H.R. 4, they will increase by one-third to total $111.3 billion in 2002. Between 1995 and 2002, total expenditures for these programs will be $753.7 billion.

The conference report also provides support for other areas in which the President has indicated support. The President has called for action to prevent teen pregnancies. We provide $75 million for abstinence education.

The President has called for tough child support enforcement. Our welfare reform bill includes significant improvements in child support enforcement which will help families avoid and escape poverty.

The failure of an absent parent to pay child support is a major reason the number of children living in poverty has increased. Between 1980 and 1992, the nationwide child support enforcement caseload grew 180 percent, from 5.4 to 15.2 million cases. The sheer growth in the caseload has strained the system.

There have been improvements in the child support enforcement system as collections have increased to $10 billion per year, but we clearly need to do better. The House and Senate have included a number of child support enforcement reforms. These include expansion of the Federal Parent Locator Service, adoption of the Uniform Interstate Family Support Act—UIFSA—use of Social Security numbers for child support enforcement, improvements in administration of interstate cases, new hire reporting, and reporting arrearages to credit bureaus. Our conference report provides increased funding for child support data automation.

As I have already mentioned, these provisions have been endorsed by the administration. Let me also note that I recently received a letter from the American Bar Association in which the ABA states it ''strongly supports the child support provisions in the conference report.'' The letter goes on to say, ''If these child support reforms are enacted, it will be an historic stride forward for children in our nation.'' If the President vetoes welfare reform, he will forfeit this historic opportunity.

On January 24, 1995 President Clinton declared at a joint session of Congress, ''Nothing has done more to undermine our sense of common responsibility than our failed welfare system.

Mr. President, vetoing welfare reform will seriously undermine the American people's confidence in our political system. The American people know the welfare system is a failure. They are also tired of empty rhetoric from politicians. Words without deeds are meaningless. The time to enact welfare reform is now.

Mr. President, I yield the floor.

Mr. MCCONNELL addressed the Chair.

The PRESIDING OFFICER. The Senator from Kentucky.

FLAG DESECRATION CONSTITUTIONAL AMENDMENT

The Senate continued with the consideration of the joint resolution.

Mr. MCCONNELL. Mr. President, on Monday I will be offering an amendment in the nature of a substitute to the underlying proposed constitutional amendment, and I ask unanimous consent that this amendment appear in the RECORD at this point. It will be cosponsored by Senator BENNETT of Utah, Senator DORGAN, and Senator BUMPERS.

There being no objection, the amendment was ordered to be printed in the RECORD, as follows:

PROPOSED AMENDMENT

Strike all after the enacting clause and inserting the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Flag Protection and Free Speech Act of 1995''.

SEC. 2. FINDINGS AND PURPOSE.

(a) FINDINGS.—The Congress finds that—

(1) the flag of the United States is a unique symbol of national unity and represents the values of liberty, justice, and equality that make this Nation an example of freedom unmatched throughout the world;

(2) the Bill of Rights is a guarantee of those freedoms and should not be amended in a manner that could be interpreted to restrict freedom, a course that is regularly resorted to by authoritarian governments which fear freedom and not by free and democratic nations;

(3) abuse of the flag of the United States causes more than pain and distress to the overwhelming majority of the American people and may amount to fighting words or a direct threat to the physical and emotional well-being of individuals at whom the threat is targeted; and

(4) destruction of the flag of the United States can be intended to incite a violent response rather than make a political statement and such conduct is outside the protections afforded by the first amendment to the United States Constitution.

(b) PURPOSE.—It is the purpose of this Act to provide the maximum protection against the use of the flag of the United States to promote violence while respecting the liberties that it symbolizes.

SEC. 3. PROTECTION OF THE FLAG OF THE UNITED STATES AGAINST USE FOR PROMOTING VIOLENCE.

