Textbook on the First Amendment:

FREEDOM OF SPEECH AND FREEDOM OF RELIGION

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In memory of Zygmunt Nagórski

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Preface

Freedom always comes with a price. This applies to freedom of speech and freedom of religion. The crucial point is who has to pay the price. Freedom cannot defend itself. It needs witnesses, martyrs and, above all, guardians and protectors. In the United States, freedom of speech and freedom of religion are considered basic freedoms because they were enshrined in the First Amendment to the Constitution. This textbook is about respect for and appreciation of these two freedoms, and consists of cases that have appeared before American courts. The United States Supreme Court is the ultimate defender of liberty and the pre-eminent guardian of these two freedoms, which is why the overwhelming majority of cited sentences are from that Court.

Twenty years ago I was awarded an LL.M. by Georgetown University Law Center where I was able to study thanks to a scholarship granted by Mr. Zygmunt Nagórski. Following the graduation ceremony at the main campus on 25 May 1992, I asked how I could show him my gratitude and he suggested that I should – perhaps sometime in the future help others obtain an education. When I returned to Poland, I was offered a post in the Faculty of Law and Administration of the University of Warsaw, and I prepared two courses in American law in addition to my regular Roman law courses. In Warsaw, and later at the Jagiellonian University in Kraków, I focused on the freedom of religion and freedom of speech in United States Supreme Court jurisprudence. This textbook is the result of my ten years' experience of teaching about the First Amendment to the United States Constitution. The textbook provides materials for discussion and consists only of selected opinions of American courts which have been abridged to enucleate the main problem and not burden the reader with all the details, and also to avoid discussing legal issues that are not directly related to the present subject matter. This manner of presenting law by choosing and collecting together legal opinions has a long tradition. It was used by Justinian's compilers, who collected the work of Roman jurists in his famous Digest of AD 533. I decided to choose this form because I believe it is the best way of introducing jurisprudential discussion. The selected extracts will enable readers to join in the discussion by allowing them to form

their own point of view and consider all the possible arguments that could be raised in each case.

The study of American cases pertaining to the freedom of speech and freedom of religion is a good introduction to common law and the legal methods of American courts as well as American legal language. Issues related to freedom of religion and freedom of speech are well-known even to the average freshman, therefore everyone can form his or her own opinion on how a conflict should or could be resolved by a court. Sentences passed by the Supreme Court of the United States are extremely convenient for encouraging such debate. The Court's opinion, which is usually extensive and considers all the important factual and legal issues of the case, is often accompanied by the concurring and dissenting opinions of the justices. These opinions illustrate almost all the possible ways of interpreting a case and appear instructive not only from the perspective of acquaintance with a particular line of precedence. They provide us with a general education in American law and the jurisprudential framework that could be applied to any legal system where liberties need to be protected. The decisions taken by the Court – be they positive or negative – are an example to European lawyers. Even though this book is largely a 'cut and paste' of cases, it still presents the author's point of view. The selected cases and choice of texts reflects his perception of the complex issues related to freedom of speech and religious freedom. I decided to cite cases that could be of interest and use to European lawyers. But I have endeavoured to present to them as impartially as possible, the questions and problems that arise in American law, and to make this book about the work of the Supreme Court as the guardian of the First Amendment and not about my understanding of it.

The problems and challenges to these two freedoms are almost the same on both sides of the Atlantic Ocean. It may sometimes be easier to discuss them based on American, i.e. seemingly distant examples, than on current issues that give rise to strong emotions. 'The American example' thus becomes a parable of the law and of freedom, particularly of the freedom of speech and freedom of religion. It is a parable that can be either understood or ignored.

Franciszek Longchamps de Bérier
Wrocław, 25 May 2012

I. FREEDOM OF SPEECH

1. Introduction

Texas v. *Johnson*, 491 U.S. 397, 109 S.Ct. 2533 (1989)

Justice BRENNAN *delivered the opinion of the Court.*

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

I

While the Republican National Convention was taking place in Dallas in 1984, respondent Johnson participated in a political demonstration. The demonstration ended in front of Dallas City Hall, where Johnson unfurled the American flag, doused it with kerosene, and set it on fire. While the flag burned, the protestors chanted, "America, the red, white, and blue, we spit on you." After the demonstrators dispersed, a witness to the flag burning collected the flag's remains and buried them in his backyard. No one was physically injured or threatened with injury, though several witnesses testified that they had been seriously offended by the flag burning.

