June 30, 1989

TO: SENATOR DOLE

FROM: SHEILA BURKE

RE: LIST OF POSSIBLE LEGISLATION

Attached is the list that Abby gave to me earlier today. There are a couple of surprises. (1) ADA is on the list to be done before the August recess. (2) Neither minimum wage nor parental leave are listed.

I should note that the list is still tentative.

Attachment

LIST OF LEGISLATION FOR THE WEEKS PRIOR TO THE AUGUST RECESS,

OTHER ITEMS MAY BE SCHEDULED AS THEY BECOME AVAILABLE.

All available Appropriations Bills

Americans with Disabilities Act, S. 933

Rural Development Bill, S. 1036

State Department Authorization, S. 1160

Foreign Aid Authorization

Legal Immigration, S. 358

Debt Limit Extension

Reconciliation Bill

Defense Authorization

Expected FSX Veto Override

Other Authorizations and Conference Reports

Executive Calendar Nominations

June 30, 1989

TO: SENATOR DOLE

FROM: DAVID TAYLOR

SUBJECT: Talking Points on Bush Campaign Finance Reform Plan

- On Thursday, President took the lead in the campaign finance reform debate by outlining a comprehensive set of proposals designed to curtail the influence of the special interests, strengthen the political parties, increase competition in Congressional races, and put the election process back in the hands of the American people.

- The President's plan bans Political Action Committees sponsored by corporations, labor unions and trade associations and sharply reduces contribution limits for the so-called ideological PACs which are protected under the First Amendment.

- Ron Brown, the Democratic National Committee chairman, criticized the President's plan on Thursday. He said, and I quote -- "The President's campaign finance bill ought to be labeled the Fat Cat Protection Act of 1989.... [George Bush] wants to make it easier to give Republican candidate access to big money contributors" -- end quote.

- I suggest that Ron Brown take the time to read through the President's plan. It does <u>not</u> favor the wealthy; it does <u>not</u> change the $1,000 contribution limit; it does <u>not</u> favor the special interests, and it does <u>not</u> rely on the taxpayers to pick up the tab for reform.

- In my view, the <u>real</u> Fat Cats are the incumbents.

- Redistricting is another important element in President Bush's plan. I believe that politicians should not be allowed to manipulate Congressional District boundaries in an effort to maintain a partisan advantage. President Bush agrees. His plan contains a non-partisan Federal standard for Congressional Districts that would go a long way toward making Congressional races fair and competitive.

NOTE: I CHECKED WITH FRED MCCLURE AT THE WHITE HOUSE. HE INDICATED THAT THE ADMINISTRATION WOULD NOT BE READY TO SEND A LEGISLATIVE PACKAGE TO THE HILL FOR 2-3 WEEKS.

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release June 29, 1989

FACT SHEET
PRESIDENT BUSH'S CAMPAIGN FINANCE PROPOSALS

Today the President announced a comprehensive campaign finance proposal designed to lessen the power of special economic interests and restore competition to American Congressional elections. The package reflects the President's strong commitment to increasing the roles of individuals and the political parties in the electoral process. It is also designed to reform the system of campaign finance under which in the 1980s House incumbents have a 97.7 percent reelection rate and Senate incumbents an 85 percent reelection rate. The proposals follow general themes first articulated by the President in his April 12 speech to the American Society of Newspaper Editors:

- Eliminating political action committees (PACs) supported by corporations, unions or trade associations, and prohibiting such entities from paying for the overhead or administrative costs of any independent PAC.

- Strengthening political parties by increasing the amounts they can spend on behalf of congressional candidates. This source of funds would permit legislators to spend less time fundraising, would ensure that challengers have greater resources with which to challenge incumbents, and would further limit the role of special economic interests in elections.

- Addressing the problem of the "permanent Congress" by reforms designed to reduce the unwarranted advantages of incumbency. Specifically, the proposals would prohibit the personal use of excess campaign funds, drastically reduce Congressional mailings under the frank, ban the rollover of campaign funds from one election cycle to the next, and legislate fair neutral criteria for the redistricting of Congressional and legislative lines that will follow the 1990 census.

- Fully disclosing all soft money spent by the political parties and all labor unions, corporations and trade associations to influence a federal election.

A more detailed description of the President's campaign finance reform package follows:

June 30, 1989

TO: SENATOR DOLE

FROM: DAVID TAYLOR

SUBJECT: Summary of The New Fat Cats by Ross K. Baker

Baker's book, commissioned by the Twentieth Century Fund, analyzes the development of leadership PACs, and their impact on campaigns, the legislative process, and the inner-workings of Congress.

Baker considers leadership PACs the institutionalization of a common practice: contributions to the campaigns of colleagues. Lyndon Johnson's success at raising money for Democratic House candidates in 1940 vaulted him into a leadership position. Since that time, members of Congress have become increasingly overt in contributing to their colleagues for their own political gain. Tony Coehlo's bid for the Democratic Whip position in 1986, and Bill Gray's bid for the Chairmanship of the House Budget Committee in 1984 are prominent examples.

Although Baker argues that the influence of leadership PACs on the outcome of House and Senate campaigns is negligible, their impact on the inner workings of the House has been dramatic. Baker believes that strong political parties strengthen the Congressional leadership by fostering cohesion and party discipline. But, leadership PACs have expanded well beyond actual leadership, creating autonomous sources of funds from within the Congress that diffuse the power of the parties.

The proliferation of leadership PACs tarnishes the image of the House by contributing to the growing perception that the political system is run by money. There may be no clear evidence of vote-buying for leaderhsip elections, but contributions by leadership candidates to other members' campaigns has become part of what Baker calls "established procedure in the quest for a prestige post in the House."

While recognizing that leadership PACs may have a greater influence on the image of Congress that on the outcomes of elections or campaigns, Baker argues for reform. His primary concern is the effect of these PACs on the internal affairs of the House and on the image of a Congress. He concludes, "Even though leadership PACs did not cause the parties' problems nor bring about this disillusionment with politicians, they exacerbate the problems and they will continue to do so until changes are made."

News from Senator

BOB DOLE

(R - Kansas) SH 141 Hart Building, Washington, D.C. 20510-1601

FOR IMMEDIATE RELEASE
THURSDAY, JUNE 29, 1989

CONTACT: WALT RIKER
(202) 224-5358

DOLE BACKS PRESIDENT'S STRONG CAMPAIGN REFORM PACKAGE; CHALLENGES DEMOCRATS "TO JOIN US ON THE HIGHROAD" TO CLEAN UP ELECTION PROCESS

WASHINGTON -- SENATE REPUBLICAN BOB DOLE TODAY HAILED PRESIDENT BUSH'S CAMPAIGN FINANCE REFORM PACKAGE AS "TOUGH ENOUGH TO TAKE THE ELECTION PROCESS OUT OF THE HANDS OF THE BIG MONEY SPECIAL INTERESTS AND GIVE IT BACK TO THE AMERICAN PEOPLE."

"PRESIDENT BUSH HAS TAKEN THE LEAD ON THIS PRIORITY ISSUE, AND I CHALLENGE THE DEMOCRATS TO JOIN US ON THE HIGH ROAD AS WE MOVE QUICKLY TO CLEAN UP THE CAMPAIGN FINANCE MESS BEFORE THE NEXT ELECTION CYCLE," DOLE SAID.

"THE PRESIDENT'S PACKAGE IS TOUGH FROM TOP TO BOTTOM, FROM CAPITOL HILL TO THE PRESIDENTIAL CAMPAIGN TRAIL," DOLE SAID. "GEORGE BUSH IS RIGHT -- IT'S LONG PAST TIME TO SHARPLY REDUCE, IF NOT ELIMINATE, THE INFLUENCE OF POLITICAL ACTION COMMITTEES, AND TO BRING REAL COMPETITION BACK INTO CONGRESSIONAL RACES -- INCUMBENTS ARE SWIMMING IN PAC MONEY, AND PROFITING FROM COUNTLESS OTHER LAVISH PERKS SUCH AS THE FRANKING PRIVILEGE."

"THE PRESIDENT HAS MADE IT CLEAR THAT TAXPAYERS SHOULD NOT HAVE TO PICK-UP THE TAB FOR "REFORM". THE LAST THING THE AMERICAN PEOPLE WANT IS THEIR HARDEARNED TAX DOLLARS GOING TO PAY FOR CONGRESSIONAL CAMPAIGNS -- THAT'S NOT REFORM, AND THAT'S WHY THE PRESIDENT IS STRONGLY OPPOSED TO PUBLIC FINANCING FOR HOUSE AND SENATE RACES.

"I'M PLEASED THAT "GERRYMANDERING" IS ALSO ON THE PRESIDENT'S REFORM HIT LIST. FOR TOO LONG, POLITICIANS HAVE BEEN ALLOWED TO PROTECT INCUMBENTS BY MANIPULATING CONGRESSIONAL DISTRICT BOUNDARIES TO FIT THEIR PARTISAN SCHEMES. THE VOTERS KNOW THEY ARE GETTING A RAW DEAL, WHICH IS WHY THEY ARE CLAMORING FOR CLEAN, COMPETITIVE GOVERNMENT.

"I CONGRATULATE PRESIDENT BUSH FOR HIS LEADERSHIP AND I LOOK FORWARD TO WORKING WITH HIM AS WE PUSH THIS REFORM PACKAGE THROUGH CONGRESS. I BELIEVE WE CAN MAKE IT EVEN TOUGHER -- THAT'S WHAT THE AMERICAN PEOPLE ARE DEMANDING."

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Child Care

June 30, 1989

SUMMARY OF KEY CHILD CARE PROPOSALS

A. DOLE BILL

The package relies principally on tax credits to deliver resources directly to needy families with children, enabling parents to make their own child care choices.

1. Young Child Supplement to the Earned Income Credit Tax Credit

   - Would provide families with children 4 years old and under an additional credit amount of 8% for one child and an additional 4% for two or more children.

   - This would provide an additional credit of up to $500 for the first child and up to $250 for the second child.

   - This credit would be refundable, would be subject to advanced payment and would be available to one earner families.

   - Approximately 3.2 million families would be assisted by the EITC enhancement.

2. Dependent Care Tax Credit Refundability

   - The Dependent Care Tax Credit (DCTC) would be made refundable and subject to advance payment to give low-income parents access to this credit. The DCTC provides two earner and single parent families with a tax credit based on their documented child care costs.

   - Approximately 5.7 million families would be assisted by refundability.

3. Block Grant To States For Child Care

   a. We expanded the current State Dependent Care Block Grant Program by $400 million to help states address a wide array of child needs, while allowing States the flexibility to concentrate on the particular child care needs they face.

- o Funds can be used for a wide array of services, including:

  + resource and referral;
  + consumer education;
  + enhanced enforcement of standards;
  + training and technical assistance of providers;
  + recruitment and training to increase the number of providers;
  + developing before and after school programs;
  + loans or grants for renovations and modifications to meet State and local health and safety standards;
  + liability risk pools;

but not including:

- \- cash payments to recipients, or the direct subsidy of services;
- \- payments for costs of construction or land acquisition;
- \- use of funds to satisfy state matching requirements of any other Federal grant.

B. ABC AS AMENDED

Tax Credits

1. Young child supplement to Earned Income Tax Credit

   o The proposal falls short (by about $1 billion) of what was offered in the Dole Amendment. Provides families with children three years old (versus four) and under an additional credit of 7 percent (versus 8 percent) for one child and an additional 3 percent (versus 4 percent) for two or more children.

2. Dependent Care Tax Credit (DCTC)

   o The DCTC is made refundable similar to what is proposed in Dole.

3. Health Insurance Credit

   o By 1994, provide a 50 percent (up to $500) tax credit for health insurance expenses

Block Grant

- o Authorizes $1.75 billion in FY90 and "such sums as are necessary" for a Federal program of grants to states for the expansion and regulation of center and family-based child care services.

- o States must develop standards in six areas (for example, teacher/child ratio).

- o The Federal government is tasked with developing model standards.

- o Religious facilities can only participate if they are licensed or regulated and states decide to provide families certificates to use in buying child care -- no direct funding is available.

- o Use of family and neighborhood child care providers is very limited. With minor exceptions, most will need to be licensed or regulated and be subject to inspection.

New Bureaucracy

Creates a National Advisory Committee on Recommended Child Care Standards, a new office of the Administration of Child Care, as well as requiring the states to form a variety of new committees and councils.

C. HAWKINS BILL AS REPORTED BY EDUCATION AND LABOR

Tax Credits

- o There are no tax credits.

Program

Authorizes $1.75 billion in FY90, and such sums as necessary in the succeeding three years.

The block grant is divided in the following way:

- o 25 percent to expand Head Start
- o 25 percent to programs for school based early childhood education and latch key programs.
- o 35 percent (approximately $612 million) for ABC like child care subsidies for working parents. Assistance may not be provided through vouchers or to reimburse parents directly -- so no religiously based program could participate.
- o 15 percent for child care coordinating activities, such as resource and referral.

- o Creates a National Committee on child care standards to develop model Federal standards, states are required to develop standards in a variety of areas.

NOTE: This bill was reported out by the Labor Committee and it has been rumored that it could see floor action in September.

The Ways and Means Committee is moving on a slower track and are looking at the earned income tax credit and an increase in the Title XX block grant. There is no apparent enthusiasm for the Bentsen health credit. The schedule for Ways and Means is unclear although they may try to move in time for reconciliation.

SIDE-BY-SIDE COMPARISON OF SENATE CHILD CARE PROPOSALS

	ABC (S. 5) AS PASSED	DOLE AMENDMENT
Parental Choice:	Authority to select child care services granted to the states although states must to the maximum extent practicable, provide the parent with their choice of care.	Authority to select child care services rests solely with the parent.
	States must distribute direct assistance in a manner which provides funds to variety of child care providers, regardless of parents' choices.	Not applicable
	Only licensed or regulated child care providers would be eligible to receive funds (some states do not regulate church-based care, and therefore, in those states, parents could not select their services).	Families could utilize any child care provider whom they wish including unlicensed church-based care or their next-door neighbor.
	Contains a requirement that all child care providers be reimbursed at market rate, thereby limiting the number of Federally-subsidized child care slots which would be made available to about 500,000 (yet, 18 million families would be eligible for services -- how do states decide which families will receive assistance?).	No similar requirement.

	ABC (S. 5) AS PASSED	DOLE AMENDMENT
	Their tax credits help a similar number of people although the focus and most of the money go to families where both parents work.	According to Bureau of Labor Statistics, there are 14.2 million families with children under age five with incomes of $20,000 and under. By 1994, all of these families will receive tax relief, or 13.7 million more families will be assisted.
Stay-at-home Parents:	Under the block grant, only those parents who work, are seeking employment, or enrolled in a job training or educational program qualify for assistance. The proposed health credit and the smaller EITC credit all available to families where a parent stays home.	Low income stay-at-home parents would be eligible for tax benefits under the enlarged Earned Income Tax Credit.
Target Funds to Low Income Families:	Under the block grant eligible families include those with annual incomes up to $47,000. Under their earned income tax credit families with children under age four and with incomes of $13,000 or less would be helped. The health credit helps families with income under $18,000.	Families with children under age five and with an annual income of $15,000 and under would be assisted through the enhanced earned income tax credit.

	ABC (S. 5) AS PASSED	DOLE AMENDMENT
Range of Child Care Options:	Assistance restricted to licensed and regulated child care providers -- if family presently uses provider which meets all current state standards, but would fail to meet new state mandated standards, the family could not choose that provider. Neighbors and most family members would also be among those that are to be regulated -- or they would not be eligible. Some states exempt church-based care from state licensing and regulatory standards -- these providers would be unable to receive any Federal assistance.	Tax benefits could be utilized for any child care provider the family chooses.
Cost:	$1.75 billion block grant. "Such sums as necessary" in future. $10.5 billion in tax credits over next five years.	$400 million block grant. Same amount each year. $10.1 billion in tax credits over next five years.

JUNE 30, 1989

TALKING POINTS

REPUBLICAN CHILD CARE ALTERNATIVE

- THE REPUBLICAN CHILD CARE INITIATIVE SATISFIES FOUR FUNDAMENTAL AND IMPORTANT PRINCIPLES WITH WHICH I AGREE: IT LEAVES CHILD CARE DECISIONS TO PARENTS; IT INCREASES THE OPTIONS AVAILABLE TO FAMILIES; IT DOES NOT DISCRIMINATE AGAINST PARENTS WHO CHOOSE TO STAY HOME WITH THEIR CHILDREN; AND IT TARGETS FEDERAL ASSISTANCE TO THE NEEDIEST FAMILIES.