(a) IN GENERAL.—Section 700 of title 18, United States Code, is amended to read as follows:

''§ 700. Incitement; damage or destruction of property involving the flag of the United States

''(a) ACTIONS PROMOTING VIOLENCE.—Any person who destroys or damages a flag of the United States with the primary purpose and intent to incite or produce imminent violence or a breach of the peace, and in circumstances where the person knows it is reasonably likely to produce imminent violence or a breach of the peace, shall be fined not more than $100,000 or imprisoned not more than 1 year, or both.

''(b) DAMAGING A FLAG BELONGING TO THE UNITED STATES.—Any person who steals or knowingly converts to his or her use, or to the use of another, a flag of the United States belonging to the United States and intentionally destroys or damages that flag shall be fined not more than $250,000 or imprisoned not more than 2 years, or both.

''(c) DAMAGING A FLAG OF ANOTHER ON FEDERAL LAND.—Any person who, within any lands reserved for the use of the United States, or under the exclusive or concurrent jurisdiction of the United States, steals or knowingly converts to his or her use, or to the use of another, a flag of the United States belonging to another person, and intentionally destroys or damages that flag shall be fined not more than $250,000 or imprisoned not more than 2 years, or both.

''(d) CONSTRUCTION.—Nothing in this section shall be construed to indicate an intent on the part of Congress to deprive any State, territory or possession of the United States, or the Commonwealth of Puerto Rico of jurisdiction over any offense over which it would have jurisdiction in the absence of this section.

''(e) DEFINITION.—As used in this section, the term 'flag of the United States' means any flag of the United States, or any part thereof, made of any substance, in any size, in a form that is commonly displayed as a flag and would be taken to be a flag by the reasonable observer.''.

(b) CLERICAL AMENDMENT.—The table of sections for chapter 33 of title 18, United States Code, is amended by striking the item relating to section 700 and inserting the following new item:

''700. Incitement; damage or destruction of property involving the flag of the United States.''.

Amend the title so as to read: ''A joint resolution to provide for the protection of the flag of the United States and free speech, and for other purposes.''.

Mr. MCCONNELL. Mr. President, every single Senator believes in the sanctity of the American flag. It is our most precious national symbol. The flag represents the ideas, values and traditions that unify us as a people and as a nation. Brave men and women have fought and given their lives and are now entering a war-torn region in defense of the freedom and way of life that our flag represents.

For all these reasons, those who desecrate the flag deserve our contempt. After all, when they defile the flag, they dishonor America. But the issue before this body is: How do we appropriately deal with the misfits who burn the flag?

Many of my colleagues who support a constitutional amendment to ban flag-burning say the only way to ensure flag-burners get the punishment they deserve is to amend the Bill of Rights for the first time in over 200 years. The first amendment, which they propose to alter, contains our most fundamental rights: free speech, religion, assembly, and the right to petition the Government. The freedoms set forth in the first amendment, arguably, were the foundation on which this great Republic was established.

Amending the Constitution was made an arduous process by the Founding Fathers for good reason. The requirements—approval by two-thirds of each House of Congress and ratification by three-fourths of the State legislatures—ensure that highly emotional issues of the day will not tear at the fabric of the Constitution. Since the addition of the Bill of Rights, the Constitution has been amended on only 17 occasions.

Let me repeat, Mr. President, after the initial 10 amendments known as

the Bill of Rights, we have altered the Constitution only 17 times in the history of our country.

And only one of those amendments—prohibition—actually constricted freedom, and it was soon repealed. The 22d amendment also restricts freedom by limiting the President to two terms, but we will have the term limits debate another day.

The proposed constitutional amendment before us does just that—it rips the fabric of the Constitution at its very center: the first amendment.

Our respect and reverence for the flag should not provoke us to cause damage to the Constitution, even in the name of patriotism.

Mr. President, I seek no protection, no safe harbor, no refuge for those who heap scorn on our Nation by desecrating the flag.

The only thing that those who provocatively burn the flag deserve is swift and certain punishment.

