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Flag Burning and the Constitution

*Geoffrey R. Stone**

I will consider four questions in this essay: First, was the decision in *Texas v. Johnson*[1] correct? Second, is it possible to draft legislation that prohibits flag burning without running afoul of *Johnson*? Third, is it possible to draft legislation that prohibits flag burning without running afoul of the first amendment?[2] And fourth, should we amend the Constitution to overrule *Johnson*? In short, my answers are yes, yes, possibly, and no.

I

In *Johnson*,[3] the Supreme Court invalidated a Texas statute that prohibited any person from desecrating the American flag by defacing, damaging or otherwise physically mistreating it "in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action,"[4] as applied to an individual who publicly burned the flag as a form of political protest.[5] The Court's decision in *Johnson* was premised upon a sound understanding of well-settled principles of first amendment jurisprudence. Indeed, *Johnson* followed quite sensibly from some of the most basic, most firmly established, and most well-reasoned precepts of American constitutional law.

At the outset, it is useful to note that *Johnson* was not the Court's first encounter with government efforts to command respect for the flag by restricting expression. In *West Virginia Board of Education v. Barnette*,[6] the Court held that a state could not constitutionally punish a student for refusing to salute the flag. In *Street v. New York*,[7] the Court held that a state could not constitutionally punish an individual for speaking contemptuously about the flag. In *Smith v. Goguen*,[8] the Court held that a state could not constitutionally punish an individual for treating the flag contemptuously by wearing a replica of the flag sewn to the seat of his pants. The Court, in *Spence v. Washington*,[9] held that a state could not constitutionally punish an individual for misuse of the flag by affixing to the flag a large

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1. 109 S. Ct. 2533 (1989).
2. The first amendment states in its relevant part that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I.
3. 109 S. Ct. 2533 (1989).
4. Tex. Penal Code Ann. § 42.09(b) (Vernon 1989); *see Johnson*, 109 S. Ct. at 2537 n.1.
5. *Johnson*, 109 S. Ct. at 2536-37.
6. 319 U.S. 624 (1943).
7. 394 U.S. 576 (1969).
8. 415 U.S. 566 (1974).
9. 418 U.S. 405 (1974).

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peace symbol made of removable tape. Although none of these decisions dealt directly with flag burning, they set the stage for *Johnson*.

The *Johnson* decision was based upon a critical distinction in first amendment doctrine. Central to the Court's reasoning was the question whether the Texas statute was "related" or "unrelated" to the suppression of free expression. This distinction, first articulated in *United States v. O'Brien*,[10] reflects an effort to distinguish between those laws that are designed to restrict speech and those that have only an incidental effect on speech. The premise of this distinction is that, from a first amendment perspective, the former are more problematic than the latter.[11]

For purposes of this distinction, a law is "related to the suppression of free expression" if it (a) explicitly restricts speech, or (b) does not explicitly restrict speech, but is justified by reference to interests that are directly related to the restriction of speech, or (c) does not explicitly restrict speech, but restricts expressive conduct because of the reactions of others to the content of the message conveyed. A law is "unrelated to the suppression of free expression" if it (a) does not explicitly restrict speech, and (b) is not justified by reference to interests that are directly related to the restriction of speech, and (c) does not restrict expressive conduct because of the reactions of others to the content of the message conveyed.

It may help if I offer a few illustrations. A law that prohibits any person from making any speech in a public park is "related to the suppression of free expression" because it explicitly restricts speech. A law that prohibits any loud noises in a public park in order to shield users of the park from offensive speech is "related to the suppression of free expression" because it is justified by reference to interests that are directly related to the restriction of speech. And a law that prohibits any loud noises in a public park that may trigger a riot is "related to the suppression of free expression" because it restricts expressive conduct because of the reactions of others to the content of the message conveyed.

On the other hand, a law that prohibits any person from driving in excess of 55 miles per hour is "unrelated to the suppression of free expression," even as applied to an individual who speeds in order to get to a political rally or to express his dissatisfaction with speed limits, because such a law does not explicitly restrict speech, it is not justified by reference to interests that are directly related to the restriction of speech, and it does not restrict expressive conduct because of the reactions of others to the content of the message conveyed.

This distinction was critical in *Johnson* because it was the ground upon which the Court distinguished its prior decision in *O'Brien*, in which the Court upheld a conviction for draft card burning. At first glance, *O'Brien* seemed the obviously controlling precedent. After all, if the government can punish an individual who publicly burns a draft card as a form of symbolic expression, it would seem to follow that it can also punish an individual who publicly burns an American flag as a form of symbolic expression.