Of the approximately 100 demonstrators, Johnson alone was charged with a crime. The only criminal offense with which he was charged was the desecration of a venerated object in violation of Tex. Penal Code.[1)] After a trial, he was convicted, sentenced to

[1)] Tex.Penal Code Ann. § 42.09 (1989) provides in full:
§ 42.09. Desecration of Venerated Object
(a) A person commits an offense if he intentionally or knowingly desecrates:
(1) a public monument;
(2) a place of worship or burial; or
(3) a state or national flag.

one year in prison, and fined $2,000. The Court of Appeals for the Fifth District of Texas at Dallas affirmed Johnson's conviction, but the Texas Court of Criminal Appeals reversed, holding that the State could not, consistent with the First Amendment, punish Johnson for burning the flag in these circumstances.

II

Johnson was convicted of flag desecration for burning the flag, rather than for uttering insulting words. This fact somewhat complicates our consideration of his conviction under the First Amendment. We must first determine whether Johnson's burning of the flag constituted expressive conduct, permitting him to invoke the First Amendment in challenging his conviction. *See, e.g., Spence* v. *Washington,* 418 U.S. 405, 409-411 (1974). If his conduct was expressive, we next decide whether the State's regulation is related to the suppression of free expression. If the State's regulation is not related to expression, then the less stringent standard we announced in *United States* v. *O'Brien*, 391 U.S. 367 (1968), for regulations of noncommunicative conduct controls. If it is, then we are outside of *O'Brien*'s test, and we must ask whether this interest justifies Johnson's conviction under a more demanding standard.[3] A third possibility is that the State's asserted interest is simply not implicated on these facts, and, in that event, the interest drops out of the picture.

In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether "[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it." Especially pertinent to this case are our decisions recognizing the communicative nature of conduct relating to flags. Attaching

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

[3] Although Johnson has raised a facial challenge to Texas' flag desecration statute, we choose to resolve this case on the basis of his claim that the statute, as applied to him, violates the First Amendment. […] Because the prosecution of a person who had not engaged in expressive conduct would pose a different case, and because this case may be disposed of on narrower grounds, we address only Johnson's claim that § 42.09, as applied to political expression like his, violates the First Amendment.

a peace sign to the flag, refusing to salute the flag, and displaying a red flag, refusing to salute the flag, and displaying a red flag, we have held, all may find shelter under the First Amendment. We have not automatically concluded, however, that any action taken with respect to our flag is expressive. Instead, in characterizing such action for First Amendment purposes, we have considered the context in which it occurred.

The State of Texas conceded for purposes of its oral argument in this case that Johnson's conduct was expressive conduct. Johnson burned an American flag as part – indeed, as the culmination – of a political demonstration that coincided with the convening of the Republican Party and its renomination of Ronald Reagan for President. In these circumstances, Johnson's burning of the flag was conduct "sufficiently imbued with elements of communication," to implicate the First Amendment.

III

The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word. It may not, however, proscribe particular conduct *because* it has expressive elements. A law *directed* at the communicative nature of conduct must, like a law directed at speech itself, be justified by the substantial showing of need that the First Amendment requires. It is, in short, not simply the verbal or nonverbal nature of the expression, but the governmental interest at stake, that helps to determine whether a restriction on that expression is valid.

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

A

Texas claims that its interest in preventing breaches of the peace justifies Johnson's conviction for flag desecration. However, no disturbance of the peace actually occurred or threatened to occur because of

Johnson's burning of the flag. The only evidence offered by the State at trial to show the reaction to Johnson's actions was the testimony of several persons who had been seriously offended by the flag burning.

The State's position, therefore, amounts to a claim that an audience that takes serious offense at particular expression is necessarily likely to disturb the peace, and that the expression may be prohibited on this basis. Our precedents do not countenance such a presumption. To accept Texas' arguments that it need only demonstrate "the potential for a breach of the peace," and that every flag burning necessarily possesses that potential, would be to eviscerate our holding in *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969). This we decline to do.

