# The Constitutionality of Flag Burning: Hate or Free Speech? An Analysis of Texas v. Johnson

*By Nicholas Barker*

*Ever since the Supreme Court handed down its 1989 ruling in Texas v. Johnson allowing desecration of the American flag as protected symbolic speech under the First Amendment, conservative forces in the United States have fought to pass a constitutional amendment that would make flag desecration a special category of speech subject to regulation by Congress. Arguments for and against a right to flag desecration made by the Supreme Court in the 5-4 Johnson decision and reactions to flag desecration will be discussed, with emphasis on legislators' and lobbyists' attempts to pass a flag protection amendment. General theories of free expression, in particular the work of philosopher John Stuart Mill and civil libertarian Alexander Meiklejohn, will show the necessity of supporting a right to flag desecration in a nation based on a concept of government by the people.*

*"A society that will trade a little liberty for a little order will lose both, and deserve neither."*

- Thomas Jefferson, in a letter to James Madison

## INTRODUCTION

Outside of the 1984 Republican National Convention in Dallas, surrounded by protesters chanting "America, the red, white and blue, we spit on you" (*Texas v. Johnson* 1989, 399), Gregory Johnson doused an American flag with kerosene and set fire to it in protest of the policies of President Ronald Reagan. After Johnson was arrested under a Texas statute protecting "venerated objects" (*Texas v. Johnson* 1989, footnote 1), Korean War veteran Dan Walker scooped up the fragments of the burned flag and respectfully buried them according to Army regulations. When asked for comment, Walker said, "I still do not know what they were protesting" (*Seattle Times* 1989, A1).

Thus began one of the most emotional First Amendment battles in our recent history, with most people angry at the disregard of the flag's special role in American culture. Indeed, values promoting Old Glory have been inculcated into American society ever since the founding of our country. For decades, school days were initiated by a harmony of voices repeating the Pledge of Allegiance, with attention focused on the Stars and Stripes. The sounds of thousands of people singing the Star Spangled Banner in unison at sporting events is as much a part of our national identity as barbecues and fireworks on the Fourth of July. Why then should we allow anyone to desecrate the banner that has contributed so much to our nation?

The simple answer is that the First Amendment says so. This paper will outline the development of a constitutionally protected right to burn the flag as protected symbolic speech, and show that in a politicized society such as the United States, unpopular expressions such as flag burning must and should be tolerated. I offer two reasons for this: 1) every opinion must have an opportunity to be expressed, so that through discussion of conflicting ideas people can come closer to comprehending the truth which these opinions purport to represent, and 2) free speech is a prerequisite to the principle of government by the people, because every member of society must be as informed as possible to enable the fullest citizen participation in government. However, we must first examine the courts' treatment of flag burning, which forms the constitutional justification for the arguments that follow.

### THE ADJUDICATION OF *TEXAS V. JOHNSON*

The Texas State Court of Appeals upheld Johnson's conviction, provoking an appeal to the Texas Court of Criminal Appeals, where the law was struck down because of constitutional case law interpreting the First Amendment's guarantee

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of free speech. After this decision, the State of Texas took the case to the Supreme Court of the United States.

The Court announced its 5-4 decision in March 1989. Justice Brennan wrote the opinion, in which Marshall, Blackmun, Scalia, and Kennedy joined. Rehnquist wrote the dissent, in which White, O'Connor and Stevens joined. The majority upheld the Court of Appeals' decision that Johnson's act conveyed a message, and was therefore considered 'speech' under the First Amendment.

"Johnson was convicted of flag desecration for burning the flag rather than for uttering insulting words. This fact," wrote Justice William Brennan, "somewhat complicates our consideration of his conviction under the First Amendment. We must first determine whether Johnson's burning of the flag constituted expressive conduct, permitting him to invoke the First Amendment in challenging his conviction." In order to determine if Johnson's actions constituted "speech," the Court applied the symbolic speech test, formalized in *United States v. O'Brien*, stipulating that the conduct must have "intent to convey a particularized message," and that "the likelihood was great that the message would be understood by those who viewed it" (*Texas v. Johnson* 1989, 404).