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10. 391 U.S. 367 (1968).
11. *See* Stone, Content Neutral Restrictions, 54 U. Chi. L. Rev. 46, 105-14 (1987).

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In *O'Brien*, the Court upheld a federal statute prohibiting any person to forge, alter, knowingly destroy, or knowingly mutilate a draft card,[12] as applied to an individual who publicly burned his draft card as an act of political protest.[13] In reaching this decision, the Court explained that the draft card statute had only an incidental effect on speech because it did not explicitly regulate expression, its asserted purpose—to facilitate the administration of the selective service laws—was unrelated to the restriction of speech, and it applied to all violators without regard to whether they had engaged in expressive conduct and without regard to the communicative impact of their expression.[14] The Court concluded that, in such circumstances, the law was "unrelated to the suppression of free expression" and thus should be tested by a relatively deferential standard of review.[15]

In *Johnson* the Court held that, unlike the draft card statute at issue in *O'Brien*, the Texas statute was not "unrelated to the suppression of free expression."[16] To the contrary, the Court explained that "[t]he Texas law is . . . 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."[17] Thus, unlike the situation in *O'Brien*, "Johnson's treatment of the flag violated Texas law" because of "the likely communicative impact of his expressive conduct."[18] The Court concluded that, in such circumstances, the Texas law was not a mere incidental restriction of speech, but was directly "related to the suppression of free expression."[19]

Although this analysis served effectively to distinguish *O'Brien*, it did not in itself mandate the invalidation of the challenged statute, for not all laws that are "related to the suppression of free expression" are unconstitutional. To the contrary, within the realm of laws that are "related to the suppression of free expression" there is a further distinction between those that are content-neutral and those that are content-based.

Content-neutral restrictions limit expression without regard to the content of the message conveyed. Laws that prohibit noisy speeches near a hospital, ban billboards in residential communities, or restrict the distribution of leaflets in public places are examples of content-neutral restrictions. Content-based restrictions, on the other hand, limit expression because of the message conveyed. Laws that prohibit seditious libel, ban the publication of confidential information, or restrict speeches that may trigger a hostile audience response illustrate this type of restriction. Content-based restrictions are especially problematic under the first amendment, for by restricting only some messages and not others such laws are especially likely to distort the substantive content of public debate and to mutilate the

12. *O'Brien*, 391 U.S. at 375.
13. Id. at 369.
14. Id. at 376-80.
15. Id. at 377.
16. Texas v. Johnson, 109 S. Ct. 2533, 2540 (1989) (citing United States v. O'Brien, 391 U.S. 367, 377 (1968)).
17. Id. at 2543.
18. Id.
19. Id. at 2542.

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thought processes of the community. Thus, unlike content-neutral restrictions, which are generally subject to a form of ad hoc balancing, content-based laws are presumptively invalid.[20]

As the Court recognized in *Johnson*, the Texas flag desecration statute was explicitly content-based.[21] Indeed, the Texas law directly violated the "bedrock" first amendment principle "that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[22] The Court thus concluded that this "content-based" restriction could withstand constitutional challenge only if the state's interest could survive "the most exacting scrutiny."[23]

In my judgment, the Court's analysis of *O'Brien* and of the Texas flag desecration statute was clearly correct and essentially uncontroversial as a matter of both precedent and principle. Nonetheless, several arguments have been advanced in opposition to *Johnson*.

First, it has been suggested that Johnson's act of burning the American flag as a form of political protest was not "speech" within the meaning of the first amendment. On this view, the first amendment protects only written and spoken communication. At least since its 1928 decision in *Stromberg v. California*,[24] however, the Court has rejected this crabbed view of the first amendment, and rightly so. Any act that is intended to communicate and is reasonably understood by others as communication should fall within the first amendment's protection of "speech."[25] This includes not only the written and spoken word, but sign language for the deaf, picketing,[26] parading,[27] the wearing of black armbands,[28] and the public burning of the American flag. Indeed, because of its unique emotive power, symbolic expression is often an especially effective means of conveying the depth of one's convictions.

Most of the perplexity traditionally associated with the issue of symbolic expression was due to the relative rigidity of first amendment doctrine in the early stages of its evolution. Consider the difficulty of attempting to integrate unconventional means of expression into a doctrinal structure that tests all restrictions of speech with a single, overarching standard, such as "clear and present danger."[29] Such "expressive" acts as

20. For a more thorough discussion of this distinction, see Stone, supra note 11; Stone, Content Regulation and the First Amendment, 25 Wm. & Mary L. Rev. 189 (1983).