Nor does Johnson's expressive conduct fall within that small class of "fighting words" that are "likely to provoke the average person to retaliation, and thereby cause a breach of the peace." *Chaplinsky* v. *New Hampshire,* 315 U.S. 568, 574 (1942). No reasonable onlooker would have regarded Johnson's generalized expression of dissatisfaction with the policies of the Federal Government as a direct personal insult or an invitation to exchange fisticuffs. We thus conclude that the State's interest in maintaining order is not implicated on these facts. The State need not worry that our holding will disable it from preserving the peace. We do not suggest that the First Amendment forbids a State to prevent "imminent lawless action." *Brandenburg*.

B

The State also asserts an interest in preserving the flag as a symbol of nationhood and national unity. In *Spence,* we acknowledged that the government's interest in preserving the flag's special symbolic value "is directly related to expression in the context of activity" such as affixing a peace symbol to a flag. We are equally persuaded that this interest is related to expression in the case of Johnson's burning of the flag. The State, apparently, is concerned that such conduct will lead people to believe either that the flag does not stand for nationhood and national unity, but instead reflects other, less positive concepts, or that the concepts reflected in the flag do not in fact exist, that is, that we do not enjoy unity as a Nation. These concerns blossom only when a person's treatment of the flag communicates some message, and thus are related "to the suppression of free expression" within the meaning of *O'Brien.* We are thus outside of *O'Brien's* test altogether.

IV

It remains to consider whether the State's interest in preserving the flag as a symbol of nationhood and national unity justifies Johnson's conviction. As in *Spence,* "[w]e are confronted with a case of prosecution for the expression of an idea through activity," and "[a]ccordingly, we must examine with particular care the interests advanced by [petitioner] to support its prosecution." Johnson was not, we add, prosecuted for the expression of just any idea; he was prosecuted for his expression of dissatisfaction with the policies of this country, expression situated at the core of our First Amendment values. Moreover, Johnson was prosecuted because he knew that his politically charged expression would cause "serious offense."

Whether Johnson's treatment of the flag violated Texas law thus depended on the likely communicative impact of his expressive conduct. Our decision in *Boos* v. *Barry*, 485 U.S. 312 (1988), tells us that this restriction on Johnson's expression is content-based. According to the principles announced in *Boos,* Johnson's political expression was restricted because of the content of the message he conveyed. We must therefore subject the State's asserted interest in preserving the special symbolic character of the flag to "the most exacting scrutiny."

Texas argues that its interest in preserving the flag as a symbol of nationhood and national unity survives this close analysis. Quoting extensively from the writings of this Court chronicling the flag's historic and symbolic role in our society, the State emphasizes the "special place" reserved for the flag in our Nation. The State's argument is not that it has an interest simply in maintaining the flag as a symbol of *something,* no matter what it symbolizes; indeed, if that were the State's position, it would be difficult to see how that interest is endangered by highly symbolic conduct such as Johnson's. Rather, the State's claim is that it has an interest in preserving the flag as a symbol of *nationhood* and *national unity,* a symbol with a determinate range of meanings. According to Texas, if one physically treats the flag in a way that would tend to cast doubt on either the idea that nationhood and national unity are the flag's referents or that national unity actually exists, the message conveyed thereby is a harmful one, and therefore may be prohibited.

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. In holding in *Barnette* that the Constitution did not leave this course open to the government, Justice JACKSON described one of our society's defining principles in words deserving of their frequent repetition: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."

In short, nothing in our precedents suggests that a State may foster its own view of the flag by prohibiting expressive conduct relating to it. To bring its argument outside our precedents, Texas attempts to convince us that, even if its interest in preserving the flag's symbolic role does not allow it to prohibit words or some expressive conduct critical of the flag, it does permit it to forbid the outright destruction of the flag. The State's argument cannot depend here on the distinction between written or spoken words and nonverbal conduct. That distinction, we have shown, is of no moment where the nonverbal conduct is expressive, as it is here, and where the regulation of that conduct is related to expression, as it is here. We never before have held that the Government may ensure that a symbol be used to express only one view of that symbol or its referents.

