FLAG BURNING AND THE FIRST AMENDMENT: WHY EXECUTIVE ACTION CANNOT OVERCOME SUPREME COURT PRECEDENT

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This paper examines the constitutional barriers to criminalizing flag burning in the United States, particularly with regard to President Trump's August 2025 executive order seeking to prosecute flag desecration. Beginning with the historical development of flag protection laws, the paper analyzes how Texas v. Johnson *(1989) and* United States v. Eichman *(1990) established flag burning as protected speech under the First Amendment. It then evaluates the repeated congressional failures to pass a constitutional amendment overturning* Johnson *and explains why the Trump administration's reliance on the imminent lawless action and fighting doctrines cannot survive constitutional scrutiny. The article concludes that, absent an amendment, flag burning will remain protected expression regardless of executive proclamations, and that the current Supreme Court is unlikely to alter that precedent.*

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INTRODUCTION

Starting in August 2025, President Donald Trump has proposed outlawing flag burning and imposing severe punishments on those who damage or destroy the American flag.[2] This reignited a debate that has been quietly circulating within American political discourse for decades: What is the scope of First Amendment protections? Flag burning remains one of the most inflammatory forms of political protest, as it almost always provokes immediate reaction and calls for legal action.

Yet despite its appeal to many Americans' sense of patriotism, the constitutional barriers to criminalizing flag burning are formidable and, under current Supreme Court precedent, appear nearly insurmountable. This article argues that barring a constitutional amendment, flag burning will remain protected speech under the First Amendment regardless of executive proclamations.

This article proceeds in seven parts. Part I examines the historical development of flag protection laws and the relevant Supreme Court precedent prior to 1989. Part II analyzes *Texas v. Johnson* and its constitutional significance, particularly the way this case establishes the modern First Amendment framework protecting flag burning as a symbolic action. Part III discusses Congress's response to *Johnson* and the ensuing legal *conflict*, focusing on the Flag Protection Act of 1989 and the Supreme Court's decision in *United States v. Eichman*. Part IV traces the repeated efforts to overturn *Johnson* through constitutional amendment and explains why those efforts have consistently failed. Part V evaluates President Trump's recent executive actions and arguments seeking to circumvent *Johnson*, explaining why they conflict with established First

[2] Nik Popli, *Trump Signs Executive Order on Flag Burning, Which the Supreme Court Considers Protected Speech*, TIME (Aug. 25, 2025, 3:55 PM), https://time.com/7312047/trump-burning-american-flag-supreme-court/.

Amendment rulings. Part VI considers whether the current Supreme Court is likely to overturn *Johnson*, concluding that such a reversal is not likely. Part VII concludes the discussion by assessing the broader constitutional and practical barriers to criminalizing flag burning.

I. FLAG PROTECTION LAWS BEFORE 1989

President Donald Trump is not the first American with the impulse to protect the American flag from desecration. Beginning in the late nineteenth century, states enacted laws designed to prevent the flag's use in advertising and to prohibit acts that would physically damage or deface the flag.[3] One Nebraska law prohibited the use of the American flag in commercial advertising. In 1907, two businessmen who had been selling beer with the American flag printed on the label challenged the law, bringing the case to the Supreme Court in *Halter v. Nebraska*. Nebraska won, and Harlan penned the majority opinion defending them. Justice Harlan emphasized the symbolic importance of the flag, stating that "it has 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." Due to the sacred nature of what the flag symbolizes, the Court reasoned that it is worthy of protections beyond the strict interpretation of the First Amendment.[4]

Beginning in 1897, individual states began adopting their own flag-desecration statutes. The first few states to enact such laws were Illinois, Pennsylvania, and South Dakota.[5] By 1932, all the states had adopted their own laws. These laws prohibited using the flag in any type of advertisement and defiling it in any way.[6]

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[3] *Timeline of Flag Desecration Issues*, USHISTORY.ORG, https://www.ushistory.org/betsy/more/desecration.htm.
[4] *Halter v. Nebraska*, 205 U.S. 34 (1907).
[5] *Timeline of Flag Desecration Issues*, *supra* note 3.
[6] *Id.*