21. *Johnson*, 109 S. Ct. at 2543.

22. Id. at 2544.

23. Id. at 2543.

24. 283 U.S. 359 (1931).

25. *See* id. at 368-69 (holding free speech clause of first amendment applicable to Young Communist League member who displayed red flag in public place).

26. *See* Thornhill v. Alabama, 310 U.S. 88 (1940) (state law prohibiting all union picketing unconstitutional).

27. *See* Edwards v. South Carolina, 372 U.S. 229 (1963) (peaceful parade through South Carolina State House grounds to protest segregation laws protected by first amendment).

28. *See* Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969) (high school students wearing black armbands to protest Vietnam War protected by first amendment).

29. This test is found in an opinion by Justice Holmes in Schenck v. United States, 249 U.S. 47, 52 (1919) ("The question in every case is whether the words used are used in such

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urinating on a public building or publicly letting the air out of the tires of a government official's car in symbolic protest of government policy would strain such a doctrinal structure to the breaking point. Is the interest in preventing public urination or minor acts of vandalism of sufficient "gravity" to satisfy the clear and present danger standard? If so, we run the risk of diluting a standard that must protect free speech against government efforts to censor seditious libel and subversive advocacy. If not, does that mean that society must tolerate such bizarre forms of expression? The simplest "solution" in such a doctrinal framework is, of course, to avoid the problem entirely by defining such expressive conduct as "nonspeech."

Because of the two distinctions discussed above—the "related/unrelated" distinction and the "content-based/content-neutral" distinction—symbolic speech issues are readily manageable under existing first amendment doctrine. Such issues are now analyzed by asking, first, whether the challenged restriction is related or unrelated to the suppression of free expression, and, second, if the latter, whether the restriction is directed at the content of the symbolic expression. The results of these two inquiries will determine the appropriate level of scrutiny. This more subtle analysis has enabled first amendment jurisprudence to accommodate a broader conception of "speech" by focusing more precisely on the specific dangers associated with different types of restrictions.

Second, it has been argued that the Texas statute might be upheld under the "fighting words" doctrine.[30] But that doctrine has no application in *Johnson*. The fighting words doctrine governs only personal insults or epithets that are intended and understood not as communication, but as verbal assaults; the doctrine contains an implicit requirement of likely and imminent danger, in that the speech must be likely to cause the average addressee to fight; and the doctrine applies only to face-to-face encounters where the speech is directed at a particular, individual addressee.[31] None of these elements was present in *Johnson*. Only a dramatic and wholly unwarranted expansion of this doctrine could justify its application in the circumstances presented in *Johnson*.

Third, it has been suggested that the Texas statute might be sustained under the "hostile audience" doctrine.[32] On this view, the government can prohibit flag desecration because such expressive conduct may cause others to react in a hostile manner. Whatever vitality this doctrine may retain beyond the narrow confines of the fighting words doctrine, it has no bearing on *Johnson*. Because the hostile audience rationale for suppressing speech invites what Harry Kalven aptly termed the "heckler's veto,"[33] the Court has long recognized that the government may restrict speech for this

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circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."). *See also* Abrams v. United States, 250 U.S. 616, 627-31 (1919) (Holmes, J., dissenting) ("clear and imminent danger" is not posed by a "silly leaflet by an unknown man").

30. For a discussion of the fighting words doctrine, see G. Stone, L. Seidman, C. Sunstein & M. Tushnet, Constitutional Law 1009-15 (1986), and cases discussed therein.

31. Id.

32. For a discussion of the hostile audience doctrine, see id. at 997-1017.

33. H. Kalven, The Negro and the First Amendment 141 (1966).

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reason, if at all, only on a specific factual showing that the danger of violent audience response is likely, imminent, grave, and beyond the capacity of government to control with reasonable law enforcement resources.[34] *Johnson* was not even remotely such a situation.

