concluding that "Johnson's flag-burning was 'conduct' sufficiently imbued with elements of communication" to implicate the First Amendment." After rejecting the claim that the statute could be justified in terms of the State's interest in "preventing breaches of the peace," see section B3 *supra*, the Court turned to the heart of the issue:

The Government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word. It may not, however, proscribe particular conduct *because* it has expressive elements. [Thus], although we have recognized that where "'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms," [O'Brien], we have limited the applicability of O'Brien's relatively lenient standard to those cases in which "the governmental interest is unrelated to the suppression of free expression." . . .

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

It remains to consider whether the State's interest in preserving the flag as a symbol of nationhood and national unity justifies Johnson's conviction. [Johnson] was prosecuted because he knew that his politically charged expression would cause "serious offense." [The] Texas law is thus not aimed at protecting the physical integrity of the flag in all circumstances, but is designed instead to protect it only against impairments that would cause serious offense to others. [Whether] Johnson's treatment of the flag violated Texas law thus depended on the likely communicative impact of his expressive conduct. [Because] this restriction [is] content-based, [we must] subject the State's asserted interest [to] "the most exacting scrutiny." . . .

If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. We have not recognized an exception to this principle even where our flag is involved. [Citing *Street*, *Spence*, and *Coguen*]. [Nothing] in our precedents suggests that a State may foster its own view of the flag by prohibiting expressive conduct related to it. [If] we were to hold that a State may forbid flag-burning wherever it is likely to endanger the flag's symbolic role, but allow it wherever burning a flag promotes that role—as where, for example, a person ceremoniously burns a dirty flag—we would be saying that when it comes to impairing the flag's physical integrity, the flag itself may be used as a symbol [only] in one direction. We would be permitting a State to "prescribe what shall be orthodox" by saying that one may burn the flag to convey one's attitude toward it and its referents only if one does not endanger the flag's representation of nationhood and national unity.

We never before have held that the Government may ensure that a symbol be used to express only one view of that symbol or its referents. [Citing *Schacht*.] To conclude that the Government may permit designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernible or

defensible boundaries. Could the Government, on this theory, prohibit the burning of state flags? Of copies of the presidential seal? Of the Constitution? ...

It is not the State's ends, but its means, to which we object. It cannot be gainsaid that there is a special place reserved for the flag in this Nation, and thus we do not doubt that the Government has a legitimate interest in making efforts to "preserv[e] the national flag as an unalloyed symbol of our country." [To] say that the Government has an interest in encouraging proper treatment of the flag, however, is not to say that it may criminally punish a person for burning a flag as a means of political protest.

Chief Justice Rehnquist, joined by Justices White and O'Connor, dissented:

The flag is not simply another "idea" or "point of view" competing for recognition in the marketplace of ideas. [Flag burning is] no essential part of any expression of ideas, [citing *Chaplinsky*], and [Johnson's] act [conveyed] nothing that could not have been conveyed [in] a dozen different ways. [Far] from being a case of "one picture being worth a thousand words," flag burning is the equivalent of an inarticulate grunt or roar that [is] most likely to be indulged in not to express any particular idea, but to antagonize others. [The] Texas statute deprived Johnson of only one rather inarticulate symbolic form of protest — a form of protest that was profoundly offensive to many — and left him with a full panoply of other symbols and every conceivable form of verbal expression to express his deep disapproval of national policy. Thus, in no way can it be said that Texas is punishing him because his hearers — or any other group of people — were profoundly opposed to the message that he sought to convey. [It] was Johnson's use of this particular symbol, and not the idea that he sought to convey by [it], for which he was punished.

Justice Stevens also dissented.

5. *Flag desecration revisited.* Almost immediately after the decision in *Johnson*, Congress enacted the Flag Protection Act of 1989, which made it a crime for any person knowingly to mutilate, deface, physically defile, burn, maintain on the floor or ground, or trample upon any flag of the United States. The government maintained that this act was constitutional because, unlike the statute addressed in *Johnson*, the act was designed to protect "the physical integrity of the flag under all circumstances," did "not target expressive conduct on the basis of the content of its message," and proscribed "conduct (other than disposal) that damages or mistreats a flag, without regard to the actor's motive, his intended message, or the likely effects of his conduct on onlookers." In *United States v. Eichman*, — U.S. —, 110 S. Ct. 2404 (1990), the Court, in a five-to-four, decision, invalidated this act.

Justice Brennan delivered the opinion:

Although the [Act] contains no explicit content-based limitation on the scope of prohibited conduct, it is nevertheless clear that the Government's asserted interest is "related to the suppression of free expression" and concerned with the content of such expression. The Government's interest in protecting the "physical integrity" of a privately owned flag rests upon a perceived need to preserve the flag's status as a symbol of our Nation and certain national ideals. But the mere destruction or disfigurement of a particular physical manifestation of the symbol, without more, does not diminish or otherwise affect the symbol itself in any way. For example, the secret destruction of a flag in one's own basement would not threaten the flag's recognized meaning. Rather, the Government's desire to preserve the flag as a symbol

