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## Congressional Prohibition Of Contemptuous Flag Burning Suppresses Constitutionally Protected Free Speech

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## CONGRESSIONAL PROHIBITION OF CONTEMPTUOUS FLAG BURNING SUPPRESSES CONSTITUTIONALLY PROTECTED FREE SPEECH

Congress can create and regulate the uses of the American flag<sup>1</sup> by exercising its power to prescribe laws concerning respect for,<sup>2</sup> and display of,<sup>3</sup> the flag. Congress made knowingly casting contempt on any United States flag by publicly burning it a misdemeanor in section 700 of Title 18 of the United States Code.<sup>4</sup> Persons convicted, in both federal and state cases,<sup>5</sup> of desecrating the American flag have argued that flag desecration statutes violate the first amendment.<sup>6</sup> The United States Supreme

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<sup>1</sup> See *Smith v. Goguen*, 415 U.S. 566, 586 (1974) (White, J., concurring). Congress' constitutional authority to provide for the general welfare, regulate commerce, and provide for defense, combined with the necessary and proper clause, includes the choosing and regulation of the national flag, the symbol of our nation. *Id.*; see U.S. CONST. art. I, § 8, cl. 1 (Congress' authority to provide for general welfare and common defense); U.S. CONST. art. I, § 8, cl. 3 (Congress' authority to regulate commerce; U.S. CONST. art. I, § 8, cl. 18 (Congress' authority to make all laws necessary and proper to execute Congress' powers).

<sup>2</sup> See 36 U.S.C. § 176 (1976). Congress has provided that no disrespect should be shown to the United States flag. For example, the flag should never touch the ground or be used as wearing apparel. See *id.* § 176(b) & (d). The flag should never be used as advertising. See *id.* § 176(i). If a flag is no longer fit for display, its owner should destroy the flag in a dignified way by burning it. See *id.* § 176(k).

<sup>3</sup> See 36 U.S.C. § 174 (1976) (times and occasions for flag display). Congress has provided that the flag should be displayed only during daylight. See *id.* § 174(a). The flag should not be displayed in inclement weather. See *id.* § 174(c). The flag should be displayed every day, especially on national holidays. See *id.* § 174(d).

<sup>4</sup> See 18 U.S.C. § 700 (1976). Section 700 provides that "[W]hoever 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." *Id.* § 700(a).

As used in § 700, "flag of the United States," includes:

... any flag; standard colors, ensign, or any picture or representation of either, or of any part or parts of either, made of any substance or represented on any substance, of any size evidently purporting to be either of said flag, standard, color or ensign of the United States of America, or a picture or representation of either, upon which shall be shown the colors, the stars and stripes, in any number of either thereof, or any part or parts of either by which the average person seeing the same without deliberation may believe the same to represent the flag, standards, colors, or ensign of the United States of America.

*Id.* § 700(b).

<sup>5</sup> See *United States v. Kime*, 673 F.2d 1318, 1318 (4th Cir.) (defendant convicted under section 700 of burning flag during public demonstration, *cert. denied*, 103 S. Ct. 266 (1982); see also *Street v. New York*, 394 U.S. 576, 577-78 (1969) (New York statute that made casting contempt upon the flag by word or act a crime is unconstitutional); *United States v. Crosson*, 462 F.2d 96, 98 (9th Cir.) (defendant convicted under § 700 of publicly burning flag, *cert. denied*, 409 U.S. 1064 (1972)).

<sup>6</sup> See *Kime v. United States*, 103 S. Ct. 266, 267 (Brennan, J., dissenting) (defendant unsuccessfully contended § 700 was unconstitutional violation of first amendment), *denying*

Court, however, has refused to hold the federal flag desecration statute unconstitutional.<sup>7</sup>

The first amendment protects freedom of speech from congressional infringement.<sup>8</sup> The Supreme Court has ruled that the fourteenth amendment protects freedom of speech from state infringement.<sup>9</sup> Speech means not only the spoken or the written word but also communicative conduct.<sup>10</sup> The Supreme Court has held, for example, that wearing a military uniform to protest the Vietnam war,<sup>11</sup> taping a peace symbol on the American flag to protest the Vietnam war,<sup>12</sup> and displaying a communist flag<sup>13</sup> are forms of symbolic speech<sup>14</sup> entitled to first amendment protection. The right of freedom of speech, however, is not absolute.<sup>15</sup> Just because an individual

*cert. to 673 F.2d 1318 (4th Cir. 1982).*

The first amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

The Supreme Court has held that the due process clause of the fourteenth amendment protects the right to freedom of speech from state infringement. *See* *Chaplinsky v. New Hampshire*, 315 U.S. 568, 570-71 (1942) (fourteenth amendment protects freedom of speech from state infringement); *Lovell v. Griffin*, 303 U.S. 444, 450 (1938) (due process clause prohibits states from abridging free speech); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (free speech included in liberties protected by due process clause from state infringement); *see also* U.S. CONST. amend. XIV, § 1 (states may not deprive anyone of life, liberty, or property without due process of law).

<sup>7</sup> *See* *Kime v. United States*, 673 F.2d 1318, 1318 (4th Cir.) (defendant convicted of violating § 700), *cert. denied*, 103 S. Ct. 266 (1982).

<sup>8</sup> *See supra* note 6 (first amendment prohibits Congress from abridging freedom of speech).

<sup>9</sup> *See supra* note 6 (fourteenth amendment protects freedom of speech from state infringement).

<sup>10</sup> *See* *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 505-06 (1969) (communicative conduct of wearing black armbands was similar to spoken or written words and entitled to full first amendment protection).

<sup>11</sup> *See* *Schacht v. United States*, 398 U.S. 58, 62 (1970) (law prohibiting wearing of military uniform in theatrical productions criticizing armed forces violated first amendment).

<sup>12</sup> *See* *Spence v. Washington*, 418 U.S. 405, 409-10 (1974) (attaching peace symbol to American flag as a political protest is free speech).