Finally, it has been argued that the Texas flag desecration statute should be understood not as a restriction on the expression of an idea—hostility to the policies of the United States government, but as a restriction on the use of a potential means of expression—the American flag. To the extent this argument implies that the Texas flag desecration statute was a regulation of means rather than content, it is clearly wrong. The Texas statute restricted the use of the flag as a means of expression *only* when it was used to convey ideas that are "offensive" to others. As the Court recognized, that is a paradigm example of content-based regulation.[35]

The main thrust of this argument must thus be that the Texas statute should be exempt from "the most exacting scrutiny" because it did not totally ban the expression of an idea, but merely restricted its expression through a single means of communication—flag desecration. For several quite compelling reasons, however, including the equality principle, the risk of distorting the substantive content of public debate, the inability confidently to distinguish between "significant" and "modest" content-based restrictions, and concerns about impermissible governmental motivation,[36] the Court has never accepted such a limitation on its scrutiny of content-based restrictions. Indeed, just as the Court does not dilute its standard on the ground that a challenged law has only a "modest" rather than a "significant" effect when it considers the constitutionality of laws that discriminate against blacks, so too does it eschew such an inquiry when it considers the constitutionality of laws that discriminate against particular points of view. Laws that prohibit anti-abortion leafleting on the steps of the Capitol, or anti-civil rights speeches in the Lincoln Memorial, or anti-war desecrations of the American flag are appropriately subject to "the most exacting scrutiny" even though they limit the expression of specific points of view only through particular means of communication. The evil of such laws is that they discriminate against specific political viewpoints, without regard to the relative "severity" of the restriction.

II

Is it possible to draft legislation that restricts flag burning without running afoul of *Johnson*? Consider the following statute: "No person may knowingly impair the physical integrity of the American flag."[37] In my view, *Johnson* does not dictate the invalidation of this statute.

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34. *See* G. Stone, L. Seidman, C. Sunstein & M. Tushnet, supra note 30, at 997-1017.

35. Texas v. Johnson,109 S. Ct. 2533, 2543 (1989).

36. *See* Stone, supra note 20, at 200-33.

37. To make such a law plausible, assume that it defines "American flag" to exclude anything other than "official" representations of the flag (e.g., made of cloth, of a certain size and shape, etc.) and that it stipulates some "accepted" method for the ceremonial disposition of such "official" flags.

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The key point is this: The Court did not hold in *Johnson* that there is an inviolable first amendment right to burn the American flag as a means of political protest. Rather, *Johnson* was expressly predicated on the Court's double-barreled conclusion that the Texas law was related to the suppression of free expression and content-based. Thus, the Court held only that the specific Texas flag desecration statute before it was an unconstitutional means of regulating such expressive conduct. As in other circumstances, it is not simply the nature of the expression, but also "the governmental interest at stake" and the nature of the regulation that help "to determine whether a restriction on . . . expression is valid."[38]

A few examples may help to clarify. Suppose an individual is prosecuted for burning an American flag in public as a means of political protest in violation of a city ordinance prohibiting any person to make an open fire in a public place. Although *Johnson* invalidated the Texas flag desecration statute, it tells us little, if anything, about the constitutionality of this ordinance, for unlike the Texas statute, the open fires ordinance is unrelated to the suppression of free expression, is not content-based, and need not be subjected to "the most exacting scrutiny." The constitutionality of the open fires ordinance is appropriately governed by *O'Brien* rather than *Johnson*.

Similarly, there can be no doubt that, on the basis of the principles articulated in *O'Brien*, the Court would uphold a statute prohibiting any person to deface the Lincoln Memorial, even as applied to an individual who scrawls politically-oriented graffiti on the Memorial. On the other hand, there also can be no doubt that, on the basis of the principles invoked in *Johnson*, the Court would invalidate a statute prohibiting any person to write "any message critical of the United States" on the Lincoln Memorial. Although the speech in the two cases is identical, the first law is unrelated to the suppression of free expression, content-neutral, and constitutional; whereas the second law, like the Texas statute invalidated in *Johnson*, is related to the suppression of free expression, content-based, and violative of the first amendment.

With this understanding of *Johnson*, we can turn to my hypothetical "flag impairment" statute, which would prohibit any person knowingly to impair the physical integrity of the American flag. Unlike the Texas law invalidated in *Johnson*, the flag impairment statute does not refer to "desecration" and does not turn in any way on whether the proscribed conduct "will seriously offend" others. Indeed, the flag impairment statute applies to the individual who burns a flag in private to ignite a fire in his fireplace as well as to the individual who burns a flag in public to protest government policy. It applies without regard to whether the conduct takes place in public or in private, without regard to whether it is undertaken for expressive or for other purposes, without regard to whether it offends others, and without regard to the particular message any individual may seek to convey. Unlike the Texas law invalidated in *Johnson*, the hypothetical statute does not turn on the communicative impact of the prohibited conduct, it is not content-based, it is not related to the suppression of free

38. *Johnson*, 109 S. Ct. at 2540.