In support of this, Brennan quotes *West Virginia Board of Education v. Barnette* (1943), that "symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality is a short cut from mind to mind" (*West Virginia Board of Education v. Barnette* 1943, 632; *Texas v. Johnson* 1989, 405). The Court concluded that flag burning was symbolic speech, much like "the expressive nature of students' wearing of black armbands to protest American military involvement in Vietnam" (*Texas v. Johnson* 1989, 404), upheld by the Court in *Tinker v. Des Moines Independent Community School District* (1969). In support of this, Johnson explained his reason for burning the flag: "The American Flag was burned as Ronald Reagan was being re-nominated as President. And a more powerful statement of symbolic speech…couldn't have been made at that time…we had new patriotism and no patriotism" (*Texas v. Johnson* 1989, 406). In these circumstances, Johnson's burning of the flag was conduct "sufficiently imbued with elements of communication" (*United States v. O'Brien* 1968, 409) to implicate the First and Fourteenth Amendments.

However, the *O'Brien* standard also stipulated that there may be restrictions on symbolic speech if there is a "sufficiently important governmental interest" unrelated to the suppression of free expression that would justify restricting First Amendment protection. Texas' argument for the important governmental interest was twofold: first, the prevention of breaches of the peace, and second, the preservation of the flag as a symbol of nationhood and national unity. The first point did not stand because Texas admitted in oral argument that "no actual breach of the peace occurred at the time of the flag burning or in response to the flag burning" (*Texas v. Johnson* 1989, 408). In regard to the second point, Texas' concern 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," only arises when "when a person's treatment of the flag communicates some message" (*Texas v. Johnson* 1989, 410). This, says Justice Brennan, relates the Texas law "to the suppression of free expression within the meaning of *O'Brien*," meaning that the *O'Brien* criteria for justifiably restricting expression are not met. Furthermore, "a government cannot mandate by fiat a feeling of unity in its citizens. Therefore, that very same government cannot carve out a symbol of unity and prescribe a set of approved messages to be associated with that symbol when it cannot mandate the status or feeling the symbol purports to represent" (*West Virginia Board of Education v. Barnette* 1943, 639; *Texas v. Johnson* 1989, 401). Therefore, Texas could not force the preservation of the flag as a national symbol.

Next, Brennan tackles the question of whether, regardless of *O'Brien*, Texas' interest in preserving the flag as a symbol of America justifies Johnson's conviction. It is noted that Johnson was prosecuted because he burned the flag in protest, not as a means of disposing of it because it was dirty or torn – which federal law designates as the preferred means of disposing of a flag unfit for display (36 U.S.C. 176k). Thus, the 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" (*Texas v. Johnson* 1989, 411), meaning prosecution depends on the intent of the person burning the flag. Brennan says this is irrational: "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…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." The effect would be to prescribe a set of orthodox messages to be associated with the flag. Moreover, in the words of *West Virginia Board of Education*, to sustain the Texas statute mandates "that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind" (*West Virginia Board of Education v. Barnette* 1943, 634). Concluding, Brennan says that "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" (*Texas v. Johnson* 1989, 414).

This position was attacked by Chief Justice Rehnquist, who said that, "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" (*Texas v. Johnson* 1989, 422). Amid stories and poems ranging from the Revolutionary War to Vietnam, Rehnquist built upon the historical significance of the flag as the primary reason for his opinion that flag desecration represents a special case that

deserves special exemption from the First Amendment. According to the Chief Justice, "the American flag… does not represent the views of any particular political party, and it does not represent any particular political philosophy. The flag is not simply another 'idea' or 'point of view' competing for recognition in the marketplace of ideas…Americans regard it with an almost mystical reverence regardless of what sort of social, political, or philosophical beliefs they may have" (*Texas v. Johnson* 1989, 429).