<sup>13</sup> *See* *Stromberg v. California*, 283 U.S. 359, 368-69 (1931) (display of a communist flag is speech protected by the first amendment).

<sup>14</sup> *See* *Nimmer, The Meaning of Symbolic Speech Under the First Amendment*, 21 U.C.L.A. L. REV. 29, 30-33 & n.13 (1973). Pure speech is the written or spoken word. *See id.* at 31. Symbolic speech is nonverbal communicative conduct. *Id.* at 31 n.13. Conduct is speech when the actor intends to communicate meaning through his conduct, and the conduct actually conveys some meaning to the actor's audience. *Id.* at 36. All communication, including pure speech, depends on symbols, but not all symbols deserve first amendment protection. *Id.* at 33.

<sup>15</sup> *See* *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949). Freedom of speech is not an absolute right. *Id.* The Supreme Court has held that speech that is likely to cause a clear and present danger of serious public disturbance may be censored or punished. *See id.*; *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942); *Schenck v. United States*, 249 U.S. 47, 52 (1919). Statutes that regulate conduct and only incidentally infringe on speech are constitutional. *See* *United States v. O'Brien*, 391 U.S. 367, 376-377 (1968); *Konigsberg v. Bar of California*, 366 U.S. 36, 50-51 (1961) (Harlan, J., concurring).

has communicated by means of pure or symbolic speech within the meaning of the first amendment does not mean that a defendant's speech is constitutionally protected.<sup>16</sup> A state's interest in guarding against an immediate breach of the peace, for example, may outweigh the right to free speech.<sup>17</sup> Therefore, for section 700 to be unconstitutional, flag burning not only must be speech, flag burning also must be constitutionally protected speech.<sup>18</sup>

In 1968, the Supreme Court in *United States v. O'Brien*,<sup>19</sup> stated that not all conduct is speech, despite the actor's intent to communicate an idea.<sup>20</sup> Since 1931, the Supreme Court has held, however, that flags and the activities associated with flags are symbolic speech.<sup>21</sup> In *Stromberg v. California*,<sup>22</sup> the Supreme Court stated that a California statute that prohibited anyone from displaying a red flag in a public place as a symbol of opposition to organized government was an unconstitutional abridgement of free speech under the fourteenth amendment.<sup>23</sup> The *Stromberg*

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<sup>16</sup> See *United States v. O'Brien*, 391 U.S. 367, 376-382 (1968) (even if burning draft cards is symbolic speech, congressional statute prohibiting draft card burning is not violation of first amendment); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572 (1942) (first amendment does not prevent punishment for speaking "fighting words").

<sup>17</sup> See *Cantwell v. Connecticut*, 310 U.S. 296, 307-308 (1940). The state has a legitimate interest in protecting peace and order. *Id.* at 307. When freedom of speech presents an immediate and substantial danger of public violence or disorder, the state's interest in preserving public safety outweighs the right to free speech. *Id.* at 308. The state may not, however, suppress free speech more than is necessary to protect peace and order. See *id.*

<sup>18</sup> See *supra* text accompanying notes 8-17 (only some speech is entitled to first amendment protection).

<sup>19</sup> 391 U.S. 367 (1968). In *United States v. O'Brien*, O'Brien and three other men burned their draft cards on the steps of a Boston courthouse. *Id.* at 369. The *O'Brien* Court upheld O'Brien's conviction which was based on his violation of a federal statute that prohibited a person from destroying his draft registration card. See *id.* at 369-70, 386.

<sup>20</sup> See *id.* at 376. The *O'Brien* Court rejected the view that mere intent to express an idea makes conduct speech. *Id.* The Supreme Court has stated that conduct must contain sufficient communicative elements to come within freedom of speech protection. See *Spence v. Washington*, 418 U.S. 405, 409 (1974). One test for determining if conduct is symbolic speech is whether the person engaging in the conduct intends to express an idea and those witnessing the conduct actually derive some meaning from the conduct. See Nimmer, *supra* note 14, at 36.

<sup>21</sup> See *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (flag salute and pledge are speech); *Stromberg v. California* 283 U.S. 359, 361, 368-69 (1931) (display of red flag in political protest is speech).

<sup>22</sup> 283 U.S. 359 (1931).

<sup>23</sup> See *id.* at 360-61, 368-69. The defendant in *Stromberg v. California* was a summer camp supervisor in California. *Id.* at 362. The camp taught, among other things, class consciousness and the solidarity of workers. *Id.* As part of the daily schedule, camp members saluted and pledged allegiance to a communist flag. *Id.* The *Stromberg* Court held that the first amendment right of free speech applied to the states through the fourteenth amendment. See *id.* at 368. The *Stromberg* Court also held that display of a flag in opposition to government was symbolic speech and that prohibiting display of a flag as a symbol of opposition was a violation of the constitutional right of free speech. See *id.* at 368-69.

Court held that flag display is symbolic speech entitled to freedom of speech protection in certain contexts.<sup>24</sup> Twelve years after *Stromberg*, in *West Virginia Board of Education v. Barnette*,<sup>25</sup> the Supreme Court held that West Virginia authorities could not compel respect for the American flag by requiring public school students to salute and pledge allegiance to the flag.<sup>26</sup> The *Barnette* Court held that the salute and pledge were symbolic speech protected under the first amendment.<sup>27</sup> West Virginia enforced its flag respect statute by expelling from school insubordinate children who refused to comply with the flag respect law.<sup>28</sup> Parents of an expelled child were subject to state prosecution for contributing to the delinquency of a minor.<sup>29</sup> After *Barnette*, government officials could not force citizens to salute or pledge allegiance to the flag.<sup>30</sup>

In *Street v. New York*,<sup>31</sup> the Supreme Court, relying on the *Barnette* decision, held unconstitutional a New York statute that imposed criminal penalties for casting contempt upon the American flag by word or act.<sup>32</sup> The *Street* Court held that the "words" portion of the statute was an abridgment of protected speech.<sup>33</sup> The Supreme Court, however, declined to consider whether the "act" portion of the statute violated the defendant's right of free speech.<sup>34</sup> The *Street* Court balanced the government's

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<sup>24</sup> *Id.* at 368-69.