- DESPITE WHAT THEY SAY, THE DEMOCRATIC BILL PASSED BY THE SENATE FORCES PARENTS TO USE INSTITUTIONAL CHILD CARE SERVICES IN ORDEER TO RECEIVE FEDERAL ASSISTANCE. WORSE, THE STATE CAN OVERRULE THE PARENT'S CHOICE OF AN INSTITUTIONAL PROVIDER -- EVEN THAT DECISION IS NOT LEFT TO THE DISCRETION OF EACH FAMILY.

- BY CONTRAST, THE REPUBLICAN ALTERNATIVE PROVIDES FUNDS DIRECTLY TO FAMILIES TO SPEND IN THE MANNER WHICH BEST SERVES THEIR NEEDS.

- IN PARTICULAR, THOSE POOR FAMILIES WHO RELY ON CHILD CARE PROVIDED BY A RELIGIOUS INSTITUTION -- WHICH MAY BE THE MOST COMMITTED TO SUBSIDIZED QUALITY DAY CARE FOR THE POOR -- MAY NOT BE ELIGIBLE FOR ASSISTANCE UNDER THE DEMOCRATIC BILL. THOSE FAMILIES CAN RECEIVE FEDERAL ASSISTANCE ONLY IF THE STATE ADOPTS A CERTIFICATE PROGRAM. ONCE AGAIN IT IS THE STATE, RATHER THAN THE FAMILY WHO MAKES THE CHOICE ABOUT APPROPRIATE DAY CARE FOR THESE FAMILIES.

- SECOND, THE REPUBLICAN ALTERNATIVE, LIKE THE AMENDED ABC BILL, MAKES THE EXISTING DEPENDENT CARE TAX CREDIT REFUNDABLE. THE DCTC BENEFITS ALL TWO-EARNER FAMILIES WITH CHILDREN WHO PAY FOR CHILD CARE SERVICES, REGARDLESS OF THEIR INCOMES. REFUNDABILITY ENSURES THAT THE VERY LOWEST INCOME FAMILIES -- FAMILIES WHOSE DEPENDENT CARE TAX CREDITS WOULD EXCEED THEIR TAX LIABILITIES -- RECEIVE THEIR FULL TAX BENEFITS.

- THIRD, WE PROVIDE A SUPPLEMENT TO THE EARNED INCOME TAX CREDIT FOR ALL VERY LOW-INCOME FAMILIES WITH YOUNG CHILDREN. THESE MAY BE FAMILIES IN WHICH ONE PARENT CHOOSES TO STAY HOME TO CARE FOR THEIR CHILDREN; HOWEVER THIS IS NOT ALWAYS THE CASE.

- BASED ON INFORMATION FROM THE BUREAU OF LABOR STATISTICS, A MAJORITY OF FAMILIES WITH INCOMES UNDER $15,000 DO NOT HAVE DOCUMENTABLE CHILD CARE EXPENSES, EVEN IF BOTH PARENTS (OR THE ONLY PARENT) WORK. FOR EXAMPLE, CHILDREN MAY BE LEFT WITH A RELATIVE, NEIGHBOR OR FRIEND. THESE FAMILIES CANNOT CLAIM A DEPENDENT CARE TAX CREDIT UNDER CURRENT LAW.

- THUS, OUR CHILD TAX CREDIT REACHES A SEGMENT OF THE LOW-INCOME POPULATION WHICH DOES NOT BENEFIT FROM THE ENHANCED DEPENDENT CARE TAX CREDIT -- LOW-INCOME FAMILIES WITH CHILDREN AGE 0-5 WHO DO NOT HAVE DOCUMENTED CHILD CARE EXPENSES.

- THE DEMOCRATIC ALTERNATIVE PASSED BY THE SENATE HAS BEEN LABELED A "COMPROMISE" BETWEEN OUR CHILD TAX CREDIT PROPOSAL AND A NEW SO-CALLED CHILD HEALTH CREDIT SPONSORED BY THE CHAIRMAN OF THE FINANCE COMMITTEE, SENATOR BENTSEN. THE RESULT IS THAT THERE WILL BE $1 BILLION LESS IN HELP THROUGH THE EITC FOR POOR FAMILIES TO USE AS THEY BELIEVE NECESSARY.

- IN CONSIDERING THE REVENUE IMPACT OF THE CHILD HEALTH CREDIT, THE JOINT TAX COMMITTEE ESTIMATED THAT THIS NEW CREDIT WOULD TO A GREAT EXTENT BENEFIT ONLY FAMILIES WHO ALREADY PAY FOR FAMILY HEALTH INSURANCE COVERAGE -- IN OTHER WORDS, THERE WOULD LIKELY BE NO ADDITIONAL COVERAGE AS A RESULT OF THIS CREDIT. AS A PRACTICAL MATTER GIVEN THE REALITY OF HEALTH INSURANCE COSTS, THIS CREDIT WILL LIKELY REWARD ONLY FAMILIES OF LOW-INCOME WORKERS WHO ARE ALREADY COVERED BY EMPLOYER-SUBSIDIZED INSURANCE BENEFITS.

- FOR EXAMPLE, A YOUNG FAMILY IN KANSAS CAN OBTAIN BASIC HEALTH INSURANCE FROM BLUE CROSS/BLUE SHIELD WITH A MINIMUM DEDUCTIBLE OF $500, FOR APPROXIMATELY $110 PER MONTH OR $1320 PER YEAR. WITH THE $500 DEDUCTIBLE THIS COMES TO $1820 PER YEAR. IF THAT FAMILY EARNS $8000 PER YEAR, THEIR HEALTH INSURANCE COSTS WOULD CONSUME 23% OF THEIR INCOME. THE CHILD HEALTH CREDIT WOULD ONLY REDUCE THIS COST TO 17.5 PERCENT. I DO NOT CONSIDER THIS INSURANCE "AFFORDABLE", AND KANSAS IS A LOW COST AREA.

- TO PAY FOR THIS CHILD HEALTH WINDFALL, THE DEMOCRAT'S TAKE $2 BILLION AWAY FROM THE NEEDIEST PARENTS. FIRST, THEY REDUCE THE REFUNDABILITY OF THE DEPENDENT CARE TAX CREDIT FOR THE POOREST TWO EARNER FAMILIES BY 10 PERCENT.

- SECOND THEY TAKE ANOTHER $1 BILLION AWAY FROM OUR EITC ENHANCEMENT, WHICH BENEFITS ALL PARENTS OF YOUNG CHILDREN EARNING LESS THAN $15,000 PER YEAR. THERE IS NO QUESTION THAT THERE IS A REAL CRISIS REGARDING ACCESS TO HEALTH CARE FOR POOR CHILDREN. BUT ACCORDING TO THE JOINT TAX COMMITTEE, THE NEW HEALTH CREDIT DOES NOT REACH 71% OF THE FAMILIES EARNING LESS THAN $5,000 PER YEAR OR 66% OF THE FAMILIES EARNING $5,000 - $10,000 PER YEAR. IN MY VIEW, THIS IS NOT A WISE ALLOCATION OF OUR LIMITED FEDERAL GOVERNMENT RESOURCES.

CONCLUSION

- AGAIN LET ME BOIL IT DOWN TO ONE QUESTION, WHO KNOWS BEST HOW CHILDREN SHOULD BE CARED FOR: THEIR OWN PARENTS OR AN OMNIPOTENT STATE? AN ENLIGHTENED USE OF TAX POLICY WOULD MAXIMIZE PARENTAL CHOICE. THAT'S WHAT THIS DEBATE IS ALL ABOUT -- CHOICE.

BOB DOLE
KANSAS

United States Senate

OFFICE OF THE REPUBLICAN LEADER
WASHINGTON, DC 20510

June 29, 1989

The President
The White House
Washington, D.C. 20500

Dear Mr. President:

As passed by the Senate, S. 5, the Act for Better Child Care, does not meet the requirements espoused by you and should be vetoed if presented to you in its current form. I will briefly review how it departs from your four principles.

Perhaps most importantly, as amended, S. 5 still delegates money, authority and choices in child care to states -- not parents. States are required to reimburse child care providers, not parents unless they set up a certificate program -- an option states may still opt not to pursue. Additionally, should the certificate program be constitutionally challenged and struck down, religious-based providers would be ineligible for assistance, thus severely biasing the subsidized care in S. 5 away from churches despite over 30 percent of child care being provided by churches.

The bill also perpetuates discrimination against two-parent families in which one parent works at home to care for children. The preponderance of the assistance provided through the block grant and the tax credits in the amended ABC bill go to families where both parents work. And although they included some modification of the Earned Income Tax Credit, it clearly falls far short of the assistance you would have provided through your child tax credit.

S. 5, as passed by the Senate, also fails to target the lowest income families. Under the grant program, eligible families include those with incomes of 100 percent of a state's median income and well above the poverty level. In the State of Connecticut, for instance, eligible families could make over $47,000 -- hardly those families most in need.

S. 5 also continues to be biased in favor of parents who use institutional care as compared to those who use informal providers, such as friends or neighbors -- despite such options being the options of choice of most Americans.

In addition, there are a number of constitutional issues left unresolved with many outside groups, promising lawsuits should religious-based care providers attempt to use any Federal funds under the bill. In fact, such open threats will deter states from issuing any certificates, thus precluding parents from any direct assistance whatsoever.

Finally, S. 5 results in the imposition of additional costly, complicated bureaucracies at the Federal, state, and local levels -- bureaucracies that can only drain preciously-scarce Federal dollars away from parents who need help.

In summary, your simple, efficient and direct ideas for helping parents with child care have been ignored by the Senate's action on June 23rd when it passed an amended S. 5. Most Americans cannot benefit from the bill the Senate passed, and when educated about the bill's provisions, would certainly disagree with its worth in their personal lives.

I am hopeful that the Administration will move quickly in working with the House to prevent passage of a bill like the amended S. 5. I continue to believe a consensus can still be achieved.

Sincerely,

Bob ,

BOB DOLE
Republican Leader

News from Senator

BOB DOLE

(R - Kansas) SH 141 Hart Building, Washington, D.C. 20510-1601

FOR IMMEDIATE RELEASE
JUNE 23, 1989

CONTACT: WALT RIKER
(202) 224-5358

"PASSAGE OF ABC BILL MEANS AMERICAN FAMILIES ARE THE LOSERS"
DOLE REJECTS "BIG GOVERNMENT MANDATES" FOR CHILD CARE

MR PRESIDENT:

THE SENATE IS ABOUT TO ANOINT A CHILD CARE BILL THAT IGNORES THE NEEDS AND WISHES OF MILLIONS OF AMERICAN WORKING FAMILIES WITH YOUNG CHILDREN.

IT IS ABOUT TO GO ON RECORD AS REJECTING THE HELPING HAND OF CHILD CARE CHOICE -- AND REPLACING IT WITH A RULE BOOK -- A FLOW CHART -- A CERTIFICATE AND AN INSPECTOR -- A GIANT BUILDING IN WASHINGTON SOME DAY -- AND ALL THE OTHER RED TAPE PARAGONS OF GOVERNMENT MEDDLING.

EVEN WORSE, THIS ACT IS ABOUT TO UNDERMINE ONE OF THE AMERICA'S MOST CHERISHED FREEDOMS -- THE FREEDOM TO DECIDE WHAT IS BEST FOR OUR CHILDREN.

"ABC" SOUNDS GOOD

OH, THIS BILL SOUNDS GOOD. VERY GOOD. WHO ON EARTH COULD BE AGAINST AN "ACT FOR BETTER CHILD CARE"? WELL, MILLIONS OF AMERICANS WILL BE ONCE THEY FIND OUT WHAT'S IN THIS 'ABC' PACKAGE OF MANDATES AND MISCHIEF.

THIS IS A CLASSIC 'INSIDE-THE-BELTWAY' BILL. IT SOUNDS GOOD.....UNTIL YOU GO OUT IN THE REAL WORLD, LIKE RUSSELL, KANSAS. THE PEOPLE IN MY HOMETOWN AREN'T YELLING FOR GOVERNMENT. THEY'RE YELLING AT IT.

THEY DON'T NEED ANY MORE GOVERNMENT IN THEIR LIVES, ESPECIALLY WHEN THE LONG ARM OF BUREAUCRACY COMES BETWEEN WORKING FAMILIES AND THEIR CHILDREN.

NO MORE BIG GOVERNMENT

IF THERE IS ONE OVERRIDING MESSAGE -- ONE THEME, ONE LESSON -- FROM THE PAST THREE PRESIDENTIAL LANDSLIDES, IT IS THAT THE AMERICAN PEOPLE ARE FED-UP WITH BIG GOVERNMENT. THAT'S A MESSAGE WE OUGHT TO BE HEARING LOUD AND CLEAR AS WE TALK ABOUT CHILD CARE.

WHEN WORKING AMERICANS SAY THEY WANT THEIR KIDS STAYING WITH THE FAMILY, THEY MEAN BROTHER, NOT BIG BROTHER.

WE'VE COVERED A LOT OF GROUND IN THIS DEBATE ON CHILD CARE AND I'M NOT GOING TO COVER IT ALL AGAIN. BUT AS WE APPROACH FINAL PASSAGE OF THIS MEASURE, I BELIEVE IT'S IMPORTANT TO REMIND MY COLLEAGUES THAT THEY MAY HAVE SOME EXPLAINING TO DO WHEN THEY RETURN HOME DURING THE UPCOMING RECESS.

LOTS OF EXPLAINING TO DO

THEY WILL HAVE TO EXPLAIN WHY THEY YIELDED TO THE SPECIAL INTEREST GROUPS AND WENT ALONG WITH A CHILD CARE PROPOSAL THAT HELPS FAR FEWER WORKING FAMILIES THAN THE ALTERNATIVE WE OFFERED -- AND THAT WAS BACKED BY PRESIDENT BUSH.

THEY WILL HAVE TO EXPLAIN WHY THEY LIMITED PARENTAL FREEDOM; WHY THEY VOTED FOR MANDATES; AND WHY THEY VOTED TO DISCRIMINATE AGAINST THE PARENTS WHO DECIDE TO STAY AT HOME WITH THEIR CHILDREN.

RELIGIOUS ISSUE UNSETTLED

AND WHAT ABOUT PARENTS WHO WANT THEIR CHILDREN CARED FOR IN A RELIGIOUS ENVIRONMENT? SURE, THE SPONSORS OF THE ABC BILL HAVE MADE SOME CHANGES IN AN ATTEMPT TO ACCOMMODATE THE RELIGIOUS QUESTION. BUT THE PROBLEM HAS NOT BEEN SOLVED.

IT IS UNFAIR TO SUBJECT A RELIGIOUS DAY CARE PROVIDER TO THE UNCERTAINTY AND BUREAUCRACY MANDATED BY THE ABC BILL. EVEN IF A RELIGIOUS PROVIDER ENGAGES IN THE PAPER WORK SCRAMBLE OF CERTIFICATES AND CONTRACT GRANTS -- WHAT ABOUT THE BASIC CONSTITUTIONAL QUESTIONS?

HOW IS A RELIGIOUS DAY CARE CENTER TO INSULATE ITSELF AGAINST A COURT CASE THAT COULD BE SPAWNED BY SOME SURPRISE INSPECTION OR ACTIVIST LAWYER?

NEIGHBORS, GRANDMA -- HAZARDOUS TO KIDS?

AND WHAT DO WE TELL OUR FRIENDS AND NEIGHBORS -- OUR GRANDPARENTS? -- "SORRY, BUT YOU CAN'T STAY WITH OUR CHILDREN ANY MORE, SOME BUREAUCRAT HAS JUST LABELED YOU HAZARDOUS TO OUR KIDS' HEALTH".

YES -- "LIMITED EXEMPTIONS" HAVE BEEN MADE FOR GRANDPARENTS, AUNTS AND UNCLES. I'M SURE THERE ARE A LOT OF GRANDMOTHERS OUT THERE BREATHING A SIGH OF RELIEF KNOWING THAT THE SENATE HAS PROVIDED THEM WITH A "LIMITED EXEMPTION."

BUT WHAT ABOUT NEIGHBORS? IS A TRUSTED FRIENDSHIP WORTH NOTHING TO THE SPONSORS OF THE ABC BILL? THE ABC BILL DENIES HELP TO FAMILIES WHO PLACE THEIR CHILDREN WITH A TRUSTED FRIEND OR NEIGHBOR. TRY EXPLAINING THAT AT THE NEXT TOWN MEETING.