To conclude that the government may permit designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernible or defensible boundaries. Could the government, on this theory, prohibit the burning of state flags? Of copies of the Presidential seal? Of the Constitution? In evaluating these choices under the First Amendment, how would we decide which symbols were sufficiently special to warrant this unique status? To do so, we would be forced to consult our own political preferences, and impose them on the citizenry, in the very way that the First Amendment forbids us to do.

There is, moreover, no indication – either in the text of the Constitution or in our cases interpreting it – that a separate juridical category exists for the American flag alone. Indeed, we would not be surprised to learn that the persons who framed our Constitution and wrote the Amendment that we now construe were not known for their reverence for the Union Jack. The First Amendment does not guarantee that other concepts virtually sacred to our Nation as a whole – such as the principle that discrimination on the basis of race is odious and destructive – will go unquestioned in the marketplace of ideas.

V

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

Justice KENNEDY, concurring.

The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result. And so great is our commitment to the process that, except in the rare case, we do not pause to express distaste for the result, perhaps for fear of undermining a valued principle that dictates the decision. This is one of those rare cases. But whether or not he could appreciate the enormity of the offense he gave, the fact remains that his acts were speech, in both the technical and the fundamental meaning of the Constitution. So I agree with the Court that he must go free.

Chief Justice REHNQUIST, with whom Justice WHITE and Justice O'CONNOR join, dissenting.

In holding this Texas statute unconstitutional, the Court ignores Justice Holmes' familiar aphorism that "a page of history is worth a volume of logic." For more than 200 years, the American flag has occupied a unique position as the symbol of our Nation, a uniqueness that justifies a governmental prohibition against flag burning in the way respondent Johnson did here.

At the time of the American Revolution, the flag served to unify the Thirteen Colonies at home while obtaining recognition of national sovereignty abroad. Ralph Waldo Emerson's Concord Hymn describes the first skirmishes of the Revolutionary War in these lines: "By the rude bridge that arched the flood; Their flag to April's breeze unfurled; Here once the embattled farmers stood; And fired the shot heard round the world."

In the First and Second World Wars, thousands of our countrymen died on foreign soil fighting for the American cause. At Iwo Jima in the Second World War, United States Marines fought hand to hand against thousands of Japanese. By the time the Marines reached the top of Mount Suribachi, they raised a piece of pipe upright and from one end fluttered a flag. That ascent had cost nearly 6,000 American lives. Impetus for the enactment of the Federal Flag Desecration Statute in 1967 came from the impact of flag burnings in the United States on troop morale in Vietnam. Representative L. Mendel Rivers, then Chairman of the House Armed Services Committee, testified that The burning of the flag has caused my mail to increase 100 percent from the boys in Vietnam, writing me and asking me what is going on in America. Representative Charles Wiggins stated:

The public act of desecration of our flag tends to undermine the morale of American troops. Countless flags are placed by the graves of loved ones each year on what was first called Decoration Day, and is now called Memorial Day. The flag is traditionally placed on the casket of deceased members of the Armed Forces, and it is later given to the deceased's family.

The American flag, then, throughout more than 200 years of our history, has come to be the visible symbol embodying our Nation. It does not represent the views of any particular political party, and it does not represent any particular political philosophy. The flag is not simply another "idea" or "point of view" competing for recognition in the marketplace of ideas. More than 80 years ago, in *Halter* v. *Nebraska,* 205 U.S. 34 (1907), this Court upheld the constitutionality of a Nebraska statute that forbade the use of representations of the American flag for advertising purposes upon articles of merchandise. The Court there said: "For that flag every true American has not simply an appreciation, but a deep affection. Hence, it has 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."

Only two Terms ago, in *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Committee,* 483 U.S. 522 (1987), the Court held that Congress could grant exclusive use of the word "Olympic" to the United States Olympic Committee. The Court thought that this restriction on expressive speech properly was characterized as incidental to the primary congressional purpose of encouraging and rewarding the USOC's activities. As the Court

stated, when a word or symbol acquires value "as the result of organization and the expenditure of labor, skill, and money" by an entity, that entity constitutionally may obtain a limited property right in the word or symbol. Surely Congress or the States may recognize a similar interest in the flag.