<sup>25</sup> 319 U.S. 624 (1943).

<sup>26</sup> *See id.* at 642 (state statute compelling respect for American flag through flag salute and pledge was unconstitutional infringement on freedom of speech).

<sup>27</sup> *See id.* at 632-33, 642. The *Barnette* Court stated that the American flag is a symbol of our national system and our history. *See id.* at 632. The flag salute, in connection with reciting the pledge of allegiance to the flag, is itself a form of speech. *Id.* West Virginia required students to say the pledge of allegiance and give a "stiff-arm" salute, which some parents found objectionable because they thought the required flag salute was similar to the Nazi salute. *Id.* at 627-29. The *Barnette* Court held that the first amendment right of freedom of speech, applied to the states through the fourteenth amendment, forbade state authorities from compelling the flag salute and pledge of allegiance. *See id.* at 637, 642.

<sup>28</sup> *Id.* at 629.

<sup>29</sup> *Id.*

<sup>30</sup> *See supra* note 26 (state statute compelling respect for American flag through flag salute and pledge was unconstitutional infringement on freedom of speech).

<sup>31</sup> 394 U.S. 576 (1969). In *Street v. New York*, after hearing of the murder of a civil rights leader, the defendant went to a public intersection and burned his own United States flag. *Id.* at 578. While the flag was burning in front of a crowd of about 30 people, including a policeman, the defendant proclaimed that the United States no longer needed a "damn flag." *Id.* at 578-79. The defendant was convicted in state court of violating a New York statute that prohibited casting contempt upon the United States flag by word or act. *Id.* at 577-78.

<sup>32</sup> *See id.* at 590-94. The *Street* Court held that the state could not prohibit disrespectful words directed at the flag because such words were protected by the first amendment. *See id.* at 593-94.

<sup>33</sup> *See id.* at 590-91 (state statute prohibiting casting contempt upon American flag by words violated right of freedom of speech).

<sup>34</sup> *See id.* at 594. The *Street* Court found that the judge who rendered the verdict against the defendant could have relied on the defendant's words alone, or on both his words and

interests in protecting the flag with the defendant's right of free speech and held the "words" part of the New York statute unconstitutional.<sup>35</sup> The *Street* Court considered four governmental interests that possibly could outweigh the defendant's right of free speech.<sup>36</sup> First, although states have a legitimate interest in preventing incitement of unlawful acts, the Supreme Court held that the defendant's words did not infringe on the state's interest because his words did not advocate unlawful action.<sup>37</sup> Second, because the defendant's words were not "fighting words,"<sup>38</sup> that is words that themselves inflict injury or immediately incite violence against the person who spoke the fighting words, the defendant's words did not come within the state's interest in maintaining the peace.<sup>39</sup> Third, the *Street* Court held that, even if the defendant's words about the flag shocked onlookers, the state's interest in protecting its citizens from witnessing shocking events does not permit the state to prohibit offensive ideas.<sup>40</sup> Finally, relying on *Barnette*, the *Street* Court held that the defendant's right to express his opinions overcame New York's interest in protecting the flag as a national symbol.<sup>41</sup> Because the New York statute impinged

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his act of burning the flag to find that the defendant violated the New York flag desecration statute. *See id.* at 586, 589-90. Because the *Street* Court decided that the "words" portion of the statute was unconstitutional and that the defendant's words may have been the basis for his conviction, the *Street* Court held the defendant's conviction unconstitutional. *See id.* at 589-94. The *Street* Court relied on a long line of decisions authorizing the Court to strike down a conviction if part of the statute upon which the conviction could have been based is unconstitutional. *See id.* at 585-87; *Yates v. United States*, 354 U.S. 298, 311 (1957); *Terminiello v. Chicago*, 337 U.S. 1, 5-6 (1949); *Cramer v. United States*, 325 U.S. 1, 36 n.45 (1945); *Williams v. North Carolina*, 317 U.S. 287, 292 (1942); *Stromberg v. California*, 283 U.S. 359, 367-68 (1931). The *Street* Court, therefore, did not need to decide whether the "act" portion of the statute was valid under the first amendment. *See* 394 U.S. at 594.

<sup>35</sup> *See Street v. New York*, 394 U.S. 576, 590-91 (1969) (Court balanced government's interest in conviction against defendant's free speech right to determine constitutionality of conviction); *see also supra* note 17 (state's interest in preserving public safety may outweigh individual's right to free speech).

<sup>36</sup> *See Street v. New York*, 394 U.S. 576, 590-93 (1969). The *Street* Court examined four governmental interests in the defendant's conviction for casting contempt on the flag. *See id.* The state has an interest in preventing vocal incitement of unlawful acts, in preserving the peace, in protecting the sensibilities of the public, and in insuring respect for the national flag. *Id.*

<sup>37</sup> *See id.* at 591 (*Street* Court held defendant's words were not incitement to unlawful action).

<sup>38</sup> *See id.* at 592 ("fighting words" are words so inflammatory as to provoke violence directed at speaker of the words).

<sup>39</sup> *See id.* (*Street* Court held that defendant's words were not provocation to breach the peace); *cf. Chaplinsky v. New Hampshire*, 315 U.S. 568, 572, 573-74 (1942) (Court upheld defendant's conviction for speaking "fighting words").

<sup>40</sup> *See Street v. New York*, 394 U.S. 576, 592 (1969) (Court held that any shock effect from defendant's words resulted from the idea he expressed which state may not suppress).