Furthering his argument, Rehnquist recalls from *Chaplinsky v. New Hampshire* (1942) that "the right of free speech is not absolute…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," are not meant to be protected by the First Amendment (*Chaplinsky v. New Hampshire* 1942, 571-572; *Texas v. Johnson* 1989, 430). Rehnquist also argues that a governmental prohibition would not stifle the ability to protest any aspect of America, because Johnson's protest of U.S. policy "conveyed nothing that could not have been conveyed…just as forcefully in a dozen different ways" (*Texas v. Johnson* 1989, 431).

Lastly, Rehnquist appeals to the civic sense of the public, arguing that "surely one of the high purposes of a democratic society is to legislate against conduct that is regarded as evil and profoundly offensive to the majority of people – whether it be murder, embezzlement, pollution, or flag burning" (*Texas v. Johnson* 1989, 435). His suggestion of legislation was realized soon after the Court announced Johnson's innocence.

### THE RESPONSE TO *TEXAS V. JOHNSON*

Congress immediately responded with the Flag Protection Act of 1989, which criminalizes the conduct of anyone who "knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon" a United States flag, except conduct related to "the disposal of a flag when it has become worn or soiled" (*United States v. Eichman* 1990, 314). Just days after passage, the Act was struck down by the Supreme Court in *U.S. v. Eichman*, by a 5-4 vote (all Justices in *Eichman* voted the same as in *Johnson*), because "the Act…suffers from the same fundamental flaw" as the Texas law, "and for the reasons stated in Johnson…the Government's interest cannot justify its infringement on First Amendment rights" (*United States v. Eichman* 1990, 317-318).

Reacting to the judgment, the Citizen's Flag Alliance said, "Americans were outraged. Public opinion surveys showed three out of four Americans favored protection for the flag, and a similar number believed a constitutional amendment was needed to achieve that goal" (The Citizens Flag Alliance 2000). In 1995, certain members of Congress began pushing for an amendment, to provide that "the Congress shall have power to prohibit the physical desecration of the flag of the United States" (104th Congress 1995, H.J.Res.79). The House passed the resolution, 312-120 (roughly 72 percent), but it died in the Senate, where the 63-36 vote fell short of the necessary two-thirds vote. While Senate passage would still have required the approval of three-fourths of state legislatures to become law, forty-nine state legislatures had enacted proposals supporting a flag protection amendment (Mauro 1998, A16).

In the 105th Congress (1997-1998), the House approved the proposal 310-114 (roughly 73 percent), but the Senate never voted on it because preliminary tallies showed it would not pass. The amendment was proposed again in the 106th Congress (1999-2000), and for the third time, it failed to pass. In the House, the vote was 305-124 (roughly 71 percent), but in the Senate it garnered only 63 yeas, 4 short of the required two-thirds majority. Most recently, the amendment was brought up again in the 107th Congress, but as of publication had not been voted on.

The debate took on a social as well as a political character, when many activists lobbied in support of the amendment. Most notable of these was the Citizens' Flag Alliance, made up of "more than 135 organizations…with collective membership around 20 million" (The Citizens Flag Alliance 2000). President of the Alliance, Daniel Wheeler reports that, "in poll after poll, more than 80 percent believe the flag deserves protection" (Wheeler 1999c, A8), in contrast to numbers reported by the Gallup Poll, whose most recent survey (1999) shows 63 percent in favor (see Appendix 2). Regardless, Wheeler proclaims that "80 percent of Americans say the Court was wrong, that flag burning is not speech, it is hateful conduct" (Wheeler 1999b, A10). According to the opinions of many Americans who have editorialized their views on the issue, he may be correct. Says one amendment supporter, "any true American…would not resort to burning our precious flag…anyone burning our flag should be denied citizenship and expelled from American soil. They do not deserve to be a part of this American system" (Chiasson 2000, B8) Another concerned citizen has expressed that "the Constitution was given as a statement of liberty," and "was not intended to serve as a…hiding place for those who would destroy and undermine the structure which was provided at so great a price." Continuing, he says that if anyone "doesn't believe in the symbol of this country" they should "move to Iran, Russia or North Korea, where they won't see it flying" (Crane 1999, B10). Clearly, many private citizens vehemently resent flag burning, and this extends to national heroes. General Norman Schwarzkopf, leader of U.S. forces in Operation Desert Storm stated, "I regard legal protections for our flag as an absolute necessity and a matter of critical importance to our nation. The American flag, far from a mere symbol or a piece of cloth, is an embodiment of our hopes, freedoms and unity" (Justis 1999, E3).