In *Chaplinsky* v. *New Hampshire*, a unanimous Court said: "There are certain well defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." But his act, like Chaplinsky's provocative words, conveyed nothing that could not have been conveyed and was not conveyed just as forcefully in a dozen different ways. As with "fighting words," so with flag burning, for purposes of the First Amendment: It is no essential part of any exposition of ideas, and [is] of such slight social value as a step to truth that any benefit that may be derived from it is clearly outweighed by the public interest in avoiding a probable breach of the peace.

Flag burning is the equivalent of an inarticulate grunt or roar that, it seems fair to say, is most likely to be indulged in not to express any particular idea, but to antagonize others. Only five years ago we said in *City Council of Los Angeles* v. *Taxpayers for Vincent,* 466 U.S. 789, 812 (1984), that "the First Amendment does not guarantee the right to employ every conceivable method of communication at all times and in all places." The Texas statute deprived Johnson of only one rather inarticulate symbolic form of protest – a form of protest that was profoundly offensive to many – and left him with a full panoply of other symbols and every conceivable form of verbal expression to express his deep disapproval of national policy. Thus, in no way can it be said that Texas is punishing him because his hearers – or any other group of people – were profoundly opposed to the message that he sought to convey. Such opposition is no proper basis for restricting speech or expression under the First Amendment. It was Johnson's use of this particular symbol, and not the idea that he sought to convey by it or by his many other expressions, for which he was punished.

Our prior cases dealing with flag desecration statutes have left open the question that the Court resolves today. The government may conscript men into the Armed Forces where they must fight

and perhaps die for the flag, but the government may not prohibit the public burning of the banner under which they fight. I would uphold the Texas statute as applied in this case.

Justice STEVENS, *dissenting.*

The question is unique. In my judgment, rules that apply to a host of other symbols, such as state flags, armbands, or various privately promoted emblems of political or commercial identity, are not necessarily controlling. The value of the flag as a symbol cannot be measured. Even so, I have no doubt that the interest in preserving that value for the future is both significant and legitimate. Conceivably, that value will be enhanced by the Court's conclusion that our national commitment to free expression is so strong that even the United States, as ultimate guarantor of that freedom, is without power to prohibit the desecration of its unique symbol. But I am unpersuaded. The creation of a federal right to post bulletin boards and graffiti on the Washington Monument might enlarge the market for free expression, but at a cost I would not pay. Similarly, in my considered judgment, sanctioning the public desecration of the flag will tarnish its value – both for those who cherish the ideas for which it waves and for those who desire to don the robes of martyrdom by burning it. That tarnish is not justified by the trivial burden on free expression occasioned by requiring that an available, alternative mode of expression – including uttering words critical of the flag – be employed.

It is appropriate to emphasize certain propositions that are not implicated by this case. The statutory prohibition of flag desecration does not "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia Board of Education* v. *Barnette,* 319 U.S. 624, 642 (1943). Nor does the statute violate "the government's paramount obligation of neutrality in its regulation of protected communication." *Young* v. *American Mini Theatres, Inc.,* 427 U.S. 50, 70 (1976) (plurality opinion). The content of respondent's message has no relevance whatsoever to the case. The case has nothing to do with "disagreeable ideas,". It involves disagreeable conduct that, in my opinion, diminishes the value of an important national asset.

The Court is therefore quite wrong in blandly asserting that respondent was prosecuted for his expression of dissatisfaction with the policies

of this country, expression situated at the core of our First Amendment values. Respondent was prosecuted because of the method he chose to express his dissatisfaction with those policies. Had he chosen to spray paint – or perhaps convey with a motion picture projector – his message of dissatisfaction on the facade of the Lincoln Memorial, there would be no question about the power of the Government to prohibit his means of expression. The prohibition would be supported by the legitimate interest in preserving the quality of an important national asset. Though the asset at stake in this case is intangible, given its unique value, the same interest supports a prohibition on the desecration of the American flag.*

***Snyder* v. *Phelps*, 131 S.Ct. 1207 (2011)**

Chief Justice ROBERTS *delivered the opinion of the Court.*

A jury held members of the Westboro Baptist Church liable for millions of dollars in damages for picketing near a soldier's funeral service. The picket signs reflected the church's view that the United States is overly tolerant of sin and that God kills American soldiers as punishment. The question presented is whether the First Amendment shields the church members from tort liability for their speech in this case.

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