Following the implementation of these laws, during World War I, over a dozen people were legally punished for violating state laws that prohibited insulting the American flag. Moreover, at the federal level, through the Sedition Act of 1918, Congress prohibited writing anything with "disloyal" language about the American flag, but specified that this only applies if the intent is to harm the flag.[7] In 1919, in *Abrams v. United States*, the Supreme Court ruled that the Sedition Act was lawful and did not violate the First Amendment. Thus, through the First World War, both state and federal laws prohibited the desecration of the flag.[8]

However, following World War I, the Court gradually shifted its position. In 1931, in *Stromberg v. California*, the Court determined that a state law prohibiting red flags, which symbolized communism, infringed on the First Amendment right to protest the government.[9] This case marked the first time the First Amendment was invoked to protect not only speech but also symbolic actions.

In 1943, in *West Virginia Board of Education v. Barnette,* the Court revisited a case from 3 years earlier and ruled that children could not be forced to salute the American flag during the Pledge of Allegiance. Justice Jackson famously wrote, "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."[10]

The Vietnam War era marked the real turning point in the constitutional treatment of symbolic flag burning. As opposition to the war intensified, flag burning was used as a form of antiwar protest. Images of

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[7] Jonathan W. White, Daniel Glenn & Rachel Wagner, *We Didn't Start the Fire: The Unknown History of Flag Desecration in America*, FED. LAW., Oct./Nov. 2017, https://www.fedbar.org/wp-content/uploads/2017/10/Unknown-History-of-Flag-Desecration-pdf-1.pdf.

[8] *Abrams v. United States,* 250 U.S. 616 (1919).

[9] *Stromberg v. California*, 283 U.S. 359 (1931).

[10] *W. Va. State Bd. of Educ. v. Barnette,* 319 U.S. 624, 642 (1943).

protestors setting American flags on fire became one of the defining symbols of the era.[11] Flag burning prosecutions increased, but so did constitutional challenges to flag desecration laws.

In 1967, over 200,000 protesters gathered in Central Park to protest the Vietnam War, where they also burned flags. The protest triggered a large media response and public anger about the desecration. This anger was made worse by the fact that the police did not make any arrests at the protest. Congress responded by passing the Flag Protection Act of 1968, expanding the ability of federal agencies to imprison and/or punish flag desecrators. The statute made it a crime to "knowingly cast contempt" on the American flag.[12]

Several pre-*Johnson* cases began to chip away at the foundations of flag protection laws, albeit without establishing clear precedent. In *Street v. New York* (1969), the Supreme Court overturned a conviction for flag burning on narrow grounds, ruling that the defendant could not be punished for his verbal disrespect toward the flag, though the Court declined to address whether the burning itself was protected.[13] In *Spence v. Washington* (1974), the Court ruled that displaying a peace symbol on an American flag was considered protected symbolic speech, arguing that the defendant's conduct was in essence communication and not actual destruction of the flag.[14]

For around two decades following the passing of the first federal flag protection statute in 1968, lower courts consistently upheld the constitutionality of flag desecration laws, and the Supreme Court declined to review these decisions. However, the Supreme Court's decisions in cases

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[11] Dave Roos, *The Volatile History of Flag Burning in the US*, HISTORY (Sept. 2, 2025), https://www.history.com/articles/flag-burning-first-amendment.

[12] *Id.*

[13] *Street v. New York*, 394 U.S. 576 (1969).

[14] *Spence v. Washington*, 418 U.S. 405 (1974).

like *Spence* suggested that a resolution of the flag burning question would soon follow.[15]

II. TEXAS V. JOHNSON

The Supreme Court addressed the question of flag burning directly in *Texas v. Johnson*,[16] a case arising from events at the 1984 Republican National Convention in Dallas. Gregory Lee Johnson, a member of the Revolutionary Communist Youth Brigade, participated in a political demonstration protesting the policies of the Reagan administration. As the protest was ending, Johnson burned an American flag while protesters chanted. No one was physically injured, though several witnesses testified that they were seriously offended.[17]

Texas prosecuted Johnson under a state law that prohibited desecration of esteemed objects, including the national flag. The prosecution argued that Texas had a legitimate interest in preventing breaches of the peace and preserving the flag as a symbol of national unity. Johnson was convicted and sentenced to one year in prison, a $2,000 fine, or both. However, the Texas Court of Criminal Appeals reversed the conviction, ruling that the state law violated the First Amendment.[18]

In a 5-4 decision penned by Justice William Brennan, the Supreme Court sided with Johnson.[19] The majority held that flag burning constitutes symbolic action protected by the First Amendment, which Texas's interests did not justify suppressing.