NOT A CHOICE, BUT ANOTHER PROGRAM

MR. PRESIDENT...THE ISSUES AND THE LOGIC HERE ARE REALLY QUITE SIMPLE. IF YOU GIVE AMERICANS A CHOICE BETWEEN A TAX CREDIT TO HELP PAY FOR THEIR CHILD CARE, OR A MANDATED GOVERNMENT PROGRAM THAT HELPS FAR FEWER FAMILIES -- THE CHOICE IS CLEAR.

BUT AMERICAN FAMILIES AREN'T GETTING A CHOICE. THEY'RE GETTING ANOTHER GOVERNMENT PROGRAM.

AS I'VE SAID BEFORE -- CHILD CARE SHOULD NOT BE A PARTISAN ISSUE. IT'S A FAMILY ISSUE. UNFORTUNATELY -- WITH THIS LEGISLATION -- WE'VE MADE IT PARTISAN.

THE WINNERS ARE THE SPECIAL INTERESTS AND THE BUREAUCRATS. THE LOSER...THE AMERICAN FAMILY.

###

Foreign Policy

M E M O R A N D U M

June 30, 1989

To: SENATOR DOLE

From: AL LEHN

Subject: FACE THE NATION: FOREIGN POLICY ISSUES

China. If any foreign policy issue comes up, I presume it will be China -- either "Isn't the President behind the power curve?"; or "Is there a confrontation brewing between the Congress and the President?"

The Administration doesn't like the House action, but knows it could have been worse. There is a blanket national security loophole for the President to invoke, to nullify any sanction, and there were many changes suggested by the Administration that were accepted by Solarz, et al, to get the House Republicans on board (the key sanction that was included: suspending the export of U.S. satellites for launch on Chinese boosters -- for the time being scuttling an already approved deal for the Chinese to launch a U.S.-built satellite for Australia). Also, there's real question whether we'll ever finish the foreign aid bill -- of which this is part.

Suggested talking points:

o THERE IS SOMETHING TO BE SAID FOR SPEAKING WITH ONE VOICE. IN FACT, THE HOUSE LANGUAGE SPECIFICALLY PRAISES WHAT THE PRESIDENT HAS DONE, AND SAYS HE NEEDS THE FLEXIBILITY TO RESPOND TO RAPIDLY-CHANGING EVENTS AND PROTECT OUR NATIONAL SECURITY INTERESTS.

o BUT SOMETIMES THERE IS SOME BENEFIT TO THE OLD ONE-TWO PUNCH (OR GOOD COP-BAD COP ROUTINE).

o THE PRESIDENT RUNS OUR FOREIGN POLICY, AND HE CAN'T AFFORD TO DO ANY GRANDSTANDING -- CERTAINLY NOT WITH A RELATIONSHIP AS IMPORTANT AS OURS WITH CHINA.

o BUT IT'S USEFUL TO PUT THE BEIJING AUTHORITIES ON NOTICE THAT THEY'VE PUSHED US INTO VERY DICEY TERRITORY, AND IT'S HIGH TIME FOR THEM TO BACK OFF. A 418-0 HOUSE VOTE OUGHT TO SEND A PRETTY STRONG SIGNAL ALONG THOSE LINES.

o I'M SURE THERE WILL BE SENATE PRESSURE FOR SOME ACTION WHEN WE GET BACK. I'LL DO WHAT I CAN TO MAKE SURE WE DON'T DO ANYTHING TO UNDERMINE THE PRESIDENT.

Cambodia. Conceivably there could be a question on providing lethal aid to Cambodia -- press leaks have revealed that a "finding" did go to the Intelligence Committees, though the Administration -- faced with some apparent Hill opposition -- has not yet made a final decision to go ahead with a program. I hope you will eventually support such a program, but you probably want to take your own closer look before committing yourself.

o I'M NOT GOING TO COMMENT ON ANYTHING HAVING TO DO WITH ANY ALLEGED COVERT ACTION PROGRAMS, OR THE INTELLIGENCE COMMITTEES.

o I WILL SAY THAT WE'RE GETTING INTO THE "END GAME" IN CAMBODIA, AND RIGHT NOW THE KHMER ROUGE AND THE VIETNAMESE-BACKED HENG SAMRIN REGIME HOLD MOST OF THE CARDS -- THAT'S NOT IN OUR INTEREST.

Panama. Maybe a question on Panama: "Hasn't Noriega called our bluff again? What should we do now?"

o I DON'T THINK WE'RE BLUFFING. I HOPE NOT.

o I'VE MADE CLEAR MY OWN VIEW THAT WE HAVE THE RIGHT TO DEFEND OUR INTERESTS, INCLUDING THE CANAL; AND HAVING NORIEGA IN POWER IS NOT IN OUR INTEREST, OR THE INTEREST OF THE PANAMANIAN PEOPLE.

o I HOPE THE PANAMANIAN PEOPLE AND ARMED FORCES, WITH THE CLEAR BACKING OF THE OAS, CAN SOLVE THIS PROBLEM. IF NOT, I JUST THINK WE'RE GOING TO HAVE TO BE PREPARED TO DO WHAT'S NECESSARY.

Angola. I guess there is a long shot that Mobutu's presence in Washington could spur a question on Angola. Key points:

o WE'VE SEEN A BIG STEP FORWARD IN ANGOLA. THE CEASEFIRE IS VERY WELCOME.

o THE POLITICAL TALKS ARE JUST BEGINNING. WE SHOULD CONTINUE TO SUPPORT SAVIMBI UNTIL REAL NATIONAL RECONCILIATION IS ACHIEVED THERE.

(c) CONTINUATION OF CERTAIN SUSPENSIONS --

(1) Suspension of new authority for OPIC -- codifies Administration action on suspending eligibility for any new insurance, reinsurance, guarantees, financing, or other financial support by OPIC.

(2) Suspends new authority of the Trade Development Agency.

(3) Suspension of munitions export licenses -- codifies Administration action on suspending issuances of new licenses.

(4) Suspension of the export of crime control and detection instruments and equipment.

(5) Suspension of the export of U.S. manufactured satellites for launch by the PRC.

(6) Suspends eligibility for a license for export under the Nuclear Cooperation with the PRC until the President has made a certification under PL 99-183, and requirements on lifting suspensions under (d).

(7) Suspension of the CoCom discussion on the liberalization of export controls.

(d) WAIVER --

-- The President could approve exceptions to the suspensions if he finds either:

* that the Chinese government had made progress on political reform throughout the country, including lifting martial law, halting executions and other reprisals, releasing political prisoners, providing increased respect for human rights, and permitting freer flow of information; or

* that it is in the national security interest of the United States to do so.

e) TASK FORCE ON CHINESE STUDENTS --

-- Creates an interagency task force on Chinese students in the United States, to advise the President on policies to address their needs;

-- Task force would report after 60 days and every 90 days thereafter, and would expire at the end of 2 years.

ETHICS

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release April 12, 1989

FACT SHEET

THE GOVERNMENT-WIDE ETHICS ACT OF 1989
PRESIDENT BUSH'S ETHICS REFORM PROPOSALS

Today the President sent to the Hill his ethics reform legislation and signed an Executive order establishing strict ethical standards for the executive branch. The bill and order reflect the President's strong commitment to integrity in Government, and incorporate many of the recommendations of the President's Commission on Federal Ethics Law Reform, established by President Bush in January 1989. These proposals follow the four principles the President had set forth to guide the commission:

1. Ethical standards for public servants must be exacting enough to ensure that the officials act with the utmost integrity and live up to the public's confidence in them.

2. Standards must be fair, objective and consistent with common sense.

3. Standards must be equitable all across the three branches of the Federal Government.

4. We cannot afford to have unreasonably restrictive requirements that discourage able citizens from entering public service.

The President recognizes that the order may need to be amended depending on what is ultimately enacted as law, but he signed the order today to avoid any delay in implementing ethics reform in the executive branch.

In separate legislation sent to the Hill today, the President proposed a 25 percent pay increase for judges, and the proposed ethics bill itself includes a limitation on receipt by judges of honoraria. The President will be working with the Congress separately on the questions of honoraria for Members of Congress, a possible congressional pay raise, and a pay raise for certain executive branch positions, including specialized jobs like those at the National Institutes of Health.

FLAG

June 30, 1989

CONSTITUTIONAL AMENDMENT ON FLAG DESECRATION

I. THE TEXAS V. JOHNSON CASE

Facts: During the 1984 Republican National Convention, a young man named Gregory Johnson participated in a political demonstration to protest the policies of the Reagan Administration. After a march through the city streets, Johnson burned an American flag while protestors chanted, "America, the red, white, and blue, we spit on you." Although several witnesses were seriously offended by the flag-burning, no one was physically injured or threatened with injury.

Court's Analysis: The Court concluded that the flag-burning possessed "sufficient communicative elements" to constitute speech protected by the First Amendment. The Court also rejected the two justifications offered by the State of Texas for its flag-burning statute: 1) that the statute was necessary to prevent breaches of the peace, and 2) that the statute was necessary to preserve the flag as a symbol of nationhood and national unity.

Effect of the Decision: The decision puts into question the continued constitutionality of the federal flag desecration statute and the flag desecration statutes enacted by 48 of the 50 states. Only Alaska and Wyoming do not have flag desecration statutes.

II. CONSTITUTIONAL AMENDMENT

The amendment reads as follows: "The Congress and the States shall have power to prohibit the physical desecration of the flag of the United States." If ratified, the flag amendment will be the 27th Amendment to the Constitution.

- In the past, constitutional amendments have been introduced in response to Supreme Court decisions. The 16th Amendment, for example, gives Congress the power to lay and collect income taxes without apportionment among the States. The amendment was a direct response to the Supreme Court's decision in Pollock v. Farmers' Loan and Trust Co., which held that the federal income tax was unconstitutional unless apportioned among the States.

- The text of the amendment is not perfect. No one -- not even our leading constitutional scholars -- can draft a perfect amendment. But as President Bush said on Friday, the text of the amendment is starkly simple and straightforward. Its message is clear and unequivocal.

- Some people may wonder what the phrase "physical desecration of the Flag" really means. "Physical desecration of the Flag" is like pornography: You know it when you see it. I think the vast majority of Americans know physical desecration of the Flag when they see it -- they know that it is not an act of endearment to burn Old Glory while chanting "America, the red, white, and blue, we spit on you."

- But to relieve any doubts about the meaning of the phrase "physical desecration," the preamble to the amendment defines the phrase in the following way: "Physical desecration may include, but is not limited to, such as acts as burning, mutilating, defacing, defiling or trampling on the Flag, or displaying the Flag in a contemptuous manner."

III. CONSTITUTIONAL AMENDMENT PROCESS

For a constitutional amendment to be valid, it must receive the votes of two-thirds of those in Congress and it must be ratified by three-fourths -- or 38 -- of the state legislatures. The amendment must also be ratified within seven years of the date Congress submits the amendment to the States for ratification.

An Historical Note: The Equal Rights Amendment failed because it was ratified by only 35 states during the seven-year ratification period.

- In their wisdom, the Framers intentionally made the amendment process long and difficult. This is to ensure that frivolous -- or meritless -- amendments are not made part of our Constitution. Like the ERA, the flag amendment will have to survive this process. If the American people don't want the flag amendment -- if it fails to receive the necessary votes in Congress or in the state legislatures, then so be it -- the process will have worked.

IV. CRITICS OF THE AMENDMENT

- To those members of Congress and to those state legislators who may not like the amendment -- who may think it is unnecessary -- I simply say this: Vote against the amendment. Voice your opposition. That's part of the amendment process. And it's part of the wonderful process we call democracy.

- Some critics say we are wrong on this one -- that this is a freedom-of-speech issue. Well, they're right. Americans are speaking out in every corner of the country -- and what they are saying is this: Keep your hands off Old Glory.

- Some critics -- mostly lawyers and law professors -- like to talk about "slippery slopes." In fact, these critics say that this amendment is a slippery slope and that the First Amendment is sliding all the way down the hill. Well, these critics are wrong. Their claims are grossly exaggerated. Recognizing that the Flag is the living symbol of our nation, the amendment will simply allow Congress and the States to prohibit acts of flag desecration. It will not prohibit anyone from speaking out against their country, their government, or their Flag.

V. RELATIONSHIP WITH RECENT CIVIL RIGHTS CASES

Earlier in the week, Attorney General Thornburgh stated that the Bush Administration would not pursue legislation to overturn the recent Supreme Court decisions on civil rights.

- For the most part, the recent Supreme Court decisions on civil rights turn on interpretations of statutes enacted by Congress. The Wards Cove decision, for example, involved an interpretation of Title VII of the Civil Rights Act of 1964. The Patterson decision involved an interpretation of Section 1981, a law enacted by Congress in 1866. Some Members of Congress -- senators Kennedy and Metzenbaum, for example -- do not like these decisions and they have introduced legislation to overturn them. That's their prerogative. That's Congress' prerogative.

- The Texas v. Johnson case -- on the other hand -- involved an interpretation of the First Amendment -- an interpretation that I and many others believe was dead wrong. Congress -- fortunately -- cannot simply pass a law to overturn a Constitutional ruling by the Supreme Court. An amendment to the Constitution is the only way that the people's voice can be heard in this situation.

- I remain committed to the vigorous enforcement of our civil rights laws. Discrimination -- in all its forms -- must never be tolerated.

June 16, 1989

M E M O R A N D U M

TO: SENATOR DOLE

FROM: DENNIS SHEA

SUBJECT: SUPREME COURT CIVIL RIGHTS DECISIONS

The Supreme Court has issued four major civil rights rulings this term. I have described two of these rulings -- City of Richmond v. Croson and Wards Cove Packing Co. v. Atonio -- in a previous memorandum. I thought a description of all four cases in a single memorandum would be helpful to you.

I. **PATTERSON V. MCLEAN CREDIT UNION**

By a 9-0 vote, the Supreme Court reaffirmed Runyon v. McCrary, a 1976 decision interpreting an 1866 civil rights law that grants to every individual "the same right...to make and enforce contracts...as is enjoyed by white citizens." In Runyon, the Court ruled that the 1866 law barred a private school from refusing to admit black students.

Although the Patterson decision upheld Runyon's interpretation of the 1866 law, the Court also ruled by a 5-4 vote that the 1866 law may not be used as the basis for lawsuits alleging racial harassment in the workplace. The Court emphasized that lawsuits alleging racial harassment in the workplace may be brought under Title VII of the Civil Rights Act of 1964 rather than under the 1866 law.

Looking into the crystal ball: When upholding Runyon, the Court applied the principle of stare decisis, the judicial doctrine that courts should refrain from overturning established and accepted precedent. The Court's application of stare decisis to Runyon may be a signal that it intends to apply stare decisis to Roe v. Wade when it soon decides the constitutionality of the Missouri abortion law.

II. **MARTIN V. WILKS**

In Martin v. Wilks, the Supreme Court ruled that court-approved affirmative action settlements were open to legal challenge by white workers who were not parties to the original settlements. To support this conclusion, the Court emphasized that "it is a principle of general application in anglo-American jurisprudence that one is not bound by a judgment...in a litigation in which he is not designated as a party or to which he has not been made a party by service of process."

The Wilks decision involved a claim by a group of white firemen in Birmingham, Alabama, that they were being denied promotions in favor of less qualified black applicants. The City of Birmingham admitted to making race-conscious employment decisions but insisted that these decisions were unassailable since they were made pursuant to a court-approved settlement.

As a result of the Wilks decision, court-approved affirmative action settlements are now subject to reverse discrimination lawsuits.

III.WARDS COVE PACKING CO. V. ATONIO

In Wards Cove Packing Co. v. Atonio, the Supreme Court altered traditional Title VII analysis by relieving employers of the burden of justifying, on the grounds of "business necessity," those practices that are shown to have a disparate impact on a minority group. The decision now requires a Title VII plaintiff to prove -- at the outset -- that a hiring practice not only has a disparate impact but also has no legitimate business justification.

Wards Cove involved a claim by native Filipinos and Eskimos that a salmon-packing company located in northern Alaska had engaged in racially discriminatory hiring practices more than 15 years ago.

IV. CITY OF RICHMOND V. CROSON

In City of Richmond v. Croson, the Supreme Court struck down Richmond's minority set-aside program as a violation of the Equal Protection Clause of the Fourteenth Amendment. In Croson, the Court emphasized that the set-aside program was not justified since the trial record revealed no prior discrimination by the City of Richmond in awarding construction contracts.

JUSTICE KENNEDY

Justice Kennedy has voted in the majority in all four decisions. He also written the majority opinion in the Patterson case. As a result, observers of the Supreme Court no longer doubt that Kennedy is a conservative jurist.