<sup>41</sup> *See id.* at 593 (*Street* Court held that state's interest in ensuring respect for national flag as symbol of state did not overcome defendant's right to express "defiant or contemptuous" opinions); *cf. Halter v. Nebraska*, 205 U.S. 34, 42 (1907) (state has duty to public to guard against disrespect for flag).

directly on pure speech, the *Street* Court held the statute unconstitutional.<sup>42</sup>

The Supreme Court has established a four-part test for government regulation of conduct combining both speech and nonspeech elements.<sup>43</sup> In *United States v. O'Brien*,<sup>44</sup> the Supreme Court held that the government may regulate communicative conduct, even though the government's regulation places incidental restrictions on freedom of speech, provided that the government's regulation meets four requirements.<sup>45</sup> First, the government must have constitutional power to regulate the activity.<sup>46</sup> Second, the regulation must further a compelling governmental interest.<sup>47</sup> Third, the governmental interest must be unrelated to the restraint of free expression.<sup>48</sup> Finally, the restriction on the first amendment rights must be no greater than necessary to further the government's interest.<sup>49</sup>

Although the Supreme Court has not applied the *O'Brien* four-part test to section 700,<sup>50</sup> arguably the statute is an unconstitutional regulation of free speech under the *O'Brien* four-part test.<sup>51</sup> The statute's prohibition of public flag burning is a regulation of speech because, as the Supreme Court has held in *Stromberg* and *Barnette*, political or emblematic use of flags is symbolic speech.<sup>52</sup> Furthermore, section 700 prohibits only flag burnings that cast contempt upon the flag.<sup>53</sup> When a person casts contempt upon the flag, he necessarily expresses the idea of contempt.<sup>54</sup> Therefore, by prohibiting demonstrations of contempt for the flag, section 700 regulates the expression of ideas.<sup>55</sup>

Although section 700 passes the first two parts of the *O'Brien*

<sup>42</sup> See *Street v. New York*, 394 U.S. 576, 581, 590-94 (1969) (Court used balancing test to decide constitutionality of statute prohibiting words contemptuous of flag); see also *supra* note 17 (state's interest in preserving public safety may outweigh individual's free speech right).

<sup>43</sup> See *infra* text accompanying notes 46-49 (*O'Brien* four-part test for regulation of communicative conduct).

<sup>44</sup> 391 U.S. 367 (1968).

<sup>45</sup> See *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968) (government regulation may restrict first amendment rights if regulation passes four-part test).

<sup>46</sup> See *id.* at 377.

<sup>47</sup> See *id.*

<sup>48</sup> See *id.*

<sup>49</sup> See *id.*

<sup>50</sup> See *supra* text accompanying note 7 (Supreme Court has declined to decide constitutionality of § 700).

<sup>51</sup> See *infra* text accompanying notes 61-66 (§ 700 is unconstitutional under *O'Brien* test).

<sup>52</sup> See *supra* text accompanying notes 22-27 (flag is symbolic speech).

<sup>53</sup> 18 U.S.C. § 700(a) (1976).

<sup>54</sup> See *Smith v. Goguen*, 415 U.S. 566, 593 (1974) (Rehnquist, J., dissenting) (person cannot treat flag contemptuously without expressing idea of contempt which is speech).

<sup>55</sup> See *Kime v. United States*, 103 S. Ct. 266, 269-70 (Brennan, J., dissenting) (§ 700 requires political expression for conviction), *denying cert. to*, 673 F.2d 1318 (4th Cir. 1982); see also *Smith v. Goguen*, 415 U.S. 566, 588-89 (1974) (White, J., concurring) (defendant's conviction under Massachusetts statute for treating flag contemptuously punished the defendant for expressing unpopular views about the flag).

test, the statute fails the *O'Brien* test's third requirement.<sup>56</sup> Section 700 meets the first requirement of the *O'Brien* test because Congress has the implied constitutional power to establish and regulate the uses of the national flag.<sup>57</sup> Congress has an interest in protecting the flag because the flag is a national symbol.<sup>58</sup> The statute furthers Congress' interest in protecting the flag as a national symbol by preventing undignified treatment of the flag.<sup>59</sup> Assuming Congress' interest in protecting the flag is substantial, section 700 passes the second part of the *O'Brien* test.<sup>60</sup> To pass part three of the *O'Brien* test, Congress' interest in protecting the flag must be distinct from the suppression of free speech.<sup>61</sup> Congress' purpose in preventing flag burning must not be the regulation of speech.<sup>62</sup> Congress protects its interest in the flag by prohibiting the flag's desecration.<sup>63</sup> Because treating the flag contemptuously is speech,<sup>64</sup> Congress' interest in protecting the integrity of the flag is related to the regulation of free speech.<sup>65</sup> Therefore, section 700 fails the third part of the *O'Brien* test.<sup>66</sup>

<sup>56</sup> See *infra* text accompanying notes 57-66 (§ 700 meets parts one and two of *O'Brien* test but fails part three).

<sup>57</sup> See *supra* text accompanying note 1 (Congress' constitutional authority to create and control uses of national flag).

<sup>58</sup> See S. REP. NO. 1287, 90th Cong., 2d Sess., 5 reprinted in 1968 U.S. CODE CONG. & AD. NEWS 2507, 2508-09 (public dishonor or destruction of the flag harms entire country because flag is national patriotic symbol).

<sup>59</sup> See 18 U.S.C. § 700(a) (1976) (persons may not cast contempt on American flag by mutilating, defacing, defiling, burning, or trampling).

<sup>60</sup> See *United States v. O'Brien*, 391 U.S. 367, 377 (1968) (government regulation of communicative conduct must further substantial governmental interest).

<sup>61</sup> See *id.* (government regulation of communicative conduct must be unrelated to restraint of free speech).

<sup>62</sup> See *Nimmer*, *supra* note 14, at 38-39 (government interest in regulating communicative conduct must be nonspeech rather than antispeech interest).

<sup>63</sup> See 18 U.S.C. § 700(a) (1976) (persons may not cast contempt on American flag by mutilating, defacing, defiling, burning, or trampling).