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[15] John R. Luckey, *Flag Desecration and the First Amendment*, CRS Rep. No. 95-709 (1995), https://www.everycrsreport.com/reports/95-709.html.
[16] *Texas v. Johnson*, 491 U.S. 397 (1989).
[17] *Id.*
[18] *Id.*
[19] *Id.* Justice Brennan's majority opinion was joined by Justices Marshall, Blackmun, Scalia, and Kennedy.

Justice Brennan's opinion established several crucial principles. First, the Court confirmed that conduct may constitute speech and thereby be protected by the First Amendment when the conduct is "sufficiently imbued with elements of communication."[20] The Court found that Johnson's flag burning was clearly intended to convey a particular message and that there was a strong likelihood that the message would be understood by those who viewed it. Because of this, Johnson's conduct was entitled to First Amendment protection.

Second, the Court applied a heightened standard of review to Texas's law because it restricted expression specifically because of the political message it conveyed, rather than regulating the conduct itself in a neutral way. While Texas claimed the law existed to prevent breaches of the peace, the Court found no evidence that Johnson's flag burning created any imminent threat of violence or disorder.[21] Therefore, the Court noted, the flag desecration statute was not aimed at preventing "breaches of the peace" generally, but rather at suppressing expression that would offend those who witnessed it.

Third, the Court rejected Texas's argument that the state had a compelling interest in preserving the flag as a symbol of national unity. The majority opinion acknowledged the flag's special place in American culture but held that this status could not justify prohibiting expression simply because it offends observers. In the Court's most frequently quoted passage, Justice Brennan wrote: "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."[22]

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[20] *Johnson*, 491 U.S. at 404.
[21] *Id.* at 407-10.
[22] *Id.* at 414.

Thus, the Court recognized that the flag serves as a symbol of national unity but concluded that the government cannot ensure respect for that symbol by punishing those who treat it disrespectfully. On the contrary, compelling respect for the flag would dilute the very freedom that makes the symbol worth protecting. The majority opinion therefore reflected a fundamental First Amendment principle: the government may not suppress speech simply to avoid offense to the public or to enforce "proper respect" for national symbols.

However, Chief Justice Rehnquist wrote a dissent along with Justices White and O'Connor, while Justice Stevens authored a separate dissent.[23] To argue that flag desecration is indeed unprotected, they emphasized the flag's unique position in American history and its role as the nation's visible symbol. Chief Justice Rehnquist recounted the flag's presence at key moments in American history and argued that the flag occupies such a unique position as a national symbol that the government should be permitted to prohibit its desecration.

The dissent distinguished flag burning from other forms of symbolic speech, arguing that the flag's special nature justified treating it differently from other objects. While the government cannot prohibit criticism of the flag or disagreement with what it represents, the dissent argued that the government should be permitted to protect the symbol's physical integrity without violating the First Amendment.

The public and political reaction to *Johnson* was swift and negative. Polls indicated that a substantial majority of Americans disagreed with the Court's decision and supported outlawing flag burning.[24] Members of

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[23] *Id.* at 421 (Rehnquist, C.J., dissenting); *id.* at 436 (Stevens, J., dissenting).

[24] Joseph Carroll, *Public Support for Constitutional Amendment on Flag Burning*, GALLUP (June 29, 2006), https://news.gallup.com/poll/23524/public-support-constitutional-amendment-flag-burning.aspx.

Congress from both parties condemned the decision, and President George H.W. Bush called for a constitutional amendment to overturn it.[25] The decision became a rallying point for conservatives who framed it as an example of judicial overreach and an offense to national symbols. It also put defenders of the ruling in the uncomfortable position of appearing to condone flag burning, even though what they supported was the constitutional principle underlying the Court's holding.