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expression, and its constitutionality is not controlled by the principles that quite correctly dictated the outcome in *Johnson*. Put simply, *Johnson* does not govern the constitutionality of the hypothetical statute.

III

This is not to say, of course, that my hypothetical flag impairment statute is constitutional. There are at least three grounds on which one might question the constitutionality of this legislation.

First, even if this statute is unrelated to the suppression of free expression and neutral with respect to content, it may still violate the first amendment as an impermissible content-neutral restriction of speech. A law that is unrelated to the suppression of free expression and neutral as to content may be immune from the "most exacting scrutiny" required of most content-based restrictions, but it is not immune from constitutional challenge entirely. Even content-neutral laws may violate the first amendment if their restrictive impact on the opportunities for free expression outweighs the legitimate governmental interests they serve. In general, however, the Court has tended to apply relatively deferential standards of review in cases involving content-neutral restrictions, and this is especially true where, as in the case of my hypothetical statute, the restriction has only an incidental effect on speech.[39] The closest analogy is, of course, *O'Brien*. Indeed, assuming that the government has a constitutionally legitimate interest in protecting the physical integrity of the flag, a question I will address in a moment, *O'Brien* strongly suggests that my hypothetical statute would withstand content-neutral review.

A second possible objection turns on the issue of impermissible legislative motivation. I have no doubt that if my hypothetical flag impairment statute were enacted in a cynical effort to circumvent *Johnson* and to suppress the use of the flag to express ideas that are offensive to the American people, the legislation could not constitutionally be enacted. Perhaps ironically, then, if such legislation were in fact enacted for such constitutionally impermissible reasons, the Court would not necessarily invalidate it on that basis, for although the Court has often inquired into the motivation underlying executive and administrative decisions,[40] it has generally declined to inquire into the motivation underlying legislative actions. In *O'Brien*, for example, the Court, largely for prudential reasons, refused to inquire into legislative motivation to determine whether the actual purpose of the draft card statute was to facilitate the administration of the draft or to punish those individuals who opposed the selective service system by burning their draft cards.[41] If this aspect of *O'Brien* governs, the

39. *See generally* Stone, supra note 11.

40. *E.g.*, Keyes v. School Dist. No. 1, 412 U.S. 189 (1973) (involving finding of Denver School Board's *de jure* segregation); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (local administration using facially neutral ordinance intentionally discriminated against Chinese nationals).

41. United States v. O'Brien, 391 U.S. 367, 383 (1968) ("It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the

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Court would be similarly reluctant to inquire into the motivations underlying the hypothetical legislation.[42] The more interesting question, however, is whether the hypothetical flag impairment statute does, indeed, have a constitutionally legitimate purpose.

That brings me to the third possible objection, which may be stated as follows: What, precisely, is the purpose of this legislation? If it is not designed merely to circumvent *Johnson* and to suppress the use of the flag for the expression of offensive opinions, what is it designed to do? Is there, indeed, any legitimate justification for this legislation that is unrelated to the suppression of free expression?

The simple answer, of course, is that the hypothetical statute is designed not to censor critics of the flag or of the nation, but to protect the physical integrity of the flag itself. It is designed, in other words, to preserve the flag as an unalloyed symbol of our nationhood and national unity and to prevent any physical damage to the flag that might dilute its symbolic power. In the words of the Texas statute, the purpose of the legislation is to establish the flag as a "venerated" object.[43]

Is this a legitimate governmental purpose? Is it, in itself, violative of the first amendment? *Johnson*, *Goguen*, *Spence*, and *Street* clearly establish that the government cannot constitutionally preserve the flag's symbolic value by prohibiting others from using it to express unpatriotic or otherwise offensive messages.[44] Does it necessarily follow, however, that the government may not attempt to preserve the symbolic value of the flag by protecting its physical integrity against *all* impairments, whether or not they are expressive and without regard to the content of any particular message? In what sense is *that* a constitutionally illegitimate purpose?

Several arguments might be advanced. First, one might argue that, by prohibiting anyone to impair the physical integrity of the flag, my hypothetical statute should be understood as an effort to promote government speech by prohibiting anyone from "interrupting" such speech. But this hardly establishes the purpose as illegitimate. The first amendment prohibits the government neither from speaking, nor from speaking effectively, nor from speaking patriotically, nor from protecting its speech—pa-

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basis of an alleged illicit legislative motive.").