<sup>64</sup> See *Kime v. United States*, 103 S. Ct. 266, 267-68 (Brennan, J., dissenting) (prosecution did not dispute that flag burning was speech), *denying cert.* to 673 F.2d 1318 (4th Cir. 1982); *Spence v. Washington*, 418 U.S. 405, 410 (1974) (relying on *Stromberg* and *Barnette*, Court held that peace symbol superimposed on American flag is speech).

<sup>65</sup> See *Kime v. United States*, 103 S. Ct. 266, 269 (Brennan, J., dissenting) (state's interest in flag as patriotic symbol exists because the flag is symbolic speech), *denying cert.* to 673 F.2d 1318 (4th Cir. 1982); *Spence v. Washington*, 418 U.S. 405, 414 n.8 (1974) (state's interest in flag as symbol of patriotism and pride in history of country is associated with the flag's expressive elements). Because § 700 is a direct, not an incidental, restriction on freedom of speech rights, § 700 fails to meet the fourth requirement of the *O'Brien* test. See *United States v. O'Brien*, 391 U.S. 367, 377 (1968); *supra* text accompanying note 49 (fourth requirement of *O'Brien* test).

<sup>66</sup> See *Kime v. United States*, 103 S. Ct. 266, 269 (Brennan, J., dissenting) (§ 700 fails third part of *O'Brien* test and is unconstitutional regulation of protected speech); *denying cert.* to 673 F.2d 1318 (4th Cir. 1982). *But see* *United States v. Crosson*, 462 F.2d 96, 102 (9th Cir.), *cert. denied*, 409 U.S. 1064 (1972). In *Crosson*, Crosson and about 75 other students took part in a protest at the University of Arizona against the Vietnam War. See 462 F.2d at 98. Crosson was convicted of violating § 700. *Id.* The *Crosson* court held that § 700 passed



Since section 700 is a direct, not incidental, regulation of speech,<sup>67</sup> however, courts should not apply the *O'Brien* four-part test to decide the statute's constitutionality.<sup>68</sup> In *O'Brien*, the government's interest in national defense justified preventing the destruction of draft registration certificates.<sup>69</sup> Congress prohibited the destruction of draft registration certificates to insure the efficient raising of armies.<sup>70</sup> The *O'Brien* Court found that the statute prohibiting the destruction of draft registration certificates did not impinge upon free speech because Congress' interest in preserving draft cards was unrelated to the suppression of free speech.<sup>71</sup>

The Court distinguished the *O'Brien* facts from a situation in which the government's interest in regulating conduct arises because the government considers the idea expressed by the conduct harmful.<sup>72</sup> The *O'Brien* Court stated that if a statute's purpose was to suppress speech, the statute could not be upheld as a regulation of noncommunicative conduct.<sup>73</sup> In section 700, Congress prohibited only conduct that expresses a contemptuous idea about the flag and what the flag symbolizes.<sup>74</sup> Congress has not made mere flag burning a crime.<sup>75</sup> In fact, burning is congressionally sanctioned as the preferred method of disposing of a worn or tattered flag.<sup>76</sup> Burning

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the four-part *O'Brien* test. *See id.* at 101-02; *see also supra* text accompanying notes 44-49 (four-part *O'Brien* test to determine constitutionality of government regulation of expressive conduct). The *Crosson* court held that Congress' interest in protecting the flag as a national symbol was unrelated to the suppression of free speech. *See* 462 F.2d 101-02. The court distinguished between writing "I love this country" on the flag and writing "I hate this country" on the flag. *See id.* at 100. The *Crosson* Court implied that both writings are defacements, but only the latter is contemptuous, and, therefore, a violation of § 700. *See id.* The *Crosson* court's holding permits only patriotic ideas to deface the flag. The *Crosson* court's interpretation of § 700, therefore, permits the censorship of unpatriotic ideas, which is the suppression of speech.

<sup>67</sup> *See* *Kime v. United States*, 103 S. Ct. 266, 270 (Brennan, J., dissenting) (§ 700 prohibits unpopular views rather than mere act of burning American flag), *denying cert. to* 673 F.2d 1318 (4th Cir. 1982); *United States v. Crosson*, 462 F.2d 96, 106 (9th Cir.) (Browning, J., dissenting) (§ 700 is direct regulation of speech), *cert. denied*, 409 U.S. 1064 (1972).

<sup>68</sup> *See* 391 U.S. 367, 382 (1968) (*O'Brien* test is inapplicable to statute regulating conduct if government's interest is controlling message contained in conduct).

<sup>69</sup> *Id.* at 375, 377-78.

<sup>70</sup> *Id.* at 381.

<sup>71</sup> *See id.* at 375 (statute prohibiting destruction of draft cards is unrelated to suppression of free speech).

<sup>72</sup> *See id.* at 382. The *O'Brien* Court stated that the four-part test established in *O'Brien* was inapplicable to a statute that is aimed at suppressing speech. *See id.* at 382.

<sup>73</sup> *See id.* (*O'Brien* test applies only to regulation of noncommunicative conduct).

<sup>74</sup> *See* *Kime v. United States*, 103 S. Ct. 266, 270 (Brennan, J., dissenting) (Congress drafted § 700 to prohibit only constitutionally protected speech), *denying cert. to* 673 F.2d 1318 (4th Cir. 1982); *United States v. Crosson*, 462 F.2d 96, 108 (1972) (Browning, J., dissenting) (§ 700 prohibits idea of contempt for American flag), *cert. denied*, 409 U.S. 1064 (1972); *see also* 18 U.S.C. § 700(a) (1976) (§ 700 prohibits any flag burning that casts contempt upon flag).

<sup>75</sup> *See* 36 U.S.C. § 176(k) (1976) (burning is proper way to destroy damaged American flag).