REACTIONS

Not surprisingly, the civil rights establishment is up-in-arms about the recent Supreme Court decisions. Ben Hooks and Ralph Neas, for example, have publicly stated that "the recent Supreme Court term has been a disaster for all those committed to equal employment opportunity."

I have attached a Washington Post op-ed piece written by Charles Fried, former Solicitor General. The piece emphasizes that the decisions do not undermine the fairness of the civil rights laws, but rather restore some needed balance.

United States Senate

WASHINGTON, DC 20510

June 30, 1989

Dear Colleague:

Earlier this morning, President Bush stood before the Iwo Jima Memorial and called upon us and other Members of Congress to introduce a constitutional amendment to protect the integrity of our flag. We are writing to urge you to join us and the President in this effort.

We have attached a copy of the amendment and the resolution accompanying the amendment. As the President said this morning, the text of the amendment is starkly simple and straightforward. It reads: "The Congress and the States shall have power to prohibit the physical desecration of the flag of the United States."

We do not approach the task of amending the Constitution lightly. The introduction of this amendment will obviously be a serious step, raising many difficult and complex constitutional issues. But we believe that protecting our flag from physical desecration is also a serious matter and that this amendment will not weaken or dilute our cherished First Amendment freedoms.

We urge all of our colleagues to co-sponsor the amendment. If you are interested in cosponsorship, or if you have any questions, please contact Dennis Shea at 224-4489 or Jim Schufreider at 224-8825. Since we intend to introduce the amendment on Wednesday, July 12, we need to hear from you before that date.

Sincerely,

BOB DOLE

ALAN DIXON

Whereas the Flag of the United States of America is a national symbol of such stature that it must be kept inviolate;

Whereas the physical desecration of the Flag should not be considered constitutionally protected speech; and

Whereas physical desecration may include, but is not limited to, such acts as burning, mutilating, defacing, defiling or trampling on the Flag, or displaying the Flag in a contemptuous manner: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years after the date of its submission for ratification:

"ARTICLE

"The Congress and the States shall have power to prohibit the physical desecration of the Flag of the United States.".

News from Senator

BOB DOLE

(R - Kansas) SH 141 Hart Building, Washington, D.C. 20510-1601

FOR IMMEDIATE RELEASE
FRIDAY, JUNE 30, 1989

CONTACT: WALT RIKER
(202) 224-5358

DOLE BACKS PRESIDENT ON CONSTITUTIONAL AMENDMENT FOR FLAG
IWO JIMA MEMORIAL REMARKS

I COMMEND PRESIDENT BUSH FOR HIS LEADERSHIP IN PROPOSING AN AMENDMENT TO THE CONSTITUTION TO PROTECT OUR FLAG. HE HAS ACTED WISELY. HE HAS ACTED RESPONSIBLY. AND HE HAS ACTED IN THE BEST INTERESTS AND IN THE BEST TRADITIONS OF OUR NATION.

THE AMENDMENT

I WAS PROUD TO JOIN WITH CONGRESSMAN MICHEL IN THE PAINSTAKING PROCESS OF DRAFTING THE AMENDMENT. IT IS A SERIOUS STEP -- AS SERIOUS AS OUR FLAG. AS SERIOUS AS OUR CONSTITUTION.

WE HAVE STUDIED COUNTLESS OPTIONS. AND WE HAVE CONSULTED WITH THE VERY BEST CONSTITUTIONAL SCHOLARS -- CONSERVATIVE AND LIBERAL -- IN DEVELOPING AN AMENDMENT THAT WILL SUITABLY PROTECT THE INTEGRITY OF OUR FLAG WITHOUT IMPINGING UPON OUR CHERISHED FIRST AMENDMENT FREEDOMS.

THE FINAL PRODUCT IS SIMPLE AND STRAIGHTFORWARD. IT GIVES TO CONGRESS AND THE STATES THE CONSTITUTIONAL POWER TO PROHIBIT THE PHYSICAL DESECRATION OF OLD GLORY. NOTHING MORE. AND NOTHING LESS.

THE AMENDMENT PROCESS

THE CONSTITUTIONAL AMENDMENT PROCESS -- ON THE OTHER HAND -- IS NOT SO SIMPLE. IN THEIR WISDOM, THE FRAMERS INTENTIONALLY MADE THE AMENDMENT PROCESS A LENGTHY AND DIFFICULT ONE. BUT I INTEND TO DO EVERYTHING IN MY POWER -- AS SENATE REPUBLICAN LEADER AND AS A CONCERNED AMERICAN -- TO ENSURE THAT THE PROCESS WORKS -- THAT THIS CONSTITUTIONAL AMENDMENT GETS THE NECESSARY VOTES IN CONGRESS AND IN STATE LEGISLATURES THROUGHOUT OUR LAND.

THE CRITICS

TO THOSE MEMBERS OF CONGRESS AND TO THOSE STATE LEGISLATORS WHO MAY NOT LIKE THIS AMENDMENT -- WHO MAY FEEL THAT THE AMENDMENT IS NOT NECESSARY, I SIMPLY SAY THIS: VOTE AGAINST THE AMENDMENT. VOICE YOUR OPPOSITION. THAT'S PART OF THE AMENDMENT PROCESS. AND IT'S PART OF THE WONDERFUL PROCESS WE CALL DEMOCRACY.

(MORE)

AMERICA, WE HEAR YOU LOUD AND CLEAR

SOME CRITICS SAY WE ARE WRONG ON THIS ONE -- THAT THIS IS A FREEDOM-OF-SPEECH ISSUE. WELL, THEY'RE RIGHT. AMERICANS ARE SPEAKING-OUT IN EVERY CORNER OF THE COUNTRY -- AND WHAT THEY ARE SAYING IS THIS: KEEP YOUR HANDS OFF OLD GLORY.

AMERICANS MAY NOT KNOW EVERY NUANCE OF CONSTITUTIONAL LAW, BUT THEY KNOW DESECRATION WHEN THEY SEE IT. THEY ARE DEMANDING ACTION -- SO TODAY I SAY TO AMERICA: WE HEAR YOU LOUD AND CLEAR.

INTRODUCTION OF THE PRESIDENT

HONORED GUESTS, I HAVE THE PRIVILEGE TODAY OF INTRODUCING THE PRESIDENT -- A BRAVE AMERICAN WHO FOUGHT WITH COURAGE AND DISTINCTION ON FOREIGN SOIL TO DEFEND THE FLAG.

NOW, HE IS ANSWERING THE CALL AGAIN.

THIS PRESIDENT -- AND THIS SENATOR -- KNOW FIRSTHAND THE SUPREME COST OF FREEDOM. AND SO DO THE GALLANT HEROES MEMORIALIZED AT THIS AWESOME MONUMENT.

WE WILL NEVER FORGET THEIR SACRIFICE. NOR WILL WE EVER STAND FOR ANYTHING LESS THAN RESPECT AND REVERENCE FOR OUR FLAG.

AND FOR THAT, AMERICA SAYS, "THANK YOU MR. PRESIDENT."

LADIES AND GENTLEMEN, THE PRESIDENT OF THE UNITED STATES, GEORGE BUSH.

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¹des·e·crate \'desə,krāt, -sē,-, *usu* -ād·+V\ *vt* -ED/-ING/-S [*de-* + *-secrate* (as in *consecrate*, v.)] **1 a :** to violate the sanctity of by diverting from sacred purpose, by contaminating, or by defiling ⟨they *desecrated* the shrine outright — bargaining with the Moslem merchants —*Time*⟩ ⟨it would ~ the Lincoln Memorial to have an obviously false voice speak from the statue there —*N.Y. Times Mag.*⟩ ⟨the quivering host whose house has been profaned and whose religion *desecrated* —W.L.Sullivan⟩ **b :** to divest of sacred character or treat as unhallowed ⟨many cemeteries were *desecrated*⟩ **2** *archaic* **:** to dedicate (someone or something) to false gods **:** condemn to an evil fate **3 :** to treat (an object of veneration, reverent devotion, or admiration) irreverently or contemptuously often in a way to provoke outrage on the part of others ⟨[his] great memory . . . has been *desecrated*. . . . —Margery Allingham⟩ ⟨Americans love the scenic outdoors, and they do not want to see it *desecrated* —R.L.Neuberger⟩ **4 :** to make desolate ⟨churned up lawns and drives, and *desecrated* houses with their broken windows —S.P.B.Mais⟩

SUPREME COURT OF THE UNITED STATES

No. 88-155

TEXAS, PETITIONER *v.* GREGORY LEE JOHNSON

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

[June 21, 1989]

JUSTICE BRENNAN delivered the opinion of the Court.

After publicly burning an American flag as a means of political protest, Gregory Lee Johnson was convicted of desecrating a flag in violation of Texas law. This case presents the question whether his conviction is consistent with the First Amendment. We hold that it is not.

I

While the Republican National Convention was taking place in Dallas in 1984, respondent Johnson participated in a political demonstration dubbed the "Republican War Chest Tour." As explained in literature distributed by the demonstrators and in speeches made by them, the purpose of this event was to protest the policies of the Reagan administration and of certain Dallas-based corporations. The demonstrators marched through the Dallas streets, chanting political slogans and stopping at several corporate locations to stage "die-ins" intended to dramatize the consequences of nuclear war. On several occasions they spray-painted the walls of buildings and overturned potted plants, but Johnson himself took no part in such activities. He did, however, accept an American flag handed to him by a fellow protestor who had taken it from a flag pole outside one of the targeted buildings.

The demonstration ended in front of Dallas City Hall, where Johnson unfurled the American flag, doused it with

kerosene, and set it on fire. While the flag burned, the protestors chanted, "America, the red, white, and blue, we spit on you." After the demonstrators dispersed, a witness to the flag-burning collected the flag's remains and buried them in his backyard. No one was physically injured or threatened with injury, though several witnesses testified that they had been seriously offended by the flag-burning.

Of the approximately 100 demonstrators, Johnson alone was charged with a crime. The only criminal offense with which he was charged was the desecration of a venerated object in violation of Tex. Penal Code Ann. § 42.09 (a)(3) (1989).[1] After a trial, he was convicted, sentenced to one year in prison, and fined $2,000. The Court of Appeals for the Fifth District of Texas at Dallas affirmed Johnson's conviction, 706 S. W. 2d 120 (1986), but the Texas Court of Criminal Appeals reversed, 755 S. W. 2d 92 (1988), holding that the State could not, consistent with the First Amendment, punish Johnson for burning the flag in these circumstances.

The Court of Criminal Appeals began by recognizing that Johnson's conduct was symbolic speech protected by the First Amendment: "Given the context of an organized demonstration, speeches, slogans, and the distribution of literature, anyone who observed appellant's act would have understood the message that appellant intended to convey. The act for which appellant was convicted was clearly 'speech'

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[1] Tex. Penal Code Ann. § 42.09 (1989) provides in full:

"§ 42.09. Desecration of Venerated Object

"(a) A person commits an offense if he intentionally or knowingly desecrates:

"(1) a public monument;

"(2) a place of worship or burial; or

"(3) a state or national flag.

"(b) For purposes of this section, 'desecrate' means deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action.

"(c) An offense under this section is a Class A misdemeanor."

contemplated by the First Amendment." *Id.*, at 95. To justify Johnson's conviction for engaging in symbolic speech, the State asserted two interests: preserving the flag as a symbol of national unity and preventing breaches of the peace. The Court of Criminal Appeals held that neither interest supported his conviction.

Acknowledging that this Court had not yet decided whether the Government may criminally sanction flag desecration in order to preserve the flag's symbolic value, the Texas court nevertheless concluded that our decision in *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624 (1943), suggested that furthering this interest by curtailing speech was impermissible. "Recognizing that the right to differ is the centerpiece of our First Amendment freedoms," the court explained, "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." 755 S. W. 2d, at 97. Noting that the State had not shown that the flag was in "grave and immediate danger," *Barnette*, *supra*, at 639, of being stripped of its symbolic value, the Texas court also decided that the flag's special status was not endangered by Johnson's conduct. 755 S. W. 2d, at 97.

As to the State's goal of preventing breaches of the peace, the court concluded that the flag-desecration statute was not drawn narrowly enough to encompass only those flag-burnings that were likely to result in a serious disturbance of the peace. And in fact, the court emphasized, the flag burning in this particular case did not threaten such a reaction. "'Serious offense' occurred," the court admitted, "but there was no breach of peace nor does the record reflect that the situation was potentially explosive. One cannot equate 'serious offense' with incitement to breach the peace." *Id.*, at 96. The court also stressed that another Texas statute, Tex.

Penal Code Ann. §42.01 (1989), prohibited breaches of the peace. Citing *Boos* v. *Barry*, 485 U. S. 312 (1988), the court decided that §42.01 demonstrated Texas' ability to prevent disturbances of the peace without punishing this flag desecration. 755 S. W. 2d, at 96.

Because it reversed Johnson's conviction on the ground that §42.09 was unconstitutional as applied to him, the state court did not address Johnson's argument that the statute was, on its face, unconstitutionally vague and overbroad. We granted certiorari, 488 U. S. —— (1988), and now affirm.

II

Johnson was convicted of flag desecration for burning the flag rather than for uttering insulting words.[2] This fact

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[2] Because the prosecutor's closing argument observed that Johnson had led the protestors in chants denouncing the flag while it burned, Johnson suggests that he may have been convicted for uttering critical words rather than for burning the flag. Brief for Respondent 33–34. He relies on *Street* v. *New York*, 394 U. S. 576, 578 (1969), in which we reversed a conviction obtained under a New York statute that prohibited publicly defying or casting contempt on the flag "either by words or act" because we were persuaded that the defendant may have been convicted for his words alone. Unlike the law we faced in *Street*, however, the Texas flag-desecration statute does not on its face permit conviction for remarks critical of the flag, as Johnson himself admits. See Brief for Respondent 34. Nor was the jury in this case told that it could convict Johnson of flag desecration if it found only that he had uttered words critical of the flag and its referents.

Johnson emphasizes, though, that the jury was instructed—according to Texas' law of parties—that "'a person is criminally responsible for an offense committed by the conduct of another if acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense.'" Brief for Respondent 2, n. 2, quoting 1 Record 49. The State offered this instruction because Johnson's defense was that he was not the person who had burned the flag. Johnson did not object to this instruction at trial, and although he challenged it on direct appeal, he did so only on the ground that there was insufficient evidence to support it. 706 S. W. 2d 120, 124 (Tex. App. 1986). It is only in this Court that Johnson has argued that the law-of-parties instruction might have led the jury to convict him for his

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. See, *e. g.*, *Spence* v. *Washington*, 418 U. S. 405, 409–411 (1974). If his conduct was expressive, we next decide whether the State's regulation is related to the suppression of free expression. See, *e. g.*, *United States* v. *O'Brien*, 391 U. S. 367, 377 (1968); *Spence*, *supra*, at 414, n. 8. If the State's regulation is not related to expression, then the less stringent standard we announced in *United States* v. *O'Brien* for regulations of noncommunicative conduct controls. See *O'Brien*, *supra*, at 377. If it is, then we are outside of *O'Brien*'s test, and we must ask whether this interest justifies Johnson's conviction under a more demanding standard.[5] See *Spence*, *supra*, at 411. A

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words alone. Even if we were to find that this argument is properly raised here, however, we would conclude that it has no merit in these circumstances. The instruction would not have permitted a conviction merely for the pejorative nature of Johnson's words, and those words themselves did not encourage the burning of the flag as the instruction seems to require. Given the additional fact that "the bulk of the State's argument was premised on Johnson's culpability as a sole actor," *ibid.*, we find it too unlikely that the jury convicted Johnson on the basis of this alternative theory to consider reversing his conviction on this ground.

[5] Although Johnson has raised a facial challenge to Texas' flag-desecration statute, we choose to resolve this case on the basis of his claim that the statute as applied to him violates the First Amendment. Section 42.09 regulates only physical conduct with respect to the flag, not the written or spoken word, and although one violates the statute only if one "knows" that one's physical treatment of the flag "will seriously offend one or more persons likely to observe or discover his action," Tex. Penal Code Ann. § 42.09(b) (1989), this fact does not necessarily mean that the statute applies only to *expressive* conduct protected by the First Amendment. *Cf.* *Smith* v. *Goguen*, 415 U. S. 566, 588 (1974) (WHITE, J., concurring in judgment) (statute prohibiting "contemptuous" treatment of flag encompasses only expressive conduct). A tired person might, for example, drag a flag through the mud, knowing that this conduct is likely to offend others, and yet have no thought of expressing any idea; neither the language nor the

third possibility is that the State's asserted interest is simply not implicated on these facts, and in that event the interest drops out of the picture. See 418 U. S., at 414, n. 8.