Opponents of the amendment voice their opinions just as strongly, though perhaps not as fanatically. Representative Gary Ackerman (D-New York) believes, "if a jerk burns a flag, America is not threatened. If a jerk burns a flag, democracy is not under siege. If a jerk burns a flag, freedom is not at risk and

we are not threatened. My colleagues, we are offended; and to change our Constitution because someone offends us is, in itself, unconscionable" (AllPolitics 1999, 1). This argument seems reasonable given that only eight flag burnings have been reported yearly for the entire United States since the decision in *Johnson* (O'Connor and Sabato 2000, 167). Other citizens have expressed contempt for the amendment because they consider flag burning a victimless crime. Says one man, "if I strike someone, I risk inflicting real harm. However, if I destroy a piece of my own property, even an American flag, I hurt no one." He continues, saying "once we attempt to regulate the 'offensive,' we've made the transition from political correctness to thought control" (O'Connor 1999, A14). Another says, "I do not like flag burning, but why give more recognition to those who do it? … Does 'the problem' need to be raised to a constitutional level? Or, is public outrage enough?" (Mackley 2000, A10).

National heroes also come down against the amendment – former senator, astronaut and Marine, John Glenn has said "it would indeed be a hollow victory to protect the symbol by taking any chance at chipping away at the freedoms themselves" (AllPolitics 1999), maintaining that "those who have made the ultimate sacrifice did not give up their lives for a red, white and blue piece of cloth" but rather "because of their allegiance to the values, the rights and principles represented by that flag" (Goldstein 2000, 236). Retired general Colin Powell echoed this sentiment in a letter to the Senate Judiciary Committee saying that while he was "rightfully outraged" by flag desecration, it did not damage "our system of freedom," whose First Amendment applies protection "not just to that with which we agree or disagree, but also that which we find outrageous. I would not amend that great shield of democracy to hammer a few miscreants" (Goldstein 2000, 239).

These conflicting opinions do not resolve the debate, but they do show that flag burning is a complex issue with many people, both public and private, supporting many different arguments. The most accurate way to test public support for the amendment is to conduct opinion polls. Five surveys published by the Gallup organization, conducted from 1989 to 1999 show amendment support ranging from 62 percent to 71 percent in favor, and 24 percent to 36 percent opposed (see Appendix 2). Perhaps the most cited number is the "80 percent support" frequently mentioned by members of the Citizens' Flag Alliance, who have conducted nearly 30 polls of their own. However, the only well-documented poll published by the Alliance was a 1998 Gallup Poll they commissioned, which "found 76 percent of respondents favor the amendment" (Taylor 1999). This number has been challenged by a Freedom Forum survey conducted in July 1999 that found only "51 percent favored a constitutional amendment to protect the American flag from desecration" (Elvin 2000, 34). Says Elliot Mincberg, legal director for People for the American Way, "this survey further reinforces the notion that the alleged support may be a mile wide, but it's only an inch deep," because "once you get out the specifics of the amendment and what it will do…support drops way down" (Taylor 1999). However, Flag Alliance President Daniel Wheeler has attacked this survey as inaccurate due to its informing respondents before questioning that "the passage of a flag amendment would mark the first time in the nation's history that the Constitution had been amended to restrict freedoms guaranteed by the First Amendment" (Taylor 1999).