<sup>76</sup> *Id.*

a United States flag, therefore, is not intrinsically contemptuous.<sup>77</sup> The flag desecration statute's purpose is not to prevent the act of burning but to suppress the idea expressed by the act.<sup>78</sup> The statute prohibits expression of the idea of contempt for the flag.<sup>79</sup> The *O'Brien* four-part test is not the proper standard for section 700 constitutionality<sup>80</sup> because the statute's purpose is not the regulation of noncommunicative conduct.<sup>81</sup>

Although the *O'Brien* four-part test is inapplicable to section 700 because the statute is a direct regulation of nonverbal expression,<sup>82</sup> section 700 is not necessarily an unconstitutional abridgment of free speech.<sup>83</sup> The correct test of the statute's constitutionality under the first amendment is a test that balances the public's interest in prohibiting contemptuous flag burning against the protester's right to freely express his contempt for the flag.<sup>84</sup> The government's interest in prohibiting public flag burning may include protecting the government's special property interest in the national flag,<sup>85</sup> protecting the sensibilities of witnesses to the flag

<sup>77</sup> See *United States v. Crosson*, 462 F.2d 96, 108 n.7 (9th Cir.) (Browning, J., dissenting) (burning of flag not contemptuous in itself because Congress has authorized flag burning as proper method of destroying damaged flag), *cert. denied*, 409 U.S. 1064 (1972).

<sup>78</sup> See *supra* text accompanying notes 74-77 (§ 700 designed to suppress expression of contempt for flag).

<sup>79</sup> *Id.*; see *Kime v. United States*, 103 S. Ct. 266, 270 (Brennan, J., dissenting) (§ 700 prohibits expression of unpatriotic political views), *denying cert. to* 673 F.2d 1318 (4th Cir. 1982); *Nimmer, supra* note 14, at 53-58 (§ 700 is direct regulation of symbolic speech).

<sup>80</sup> See *United States v. O'Brien*, 391 U.S. 367, 382 (1968) (laws directed at suppressing expression of ideas are not constitutional regulations of noncommunicative conduct); *United States v. Crosson*, 462 F.2d 96, 106 (9th Cir.) (Browning, J., dissenting) (*O'Brien* four-part test applies only to regulation of conduct that incidentally involves expression of ideas), *cert. denied*, 409 U.S. 1064 (1972).

<sup>81</sup> See *supra* text accompanying notes 74-78 (§ 700's purpose is to suppress expression of contempt for flag, and is not aimed at preventing flag burning per se). *But see* S. REP. NO. 1287, 90th Cong., 2d Sess. 5, *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS 2507, 2508 (§ 700's purpose is to prevent physical dishonor and destruction of flag not to prohibit communication of ideas).

<sup>82</sup> See *supra* text accompanying notes 72-73 (*O'Brien* test inapplicable to direct regulation of speech).

<sup>83</sup> See *supra* text accompanying notes 16-18 (for regulation of speech to be unconstitutional, speech must be protected speech).

<sup>84</sup> See *Spence v. Washington*, 418 U.S. 405, 411-414 (1974) (Court balanced state's interest in protecting flag against defendant's right of free speech to determine constitutionality of regulation of speech); *Street v. New York*, 394 U.S. 576, 590-94 (1969) (Court balanced state's interest in protecting flag from verbal abuse against defendant's right of free speech to determine constitutionality of regulation of speech); see also *supra* text accompanying note 17 (*Cantwell* Court weighed state's interest in protecting public safety against defendant's right of free speech); see generally *Nimmer, supra* note 14, 52-57 (discussing government interests in prohibiting flag desecration).

<sup>85</sup> See *Smith v. Goguen*, 415 U.S. 566, 594-96 (1974) (Rehnquist, J., dissenting) (state has property interest in national flag); *Street v. New York*, 394 U.S. 576, 615-617 (1969) (Fortas, J., dissenting) (state's property interest in American flag outweighs defendant's right to speak contemptuously of flag).

burning,<sup>86</sup> preventing a breach of the peace caused by the flag burning,<sup>87</sup> and protecting the flag from disgrace because it is a national patriotic symbol.<sup>88</sup> The government may suppress speech in certain circumstances because the right to free speech is not absolute,<sup>89</sup> but the government's interest in regulating speech must be substantial<sup>90</sup> and the regulation must not be overly restrictive.<sup>91</sup>

In his dissent to the Supreme Court's decision in *Street v. New York*,<sup>92</sup> Justice Fortas stated that the United States has a special property interest in the national flag that places obligations and restrictions on the uses of even a privately owned flag.<sup>93</sup> For example, the government may restrict how and when the flag may be displayed<sup>94</sup> and the use of the flag in advertising.<sup>95</sup> Justice Rehnquist stated, in his dissenting opinion in *Smith v. Goguen*,<sup>96</sup> that the government could prohibit burning the flag just as the government can prohibit alteration or defacement of the national currency.<sup>97</sup> Contrary to Justice Fortas and Justice Rehnquist's reasoning, however, section 700 is drawn too narrowly to qualify as a nonspeech regulation of the flag.<sup>98</sup> Because the statute prohibits only contemptuous

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<sup>86</sup> *Street v. New York*, 394 U.S. 576, 591 (1969).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942) (right of free speech is not absolute); *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940) (freedom of a person to believe whatever he wants is absolute, but freedom of a person to act however he wants is not absolute).

<sup>90</sup> See *Terminiello v. Chicago*, 337 U.S. 1,4 (1949) (government may not suppress free speech unless speech is likely to produce substantial harm).

<sup>91</sup> See *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (regulation of speech must not abridge unduly freedom of speech).

<sup>92</sup> 394 U.S. 576 (1969).

<sup>93</sup> See *id.* at 616-617 (Fortas, J., dissenting). In his dissent to *Street v. New York*, Justice Fortas stated that the American flag is a special kind of personal property whose use has always been regulated by special rules. See *id.* at 616. Justice Fortas argued that the state's special property interest in the flag extended to privately owned flags and that the state's property interest in the flag justified the prohibition against public flag burning. See *id.* at 617.

<sup>94</sup> See *id.* at 617 (Fortas, J., dissenting) (New York statute regulates display of flag); see also 36 U.S.C. § 174 (1976) (federal statute regulating times and occasions of flag display); *supra* note 1 (Congress' implied power to establish and regulate uses of national flag).