The First Amendment literally forbids the abridgement only of "speech," but we have long recognized that its protection does not end at the spoken or written word. While we have rejected "the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea," *United States* v. *O'Brien*, *supra*, at 376, we have acknowledged that conduct may be "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments." *Spence*, *supra*, at 409.

In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether "[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it." 418 U. S., at 410–411. Hence, we have recognized the expressive nature of students' wearing of black armbands to protest American military involvement in Vietnam, *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503, 505 (1969); of a sit-in by blacks in a "whites only" area to protest segregation, *Brown* v. *Louisiana*, 383 U. S. 131, 141–142 (1966); of the wearing of American military uniforms in a dramatic presentation criticizing American involvement in Vietnam, *Schacht* v. *United States*, 398 U. S. 58 (1970); and of picketing about a wide variety of causes, see, *e. g.*, *Food Employees* v. *Logan Valley Plaza*,

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Texas courts' interpretations of the statute precludes the possibility that such a person would be prosecuted for flag desecration. Because the prosecution of a person who had not engaged in expressive conduct would pose a different case, and because we are capable of disposing of this case on narrower grounds, we address only Johnson's claim that § 42.09 as applied to political expression like his violates the First Amendment.

Inc., 391 U. S. 308, 313–314 (1968); *United States* v. *Grace*, 461 U. S. 171, 176 (1983).

Especially pertinent to this case are our decisions recognizing the communicative nature of conduct relating to flags. Attaching a peace sign to the flag, *Spence*, *supra*, at 409–410; saluting the flag, *Barnette*, 319 U. S., at 632; and displaying a red flag, *Stromberg* v. *California*, 283 U. S. 359, 368–369 (1931), we have held, all may find shelter under the First Amendment. See also *Smith* v. *Goguen*, 415 U. S. 566, 588 (1974) (WHITE, J., concurring in judgment) (treating flag "contemptuously" by wearing pants with small flag sewn into their seat is expressive conduct). That we have had little difficulty identifying an expressive element in conduct relating to flags should not be surprising. The very purpose of a national flag is to serve as a symbol of our country; it is, one might say, "the one visible manifestation of two hundred years of nationhood." *Id.*, at 603 (REHNQUIST, J., dissenting). Thus, we have observed:

> "[T]he flag salute is a form of utterance. 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. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design." *Barnette*, *supra*, at 632.

Pregnant with expressive content, the flag as readily signifies this Nation as does the combination of letters found in "America."

We have not automatically concluded, however, that any action taken with respect to our flag is expressive. Instead, in characterizing such action for First Amendment purposes, we have considered the context in which it occurred. In *Spence*, for example, we emphasized that Spence's taping of a peace sign to his flag was "roughly simultaneous with and concededly triggered by the Cambodian incursion and the

Kent State tragedy." 418 U. S., at 410. The State of Washington had conceded, in fact, that Spence's conduct was a form of communication, and we stated that "the State's concession is inevitable on this record." *Id.*, at 409.

The State of Texas conceded for purposes of its oral argument in this case that Johnson's conduct was expressive conduct, Tr. of Oral Arg. 4, and this concession seems to us as prudent as was Washington's in *Spence*. Johnson burned an American flag as part—indeed, as the culmination—of a political demonstration that coincided with the convening of the Republican Party and its renomination of Ronald Reagan for President. The expressive, overtly political nature of this conduct was both intentional and overwhelmingly apparent. At his trial, Johnson explained his reasons for burning the flag as follows: "The American Flag was burned as Ronald Reagan was being renominated as President. And a more powerful statement of symbolic speech, whether you agree with it or not, couldn't have been made at that time. It's quite a just position [juxtaposition]. We had new patriotism and no patriotism." 5 Record 656. In these circumstances, Johnson's burning of the flag was conduct "sufficiently imbued with elements of communication," *Spence*, 418 U. S., at 409, to implicate the First Amendment.

III

The Government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word. See *O'Brien*, 391 U. S. at 376–377; *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288, 293 (1984); *Dallas* v. *Stanglin*, 490 U. S. ——, —— (1989) (slip op., at 5–6). It may not, however, proscribe particular conduct *because* it has expressive elements. "[W]hat might be termed the more generalized guarantee of freedom of expression makes the communicative nature of conduct an inadequate *basis* for singling out that conduct for proscription. A law *directed at* the communicative nature of conduct must,

like a law directed at speech itself, be justified by the substantial showing of need that the First Amendment requires." *Community for Creative Non-Violence* v. *Watt*, 227 U. S. App. D. C. 19, 55–56, 703 F. 2d 586, 622–623 (1983) (Scalia, J., dissenting), rev'd *sub nom. Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288 (1984) (emphasis in original). It is, in short, not simply the verbal or nonverbal nature of the expression, but the governmental interest at stake, that helps to determine whether a restriction on that expression is valid.

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*, *supra*, at 376, 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." *Id.*, at 377; see also *Spence*, 418 U. S., at 414, n. 8. In stating, moreover, that *O'Brien*'s test "in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions," *Clark*, *supra*, at 298, we have highlighted the requirement that the governmental interest in question be unconnected to expression in order to come under *O'Brien*'s less demanding rule.

In order to decide whether *O'Brien*'s test applies here, therefore, we must decide whether Texas has asserted an interest in support of Johnson's conviction that is unrelated to the suppression of expression. If we find that an interest asserted by the State is simply not implicated on the facts before us, we need not ask whether *O'Brien*'s test applies. See *Spence*, *supra*, at 414, n. 8. The State offers two separate interests to justify this conviction: preventing breaches of the peace, and preserving the flag as a symbol of nationhood and national unity. We hold that the first interest is not impli-

cated on this record and that the second is related to the suppression of expression.

A

Texas claims that its interest in preventing breaches of the peace justifies Johnson's conviction for flag desecration.[4] However, no disturbance of the peace actually occurred or threatened to occur because of Johnson's burning of the flag. Although the State stresses the disruptive behavior of the protestors during their march toward City Hall, Brief for Petitioner 34–36, it admits that "no actual breach of the peace occurred at the time of the flagburning or in response to the flagburning." *Id.*, at 34. The State's emphasis on the protestors' disorderly actions prior to arriving at City Hall is not only somewhat surprising given that no charges were brought on the basis of this conduct, but it also fails to show that a disturbance of the peace was a likely reaction to *Johnson's* conduct. The only evidence offered by the State at trial to show the reaction to Johnson's actions was the testimony of several persons who had been seriously offended by the flag-burning. *Id.*, at 6–7.

The State's position, therefore, amounts to a claim that an audience that takes serious offense at particular expression is necessarily likely to disturb the peace and that the expres-

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[4] Relying on our decision in *Boos* v. *Barry*, 485 U. S. 312 (1988), Johnson argues that this state interest is related to the suppression of free expression within the meaning of *United States* v. *O'Brien*, 391 U. S. 367 (1968). He reasons that the violent reaction to flag-burnings feared by Texas would be the result of the message conveyed by them, and that this fact connects the State's interest to the suppression of expression. Brief for Respondent 12, n. 11. This view has found some favor in the lower courts. See *Monroe* v. *State Court of Fulton County*, 739 F. 2d 568, 574–575 (CA11 1984). Johnson's theory may overread *Boos* insofar as it suggests that a desire to prevent a violent audience reaction is "related to expression" in the same way that a desire to prevent an audience from being offended is "related to expression." Because we find that the State's interest in preventing breaches of the peace is not implicated on these facts, however, we need not venture further into this area.

sion may be prohibited on this basis.[5] Our precedents do not countenance such a presumption. On the contrary, they recognize that a principal "function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello* v. *Chicago*, 337 U. S. 1, 4 (1949). See also *Cox* v. *Louisiana*, 379 U. S. 536, 551 (1965); *Tinker* v. *Des Moines Independent School Dist.* 393 U. S., at 508–509; *Coates* v. *Cincinnati*, 402 U. S. 611, 615 (1971); *Hustler Magazine, Inc.* v. *Falwell*, 485 U. S. 46, 55–56 (1988). It would be odd indeed to conclude *both* that "if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection," *FCC* v. *Pacifica Foundation*, 438 U. S. 726, 745 (1978) (opinion of STEVENS, J.), *and* that the Government may ban the expression of certain disagreeable ideas on the unsupported presumption that their very disagreeableness will provoke violence.

Thus, we have not permitted the Government to assume that every expression of a provocative idea will incite a riot, but have instead required careful consideration of the actual circumstances surrounding such expression, asking whether the expression "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg* v. *Ohio*, 395 U. S. 444, 447 (1969) (reviewing circumstances surrounding rally and speeches by Ku Klux Klan). To accept Texas' arguments that it need only demonstrate "the potential for a breach of the peace," Brief for Petitioner 37, and that every flag-burning necessarily possesses that potential, would be to eviscerate our holding in *Brandenburg*. This we decline to do.

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[5] There is, of course, a tension between this argument and the State's claim that one need not actually cause serious offense in order to violate § 42.09. See Brief for Petitioner 44.

Nor does Johnson's expressive conduct fall within that small class of "fighting words" that are "likely to provoke the average person to retaliation, and thereby cause a breach of the peace." *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 574 (1942). No reasonable onlooker would have regarded Johnson's generalized expression of dissatisfaction with the policies of the Federal Government as a direct personal insult or an invitation to exchange fisticuffs. See *id.*, at 572–573; *Cantwell* v. *Connecticut*, 310 U. S. 296, 309 (1940); *FCC* v. *Pacifica Foundation*, *supra*, at 745 (opinion of STEVENS, J.).

We thus conclude that the State's interest in maintaining order is not implicated on these facts. The State need not worry that our holding will disable it from preserving the peace. We do not suggest that the First Amendment forbids a State to prevent "imminent lawless action." *Brandenburg*, *supra*, at 447. And, in fact, Texas already has a statute specifically prohibiting breaches of the peace, Tex. Penal Code Ann. § 42.01 (1989), which tends to confirm that Texas need not punish this flag desecration in order to keep the peace. See *Boos* v. *Barry*, 485 U. S., at 327–329.

B

The State also asserts an interest in preserving the flag as a symbol of nationhood and national unity. In *Spence*, we acknowledged that the Government's interest in preserving the flag's special symbolic value "is directly related to expression in the context of activity" such as affixing a peace symbol to a flag. 418 U. S., at 414, n. 8. We are equally 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*. We are thus outside of *O'Brien*'s test altogether.

IV

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.

As in *Spence*, "[w]e are confronted with a case of prosecution for the expression of an idea through activity," and "[a]ccordingly, we must examine with particular care the interests advanced by [petitioner] to support its prosecution." 418 U. S., at 411. Johnson was not, we add, prosecuted for the expression of just any idea; he was prosecuted for his expression of dissatisfaction with the policies of this country, expression situated at the core of our First Amendment values. See, *e. g.*, *Boos* v. *Barry*, *supra*, at 318; *Frisby* v. *Schultz*, 487 U. S. ——, —— (1988).

Moreover, Johnson was prosecuted because he knew that his politically charged expression would cause "serious offense." If he had burned the flag as a means of disposing of it because it was dirty or torn, he would not have been convicted of flag desecration under this Texas law: federal law designates burning as the preferred means of disposing of a flag "when it is in such condition that it is no longer a fitting emblem for display," 36 U. S. C. § 176(k), and Texas has no quarrel with this means of disposal. Brief for Petitioner 45. 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.[6] Texas concedes as much: "Section 42.09(b) reaches only those severe acts of physical abuse

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[6] *Cf. Smith* v. *Goguen*, 415 U. S., at 590–591 (BLACKMUN, J., dissenting) (emphasizing that lower court appeared to have construed state statute so as to protect physical integrity of the flag in all circumstances); *id.*, at 597–598 (REHNQUIST, J., dissenting) (same).

of the flag carried out in a way likely to be offensive. The statute mandates intentional or knowing abuse, that is, the kind of mistreatment that is not innocent, but rather is intentionally designed to seriously offend other individuals." *Id.*, at 44.

Whether Johnson's treatment of the flag violated Texas law thus depended on the likely communicative impact of his expressive conduct.[7] Our decision in *Boos* v. *Barry*, *supra*, tells us that this restriction on Johnson's expression is content-based. In *Boos*, we considered the constitutionality of a law prohibiting "the display of any sign within 50 feet of a foreign embassy if that sign tends to bring that foreign government into 'public odium' or 'public disrepute.'" *Id.*, at 315. Rejecting the argument that the law was content-neutral because it was justified by "our international law obligation to shield diplomats from speech that offends their dignity," *id.*, at 320, we held that a "[t]he emotive impact of speech on its audience is not a 'secondary effect'" unrelated to the content of the expression itself. *Id.*, at 321, (purality opinion); see

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[7] Texas suggests that Johnson's conviction did not depend on the onlookers' reaction to the flag-burning because § 42.09 is violated only when a person physically mistreats the flag in a way that he "*knows* will seriously offend one or more persons likely to observe or discover his action." Tex. Penal Code Ann. § 42.09(b) (1969) (emphasis added). "The 'serious offense' language of the statute," Texas argues, "refers to an individual's intent and to the manner in which the conduct is effectuated, not to the reaction of the crowd." Brief for Petitioner 44. If the statute were aimed only at the actor's intent and not at the communicative impact of his actions, however, there would be little reason for the law to be triggered only when an audience is "likely" to be present. At Johnson's trial, indeed, the State itself seems not to have seen the distinction between knowledge and actual communicative impact that it now stresses; it proved the element of knowledge by offering the testimony of persons who had in fact been seriously offended by Johnson's conduct. *Id.*, at 6–7. In any event, we find the distinction between Texas' statute and one dependent on actual audience reaction too precious to be of constitutional significance. Both kinds of statutes clearly are aimed at protecting onlookers from being offended by the ideas expressed by the prohibited activity.

also *id.*, at 334, (BRENNAN, J., concurring in part and concurring in judgment).

According to the principles announced in *Boos*, Johnson's political expression was restricted because of the content of the message he conveyed. We must therefore subject the State's asserted interest in preserving the special symbolic character of the flag to "the most exacting scrutiny." *Boos* v. *Barry*, 485 U. S., at 321.[6]

Texas argues that its interest in preserving the flag as a symbol of nationhood and national unity survives this close analysis. Quoting extensively from the writings of this Court chronicling the flag's historic and symbolic role in our society, the State emphasizes the "'special place'" reserved for the flag in our Nation. Brief for Petitioner 22, quoting *Smith* v. *Goguen*, 415 U. S., at 601 (REHNQUIST, J., dissenting). The State's argument is not that it has an interest simply in maintaining the flag as a symbol of *something*, no matter what it symbolizes; indeed, if that were the State's position, it would be difficult to see how that interest is endangered by highly symbolic conduct such as Johnson's. Rather, the State's claim is that it has an interest in preserving the flag as a symbol of *nationhood* and *national unity*, a symbol with a determinate range of meanings. Brief for Petitioner 20–24. According to Texas, if one physically treats the flag in a way that would tend to cast doubt on either the idea that nationhood and national unity are the flag's referents or that national unity actually exists, the

[6] Our inquiry is, of course, bounded by the particular facts of this case and by the statute under which Johnson was convicted. There was no evidence that Johnson himself stole the flag he burned, Tr. of Oral Arg. 17, nor did the prosecution or the arguments urged in support of it depend on the theory that the flag was stolen. *Ibid.* Thus, our analysis does not rely on the way in which the flag was acquired, and nothing in our opinion should be taken to suggest that one is free to steal a flag so long as one later uses it to communicate an idea. We also emphasize that Johnson was prosecuted *only* for flag desecration—not for trespass, disorderly conduct, or arson.

message conveyed thereby is a harmful one and therefore may be prohibited.[9]

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. See, *e. g.*, *Hustler Magazine* v. *Falwell*, 485 U. S., at 55–56; *City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S. 789, 804 (1984); *Bolger* v. *Youngs Drug Products Corp.*, 463 U. S. 60, 65, 72 (1983); *Carey* v. *Brown*, 447 U. S. 455, 462–463 (1980); *FCC* v. *Pacifica Foundation*, 438 U. S., at 745–746; *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50, 63–65, 67–68 (1976) (plurality opinion); *Buckley* v. *Valeo*, 424 U. S. 1, 16–17 (1976); *Grayned* v. *Rockford*, 408 U. S. 104, 115 (1972); *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92, 95 (1972); *Bachellar* v. *Maryland*, 397 U. S. 564, 567 (1970); *O'Brien*, 391 U. S., at 382; *Brown* v. *Louisiana*, 383 U. S., at 142–143; *Stromberg* v. *California*, 283 U. S., at 368–369.

