

litical protest was not justified under the state's asserted interest in preserving the flag as a symbol of nationhood and national unity. The Court's opinion left little doubt that the existing federal statute, 18 U.S.C. § 700, and the flag desecration laws of 47 other states would suffer a similar fate in a similar case. Doubt remained, however, as to whether the Court would uphold a "content-neutral" statute protecting the physical integrity of the flag.

Immediately following *Johnson*, Congress enacted a new flag protection statute providing punishment for anyone who "knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States."¹⁵⁷² The law was designed to be content-neutral and to protect the "physical integrity" of the flag.¹⁵⁷³ Nonetheless, in overturning convictions of flag burners, the Court found that the law suffered from "the same fundamental flaw" as the Texas law in *Johnson*. The government's underlying interest, characterized by the Court as resting upon "a perceived need to preserve the flag's status as a symbol of our Nation and certain national ideals,"¹⁵⁷⁴ still related to the suppression of free expression. Support for this interpretation was found in the fact that most of the prohibited acts are usually associated with disrespectful treatment of the flag; this suggested to the Court "a focus on those acts likely to damage the flag's symbolic value."¹⁵⁷⁵ As in *Johnson*, such a law could not withstand "most exacting scrutiny" analysis.

The Court's ruling in *Eichman* rekindled congressional efforts, postponed with enactment of the Flag Protection Act, to amend the Constitution to authorize flag desecration legislation at the federal and state levels. In both the House and the Senate these measures failed to receive the necessary two-thirds vote.¹⁵⁷⁶

¹⁵⁷² The Flag Protection Act of 1989, Pub. L. 101-131 (1989).

¹⁵⁷³ See H.R. REP. NO. 231, 101st Cong., 1st Sess. 8 (1989) ("The purpose of the bill is to protect the physical integrity of American flags in all circumstances, regardless of the motive or political message of any flag burner").

¹⁵⁷⁴ *United States v. Eichman*, 496 U.S. at 316.

¹⁵⁷⁵ 496 U.S. at 317.

¹⁵⁷⁶ In the 101st Congress, the House defeated H.J. Res. 350 by vote of 254 in favor to 177 against (136 CONG. REC. H4086 (daily ed. June 21, 1990), and the Senate defeated S.J. Res. 332 by vote of 58 in favor to 42 against (136 CONG. REC. S8737 (daily ed. June 26, 1990)). In every Congress since then (though the 111th in 2009), constitutional amendments to allow Congress or the states to prohibit flag desecration have been proposed. In each Congress from the 104th through the 109th (1995-2006), the House passed such a proposal, but the Senate either rejected it or did not vote on it.