<sup>95</sup> See *Street v. New York*, 394 U.S. 576, 616-617 (1969) (Fortas, J., dissenting) (government may regulate use of American flag in advertising); *Halter v. Nebraska*, 205 U.S. 34, 41 (1907) (state law forbidding use of flag for advertisement does not infringe on constitutional rights); see also 36 U.S.C. § 176(i) (1976) (flag should never be used for advertising purposes).

<sup>96</sup> 415 U.S. 566 (1974).

<sup>97</sup> See *Smith v. Goguen*, 415 U.S. 566, 595-96 (1974) (Rehnquist, J., dissenting) (Congress may protect its special interest in private property); see also 18 U.S.C. § 331 (1976) (prohibition against mutilation of United States coins); 18 U.S.C. § 333 (1976) (prohibition against mutilation of national bank note, bill, or draft).

<sup>98</sup> See *Nimmer*, *supra* note 14, at 52-53 (§ 700 is overly narrow as property regulation because statute prohibits only public destruction of property that casts contempt); see also *Smith v. Goguen*, 415 U.S. 566, 588-90 (1974) (White, J., concurring) (state statute prohibiting

defacement of the flag, the statute prohibits only desecrations that express unpatriotic political ideas.<sup>99</sup> Therefore, section 700 suppresses free speech under the appearance of preserving the physical integrity of the flag as a constitutionally valid regulation may not do.<sup>100</sup>

The government's property interest in the flag is similar to the government's interest in protecting the sensibilities of its citizens from the shock of witnessing contemptuous treatment of the flag.<sup>101</sup> The *Street* Court held that the state's interest in protecting the sensibilities of the public from hearing shocking words about the flag did not outweigh a person's first amendment right to express his opinions concerning the flag.<sup>102</sup> Expressing contempt for the flag by burning it is more emotionally shocking than speaking contemptuous words about the flag.<sup>103</sup> The Supreme Court has held, however, that whether the first amendment protects shocking speech depends not on the level of offensiveness of the speech,<sup>104</sup> but on whether the idea the defendant's speech expressed produced the shocking effect.<sup>105</sup> Because section 700 prohibits expression of the idea of contempt for the flag, the statute prohibits shocking ideas and, therefore, cannot be a constitutionally valid protection of sensibilities of bystanders.<sup>106</sup>

For several decades the Supreme Court has raised no objection to the government's suppression of speech that presents a clear and present danger of resulting in imminent violence or unlawful acts.<sup>107</sup> For example, the Court has held that the first amendment does not protect "fighting

casting contempt on flag by act is overly narrow as protection of flag's integrity because statute prohibited only contemptuous desecrations).

<sup>99</sup> See *supra* note 98 (statute prohibiting only contemptuous desecrations of flag punishes communication of ideas about flag).

<sup>100</sup> See *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940) (state may not suppress expression of ideas merely by claiming that regulation of activity preserves public order and safety).

<sup>101</sup> See *Street v. New York*, 394 U.S. 576, 591-92 (1969) (Court considered possible state interest in protecting passersby from shocking effect of defendant's contempt for flag).

<sup>102</sup> See *id.* at 592 (if offensiveness of defendant's words is attributable to content of ideas communicated, then government may not suppress defendant's speech).

<sup>103</sup> See *Nimmer, supra* note 14, at 55 (witnessing physical destruction of flag more shocking than hearing contemptuous words cast upon flag).

<sup>104</sup> See *Cohen v. California*, 403 U.S. 15, 26 (1971) (offensive words have first amendment protection even though defendant could have used less offensive words to express same idea).

<sup>105</sup> See *Street v. New York*, 394 U.S. 576, 592 (1969) (if offensiveness of defendant's words attributable to content of ideas communicated, then government may not suppress defendant's speech).

<sup>106</sup> See *supra* text accompanying notes 103-05 (offensive symbolic speech entitled to same first amendment protection as offensive pure speech).

<sup>107</sup> See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (government may abridge speech that threatens to provoke breach of peace); *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) (first amendment does not protect speech that is likely to produce clear and present danger of great harm to public safety); *Schenck v. United States*, 249 U.S. 47, 52 (1919) (right of free speech would not protect person who falsely yelled "fire" in theater and caused panic).

words."<sup>108</sup> Even if a particular flag burning resulted in a breach of the peace, however, section 700 could not support a conviction for breach of the peace because the statute is written too broadly.<sup>109</sup> A statute suppressing speech may not unduly restrict freedom of expression.<sup>110</sup> Because section 700's prohibitions extend beyond circumstances likely to produce violence,<sup>111</sup> section 700 is an unconstitutional abridgment of free speech under the test for breach of the peace statutes.<sup>112</sup>

Arguably, the reason section 700 satisfies the requirements of a valid breach of the peace statute is that contemptuous treatment of the flag, our national symbol, is likely to cause bystanders to act violently.<sup>113</sup> Although section 700 is too broadly written to be a constitutional breach of the peace statute,<sup>114</sup> the government has an interest in protecting the flag merely because the national flag is a symbol of patriotism and our country's history.<sup>115</sup> Section 700 protects the American flag's symbolic integrity by prohibiting persons from contemptuously burning the flag.<sup>116</sup> In *Street v. New York*,<sup>117</sup> the Supreme Court held that the government may not prohibit a person from expressing his disrespectful opinion of

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<sup>108</sup> See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (first amendment does not protect words whose utterance inflicts injury or incites violence).