We have not recognized an exception to this principle even where our flag has been involved. In *Street* v. *New York*, 394 U. S. 576 (1969), we held that a State may not criminally punish a person for uttering words critical of the flag. Rejecting the argument that the conviction could be sustained on the ground that Street had "failed to show the respect for our national symbol which may properly be demanded of every citizen," we concluded that "the constitutionally guaranteed 'freedom to be intellectually . . . diverse or even con-

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[9] Texas claims that "Texas is not endorsing, protecting, avowing or prohibiting any particular philosophy." Brief for Petitioner 29. If Texas means to suggest that its asserted interest does not prefer Democrats over Socialists, or Republicans over Democrats, for example, then it is beside the point, for Johnson does not rely on such an argument. He argues instead that the State's desire to maintain the flag as a symbol of nationhood and national unity assumes that there is only one proper view of the flag. Thus, if Texas means to argue that its interest does not prefer *any* viewpoint over another, it is mistaken; surely one's attitude towards the flag and its referents is a viewpoint.

trary,' and the 'right to differ as to things that touch the heart of the existing order,' encompass the freedom to express publicly one's opinions about our flag, including those opinions which are defiant or contemptuous." *Id.*, at 593, quoting *Barnette*, 319 U. S., at 642. Nor may the Government, we have held, compel conduct that would evince respect for the flag. "To sustain the compulsory flag salute we are required to say 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." *Id.*, at 634.

In holding in *Barnette* that the Constitution did not leave this course open to the Government, Justice Jackson described one of our society's defining principles in words deserving of their frequent repetition: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.*, at 642. In *Spence*, we held that the same interest asserted by Texas here was insufficient to support a criminal conviction under a flag-misuse statute for the taping of a peace sign to an American flag. "Given the protected character of [Spence's] expression and in light of the fact that no interest the State may have in preserving the physical integrity of a privately owned flag was significantly impaired on these facts," we held, "the conviction must be invalidated." 418 U. S., at 415. See also *Goguen*, 415 U. S., at 588 (WHITE, J., concurring in judgment) (to convict person who had sewn a flag onto the seat of his pants for "contemptuous" treatment of the flag would be "[t]o convict not to protect the physical integrity or to protect against acts interfering with the proper use of the flag, but to punish for communicating ideas unacceptable to the controlling majority in the legislature").

In short, nothing in our precedents suggests that a State may foster its own view of the flag by prohibiting expressive

conduct relating to it.[10] To bring its argument outside our precedents, Texas attempts to convince us that even if its interest in preserving the flag's symbolic role does not allow it to prohibit words or some expressive conduct critical of the flag, it does permit it to forbid the outright destruction of the flag. The State's argument cannot depend here on the distinction between written or spoken words and nonverbal conduct. That distinction, we have shown, is of no moment where the nonverbal conduct is expressive, as it is here, and where the regulation of that conduct is related to expression, as it is here. See *supra*, at 4–5. In addition, both *Barnette* and *Spence* involved expressive conduct, not only verbal communication, and both found that conduct protected.

Texas' focus on the precise nature of Johnson's expression, moreover, misses the point of our prior decisions: their enduring lesson, that the Government may not prohibit expression simply because it disagrees with its message, is not dependent on the particular mode in which one chooses to express an idea.[11] If we were to hold that a State may forbid

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[10] Our decision in *Halter* v. *Nebraska*, 205 U. S. 34 (1907), addressing the validity of a state law prohibiting certain commercial uses of the flag, is not to the contrary. That case was decided "nearly 20 years before the Court concluded that the First Amendment applies to the States by virtue of the Fourteenth Amendment." *Spence* v. *Washington*, 418 U. S. 405, 413, n. 7 (1974). More important, as we continually emphasized in *Halter* itself, that case involved purely commercial rather than political speech. 205 U. S., at 38, 41, 42, 45.

Nor does *San Francisco Arts & Athletics* v. *Olympic Committee*, 483 U. S. 522, 524 (1987), addressing the validity of Congress' decision to "authoriz[e] the United States Olympic Committee to prohibit certain commercial and promotional uses of the word 'Olympic,'" relied upon by the dissent, *post*, at 9, even begin to tell us whether the Government may criminally punish physical conduct towards the flag engaged in as a means of political protest.

[11] The dissent appears to believe that Johnson's conduct may be prohibited and, indeed, criminally sanctioned, because "his act . . . conveyed nothing that could not have been conveyed and was not conveyed just as forcefully in a dozen different ways." *Post*, at 10. Not only does this as-

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—as a substitute for the written or spoken word or a "short cut from mind to mind"—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. Indeed, in *Schacht* v. *United States*, we invalidated a federal statute permitting an actor portraying a member of one of our armed forces to "'wear the uniform of that armed force if the portrayal does not tend to discredit that armed force.'" 398 U. S., at 60, quoting 10 U. S. C. § 772(f). This proviso, we held, "which leaves Americans free to praise the war in Vietnam but can send persons like Schacht to prison for opposing it, cannot survive in a country which has the First Amendment." *Id.*, at 63.

We perceive no basis on which to hold that the principle underlying our decision in *Schacht* does not apply to this case. 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? In evaluating these

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sertion sit uneasily next to the dissent's quite correct reminder that the flag occupies a unique position in our society—which demonstrates that messages conveyed without use of the flag are not "just as forcefu[l]" as those conveyed with it—but it also ignores the fact that, in *Spence*, *supra*, we "rejected summarily" this very claim. See 418 U. S., at 411, n. 4.

choices under the First Amendment, how would we decide which symbols were sufficiently special to warrant this unique status? To do so, we would be forced to consult our own political preferences, and impose them on the citizenry, in the very way that the First Amendment forbids us to do. See *Carey* v. *Brown*, 447 U. S., at 466–467.

There is, moreover, no indication—either in the text of the Constitution or in our cases interpreting it—that a separate juridical category exists for the American flag alone. Indeed, we would not be surprised to learn that the persons who framed our Constitution and wrote the Amendment that we now construe were not known for their reverence for the Union Jack. The First Amendment does not guarantee that other concepts virtually sacred to our Nation as a whole—such as the principle that discrimination on the basis of race is odious and destructive—will go unquestioned in the marketplace of ideas. See *Brandenburg* v. *Ohio*, 395 U. S. 444 (1969). We decline, therefore, to create for the flag an exception to the joust of principles protected by the First Amendment.

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." *Spence*, 418 U. S., at 412. We reject the suggestion, urged at oral argument by counsel for Johnson, that the Government lacks "any state interest whatsoever" in regulating the manner in which the flag may be displayed. Tr. of Oral Arg. 38. Congress has, for example, enacted precatory regulations describing the proper treatment of the flag, see 36 U. S. C. §§ 173–177, and we cast no doubt on the legitimacy of its interest in making such recommendations. 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. "National unity as an end which officials may foster by persuasion and example is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement." *Barnette*, 319 U. S., at 640.

We are fortified in today's conclusion by our conviction that forbidding criminal punishment for conduct such as Johnson's will not endanger the special role played by our flag or the feelings it inspires. To paraphrase Justice Holmes, we submit that nobody can suppose that this one gesture of an unknown man will change our Nation's attitude towards its flag. See *Abrams* v. *United States*, 250 U. S. 616, 628 (1919) (Holmes, J., dissenting). Indeed, Texas' argument that the burning of an American flag "'is an act having a high likelihood to cause a breach of the peace,'" Brief for Petitioner 31, quoting *Sutherland* v. *DeWulf*, 323 F. Supp. 740, 745 (SD Ill. 1971) (citation omitted), and its statute's implicit assumption that physical mistreatment of the flag will lead to "serious offense," tend to confirm that the flag's special role is not in danger; if it were, no one would riot or take offense because a flag had been burned.

We are tempted to say, in fact, that the flag's deservedly cherished place in our community will be strengthened, not weakened, by our holding today. Our decision is a reaffirmation of the principles of freedom and inclusiveness that the flag best reflects, and of the conviction that our toleration of criticism such as Johnson's is a sign and source of our strength. Indeed, one of the proudest images of our flag, the one immortalized in our own national anthem, is of the bombardment it survived at Fort McHenry. It is the Nation's resilience, not its rigidity, that Texas sees reflected in the flag—and it is that resilience that we reassert today.

The way to preserve the flag's special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong. "To courageous, self-reliant men, with confidence in the power of free and fearless

reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. 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." *Whitney* v. *California*, 274 U. S. 357, 377 (1927) (Brandeis, J., concurring). And, precisely because it is our flag that is involved, one's response to the flag-burner may exploit the uniquely persuasive power of the flag itself. We can imagine no more appropriate response to burning a flag than waving one's own, no better way to counter a flag-burner's message than by saluting the flag that burns, no surer means of preserving the dignity even of the flag that burned than by—as one witness here did—according its remains a respectful burial. We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents.

V

Johnson was convicted for engaging in expressive conduct. The State's interest in preventing breaches of the peace does not support his conviction because Johnson's conduct did not threaten to disturb the peace. Nor does the State's interest in preserving the flag as a symbol of nationhood and national unity justify his criminal conviction for engaging in political expression. The judgment of the Texas Court of Criminal Appeals is therefore

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 88–155

TEXAS, PETITIONER *v.* GREGORY LEE JOHNSON

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

[June 21, 1989]

JUSTICE KENNEDY, concurring.

I write not to qualify the words JUSTICE BRENNAN chooses so well, for he says with power all that is necessary to explain our ruling. I join his opinion without reservation, but with a keen sense that this case, like others before us from time to time, exacts its personal toll. This prompts me to add to our pages these few remarks.

The case before us illustrates better than most that the judicial power is often difficult in its exercise. We cannot here ask another branch to share responsibility, as when the argument is made that a statute is flawed or incomplete. For we are presented with a clear and simple statute to be judged against a pure command of the Constitution. The outcome can be laid at no door but ours.

The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result. And so great is our commitment to the process that, except in the rare case, we do not pause to express distaste for the result, perhaps for fear of undermining a valued principle that dictates the decision. This is one of those rare cases.

Our colleagues in dissent advance powerful arguments why respondent may be convicted for his expression, reminding us that among those who will be dismayed by our holding will be some who have had the singular honor of carrying the flag

in battle. And I agree that the flag holds a lonely place of honor in an age when absolutes are distrusted and simple truths are burdened by unneeded apologetics.

With all respect to those views, I do not believe the Constitution gives us the right to rule as the dissenting members of the Court urge, however painful this judgment is to announce. Though symbols often are what we ourselves make of them, the flag is constant in expressing beliefs Americans share, beliefs in law and peace and that freedom which sustains the human spirit. The case here today forces recognition of the costs to which those beliefs commit us. It is poignant but fundamental that the flag protects those who hold it in contempt.

For all the record shows, this respondent was not a philosopher and perhaps did not even possess the ability to comprehend how repellent his statements must be to the Republic itself. But whether or not he could appreciate the enormity of the offense he gave, the fact remains that his acts were speech, in both the technical and the fundamental meaning of the Constitution. So I agree with the Court that he must go free.

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CHIEF JUSTICE REHNQUIST, with whom JUSTICE WHITE and JUSTICE O'CONNOR join, dissenting.

In holding this Texas statute unconstitutional, the Court ignores Justice Holmes' familiar aphorism that "a page of history is worth a volume of logic." *New York Trust Co.* v. *Eisner*, 256 U. S. 345, 349 (1921). 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.

At the time of the American Revolution, the flag served to unify the Thirteen Colonies at home, while obtaining recognition of national sovereignty abroad. Ralph Waldo Emerson's Concord Hymn describes the first skirmishes of the Revolutionary War in these lines:

> "By the rude bridge that arched the flood
> Their flag to April's breeze unfurled,
> "Here once the embattled farmers stood
> And fired the shot heard round the world."

During that time, there were many colonial and regimental flags, adorned with such symbols as pine trees, beavers, anchors, and rattle snakes, bearing slogans such as "Liberty or Death," "Hope," "An Appeal to Heaven," and "Don't Tread on Me." The first distinctive flag of the Colonies was the "Grand Union Flag"—with 13 stripes and a British flag in the

left corner—which was flown for the first time on January 2, 1776, by troops of the Continental Army around Boston. By June 14, 1777, after we declared our independence from England, the Continental Congress resolved:

> "That the flag of the thirteen United States be thirteen stripes, alternate red and white: that the union be thirteen stars, white in a blue field, representing a new constellation." 8 Journal of the Continental Congress 1774–1789, p. 464 (Ford Ed. 1907).

One immediate result of the flag's adoption was that American vessels harassing British shipping sailed under an authorized national flag. Without such a flag, the British could treat captured seamen as pirates and hang them summarily; with a national flag, such seamen were treated as prisoners of war.

During the War of 1812, British naval forces sailed up Chesapeake Bay and marched overland to sack and burn the city of Washington. They then sailed up the Patapsco River to invest the city of Baltimore, but to do so it was first necessary to reduce Fort McHenry in Baltimore Harbor. Francis Scott Key, a Washington lawyer, had been granted permission by the British to board one of their warships to negotiate the release of an American who had been taken prisoner. That night, waiting anxiously on the British ship, Key watched the British fleet firing on Fort McHenry. Finally, at daybreak, he saw the fort's American flag still flying; the British attack had failed. Intensely moved, he began to scribble on the back of an envelope the poem that became our national anthem:

> "Oh! say can you see by the dawn's early light,
> What so proudly we hailed at the twilight's last gleaming?
> Whose broad stripes and bright stars, thro' the perilous fight,

O'er the ramparts we watched were so gallantly
streaming?
And the rockets' red glare, the bombs bursting in air,
Gave proof thro' the night that our flag was still there.
Oh! say does that star-spangled banner yet wave
O'er the land of the free and the home of the brave?"

The American flag played a central role in our Nation's most tragic conflict, when the North fought against the South. The lowering of the American flag at Fort Sumter was viewed as the start of the war. G. Preble, History of the Flag of the United States of America 453 (1880). The Southern States, to formalize their separation from the Union, adopted the "Stars and Bars" of the Confederacy. The Union troops marched to the sound of "Yes We'll Rally Round The Flag Boys, We'll Rally Once Again." President Abraham Lincoln refused proposals to remove from the American flag the stars representing the rebel States, because he considered the conflict not a war between two nations but an attack by 11 States against the National Government. *Id.*, at 411. By war's end, the American flag again flew over "an indestructible union, composed of indestructible states." *Texas* v. *White*, 7 Wall. 700, 725 (1869).

One of the great stories of the Civil War is told in John Greenleaf Whittier's poem, Barbara Frietchie:

"Up from the meadows rich with corn,
Clear in the cool September morn,
"The clustered spires of Frederick stand
Green-walled by the hills of Maryland.
"Round about them orchards sweep,
Apple and pear tree fruited deep,
"Fair as the garden of the Lord
To the eyes of the famished rebel horde,
"On that pleasant morn of the early fall
When Lee marched over the mountain wall;
"Over the mountains winding down,

Horse and foot, into Frederick town.
"Forty flags with their silver stars,
Forty flags with their crimson bars,
"Flapped in the morning wind: the sun
Of noon looked down, and saw not one.
"Up rose old Barbara Frietchie then,
Bowed with her fourscore years and ten;
'Bravest of all in Frederick town,
She took up the flag the men hauled down,
"In her attic-window the staff she set,
To show that one heart was loyal yet.
"Up the street came the rebel tread,
Stonewall Jackson riding ahead.
"Under his slouched hat left and right
He glanced; the old flag met his sight.
"'Halt!'—the dust-brown ranks stood fast.
'Fire!'—out blazed the rifle-blast.
"It shivered the window, pane and sash;
It rent the banner with seam and gash.
"Quick, as it fell, from the broken staff
Dame Barbara snatched the silken scarf.
"She leaned far out on the window-sill,
And shook it forth with a royal will.
"'Shoot if you must, this old grey head,
But spare your country's flag,' she said.
"A shade of sadness, a blush of shame,
Over the face of the leader came;
"The nobler nature within him stirred
To life at that woman's deed and word;
"'Who touches a hair of yon grey head
Dies like a dog! March on! he said.
"All day long through Frederick street
Sounded the tread of marching feet:
"All day long that free flag tost
Over the heads of the rebel host.
"Ever its torn folds rose and fell

On the loyal winds that loved it well;
"And through the hill-gaps sunset light
Shone over it with a warm good-night.
"Barbara Frietchie's work is o'er,
And the rebel rides on his raids no more.
"Honor to her! and let a tear
Fall, for her sake, on Stonewall's bier.
"Over Barbara Frietchie's grave,
Flag of Freedom and Union, wave!
"Peace and order and beauty draw
Round thy symbol of light and law;
"And ever the stars above look down
On thy stars below in Frederick town!"