The question remains: do these specific, one-issue surveys tell the truth about public sentiment? Robert Goldstein of Michigan's Oakland University says no: "the public as a whole has completely lost interest in this issue. The public is not in fear for their lives because of these flag-burners" (Taylor 1999). He continues, "when pollsters ask Americans about the most important issues, fewer than 1 percent of respondents mention flag desecration," which is insignificant, because "if they are really concerned about something, they will spontaneously respond to an open-ended question" (Taylor 1999). There have been other signs that concern about the issue is low: in Indianapolis (home of the Citizen's Flag Alliance and the American Legion) on Flag Day, 1999, only 150 people showed up at a celebration to "retire" a flag with a ceremonial burning, and support the flag desecration amendment (Goldstein 2000, 241).

Regardless of whose numbers are correct, the debate over the amendment will continue. Will lawmakers propose it again, and if so, will it pass? Or is it more appropriate to ask, should it pass? This question invites a normative response that reflects one's individual values and beliefs.

### FLAG BURNING THROUGH A LIBERAL DEMOCRATIC LENS

Two documents that best reflect American attitudes toward freedom, the Declaration of Independence and the United States Constitution, both derive their substance from liberal democratic theory. Preservation of individual dignity and a limited government where the majority rules while protecting minority rights are basic tenets of American government. Just as Thomas Jefferson believed that governments derive their just powers from the consent of the governed, so too does our national identity derive its meaning and value from the collective opinion, the outcome of millions of individual opinions. In expressing an individual opinion, every person has worth in the marketplace of ideas, and this ability to participate in meaningful discourse is the cornerstone of the First Amendment's guarantee of freedom of speech.

Most would take it as given that free speech is important, given the legal protection afforded to it by the First Amendment. But the question remains to be answered, why is freedom of speech important? Drawing upon two-hundred plus years of constitutional law and political theory, I offer two main answers: the first lies in the role of free speech as a means of finding truth, and therefore making advances and solving problems. The second answer, in line with the intent of this nation's founders, proposes that free speech is a necessary precondition for an informed citizenry that must make

critical decisions at the ballot box to guide government in the direction they see fit, and therefore perform their role in the social compact that is the United States of America. I draw support for the first answer from the work of philosopher John Stuart Mill and its applications to the conclusions of the Court in *Johnson*. In regards to the second, the case law on free speech, and its interpretations by civil libertarian Alexander Meiklejohn demonstrate the essential role free speech plays in the fulfillment of civic participation under the U.S. Constitution.

Regarding the first answer, the search for truth requires an environment that tolerates and welcomes dissent. Mill notes that "the will of the people…practically means…the majority," and that "these people…may desire to oppress a part of their number; and precautions are as much needed against this, as against any other abuse of power" (Mill 1978, 4). This forms the basis for the idea of majority rule with minority rights, that government cannot coerce people to accept one view. Mill continues by saying that the public good "authorizes the subjection of individual spontaneity to external control, only in respect to those actions of each, which concern the interest of other people" (Mill 1978, 10). By saying this, Mill sets up a dichotomy in the realm of speech: because the goal of society is to maximize utility, the majority can curtail any speech that harms other people (regarding the Johnson case, the flag was stolen, and there was some destruction of property such as overturning potted plants, in which case charging the violators with theft or vandalism would be an appropriate course of action). With regards to the propensity of speech to cause harm, the Supreme Court's ruling in *Brandenburg v. Ohio* (1969) provides the proper rule: "[The Court's] decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action" (*Brandenburg v. Ohio* 1969, 447). Otherwise, the individual can engage in any opinions they wish. The Court reflects this idea in its analysis of whether Johnson's act was "a breach of the peace," in which case, harm would have been done to others. Since it was not, Mill would argue that the Court not uphold the conviction.

Furthermore, the Court ruled against Texas' argument that they could arrest Johnson to "preserve the flag as a symbol of national unity," justifying Mill's idea that "there needs protection against the tyranny of the prevailing opinion and feeling; against the tendency of society to impose…its own ideas and practices as rules of conduct on those who dissent from them" (Mill 1978, 4). This is crucial because society may not "fetter the development…of any individuality not in harmony with its ways, and compel all characters to fashion themselves upon the model of its own" (Mill 1978, 5).