<sup>109</sup> See *Street v. New York*, 394 U.S. 576, 592 (1969) (breach of peace statute must be drawn narrowly to prohibit only words likely to incite violence); *Terminiello v. Chicago*, 337 U.S. 1, 5 (1949) (law that would permit defendant's conviction for speech that caused anger, dispute, or unrest is unconstitutional abridgement of free speech); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 569, 574 (1942) (state statute prohibiting person from addressing offensive or derisive words to another person with intent to annoy was constitutional); see also 18 U.S.C. § 700 (a) (1976) (§ 700 does not prohibit only those flag burnings likely to cause violence); Note, *Flag Burning, Flag Waving and the Law*, 4 VAL. U. L. REV. 345, 350 (1970) (§ 700 does not distinguish between flag burning that threatens peace and flag burning that does not threaten peace). But see Rosenblatt, *Flag Desecration Statutes: History and Analysis*, 1972 WASH. U.L.Q. 193, 216 (§ 700 is constitutional as breach of peace statute).

<sup>110</sup> See *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (breach of peace statute must not unduly infringe on first amendment rights).

<sup>111</sup> See *supra* note 109 (§ 700's prohibitions are not restricted to acts likely to cause violence).

<sup>112</sup> See *supra* text accompanying notes 109-111 (§ 700's terms are not sufficiently narrow to qualify as valid breach of peace statute).

<sup>113</sup> See Rosenblatt, *supra* note 109, at 216 (§ 700 deters violence likely to occur when someone burns flag).

<sup>114</sup> See *supra* text accompanying notes 109-13 (§ 700's terms are not sufficiently narrow to qualify as valid breach of peace statute).

<sup>115</sup> See *Spence v. Washington*, 418 U.S. 405, 413 (1974) (flag is symbol of patriotism, pride in history of country, and service of citizens in peace and war); see also S. REP. NO. 1287, 90th Cong., 2d Sess. 5, reprinted in 1968 U.S. CODE CONG. & AD. NEWS 2507, 2508-09 (dishonor of national symbol harms entire country); Nimmer, *supra* note 14, at 56-57 (interest in flag as a symbol is interest in protecting idea).

<sup>116</sup> 18 U.S.C. § 700(a) (1976).

<sup>117</sup> 394 U.S. 576 (1969).

the flag.<sup>118</sup> Although the *Street* Court considered only verbal disrespect for the flag,<sup>119</sup> first amendment protections apply both to pure speech and symbolic speech.<sup>120</sup> Therefore, because section 700 prohibits expression of disrespect for the flag, section 700 is an unconstitutional infringement on free speech.<sup>121</sup>

Flag burning is a dramatic form of symbolic speech<sup>122</sup> that Congress has suppressed in section 700.<sup>123</sup> Section 700 fails the *O'Brien* four-part test for determining the constitutionality of regulating conduct incidentally involving expression,<sup>124</sup> and section 700 fails the balancing test for determining the constitutionality of regulating speech directly.<sup>125</sup> Flag burning, therefore, is speech protected under the first amendment, and section 700 unconstitutionally infringes this protected right.<sup>126</sup> If Congress wants to protect the symbolic integrity of the flag, then Congress should enact a flag protection statute that either prohibits all flag burnings<sup>127</sup>

<sup>118</sup> See *id.* at 593-94 (state's interest in protecting flag as political symbol does not permit state to punish disrespect for flag by making contemptuous treatment of the flag a crime).

<sup>119</sup> See *id.* at 594 (*Street* Court did not decide constitutionality of part of statute prohibiting disrespect for flag by act).

<sup>120</sup> See *supra* text accompanying notes 10-14 (speech means spoken or written words and communicative conduct). Two reasons might justify treating burning the flag differently from verbal disrespect for the flag. See *supra* text accompanying notes 103-07. First, burning the flag is more emotionally shocking to onlookers than verbal disrespect for the flag. See *supra* note 103. Second, because flag burning is more emotionally disturbing than verbal disrespect for the flag, flag burning is more likely than verbal disrespect for the flag to result in a breach of the peace. See Rosenblatt, *supra* note 109, at 216. The *Cohen* Court, however, has held that whether the first amendment protects offensive speech does not depend on the level of offensiveness of the defendant's speech. See *Cohen v. California*, 403 U.S. 15, 26 (1971); *supra* text accompanying notes 101-05. Although flag-burning may produce or be likely to produce a breach of the peace, § 700 is written too broadly to be a valid breach of the peace statute. See *supra* text accompanying notes 109-12 (breach of peace statute must be restricted to situations likely to produce violence).

<sup>121</sup> See *supra* text accompanying notes 116-120 (§ 700 is unconstitutional prohibition against contempt for flag); see also Nimmer, *supra* note 14, at 57 (protection of flag as a symbol is anti-speech interest).

<sup>122</sup> See *Kime v. United States*, 103 S. Ct. 266, 267 (Brennan, J., dissenting) (flag burning is expressive conduct within first amendment protection of free speech), *denying cert.* to 673 F.2d 1318 (4th Cir. 1982); See also *supra* text accompanying notes 21-27 (flag and activities associated with flag are symbolic speech).

<sup>123</sup> See 18 U.S.C. § 700(a) (1976) (§ 700 prohibits person from contemptuously burning flag in public).

<sup>124</sup> See *supra* text accompanying notes 61-66 (§ 700 fails *O'Brien* four-part test because government's interest in preventing flag burning is related to suppression of free speech).

<sup>125</sup> See *supra* text accompanying notes 92-121 (§ 700 fails balancing test because government's interests in preventing flag burning are not sufficiently substantial to outweigh person's first amendment right to express his contempt for flag).

<sup>126</sup> See *supra* text accompanying notes 21-27, 61-66, & 92-121 (§ 700 abridges protected first amendment rights).

<sup>127</sup> See *United States v. O'Brien*, 391 U.S. 367, 377 (1969). Arguably, if Congress pro-

and not just those that are contemptuous, or that prohibits only flag burnings that are likely to produce immediate violence.<sup>128</sup>

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hibited all flag burnings, then any incidental infringement on free speech would be unrelated to Congress' interest, for example, in preserving its property interest in the flag. Such a regulation against all flag burning, therefore, would pass the *O'Brien* test's third requirement. *See id.* *See also supra* text accompanying notes 61-66.

<sup>128</sup> *See supra* note 109 (breach of peace statute must be narrowly drawn so that statute does not unduly abridge free speech).