III. THE FLAG PROTECTION ACT OF 1989

Rather than immediately trying to amend the Constitution, Congress first attempted to enact a statute that could satisfy the Supreme Court's constitutional concerns while still prohibiting flag burning. The result was the Flag Protection Act of 1989, which was enacted just months after the *Johnson* decision.[26]

Instead of prohibiting flag burning based on the content or viewpoint of the message conveyed, the Act prohibited anyone from knowingly mutilating or defiling any flag of the United States, regardless of the person's motivation or message. The theory was that a content-neutral prohibition banning flag destruction for any purpose might survive constitutional scrutiny where Texas's statute had failed. As opposed to the 1968 Act, this statute removed the "casting contempt" requirement and focused only on the physical destruction of the flag.[27]

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[25] American Civil Liberties Union, *ACLU Calls Bush Stance on Flag Amendment Misguided*, ACLU (June 22, 1989), https://www.aclu.org/press-releases/aclu-calls-bush-stance-flag-amendment-misguided-says-constitution-must-be-protected.

[26] Flag Protection Act of 1989, Pub. L. No. 101-131, 103 Stat. 777 (codified at 18 U.S.C. § 700).

[27] Mitzi Ramos, *Flag Protection Acts of 1968 and 1989*, FIRST AMENDMENT ENCYCLOPEDIA (Jan. 1, 2009), https://firstamendment.mtsu.edu/article/flag-protection-acts-of-1968-and-1989/.

However, Congress's hopes were quickly disappointed. In *United States v. Eichman* (1990), the Supreme Court struck down the Flag Protection Act by the same 5-4 vote.[28] Justice Brennan again wrote for the majority, explaining that although the Act did not explicitly target expression based on its content, it still suffered from the same fundamental flaw as the Texas statute: it suppressed expression based on the content of the message.

The Court explained that the government's interest in protecting the physical integrity of the flag as a symbol was inherently related to the suppression of free expression.[29] The Act criminalized conduct that would damage the flag's physical integrity precisely because such damage would get in the way of the flag's function as a symbol. Merely eliminating explicit reference to the message conveyed did not transform the statute into a permissible content-neutral regulation.

Eichman made clear that as long as the government's interest in prohibiting flag desecration rested on protecting the flag's symbolic value, any such prohibition would be unconstitutional regardless of how it was drafted.

IV. THE CONSTITUTIONAL AMENDMENT EFFORTS

Following *United States v. Eichman*, proponents of flag protection laws recognized that only a constitutional amendment could overcome the Supreme Court's First Amendment analysis. Beginning in 1989, lawmakers proposed a series of amendments that would grant Congress the power to prohibit physical desecration of the American flag.[30]

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[28] *United States v. Eichman*, 496 U.S. 310 (1990).
[29] *Eichman*, 496 U.S. at 317–18.
[30] S.J. Res. 12, 109th Cong. (2005).

While the exact language varied across different proposals, most granted Congress the power "to prohibit the physical desecration of the flag of the United States."[31] This language was carefully crafted to grant authority without mandating specific penalties or defining precisely what conduct would be prohibited, leaving those determinations to future legislation.

Flag desecration amendments came remarkably close to passing several times. The House of Representatives passed these amendments multiple times, sometimes by overwhelming margins exceeding the required two-thirds supermajority. The real battleground was the Senate, where the amendment repeatedly fell just short of the 67 votes needed.[32]

The closest attempt occurred in 2006, when the Senate voted 66-34 in favor of the amendment. This was one vote away from the two-thirds majority required to send it to the states to be ratified.[33] Earlier attempts in 1989, 1995, and 2000 also came within a handful of votes of passing.[34] Each time, supporters mobilized veterans' groups and appealed to patriotic sentiment, while opponents warned against tampering with the First Amendment for the first time in history to restrict, rather than expand, freedom.[35]

Several factors contributed to the repeated failure of flag desecration amendments to clear the Senate. First, a core group of senators remained committed to protecting the First Amendment even

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[31] S.J. Res. 12, 109th Cong. (2005).

[32] American Civil Liberties Union, *Background on the Flag Desecration Amendment*, ACLU (Mar. 4, 2004), https://www.aclu.org/documents/background-flag-desecration-amendment.

[33] Roll Call Vote 189, 109th Cong., 2d Sess. (June 27, 2006), https://www.senate.gov/legislative/LIS/roll_call_votes/vote1092/vote_109_2_00189.htm.

[34] *Flag Desecration Amendment Fails by One Vote in Senate*, JURIST (June 27, 2006), https://www.jurist.org/news/2006/06/flag-desecration-amendment-fails-by/.