Opponents of flag burning would criticize this, arguing that within a democracy, if the majority of the people want a ban, then that should become the law. However, "those who have been in advance of society in thought and feeling…have occupied themselves…in inquiring what things society ought to like or dislike, rather than in questioning whether its likings or dislikings should be a law to individuals" (Mill 1978, 7). The principle of individual rights, and therefore minority rights means "that the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others" (Mill 1978, 9).

Finally, Mill explains why freedom of opinion is so important to the exposition of truth: every opinion has intrinsic value, and is meaningful in and of itself.

> If all mankind minus one, were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind…the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it (Mill 1978, 16).

The only way we can move towards discovering truth is to constantly temper widely regarded ideas by exposing them to disagreement, and to let the best idea win. It is important to keep dissent alive for the good of humanity, because "however unwillingly a person who has a strong opinion may admit the possibility that his opinion may be false, he ought to be moved by the consideration that however true it may be, if it is not fully, frequently, and fearlessly discussed, it will be held as a dead dogma, not a living truth" (Mill 1978, 34). In the end, the exposition of truth culminating in the fulfillment of human potential is the motivation for Mill's emphasis on the necessity of dissent and free discussion of ideas.

Regarding American society, Alexander Meiklejohn argues that "no one can deny that the winning of the truth is important for the purposes of self-government. But that is not our deepest need…If men are to be their own rulers…whatever truth may become available shall be placed at the disposal of all the citizens of the community" (Meiklejohn 1948, 88). Although finding truth is important, the First Amendment's primary role "is a device for the sharing of whatever truth has been won. Its purpose is to give to every voting member of the body politic the fullest possible participation in the understanding of those problems with which the citizens of a self-governing society must deal" (Meiklejohn 1948, 88). This supports my second contention, that unabridged free speech is vital to fulfill the Constitution's principle of self-government.

The crucial role voting plays in self-governance provides the basis for an unalienable right to free speech. While Mill's development of truth hinges on the right of the speaker to express opinion, Meiklejohn's argument goes further by asserting the necessity of the public to hear and evaluate those opinions. "When a free man is voting, it is not enough that the truth is known by…some scholar or administrator or legislator. The voters must have it, all of them" (Meiklejohn

1948, 88). Citizens cannot govern themselves based on flawed information, because this allows biased outcomes that make them subservient to those people whose opinions dominate the public sphere. This is unacceptable, given that "under the compact upon which the Constitution rests, it is agreed that men shall not be governed by others," but "that they shall govern themselves" (Meiklejohn 1948, 89). This constitutional obligation provides for the public that "no idea, no opinion, no doubt, no belief, no counterbelief, no relevant information, may be kept from them" (Meiklejohn 1948, 89). Only by considering all opinions when making decisions on electoral and public policy matters can we be assured that American government is operating at its fullest potential, and that the Constitution's pronouncement of popular sovereignty is being realized. In this line of reasoning, Justice Brennan's assertion that "the flag's deservedly cherished place in our community will be strengthened, not weakened, by our holding" (*Texas v. Johnson* 1989, 419) is correct: the flag as the symbol of the American system can only be strengthened by a decision that protects the public's obligation to keep that system working through the process of self government.

For Meiklejohn, "the essential point is that we are pledged together to create a society in which men shall have the status of governors of themselves." We must move as a body critical of its own elements, but not hostile towards them: "not with bayonets behind, but purposes ahead. And if we fail in that…without regret, without scruple, we have abandoned the Constitution" (Meiklejohn 1948, 82). What then, is the best way for American society to make progress? "We must accept and applaud the assertion that the Constitution is an experiment," in which our plan of government, being based on imperfect knowledge, "must be forever open to amendment, forever on trial," with no one knowing "how slow or how quick, how superficial or how radical, those changes will be" (Meiklejohn 1948, 85). One might argue that this justifies a constitutional amendment to prohibit flag desecration, as a perfectly legitimate "evolution" of the Constitution. The point, however, is this: to single out and ban one form of expression forever stifles development of the Constitution in the area of free speech. We the people would cease to have sovereignty over ourselves in that area, antithetical to the proclamation of self-governance contained in the Constitution.