42. At least in the religion area, the Court in recent years has been increasingly willing to invalidate legislation because of constitutionally impermissible legislative motivation. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38 (1985) (invalidating Alabama statute authorizing one minute at beginning of school day "for meditation or voluntary prayer"); Stone v. Graham, 449 U.S. 39 (1980) (Kentucky statute requiring posting of Ten Commandments on classroom walls held unconstitutional). In Edwards v. Aguillard, 482 U.S. 578 (1987), the Court invalidated Louisiana's "Creationism Act." The Act required that whenever evolution or creationism is taught, "the other must also be taught." Id. at 581. The stated purpose of the legislation was to " 'assure academic freedom.' " Id. at 600 (Powell, J., concurring) (quoting Appendix to briefs). Justice Brennan's opinion, however, asserts that "[w]hile the Court is normally deferential to a state's articulation of a secular purpose, it is required that the statement of such purpose be sincere." Id. at 586-87. It is at least possible that the Court eventually will extend these precedents to the free expression area as well.

43. Texas v. Johnson, 109 S. Ct. 2533, 2537 n.1 (1989).

44. For a discussion of these cases, see supra text accompanying notes 6-9.

triotic or otherwise—from interruption. There is simply nothing here that can be said, in and of itself, to violate the first amendment.

Second, one might argue that this statute is invalid not because it protects government speech from interruption, but because it does so in a discriminatory manner. On this view, my hypothetical flag impairment statute might be analogized to a law prohibiting any person from interrupting "patriotic" speeches. Such a law would, of course, violate the first amendment because it explicitly discriminates on the basis of viewpoint. Is the flag impairment statute similarly invalid because it protects the flag without equally protecting all other symbols, such as the Republican elephant, the Nazi swastika, the Union Jack, and the hammer and sickle?[45]

I think not. Government speech is different from private speech. It serves different functions. It is not at all clear that the government must provide the same protection to private speech as it provides its own. Suppose, for example, a town council regularly posts the minutes of its meetings on a kiosk in the town square and prohibits anyone from removing, destroying, or defacing these minutes. Must the town provide the same protection to *all* notices that are posted on the kiosk or, for that matter, in the town? If the government grants landmark status to Independence Hall, must it grant similar status to the building in which the Socialist Workers Party drafted its first constitution? Laws that accord special protection to governmental symbols cannot fairly be equated to content-based restrictions favoring "patriotic" speech. The problems of government speech and government symbols are simply too complex to be governed by so easy an analogy.

Third, one might argue that if the purpose of my hypothetical flag impairment statute is to preserve the symbolic value of the flag, the only acts of physical impairment that would actually undermine that purpose are those that are designed to convey a different and inconsistent message. Other acts of physical impairment, such as the use of the flag to light a fire in one's fireplace, would not dilute the flag's symbolic value and could not rationally be brought within the scope of the law's prohibition. On this view, the statute would clearly seem to be "related to the suppression of free expression," for only acts of physical impairment that involve speech would threaten the government's interest.

It is not at all clear, however, that the flag's status as a symbolic or venerated object would be impaired only by its use to convey inconsistent messages. Certainly there are religious groups who proscribe the physical impairment of venerated objects without regard to either the expressive purpose of the object or the expressive intent of the individual who defaces it. Moreover, one can readily understand why the government might want to prohibit impairment of the physical integrity of the flag, whether or not the impairment consists of express conduct.

Suppose Congress decides that because the bald eagle is the symbol of the United States no one should be allowed to kill bald eagles. (Suppose also that there is no shortage of bald eagles, so the example is not complicated

45. *See* Ely, Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis, 88 Harv. L. Rev. 1482, 1503-08 (1975).

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by any concern about preserving the bald eagle as an endangered species.) Against this background, is a law that prohibits any person from knowingly killing a bald eagle violative of the first amendment because it furthers a constitutionally illegitimate purpose? What is the illegitimate purpose? Surely the law is not designed to suppress anyone's expression, for so far as I know no one has ever killed a bald eagle as a symbolic expression of opposition to government policy. Indeed, from this perspective, the law is clearly no more "related to the suppression of free expression" than the draft card law upheld in *O'Brien*.