In the First and Second World Wars, thousands of our countrymen died on foreign soil fighting for the American cause. At Iwo Jima in the Second World War, United States Marines fought hand-to-hand against thousands of Japanese. By the time the Marines reached the top of Mount Suribachi, they raised a piece of pipe upright and from one end fluttered a flag. That ascent had cost nearly 6,000 American lives. The Iwo Jima Memorial in Arlington National Cemetery memorializes that event. President Franklin Roosevelt authorized the use of the flag on labels, packages, cartons, and containers intended for export as lend-lease aid, in order to inform people in other countries of the United States' assistance. Presidential Proclamation No. 2605, 58 Stat. 1126.

During the Korean War, the successful amphibious landing of American troops at Inchon was marked by the raising of an American flag within an hour of the event. Impetus for the enactment of the Federal Flag Desecration Statute in 1967 came from the impact of flag burnings in the United States on troop morale in Vietnam. Representative L. Mendel Rivers, then chairman of the House Armed Services Committee, testified that, "The burning of the flag . . . has caused my mail to increase 100 percent from the boys in Vietnam, writ-

ing me and asking me what is going on in America." Hearings Desecration of the Flag, on H. R. 271 before Subcommittees No. 4 of the House Committee on the Judiciary, 90th Cong., 1st Sess. 189, (1967). Representative Charles Wiggins stated: "The public act of desecration of our flag tends to undermine the morale of American troops. That this finding is true can be attested by many Members who have received correspondence from servicemen expressing their shock and disgust of such conduct." 113 Cong. Rec. 16459 (1967).

The flag symbolizes the Nation in peace as well as in war. It signifies our national presence on battleships, airplanes, military installations, and public buildings from the United States Capitol to the thousands of county courthouses and city halls throughout the country. Two flags are prominently placed in our courtroom. Countless flags are placed by the graves of loved ones each year on what was first called Decoration Day, and is now called Memorial Day. The flag is traditionally placed on the casket of deceased members of the Armed Forces, and it is later given to the deceased's family. 10 U. S. C. §§ 1481, 1482. Congress has provided that the flag be flown at half-staff upon the death of the President, Vice President, and other government officials "as a mark of respect to their memory." 36 U. S. C. § 175(m). The flag identifies United States merchant ships, 22 U. S. C. § 454, and "[t]he laws of the Union protect our commerce wherever the flag of the country may float." *United States* v. *Guthrie*, 17 How. 284, 309 (1855).

No other American symbol has been as universally honored as the flag. In 1931, Congress declared "The Star Spangled Banner" to be our national anthem. 36 U. S. C. § 170. In 1949, Congress declared June 14th to be Flag Day. § 157. In 1987, John Philip Sousa's "The Stars and Stripes Forever" was designated as the national march. Pub. L. 101–186, 101 Stat. 1286. Congress has also established "The Pledge of Allegiance to the Flag" and the manner of its deliverance. 36

U. S. C. § 172. The flag has appeared as the principal symbol on approximately 33 United States postal stamps and in the design of at least 43 more, more times than any other symbol. United States Postal Service, Definitive Mint Set 15 (1988).

Both Congress and the States have enacted numerous laws regulating misuse of the American flag. Until 1967, Congress left the regulation of misuse of the flag up to the States. Now, however, Title 18 U. S. C. § 700(a), provides that:

> "Whoever knowingly casts contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it shall be fined not more than $1,000 or imprisoned for not more than one year, or both."

Congress has also prescribed, *inter alia*, detailed rules for the design of the flag, 4 U. S. C. § 1, the time and occasion of flag's display, 36 U. S. C. § 174, the position and manner of its display, § 175, respect for the flag, § 176, and conduct during hoisting, lowering and passing of the flag, § 177. With the exception of Alaska and Wyoming, all of the States now have statutes prohibiting the burning of the flag.[1] Most of

[1] See Ala. Code § 13A-11-12 (1982); Ariz. Rev. Stat. Ann. § 13-3703 (1978); Ark. Code Ann. § 5-51-207 (1987); Cal. Mil. & Vet. Code Ann. § 614 (West 1988); Colo. Rev. Stat. § 18-11-204 (1986); Conn. Gen. Stat. § 53-258a (1985); Del. Code. Ann., Tit. 11, § 1331 (1987); Fla. Stat. § 256.05-256.051 (1975); Fla. Stat. § 876.52 (1976); Ga. Code Ann. § 50-3-9 (1986); Haw. Rev. Stat. § 711-1107 (1988); Idaho Code § 18-3401 (1987); Ill. Rev. Stat., ch. 1, ¶¶ 3307, 3351 (1980); Ind. Code § 35-45-1-4 (1986); Iowa Code § 32.1 (1978 and Supp. 1989); Kan. Stat. Ann. § 21-4114 (1988); Ky. Rev. Stat. Ann. § 525.110 (Michie Supp. 1988); La. Rev. Stat. Ann. § 14:116 (West 1986); Me. Rev. Stat. Ann., Tit. 1, § 254 (1979); Md. Ann. Code, Art. 27, § 83 (1988); Mass. Gen. Laws § 264, 5 (1980); Mich. Comp. Laws § 750.246 (1968); Minn. Stat. § 609.40 (1987); Miss. Code Ann. § 97-7-39 (1973); Mo. Rev. Stat. § 578.095 (Supp. 1989); Mont. Code Ann. § 45-8-215 (1987); Neb. Rev. Stat. § 28-928 (1985); Nev. Rev. Stat. § 201.290 (1986); N. H. Rev. Stat. Ann. § 646.1 (1986); N. J. Stat. Ann. § 2C:33-9 (West 1982); N. M. Stat. Ann. § 30-21-4 (1984); N. Y. Gen. Bus. Law 136 (McKinney 1988); N. C. Gen. Stat. § 14-381 (1986); N. D. Cent.

the state statutes are patterned after the Uniform Flag Act of 1917, which in § 3 provides: "No person shall publicly mutilate, deface, defile, defy, trample upon, or by word or act cast contempt upon any such flag, standard, color, ensign or shield." Proceedings of National Conference of Commissioners on Uniform State Laws 323–324 (1917). Most were passed by the States at about the time of World War I. Rosenblatt, Flag Desecration Statutes: History and Analysis, 1972 Wash. U. L. Q. 193, 197.

The American flag, then, throughout more than 200 years of our history, has come to be the visible symbol embodying our Nation. It 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. Millions and millions of Americans regard it with an almost mystical reverence regardless of what sort of social, political, or philosophical beliefs they may have. I cannot agree that the First Amendment invalidates the Act of Congress, and the laws of 48 of the 50 States, which make criminal the public burning of the flag.

More than 80 years ago in *Halter* v. *Nebraska*, 205 U. S. 34 (1907), this Court upheld the constitutionality of a Nebraska statute that forbade the use of representations of the American flag for advertising purposes upon articles of merchandise. The Court there said:

> "For that flag every true American has not simply an appreciation but a deep affection. . . . Hence, it has

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Code § 12.1–07–02 (1985); Ohio Rev. Code Ann. § 2927.11 (1987); Okla. Stat., Tit. 21, § 372 (1983); Ore. Rev. Stat. § 166.075 (1987); 18 Pa. Cons. Stat. § 2102 (1983); R. I. Gen. Laws § 11–15–2 (1981); S. C. Code §§ 16–17–220, 16–17–230 (1985) and Supp. 1988; S. D. Codified Laws § 22–9–1 (1988); Tenn. Code Ann. §§ 39–5–843, 39–5–847 (1982); Tex. Penal Code Ann. § 42.09 (1974); Utah Code Ann. § 76–9–601 (1978); Vt. Stat. Ann., Tit. 13, § 1903 (1974); Va. Code § 18.2–488 (1988); Wash. Rev. Code § 9.86.030 (1988); W. Va. Code § 61–1–8 (1989); Wis. Stat. § 946.05 (1981).

> often occurred that insults to a flag have been the cause of war, and indignities put upon it, in the presence of those who revere it, have often been resented and sometimes punished on the spot." *Id.*, at 41.

Only two Terms ago, in *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Committee*, 483 U. S. 522 (1987), the Court held that Congress could grant exclusive use of the word "Olympic" to the United States Olympic Committee. The Court thought that this "restrictio[n] on expressive speech properly [was] characterized as incidental to the primary congressional purpose of encouraging and rewarding the USOC's activities." *Id.*, at 536. As the Court stated, "when a word [or symbol] acquires value 'as the result of organization and the expenditure of labor, skill, and money' by an entity, that entity constitutionally may obtain a limited property right in the word [or symbol]." *Id.*, at 532, quoting *International News Service* v. *Associated Press*, 248 U. S. 215, 239 (1918). Surely Congress or the States may recognize a similar interest in the flag.

But the Court insists that the Texas statute prohibiting the public burning of the American flag infringes on respondent Johnson's freedom of expression. Such freedom, of course, is not absolute. See *Schenck* v. *United States*, 249 U. S. 47 (1919). In *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942), a unanimous Court said:

> "Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include 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. It has been well observed

> that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Id.*, at 571–572 (footnotes ommitted).

The Court upheld Chaplinsky's conviction under a state statute that made it unlawful to "address any offensive, derisive or annoying word to any person who is lawfully in any street or other public place." *Id.*, at 569. Chaplinsky had told a local Marshal, "You are a God damned racketeer" and a "damned Fascist and the whole government of Rochester are Fascists or agents of Fascists." *Ibid.*

Here it may equally well be said that the public burning of the American flag by Johnson was no essential part of any exposition of ideas, and at the same time it had a tendency to incite a breach of the peace. Johnson was free to make any verbal denunciation of the flag that he wished; indeed, he was free to burn the flag in private. He could publicly burn other symbols of the Government or effigies of political leaders. He did lead a march through the streets of Dallas, and conducted a rally in front of the Dallas City Hall. He engaged in a "die-in" to protest nuclear weapons. He shouted out various slogans during the march, including: "Reagan, Mondale which will it be? Either one means World War III"; "Ronald Reagan, killer of the hour, Perfect example of U. S. power"; and "red, white and blue, we spit on you, you stand for plunder, you will go under." Brief for Respondent 3. For none of these acts was he arrested or prosecuted; it was only when he proceeded to burn publicly an American flag stolen from its rightful owner that he violated the Texas statute.

The Court could not, and did not, say that Chaplinsky's utterances were not expressive phrases—they clearly and succinctly conveyed an extremely low opinion of the addressee. The same may be said of Johnson's public burning of the flag in this case; it obviously did convey Johnson's bitter dislike

of his country. But his act, like Chaplinsky's provocative words, conveyed nothing that could not have been conveyed and was not conveyed just as forcefully in a dozen different ways. As with "fighting words," so with flag burning, for purposes of the First Amendment: It is "no essential part of any exposition of ideas, and [is] of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed" by the public interest in avoiding a probable breach of the peace. The highest courts of several States have upheld state statutes prohibiting the public burning of the flag on the grounds that it is so inherently inflammatory that it may cause a breach of public order. See, *e. g.*, *State* v. *Royal*, 113 N. H. 224, 229, 305 A. 2d 676, 680 (1973); *State* v. *Waterman*, 190 N. W. 2d 809, 811–812 (Iowa 1971); see also *State* v. *Mitchell*, 32 Ohio App. 2d 16, 30, 288 N. E. 2d 216, 226 (1972).

The result of the Texas statute is obviously to deny one in Johnson's frame of mind one of many means of "symbolic speech." 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, it seems fair to say, is most likely to be indulged in not to express any particular idea, but to antagonize others. Only five years ago we said in *Los Angeles City Council* v. *Taxpayers for Vincent*, 466 U. S. 789, 812 (1984), that "the First Amendment does not guarantee the right to employ every conceivable method of communication at all times and in all places." 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. Such opposition is no proper basis for restricting speech or expression under the

First Amendment. It was Johnson's use of this particular symbol, and not the idea that he sought to convey by it or by his many other expressions, for which he was punished.

Our prior cases dealing with flag desecration statutes have left open the question that the Court resolves today. In *Street* v. *New York*, 394 U. S. 576, 579 (1969), the defendant burned a flag in the street, shouting "We don't need no damned flag" and, "[i]f they let that happen to Meredith we don't need an American flag." The Court ruled that since the defendant might have been convicted solely on the basis of his words, the conviction could not stand, but it expressly reserved the question of whether a defendant could constitutionally be convicted for burning the flag. *Id.*, at 581.

Chief Justice Warren, in dissent, stated: "I believe that the States and Federal Government do have the power to protect the flag from acts of desecration and disgrace. . . . [I]t is difficult for me to imagine that, had the Court faced this issue, it would have concluded otherwise." *Id.*, at 605 (Warren, C. J., dissenting). Justices Black and Fortas also expressed their personal view that a prohibition on flag burning did not violate the Constitution. See *id.*, at 610 (Black, J., dissenting) ("It passes my belief that anything in the Federal Constitution bars a State from making the deliberate burning of the American Flag an offense"); *id.*, at 615–617 (Fortas, J., dissenting) ("[T]he States and the Federal Government have the power to protect the flag from acts of desecration committed in public. . . . [T]he flag is a special kind of personality. Its use is traditionally and universally subject to special rules and regulation. . . . A person may 'own' a flag, but ownership is subject to special burdens and responsibilities. A flag may be property, in a sense; but it is property burdened with peculiar obligations and restrictions. Certainly . . . these special conditions are not *per se* arbitrary or beyond governmental power under our Constitution").

In *Spence* v. *Washington*, 418 U. S. 405 (1974), the Court reversed the conviction of a college student who displayed

the flag with a peace symbol affixed to it by means of removable black tape from the window of his apartment. Unlike the instant case, there was no risk of a breach of the peace, no one other than the arresting officers saw the flag, and the defendant owned the flag in question. The Court concluded that the student's conduct was protected under the First Amendment, because "no interest the State may have in preserving the physical integrity of a privately owned flag was significantly impaired on these facts." *Id.*, at 415. The Court was careful to note, however, that the defendant "was not charged under the desecration statute, nor did he permanently disfigure the flag or destroy it." *Ibid.*

In another related case, *Smith* v. *Goguen*, 415 U. S. 566 (1974), the appellee, who wore a small flag on the seat of his trousers, was convicted under a Massachusetts flag-misuse statute that subjected to criminal liability anyone who "publicly . . . treats contemptuously the flag of the United States." *Id.*, at 568–569. The Court affirmed the lower court's reversal of appellee's conviction, because the phrase "treats contemptuously" was unconstitutionally broad and vague. *Id.*, at 576. The Court was again careful to point out that "[c]ertainly nothing prevents a legislature from defining with substantial specificity what constitutes forbidden treatment of United States flags." *Id.*, at 581–582. See also *id.*, at 587 (WHITE, J., concurring in judgment) ("The flag is a national property, and the Nation may regulate those who would make, imitate, sell, possess, or use it. I would not question those statutes which proscribe mutilation, defacement, or burning of the flag or which otherwise protect its physical integrity, without regard to whether such conduct might provoke violence. . . . There would seem to be little question about the power of Congress to forbid the mutilation of the Lincoln Memorial. . . . The flag is itself a monument, subject to similar protection"); *id.*, at 591 (BLACKMUN, J., dissenting) ("Goguen's punishment was con-

stitutionally permissible for harming the physical integrity of the flag by wearing it affixed to the seat of his pants").

But the Court today will have none of this. The uniquely deep awe and respect for our flag felt by virtually all of us are bundled off under the rubric of "designated symbols," *ante*, at 19, that the First Amendment prohibits the government from "establishing." But the government has not "established" this feeling; 200 years of history have done that. The government is simply recognizing as a fact the profound regard for the American flag created by that history when it enacts statutes prohibiting the disrespectful public burning of the flag.

The Court concludes its opinion with a regrettably patronizing civics lecture, presumably addressed to the Members of both Houses of Congress, the members of the 48 state legislatures that enacted prohibitions against flag burning, and the troops fighting under that flag in Vietnam who objected to its being burned: "The way to preserve the flag's special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong." *Ante*, at 21–22. The Court's role as the final expositor of the Constitution is well established, but its role as a platonic guardian admonishing those responsible to public opinion as if they were truant school children has no similar place in our system of government. The cry of "no taxation without representation" animated those who revolted against the English Crown to found our Nation—the idea that those who submitted to government should have some say as to what kind of laws would be passed. 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.