The solution lies in the free exchange of ideas, what Justice Oliver Wendell Holmes first termed 'the marketplace of ideas.' This principle tells us that the only truth we can rely on "is that which we win for ourselves in the give and take of public discussion" (Meiklejohn 1948, 86). Even if Chief Justice Rehnquist believes that Johnson's act "was no essential part of any exposition of ideas" (*Texas v. Johnson* 1989, 430), the chance that in witnessing the act one might be compelled to reconsider her or his beliefs, possibly resulting in a shift of opinion, means that a display of opinion such as Johnson's may not be prohibited. In the marketplace of ideas, "unwise ideas must have a hearing as well as wise ones…un-American as well as American," and these ideas "may be expressed, must be expressed, not because they are valid, but because they are relevant" (Meiklejohn 1948, 26-7). If anyone seriously entertains these ideas, we the voters need to hear them, for "to be afraid of ideas, any idea, is to be unfit for self-government" (Meiklejohn 1948, 27).

## Conclusion

The Court made it clear in *Texas v. Johnson* that the Constitution allows flag burning as an acceptable form of symbolic speech. Although some in Congress believe that they are justified in changing the Constitution to fit their beliefs, I disagree. Proposing any amendment to the Constitution, even one to prohibit flag desecration, may be legitimate: but by any standard which values freedom, tolerance, diversity, limited government, truth, the fulfillment of human potential, government by the people, the notion of "banning any type of free speech that does not cause imminent harm" is unintelligible. I have shown that a ban on flag desecration would not be in accord with a liberal-democratic approach to civil liberties. The application of Mill's analysis shows that banning flag desecration conceals the truth by circumscribing what we can discuss, and concerning symbolic speech, how we can discuss it. Meiklejohn's arguments demonstrate that if we are to govern ourselves, we must not only tolerate but also embrace the opinions of others, for only in having a more complete understanding of the truth can we be effective in politics. Given all this, it seems obvious that Americans should tolerate flag burning as a form of free expression.

In addition, arguments supporting a right to desecrate the American flag find their basis in logic and sound legal theory, whereas arguments supporting a ban on flag desecration usually rest on appeals to emotion and unbridled patriotism, and are for the most part devoid of reason or legal justification. After his recent introduction of the flag amendment, Utah Senator Orrin Hatch supported his position, saying "it is time for us to make unequivocally clear that certain behavior in the country is and should be recognized as wrong and punishable by law" (Salt Lake Tribune 1999, A1). Let us examine this statement: Senator Hatch believes flag desecration is "wrong," a normative opinion without bearing on whether it should be regarded as legal or illegal, a question which was settled in *Texas v. Johnson*. He continues: "by passing the flag protection constitutional amendment, we will reaffirm the very basis of the Constitution" (Salt Lake Tribune 2001, A1). My response to this is, "how so?" Nowhere in the Constitution are the American flag or restrictions on free speech mentioned, and therefore there is no basis in the Constitution for banning flag desecration.

Consider arguments by Major General Patrick Brady, chairman of the board of directors of the Citizen's Flag

Alliance: he says that flag burning "teaches that…the courts, not the people, own the Constitution" (U.S. Newswire 2001). I realize that every citizen of the United States has a stake in the system of government outlined by the Constitution, but that same document explicitly outlines that "the judicial power shall extend to all cases, in law and equity, arising under this Constitution" (U.S. Constitution, Article III, Section 2), a grant which has been interpreted for 200 years to mean that the Supreme Court is the ultimate interpreter of constitutional meaning. Thus, Brady's argument is without merit: if he purports to defend the Constitution, he should recognize the right of the courts to interpret it.

He also states that those who call flag burning 'speech' "demean the First Amendment and the Bill of Rights and threaten the very foundation of our Constitution as defined by our founders" (U.S. Newswire 2001). Perhaps if the founders had intended there to be a limitation on flag desecration, they would have written one in themselves. Brady's argument is without merit, and is at best an opinion. Furthermore, how does flag desecration threaten "the very foundation of our Constitution?" There is not a shred of logic or justification behind this statement.