[35] *Flag-Burning Amendment Fails*, CQ ALMANAC (1995), https://library.cqpress.com/cqalmanac/document.php?id=cqal95-1100498.

when doing so was politically unpopular. These senators argued that the Bill of Rights should not be amended to restrict freedoms. They thus treated the First Amendment as a firm boundary that even widespread public sentiment could not override.[36]

Second, opponents used versions of the slippery slope argument. If the government could prohibit flag desecration, what other symbols might it protect next? Could it prohibit burning the Constitution, defacing images of the Founding Fathers, or desecrating religious symbols? These concerns resonated with senators worried about opening the door to broader restrictions on political expression.

Third, practical questions about enforcement complicated the debate. What exactly constitutes a flag? Would the amendment apply to flag imagery on clothing, napkins, or commercial products? These definitional problems suggested that implementing any legislation would create significant practical challenges.

The difficulty of amending the Constitution, evident here, reflects the Founders' design. Article V of the Constitution requires that amendments be proposed by two-thirds of both houses of Congress and ratified by three-fourths of state legislatures.[37] This high bar ensures that only amendments with overwhelming national support can alter the American government.

In the case of flag desecration amendments, the requirement that three-fourths of states ratify any amendment Congress proposed created additional uncertainty. While polls suggested public support for flag protection, translating that support into action by thirty-eight state legislatures was far from guaranteed.

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[36] *Why the Flag-Burning Ban Failed*, TIME (Oct. 22, 1989), https://time.com/archive/6919725/why-the-flag-burning-ban-failed/.

[37] U.S. Const. art. V.

V. TRUMP'S POSITION AND EXECUTIVE POWER LIMITATIONS

Donald Trump has repeatedly expressed support for criminalizing flag burning, both as a candidate and as president. In 2016, he tweeted that anyone who burns the American flag should face consequences, including possibly loss of citizenship or a year in jail.[38] In August 2025, President Trump escalated these efforts by issuing an executive order titled "Prosecuting Burning of the American Flag."[39]

The executive order invokes an interesting legal strategy by attempting to circumvent *Johnson* without directly challenging it. Rather than seeking an overall prohibition on flag burning, the order instructs the Attorney General to prosecute such conduct under existing federal laws on property damage, discrimination, hate crimes, and violence only when the flag burning causes "harm unrelated to expression, consistent with the First Amendment."[40] This framing attempts to sidestep Johnson by targeting the physical act rather than the message, but in practice it may be difficult to disentagle the two, since the expressive and physical dimensions of flag burning are inseparable. More controversially, the order claims that "the Court has never held that American Flag desecration conducted in a manner that is likely to incite imminent lawless action or that is an action amounting to 'fighting words' is constitutionally protected."[41]

This argument attempts to exploit two established exceptions to First Amendment protection. The first is the "imminent lawless action" test articulated in *Brandenburg v. Ohio* (1969), which held that speech may be

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[38] Luckey, *supra* note 15.

[39] Exec. Order No. 14,341, *Prosecuting Burning of the American Flag*, 90 Fed. Reg. 42,127 (Aug. 28, 2025), https://www.federalregister.gov/documents/2025/08/28/2025-16616/prosecuting-burning-of-the-american-flag.

[40] *Id.*

[41] *Id.*

prohibited only if it is “directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”[42] The second is the "fighting words” doctrine from *Chaplinsky v. New Hampshire* (1942), which excludes from First Amendment protection words that “by their very utterance inflict injury or tend to incite an immediate breach of the peace."[43]

It is worth noting that the Brandenburg incitement test has been interpreted narrowly: speech is only unprotected if it is both directed to produce imminent lawless action and likely to do so — an exceptionally high threshold that the Court has been reluctant to expand beyond classic speech. Applying this exception to flag burning would be a doctrinal stretch, as flag burning is typically a symbolic act rather than speech directed at provoking immediate violence or inflicting injury on a specific person. Similarly, modern First Amendment law treats fighting words as a very narrow doctrine that applies almost exclusively to direct, personal insults likely to provoke an immediate breach of the peace; it has never been successfully extended to symbolic political conduct of the kind at issue in flag burning cases.