It is no doubt troubling—at least to me—that the government might want to establish the bald eagle as a venerated object. But I can think of no sound reason for concluding that it is constitutionally illegitimate for the government to do this.[46] The government can legitimately speak without violating the first amendment, it can legitimately speak patriotically without violating the first amendment, it can legitimately employ symbols of patriotism without violating the first amendment, and it can legitimately prohibit the destruction of such symbols of patriotism *so long as its purpose is not to restrict anyone else's expression*.[47]

If the bald eagle statute serves a legitimate government interest, it would seem to follow that the hypothetical flag impairment statute may serve a constitutionally legitimate interest as well. Indeed, the only distinction is that in the bald eagle situation we can perhaps more readily accept as plausible the government's claim that its actual purpose is to protect the symbol rather than to suppress expression, whereas in the flag situation we are, at a minimum, suspicious of the sincerity of this claim. In light of *O'Brien*, however, this is most likely a distinction without constitutional implications.

I would like to add two final points. First, I do not mean to suggest that I favor the enactment of my hypothetical statute. To the contrary, it would be thoroughly impractical, it would restrict a useful means of expression for little reason, and it would almost certainly be adopted for constitutionally impermissible reasons. My effort here is to explore the rather different question whether such a law, however inadvisable, might nonetheless be constitutional.

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46. I would reject as frivolous the argument that such a law would violate the establishment clause of the first amendment.

47. It is possible, of course, that the bald eagle statute might some day be invoked to punish an individual who shoots a bald eagle in symbolic protest of American foreign policy. But that is not unconstitutional, for the effect is wholly incidental and is clearly governed by *O'Brien*. It is also possible that the government might eventually declare so many symbols of national unity to be "venerated" objects that, in cumulation, this would have a serious effect on the opportunities for free expression. For example, the government might declare not only the bald eagle, but also the flag, the visage of the President, copies of the Constitution, and all pictures of the Capitol, the White House, and the Supreme Court to be "venerated" objects. The inability of citizens to impair the physical integrity of all these objects in symbolic protest of government policy might have a serious, even if only incidental, effect on the overall opportunities for free expression. But the answer to this concern, in this as in related contexts involving incidental restrictions of speech, is to deal with the problem if and when we come to it. In any event, this concern goes only to the constitutionality of the law as a content-neutral restriction of speech. It does not go to the legitimacy of the government's interest.

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Second, I should point out that the legislation actually enacted by Congress in response to *Johnson* does not pose quite as clean an issue as my hypothetical statute. Rather than prohibiting any person from impairing the physical integrity of the flag, the actual legislation prohibits any person to mutilate, deface, defile, burn, maintain on the floor or ground, or trample upon any flag of the United States.[48] Although this legislation avoids the most serious difficulties of the Texas statute—it is not directed explicitly at expression, it does not turn on communicative impact, and it is not concerned with the extent to which others find the expression offensive—it does employ phrases that are ideologically charged and that carry at least some of the same connotations as "desecration." Thus, the legislation actually enacted well might be brought within the scope of *Johnson* even though, like my hypothetical statute, it avoids the more flagrant deficiencies of the Texas flag desecration statute.

IV

I would like to conclude with a few thoughts on the constitutional amendment that the Bush Administration proposed in its effort to override *Johnson*. The proposed amendment provided that "Congress and the States shall have the power to prohibit the physical desecration of the Flag of the United States."[49] Congress rightly rejected this proposal.[50]

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48. Act of Oct. 28, 1989, Pub. L. No. 101-131, 103 Stat. 777 (1989) (to be codified at 18 U.S.C. § 700). The legislation states in relevant part:

> (a)(1) Whoever knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States shall be fined under this title or imprisoned for not more than one year, or both.
>
> (2) This subsection does not prohibit any conduct consisting of the disposal of a flag when it has become worn or soiled.
>
> . . . .
>
> (b) As used in this section, the term "flag of the United States" means any flag of the United States, or any part thereof, made of any substance, of any size, in a form that is commonly displayed.
>
> . . . .
>
> (d)(1) An appeal may be taken directly to the Supreme Court of the United States from any interlocutory or final judgment, decree, or order issued by a United States district court ruling upon the constitutionality of subsection (a).
>
> (2) The Supreme Court shall, if it has not previously ruled on the question, accept jurisdiction over the appeal and advance on the docket and expedite to the greatest extent possible.

Id.

The legislation became law without the signature of President Bush. *See* U.S. Const. art. I, § 7, cl. 2 (stating in relevant part: "If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it").