Finally, Brady appeals to the public's emotions and sense of patriotism: "our flag ignited a fire in the hearts of our patriots. Burning the flag will put that fire out" (U.S. Newswire 2001). This argument is nothing but abstraction, with no basis in reality. Metaphors and figurative speech may make for good sound bytes, but they cannot form the basis for jurisprudence, especially in an area of law so vital as First Amendment free expression.

Still, opponents of flag burning have just as much right to their opinion as do flag burners. But what they must realize is that instead of subverting the intent of the Constitution and desecrating free speech rights with an amendment, there is an alternative that consecrates the First Amendment and ensures that the intent of the framers remains intact. Justice Louis Brandeis put it best when he said that as long as we have "confidence in the power of free and fearless reasoning applied through the processes of popular government" (Meiklejohn 1948, 53), we have nothing to fear from opinions we disagree with, for "if there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence" (Meiklejohn 1948, 53). Rather than clinging to misguided notions that the government can legislate respect for the flag with an amendment, those who revile flag desecration should instead try to convince the few flag burners to reconsider their position on the issue.

The question is this: what is more important, the symbol of our freedom, or the freedom itself? The rights of free expression embodied in the First Amendment are likely the most important that we possess, because they open the door to innumerable other freedoms that we enjoy as Americans. Regardless of one's individual position on whether the act of flag desecration is right or wrong, the right to do so is necessary and should be welcomed as a symbol of the United States' absolute commitment to the importance of free expression. For as long as we can publicly discuss ideas, we are better equipped to find truth and govern ourselves effectively. Essentially, "the unabridged freedom of public discussion is the rock on which our government stands. With that foundation beneath us, we shall not flinch in the face of any danger" (Meiklejohn 1948, 91). The desirability of free expression is superceded only by its necessity: only through understanding the essential role free speech plays in ensuring a just order can we truly take advantage of the freedom we possess and fulfill our potential as a society.

## APPENDIX 1: CONGRESSIONAL VOTES ON THE FLAG BURNING AMENDMENT

| | | | | | |
|---|---|---|---|---|---|
| 1st Attempt at Amendment: 104th Congress | | | | | |
| House: | Yea: 312 | Nay: 120 | 72% | H.J.Res.79. | 6/28/95 |
| Senate: | Yea: 63 | Nay: 36 | 63% | S.J.Res.31. | 12/12/95 |
| 2nd Attempt at Amendment: 105th Congress | | | | | |
| House: | Yea: 310 | Nay: 114 | 73% | H.J.Res.54. | 6/12/97 |
| Senate: | Not brought to floor for vote | | N/A | S.J.Res.40. | 2/4/98 |
| 3rd Attempt at Amendment: 106th Congress | | | | | |
| House: | Yea: 305 | Nay: 124 | 71% | H.J.Res.33. | 6/24/99 |
| Senate: | Yea: 63 | Nay: 37 | 63% | S.J.Res.14. | 3/29/00 |

## APPENDIX 2: GALLUP POLLS OF PUBLIC SUPPORT FOR THE FLAG BURNING AMENDMENT

| Date: | Favor: | Oppose: | No Opinion: |
|---|---|---|---|
| June 1989* | 71% | 24% | 5% |
| October 1989** | 65% | 31% | 4% |
| June 1990* | 68% | 27% | 5% |
| 7-9 July 1995*** | 62% | 36% | 2% |
| 25-27 June 1999*** | 63% | 35% | 2% |

* Question wording: "Do you think we should pass a constitutional amendment to make flag burning illegal, or not?"

** Question wording: "Do you favor or oppose a constitutional amendment that would allow federal and state governments to make flag burning illegal?"

*** Question wording: "Do you favor or oppose a constitutional amendment that would allow Congress and state governments to make it illegal to burn the American flag?"

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