The order also directs immigration authorities to "deny, prohibit, terminate, or revoke visas, residence permits, naturalization proceedings, and other immigration benefits" for foreign nationals who engage in flag desecration.[44]

These statements and executive actions resonate with Trump’s political base and reflect genuine frustration among many Americans who view flag burning as beyond the limits of acceptable protest. However, the theory underlying the order faces substantial constitutional obstacles and

[42] *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).
[43] *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).
[44] Exec. Order No. 14,341, *supra* note 39.

reflects a misunderstanding of how First Amendment exceptions actually operate.

The president cannot criminalize conduct. The constitutional separation of powers reserves lawmaking authority for Congress, and even Congress may not enact a law that violates the First Amendment as interpreted by the Supreme Court. A presidential executive order purporting to impose criminal penalties for flag burning would be void and unenforceable.

Moreover, the president cannot override Supreme Court precedent through executive action. The *Johnson* and *Eichman* decisions remain binding precedent until either the Supreme Court overturns them or a constitutional amendment supersedes them. No executive order can alter this reality. The Department of Justice is bound by the Constitution and cannot prosecute conduct that the Supreme Court has held to be constitutionally protected.

Trump's suggestion that flag burners should lose their citizenship raises additional constitutional problems. The Supreme Court held in *Afroyim v. Rusk* (1967) that Congress cannot revoke citizenship without a citizen's consent.[45] Denaturalizing flag burners would violate this established principle independent of any First Amendment concerns.

The Trump administration's legal strategy rests on the claim that flag burning can be prosecuted when it either incites imminent lawless action or constitutes fighting words. This theory faces several problems that motivated legal experts to quickly dismiss the executive order as constitutionally invalid.

[45] *Afroyim v. Rusk*, 387 U.S. 253 (1967).

First, the Supreme Court already addressed and rejected the "breach of peace" argument in *Johnson* itself. Texas had argued that Johnson's flag burning threatened to provoke violence, but the Court found no evidence of imminent disturbance. Justice Brennan wrote that the state's interest in preventing breaches of the peace was not in question here because "no disturbance of the peace actually occurred or threatened to occur."[46] The Court further held that the mere possibility that others might react violently to offensive expression cannot justify suppressing that expression. If it were otherwise, hostile audiences would be able to silence speakers simply by threatening violence.[47]

Second, the Brandenburg test requires both that speech be "directed to inciting" lawless action and that such action be "likely" to occur "imminently."[48] Flag burning as a political protest usually satisfies neither requirement. In Brandenburg, the Court protected even a Ku Klux Klan leader's inflammatory rhetoric because it was conditional and not an immediate call to violence.[49] If the conditional racist threats in Brandenburg were protected, then flag burning, which communicates political disagreement but does not call for violence, should certainly be protected. Flag burners are expressing opposition to government policies, not directing anyone to take immediate unlawful action.

Third, the fighting words doctrine has been substantially narrowed since *Chaplinsky* and has never been successfully applied to symbolic political protest. In *Cohen v. California* (1971), the Court rejected a fighting words argument to punish someone wearing a jacket reading "F— the Draft" in a courthouse, holding that the doctrine applies only to "personally abusive epithets" directed at specific individuals in face-to-face

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[46] *Texas v. Johnson*, 491 U.S. 397, 408 (1989).
[47] *Id.*
[48] *Brandenburg*, 395 U.S. at 447.
[49] *Id.*

confrontations.[50] Flag burning is not directed at any particular person; rather, it is a symbolic political statement directed at government policy. The Court in *Johnson* essentially rejected the fighting words theory by protecting flag burning even though observers testified to being "seriously offended."

Fourth, in *Virginia v. Black* (2003), the Court clarified that cross burning may be prohibited only when done with the intent to intimidate.[51] The Court struck down a provision that treated cross burning itself as evidence of such intent, holding that some instances of cross burning are protected expressions of "a statement of ideology" or "group solidarity."[52] If even cross burning, which is sometimes associated with terrorist violence, receives First Amendment protection without proof of specific intent to intimidate identified victims, flag burning must likewise be protected when done as political protest.