49. S.J. Res. 180, 101st Cong., 1st Sess. (1989).

50. The proposed amendment failed to pass the Senate on Oct. 19, 1989. *See* 142 Cong. Rec. S13,733 (daily ed. Oct. 19, 1989) (51 for, 48 against); *see also* Toner, Senate Rejects Amendment Outlawing Flag Desecration, N.Y. Times, Oct. 20, 1989, at A1, col. 1.

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Before I offer my reasons for that conclusion, however, I would like to address two arguments that were made against the amendment that I found quite unpersuasive. First, it was argued that, if enacted, the proposed amendment would effectively have amended not only the first amendment, as interpreted in *Johnson*, but all other constitutional provisions as well, including the fourth amendment,[51] the self-incrimination clause,[52] the due process clause,[53] and the cruel and unusual punishment clause.[54] Thus, on this view, the proposed amendment, if enacted, would have authorized legislation allowing searches for evidence of flag desecration based on less than probable cause, denying flag desecration defendants the right to counsel and inflicting the death penalty on flag desecrators. This is sheer nonsense. The proposed amendment was explicitly and unambiguously designed to overrule *Johnson*. It was not understood as, and would not be interpreted as, a broadscale obliteration of the other protections of the Constitution in prosecutions for flag desecration.

Second, it was argued that the proposed amendment would fail to achieve its explicit objective, for it would appropriately be construed by the Court as incorporating existing law—including the decision in *Johnson*. In light of the unambiguous background of the proposed amendment, I find this argument unpersuasive in the extreme.

There were, however, sound reasons to reject the proposed constitutional amendment. First, and most narrowly, given a choice between a legislative response to *Johnson* and a constitutional amendment, the legislative route was in every respect the more sound. The Supreme Court has long been guided by the general principle that it should not address constitutional questions unless it cannot otherwise resolve the dispute before it.[55] This recognition of the power of judicial review has well served the Court. The same principle should govern in this situation as well. If

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51. The fourth amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

52. The self-incrimination clause is found in the fifth amendment and states: "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V.

53. The due process clause is found in the fifth amendment and states: "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

54. The cruel and unusual punishment clause is found in the eighth amendment and states: "cruel and unusual punishments [shall not be] inflicted." U.S. Const. amend. VIII.

55. *See* Ashwander v. TVA, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring) ("The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it.' " (quoting Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration, 113 U.S. 33, 39 (1885))); *see also* Webster v. Reproductive Health Servs., 109 S. Ct. 3040, 3060-61 (1989) (O'Connor, J., concurring in part and concurring in the judgment) ("Where there is no need to decide a constitutional question, it is a venerable principle of this Court's adjudicatory processes not to do so"); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 154-55 (1951) (Frankfurter, J., concurring) (courts "do not review issues, especially constitutional issues, until they have to").

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Congress can address a problem through legislative action, it should *ordinarily* pursue the legislative solution before resorting to the more solemn processes of constitutional amendment.

Second, even if the Court eventually holds that there is no method by which the government can constitutionally protect the physical integrity of the flag through legislation, a constitutional amendment to overrule *Johnson* would be undesirable because *Johnson* itself was premised upon sound principles of constitutional theory. The "bedrock" principle that government should not "prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"[56] is not only a correct interpretation of the first amendment, it is wise public policy in a free and self-governing society. An amendment that would carve that principle from the Constitution would ultimately weaken rather than strengthen our constitutional order.

Third, even if this "bedrock" principle, as applied to flag desecration, is not a necessary predicate of democratic government, the amendment would still be unwarranted, for as important as the flag may be, and as offensive as desecration of the flag may be, a constitutional amendment to narrow the protections of the first amendment would be wholly unprecedented in the two hundred years of our constitutional history—and for good reason. The Constitution is our fundamental charter of government. We should not tamper with it to adjust for what must fairly be understood as matters of only secondary importance in the overall scheme of American government. We have not in the past, and we should not in the present, submit to the temptation to invoke the processes of constitutional amendment to override a decision of the Supreme Court just because it offends —or even deeply offends—a substantial majority of our citizens. Such a practice would clutter, trivialize, and, indeed, denigrate the Constitution. We should recognize the flag issue for what it is—a profoundly controversial and inflammatory dispute over what in the grand scheme of constitutional government is ultimately a matter of secondary importance. It does not warrant resort to the most profoundly solemn act our nation can pursue—amendment of the Constitution of the United States.

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56. *Johnson*, 109 S. Ct. at 2544.

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