Our Constitution wisely places limits on powers of legislative majorities to act, but the declaration of such limits by this Court "is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a

doubtful case." *Fletcher* v. *Peck*, 6 Cranch 87, 128 (1810) (Marshall, C. J.). Uncritical extension of constitutional protection to the burning of the flag risks the frustration of the very purpose for which organized governments are instituted. The Court decides that the American flag is just another symbol, about which not only must opinions pro and con be tolerated, but for which the most minimal public respect may not be enjoined. The government may conscript men into the Armed Forces where they must fight and perhaps die for the flag, but the government may not prohibit the public burning of the banner under which they fight. I would uphold the Texas statute as applied in this case.[2]

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[2] In holding that the Texas statute as applied to Johnson violates the First Amendment, the Court does not consider Johnson's claims that the statute is unconstitutionally vague or overbroad. Brief for Respondent 24–30. I think those claims are without merit. In *New York State Club Assn.* v. *City of New York*, 487 U. S. ——, —— (1988), we stated that a facial challenge is only proper under the First Amendment when a statute can never be applied in a permissible manner or when, even if it may be validly applied to a particular defendant, it is so broad as to reach the protected speech of third parties. While Tex. Penal Code Ann. § 42.09 (1989) "may not satisfy those intent on finding fault at any cost, [it is] set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with." *CSC* v. *Letter Carriers*, 413 U. S. 548, 579 (1973). By defining "desecrate" as "deface," "damage" or otherwise "physically mistreat" in a manner that the actor knows will "seriously offend" others, § 42.09 only prohibits flagrant acts of physical abuse and destruction of the flag of the sort at issue here—soaking a flag with lighter fluid and igniting it in public—and not any of the examples of improper flag etiquette cited in Respondent's brief.

SUPREME COURT OF THE UNITED STATES

No. 88–155

TEXAS, PETITIONER *v.* GREGORY LEE JOHNSON

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

[June 21, 1989]

JUSTICE STEVENS, dissenting.

As the Court analyzes this case, it presents the question whether the State of Texas, or indeed the Federal Government, has the power to prohibit the public desecration of the American flag. The question is unique. In my judgment rules that apply to a host of other symbols, such as state flags, armbands, or various privately promoted emblems of political or commercial identity, are not necessarily controlling. Even if flag burning could be considered just another species of symbolic speech under the logical application of the rules that the Court has developed in its interpretation of the First Amendment in other contexts, this case has an intangible dimension that makes those rules inapplicable.

A country's flag is a symbol of more than "nationhood and national unity." *Ante*, at 9, 12, 13, 15, 19, 22. It also signifies the ideas that characterize the society that has chosen that emblem as well as the special history that has animated the growth and power of those ideas. The fleurs-de-lis and the tricolor both symbolized "nationhood and national unity," but they had vastly different meanings. The message conveyed by some flags—the swastika, for example—may survive long after it has outlived its usefulness as a symbol of regimented unity in a particular nation.

So it is with the American flag. It is more than a proud symbol of the courage, the determination, and the gifts of nature that transformed 13 fledgling Colonies into a world

power. It is a symbol of freedom, of equal opportunity, of religious tolerance, and of goodwill for other peoples who share our aspirations. The symbol carries its message to dissidents both at home and abroad who may have no interest at all in our national unity or survival.

The value of the flag as a symbol cannot be measured. Even so, I have no doubt that the interest in preserving that value for the future is both significant and legitimate. Conceivably that value will be enhanced by the Court's conclusion that our national commitment to free expression is so strong that even the United States as ultimate guarantor of that freedom is without power to prohibit the desecration of its unique symbol. But I am unpersuaded. The creation of a federal right to post bulletin boards and graffiti on the Washington Monument might enlarge the market for free expression, but at a cost I would not pay. Similarly, in my considered judgment, sanctioning the public desecration of the flag will tarnish its value—both for those who cherish the ideas for which it waves and for those who desire to don the robes of martyrdom by burning it. That tarnish is not justified by the trivial burden on free expression occasioned by requiring that an available, alternative mode of expression—including uttering words critical of the flag, see *Street* v. *New York*, 394 U. S. 576 (1969)—be employed.

It is appropriate to emphasize certain propositions that are not implicated by this case. The statutory prohibition of flag desecration does not "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624, 642 (1943). The statute does not compel any conduct or any profession of respect for any idea or any symbol.

Nor does the statute violate "the government's paramount obligation of neutrality in its regulation of protected communication." *Young* v. *American Mini Theatres, Inc.*, 427

U. S. 50, 70 (1976) (plurality opinion). The content of respondent's message has no relevance whatsoever to the case. The concept of "desecration" does not turn on the substance of the message the actor intends to convey, but rather on whether those who view the *act* will take serious offense. Accordingly, one intending to convey a message of respect for the flag by burning it in a public square might nonetheless be guilty of desecration if he knows that others—perhaps simply because they misperceive the intended message—will be seriously offended. Indeed, even if the actor knows that all possible witnesses will understand that he intends to send a message of respect, he might still be guilty of desecration if he also knows that this understanding does not lessen the offense taken by some of those witnesses. Thus, this is not a case in which the fact that "it is the speaker's opinion that gives offense" provides a special "reason for according it constitutional protection," *FCC* v. *Pacifica Foundation*, 438 U. S. 726, 745 (1978) (plurality opinion). The case has nothing to do with "disagreeable ideas," see *ante*, at 11. It involves disagreeable conduct that, in my opinion, diminishes the value of an important national asset.

The Court is therefore quite wrong in blandly asserting that respondent "was prosecuted for his expression of dissatisfaction with the policies of this country, expression situated at the core of our First Amendment values." *Ante*, at 13. Respondent was prosecuted because of the method he chose to express his dissatisfaction with those policies. Had he chosen to spray paint—or perhaps convey with a motion picture projector—his message of dissatisfaction on the facade of the Lincoln Memorial, there would be no question about the power of the Government to prohibit his means of expression. The prohibition would be supported by the legitimate interest in preserving the quality of an important national asset. Though the asset at stake in this case is in-

tangible, given its unique value, the same interest supports a prohibition on the desecration of the American flag.*

The ideas of liberty and equality have been an irresistible force in motivating leaders like Patrick Henry, Susan B. Anthony, and Abraham Lincoln, schoolteachers like Nathan Hale and Booker T. Washington, the Philippine Scouts who fought at Bataan, and the soldiers who scaled the bluff at Omaha Beach. If those ideas are worth fighting for—and our history demonstrates that they are—it cannot be true that the flag that uniquely symbolizes their power is not itself worthy of protection from unnecessary desecration.

I respectfully dissent.

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*The Court suggests that a prohibition against flag desecration is not content-neutral because this form of symbolic speech is only used by persons who are critical of the flag or the ideas it represents. In making this suggestion the Court does not pause to consider the far-reaching consequences of its introduction of disparate impact analysis into our First Amendment jurisprudence. It seems obvious that a prohibition against the desecration of a gravesite is content-neutral even if it denies some protesters the right to make a symbolic statement by extinguishing the flame in Arlington Cemetery where John F. Kennedy is buried while permitting others to salute the flame by bowing their heads. Few would doubt that a protester who extinguishes the flame has desecrated the gravesite, regardless of whether he prefaces that act with a speech explaining that his purpose is to express deep admiration or unmitigated scorn for the late President. Likewise, few would claim that the protester who bows his head has desecrated the gravesite, even if he make clear that his purpose is to show disrespect. In such a case, as in a flag burning case, the prohibition against desecration has absolutely nothing to do with the content of the message that the symbolic speech is intended to convey.

Syllabus

(b) Texas has not asserted an interest in support of Johnson's conviction that is unrelated to the suppression of expression and would therefore permit application of the test set forth in *United States* v. *O'Brien*, 391 U. S. 367, whereby an important governmental interest in regulating nonspeech can justify incidental limitations on First Amendment freedoms when speech and nonspeech elements are combined in the same course of conduct. An interest in preventing breaches of the peace is not implicated on this record. Expression may not be prohibited on the basis that an audience that takes serious offense to the expression may disturb the peace, since the Government cannot assume that every expression of a provocative idea will incite a riot but must look to the actual circumstances surrounding the expression. Johnson's expression of dissatisfaction with the Federal Government's policies also does not fall within the class of "fighting words" likely to be seen as a direct personal insult or an invitation to exchange fisticuffs. This Court's holding does not forbid a State to prevent "imminent lawless action" and, in fact, Texas has a law specifically prohibiting breaches of the peace. Texas' interest in preserving the flag as a symbol of nationhood and national unity is related to expression in this case and, thus, falls outside the *O'Brien* test. Pp. 8–12.

(c) The latter interest does not justify Johnson's conviction. The restriction on Johnson's political expression is content-based, since the Texas statute is not aimed at protecting the physical integrity of the flag in all circumstances, but is designed to protect it from intentional and knowing abuse that causes serious offense to others. It is therefore subject to "the most exacting scrutiny." *Boos* v. *Barry*, 485 U. S. 312. The Government may not prohibit the verbal or nonverbal expression of an idea merely because society finds the idea offensive or disagreeable, even where our flag is involved. Nor may a State foster its own view of the flag by prohibiting expressive conduct relating to it, since the Government may not permit designated symbols to be used to communicate a limited set of messages. Moreover, this Court will not create an exception to these principles protected by the First Amendment for the American flag alone. Pp. 12–22.

755 S. W. 2d 92, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which MARSHALL, BLACKMUN, SCALIA, and KENNEDY, JJ., joined. KENNEDY, J., filed a concurring opinion. REHNQUIST, C. J., filed a dissenting opinion, in which WHITE and O'CONNOR, JJ., joined. STEVENS, J., filed a dissenting opinion.

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

TEXAS *v.* JOHNSON

CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 88–155. Argued March 21, 1989—Decided June 21, 1989

During the 1984 Republican National Convention, respondent Johnson participated in a political demonstration to protest the policies of the Reagan administration and some Dallas-based corporations. After a march through the city streets, Johnson burned an American flag while protesters chanted. No one was physically injured or threatened with injury, although several witnesses were seriously offended by the flag-burning. Johnson was convicted of desecration of a venerated object in violation of a Texas statute, and a state court of appeals affirmed. However, the Texas Court of Criminal Appeals reversed, holding that the State, consistent with the First Amendment, could not punish Johnson for burning the flag in these circumstances. The court first found that Johnson's burning of the flag was expressive conduct protected by the First Amendment. The court concluded that the State could not criminally sanction flag desecration in order to preserve the flag as a symbol of national unity. It also held that the statute did not meet the State's goal of preventing breaches of the peace, since it was not drawn narrowly enough to encompass only those flag-burnings that would likely result in a serious disturbance, and since the flag-burning in this case did not threaten such a reaction. Further, it stressed that another Texas statute prohibited breaches of the peace and could be used to prevent disturbances without punishing this flag desecration.

Held: Johnson's conviction for flag desecration is inconsistent with the First Amendment. Pp. 4–22.

(a) Under the circumstances, Johnson's burning of the flag constituted expressive conduct, permitting him to invoke the First Amendment. The State conceded that the conduct was expressive. Occurring as it did at the end of a demonstration coinciding with the Republican National Convention, the expressive, overtly political nature of the conduct was both intentional and overwhelmingly apparent. Pp. 4–8.

SCANDAL

TO: SENATOR

FM: WALT

IF THE WASHINGTON TIMES HOMOSEXUAL SCANDAL COMES UP:

o IMMEDIATELY STATE THAT IT IS AN ONGOING CRIMINAL INVESTIGATION. AT THIS POINT, ALL THE DETAILS ARE COMING FROM THE PRESS.

o IF WE HAVE LEARNED ANYTHING AT ALL FROM THE TOWER DEBACLE, IT IS TO DEMAND THE MOST CAREFUL AND ACCURATE FACTS. INNUENDO, SMEARS AND RUMORS CAN NOT BE TOLERATED.

o PEOPLE'S LIVES AND REPUTATIONS ARE AT STAKE. HAVING SAID THAT, IF LAWS ARE BROKEN, IF NATIONAL SECURITY IS THREATENED, THEN IT IS IMPERATIVE THAT THE INVESTIGATION PROCEED WITH VIGOR.

o WITH REGARD TO THE ELIZABTH DOLE CONNECTION (PAUL BALACH), PLEASE REFER TO THE ATTACHED QUOTES (next page).

o OR, YOU CAN PIVOT OFF THE STORY AND GET THE FOCUS BACK ON THE DOUBLE STANDARD ON ETHICS: OUTCRY WHEN DEMOCRATS GO DOWN, GLORIOUS SPORT WHEN REPUBLICANS ARE KICKED THROUGH THE GOAL POSTS.
TOWER, BORK AND REAGAN "SLEAZE" VS. 'SAD' ENDING TO GOOD MEN LIKE JIM WRIGHT AND COELHO.

GOP

From page A1

had procured male prostitutes and was subjected to blackmail threats by one of the call boys.

In a letter announcing his resignation as Mrs. Dole's political personnel liaison to the White House, Paul R. Balach wrote: "I hereby resign my position this date due to the public disclosure of activities concerning my personal life."

Mr. Balach said in an interview late yesterday he was told by the department's solicitor, Robert Davis, he must either resign or be fired. He said he was not allowed to talk to Mrs. Dole about the matter.

"They said they reached this decision with a great deal of pain because I was a valued employee. But they thought that the cloud surrounding me would not allow me to continue to hold a political job in the administration," he said.

"I think they are protecting Elizabeth, and frankly I would do the same thing," Mr. Balach said. "I live paycheck to paycheck. They promised me that they would try and find me another position somewhere in the government, but I just don't know. . . . Somebody else is going to clean out my office. They didn't want me to come back into the office."

U.S. Attorney Jay B. Stephens confirmed in a statement yesterday that his office "has been investigating allegations involving credit card fraud" following a Feb. 28 raid on the call boy ring's Northwest Washington headquarters. But Mr. Stephens refused to discuss the matter further.

A Justice Department spokesman said the investigation was being led by the Secret Service.

But the spokesman denied that the government was investigating the possibility that homosexuals who held senior posts during the Reagan administration were compromised by blackmail or by Soviet agents who may have used young

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SPENCE

From page A1

"For once in his life, Craig was doing something nice. We just thought, neat, we get a free midnight tour of the White House," the man said.

Another person on the tour said the group walked through all the public areas of the White House and "even took pictures of ourselves in the barber's chair."

After arriving in Washington in the late 1970s, Mr. Spence was hosting parties during the early Reagan years attended by, among others, journalists Eric Sevareid, Ted Koppel and William Safire; former CIA Director William Casey; the late John Mitchell, attorney general in the Nixon administration; conservative activist Phyllis Schlafly; Ambassador James Lilley; and Gen. Alfred M. Gray, the commandant of the cerned about him."

One former Reagan administration official who worked at the U.S. Information Agency and is an open homosexual said he went to private parties at Mr. Spence's home and saw a great deal of recording and taping equipment.

"It was my clear impression that the house was bugged," he said.

Another man, an Air Force sergeant who worked for Mr. Spence as a bodyguard, said: "The house was definitely bugged. I can't say what he was doing with the information. I don't know that. But he was recording what occurred there."

Several others confirmed that Mr. Spence had bragged on several occasions that he had his house bugged and that conversations between guests often had been overheard. They said Mr. Spence often would come down late to parties he hosted and told close associates that he had been listening to what was being said about him.

Several people also said Mr.

S&LS

June 30, 1989

TO: SENATOR DOLE

FROM: DAVID TAYLOR

SUBJECT: S&L Update for Face the Nation

Update:

The Senate selected 8 Senators to serve on the conference, 5 from the Banking Committee and 3 from the Finance Committee. In the House, things are a bit more complicated. At last count, the House had appointed a total of 95 members from 5 different Committees to serve on the conference.

The conferees are scheduled to begin work on the day that the Senate comes back in session (July 11th). Senate Banking Committee Chairman Don Riegle has been elected chairman of the conference, and I understand that he plans to begin work on the major issues right away.

Talking Points:

- This is a massive piece of legislation. It lays the groundwork for a structural overhaul of the thrift regulatory system and provides a funding mechanism for the largest bailout in history -- the total cost could run over $157 billion over the next 10 years.

- There are major differences between the House and Senate versions of the S&L Reform bill. The funding and housing provisions are obvious examples. My hope is that the conferees will decide to include the toughest provisions in both bills in the conference agreement.

- If I had one thing to say to the conferees on this bill, I would say this. We owe the American taxpayer our best effort to ensure that this never happens again. That means holding firm on tough capital requirements and keeping the bill from getting bogged down with special interest amendments.