Fifth, selective enforcement of neutral laws based on the expressive content of conduct violates the First Amendment just as much as a direct prohibition on expression. The executive order instructs officials to "prioritize" enforcement of property damage and public safety laws against flag burners, which constitutes viewpoint discrimination. As legal scholar Eugene Volokh noted, this amounts to targeting protected speech through selective prosecution. Trump wants to prosecute flag burners under laws that would not be enforced against others who light fires for non-expressive purposes.[53]

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[50] *Cohen v. California*, 403 U.S. 15, 20 (1971).
[51] *Virginia v. Black*, 538 U.S. 343, 360 (2003).
[52] *Id.*
[53] Eugene Volokh, *Prosecutions Under New "Prosecuting Burning of the American Flag" Executive Order Would Violate First Amendment*, REASON: VOLOKH CONSPIRACY (Aug. 25, 2025, 4:05 PM), https://reason.com/volokh/2025/08/25/prosecutions-under-new-prosecuting-burning-of-the-american-flag-order-would-violate-first-amendment/.

The Supreme Court has historically recognized that viewpoint discrimination is “an egregious form of content discrimination.” This was verbalized in this way in *Rosenberger v. Rector & Visitors of the University of Virginia* (1995), where the Court declared that when “the government targets not subject matter but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.”[54] This principle applies with equal force whether viewpoint discrimination occurs through legislation or through selective enforcement of facially neutral laws which are.

A recent case, *Frederick Douglass Foundation v. District of Columbia* (2023), illustrates why the Trump order’s selective enforcement strategy is unlikely to be successful in aligning with the Constitution.[55] In that case, the D.C. Circuit ruled that the District of Columbia violated the First Amendment by selectively enforcing its defacement rule by arresting pro-life protestors for writing “Black Pre-Born Lives Matter” on sidewalks while permitting Black Lives Matter protesters to paint messages on streets and public property with no consequences.[56] The court emphasized that “the government may not enforce the laws in a manner that picks winners and losers in public debates,” as that would go against the First Amendment.[57]

Critically, the D.C. Circuit held that discriminatory motive is not an element of this question. The government violates the First Amendment when it discriminates based on viewpoint, whether or not that was their intention.[58] Thus, even when officials believe they are pursuing legitimate

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[54] *Rosenberger v. Rector & Visitors of Univ. of Va.,* 515 U.S. 819, 829 (1995).

[55] *Frederick Douglass Found., Inc. v. District of Columbia,* 82 F.4th 1122, 1129 (D.C. Cir. 2023).

[56] *Id.*

[57] *Id.*

[58] *Id.*

objectives, selective enforcement based on the content or viewpoint of expression remains unconstitutional.[59]

The Trump order creates a problem of selective enforcement: by instructing officials to prioritize enforcement against flag burners, it targets expressive conduct based on its message. A person who lights a fire in a park for a cookout would not face prosecution, but someone burning a flag in a political protest might. This differential treatment based on the expressive nature of the conduct constitutes viewpoint discrimination, even if framed in the language of natural law enforcement.[60]

While President Trump cannot criminalize flag burning, he is not entirely powerless on the issue. As president, Trump could advocate for a constitutional amendment by mobilizing public support and pressuring Congress to act. He could also shape the judiciary through his appointment power. By nominating justices and judges who share his views on flag protection, he could influence future judicial interpretation of the First Amendment in favor of flag protection. Finally, the administration could encourage states to pass their own flag desecration statutes, knowing they would be challenged in court. This strategy could create vehicles for bringing new flag burning cases to the Supreme Court, potentially providing an opportunity for the Court to revisit Johnson.

VI. COULD THE CURRENT SUPREME COURT OVERTURN JOHNSON?

The composition of the Supreme Court has changed dramatically since *Johnson* was decided in 1989. All five justices in the *Johnson* majority have left the Court, as have three of the four dissenters. The current Court includes six justices appointed by Republican presidents, leading some to speculate that *Johnson* could be reconsidered if revisited.

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[59] *Id.*
[60] *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 96 (1972).

However, predicting that a conservative Supreme Court would overturn *Johnson* misunderstands contemporary conservative thought on free speech. Conservative justices have generally been strongly protective of First Amendment rights, often more so than their liberal colleagues in certain contexts. Justices who embrace textualist and originalist methodologies take the text of the First Amendment seriously, and that text contains no exception for flag burning or other offensive symbolic speech.

Recent conservative jurisprudence has emphasized protecting unpopular or offensive speech against government restriction. For example, in *United States v. Stevens*, a conservative-majority Court struck down a broad criminal prohibition on depictions of animal cruelty for being overbroad under the First Amendment.[61] This reflects a broader doctrinal pattern in which the Court, including its conservative members, has been hesitant to uphold speech restrictions absent of established doctrinal categories that justify such limits.

The doctrine of stare decisis creates additional obstacles to overturning *Johnson*. While the current Court has demonstrated a willingness to overturn precedent in some areas, *Johnson* has achieved a status approaching super-precedent. The decision has stood for more than three decades, Congress has repeatedly failed to overturn it through constitutional amendment, and the legal community has largely accepted its reasoning even when disagreeing with its result.[62]

Moreover, overturning *Johnson* would require the Court to articulate a new First Amendment framework capable of distinguishing flag burning from other forms of offensive symbolic speech. What principle would allow

[61] *United States v. Stevens*, 559 U.S. 460 (2010).
[62] *See supra* Section IV.

the government to prohibit flag burning while still protecting other forms of political protest that many find offensive? The absence of a clear limiting principle makes revisiting *Johnson* particularly unattractive from a doctrinal perspective.

Taking these factors together, a reversal of *Texas v. Johnson* appears unlikely despite the Court's conservative majority. First Amendment principles transcend conventional categories, and the current Court has shown no desire to create new categories of unprotected speech. The originalist case for flag protection is weak, as the Founders gave no indication that they intended to permit government censorship of political protest, even protest that disrespects national symbols. Furthermore, any justice considering a vote to overturn *Johnson* would need to grapple with the slippery-slope problems that the decision itself identified. These reasons suggest that *Johnson* is an important and immovable wall against broader government control of political expression, and so even conservative justices would be hesitant to dismantle it.

CONCLUSION

The constitutional barriers to criminalizing flag burning are formidable, and under current Supreme Court precedent, they are effectively insurmountable. *Texas v. Johnson* established that flag burning constitutes protected symbolic speech under the First Amendment, and *United States v. Eichman* confirmed that even content-neutral prohibitions on flag destruction violate the Constitution. These decisions rest on bedrock First Amendment principles that prohibit the government from suppressing expression simply because the public finds it offensive.

Efforts to overturn *Johnson* through legislation have failed because they cannot address the fundamental constitutional problem identified by the Court. Attempts to amend the Constitution to permit flag protection

have repeatedly fallen short, coming within a handful of votes of passage but never succeeding in achieving the required supermajority. Presidential pronouncements threatening flag burners with criminal penalties or loss of citizenship, while politically resonant with some audiences, remain legally ineffective given the separation of powers and existing Supreme Court precedent.

The Trump administration's August 2025 executive order represents the most sophisticated attempt yet to circumvent *Johnson* without directly overturning it by arguing that flag burning can be prosecuted when it incites imminent lawless action or constitutes fighting words. Yet this strategy fails for multiple reasons: the Court already rejected the breach-of-peace rationale in *Johnson* itself; the Brandenburg test requires speech directed at producing imminent lawless action, which flag burning does not satisfy; the fighting words doctrine only applies to face-to-face confrontations, not symbolic political statements; and selective enforcement of neutral laws constitutes viewpoint discrimination. Put simply, the First Amendment's narrow exceptions have historically been applied sparingly, making it implausible that a broad set of flag burning prosecutions could be sustained under these tests.

Beyond the constitutional analysis, the persistence of this debate reveals important truths about American political culture. Proponents of flag protection emphasize the flag's unique status as a unifying national symbol and the emotional harm flag burning causes to veterans who served under it. These concerns are genuine and reflect deeply held values about patriotism. Yet the constitutional doctrine that protects flag burning embodies an equally important American value: the principle that the government cannot compel respect for national symbols through criminal penalties. Forced patriotism is not patriotism at all.

This debate reflects fundamental tensions in American political culture. Americans value patriotism and respect for national symbols, yet also cherish freedom of expression and distrust government-imposed orthodoxy. Perhaps the most patriotic act American citizens can perform is to protect flag burning, even as some find it offensive and hurtful. In doing so, the United States can demonstrate its commitment to the freedoms the flag represents.