Therefore, the statutory amendment I have proposed would ensure that acts of deliberately confrontational flag-burnings are punished with stiff fines and even jail time.

My amendment will prevent desecration of the flag and at the same time, protect the Constitution.

Those malcontents who desecrate the flag do so to grab attention for themselves and to inflame the passions of patriotic Americans. And, speech that incites lawlessness or is intended to do so, the Supreme Court has made abundantly clear, merits no first amendment protection. From Chaplinsky's ''fighting words'' doctrine in 1942 to Brandenburg's ''incitement'' test in 1969 to Wisconsin versus Mitchell's ''physical assault'' standard in 1993, the Supreme Court has never protected speech which causes or intends to cause physical harm to others.

And, that, Mr. President, is the basis for this amendment, that I am discussing. My amendment outlaws three types of illegal flag desecration. First, anyone who destroys or damages a U.S. flag with a clear intent to incite imminent violence or a breach of the peace may be punished by a fine of up to $100,000, or up to 1 year in jail, or both.

Second, anyone who steals a flag that belongs to the United States and destroys or damages that flag may be fined up to $250,000 or imprisoned up to 2 years, or both.

And third, anyone who steals a flag from U.S. property and destroys or damages that flag may also be fined up to $250,000 or imprisoned up to 2 years, or both.

Some of my colleagues will argue that we've been down the statutory road before and the Supreme Court has rejected it.

However, the Senate's previous statutory effort wasn't pegged to the well-established Supreme Court precedents in this area.

This amendment differs from the statutes reviewed by the Supreme Court in the two leading cases: Texas versus Johnson (1989) and U.S. versus Eichman (1990).

In Johnson, the defendant violated a Texas law banning the desecration of a venerated object, including the flag, in a way that will offend—offend, Mr. President—one or more persons. Johnson took a stolen flag and burned it as part of a political protest staged outside the 1984 Republican Convention in Dallas. The State of Texas argued that its interest in enforcing the law centered on preventing breaches of the peace.

But the Government, according to the Supreme Court, may not—may not—''assume every expression of a provocative idea will incite a riot * * *.'' Johnson, according to the Court, was prosecuted for the expression of his particular ideas: dissatisfaction with Government policies. And it is a bedrock principle underlying the first amendment, said the Court, that an individual cannot be punished for expressing an idea that offends. I repeat, the Court said you cannot be punished for engaging in offensive speech.

The Johnson decision started a national debate on flag-burning and as a result, Congress, in 1989, enacted the Flag Protection Act. In seeking to safeguard the flag as the symbol of our Nation, Congress took a different tack from the Texas Legislature. The Federal statute simply outlawed the mutilation or other desecration of the flag.

But in Eichman, the Supreme Court found congressional intent to protect the national symbol insufficient—insufficient—to overcome the first amendment protection for expressive conduct exhibited by flag-burning.

The Court, however, clearly left the door open for outlawing flag-burning that incites lawlessness. The Court said: ''the mere destruction or disfigurement of a particular physical manifestation of the symbol, without more, does not diminish or otherwise affect the symbol itself in any way.''

But, Mr. President, you do not have to take my word on it. The Congressional Research Service has offered legal opinions to Senators BENNETT and CONRAD concluding that this initiative will withstand constitutional scrutiny:

''The judicial precedents establish that the [amendment]''—referring to the amendment I have just been discussing—''if enacted, while not reversing Johnson and Eichman, should survive constitutional attack on first amendment grounds.''

In addition, Bruce Fein, a former official in the Reagan administration and respected constitutional scholar concurs:

''In holding flag desecration statutes unconstitutional in Johnson, the Court cast no doubt on the continuing vitality of Brandenburg and Chaplinsky as applied to expression through use or abuse of the flag. [The amendment] ''—referring to my amendment—falls well within the protective constitutional umbrella of Brandenburg and Chaplinsky * * * [and it] also avoids content-based discrimination which is generally frowned on by the First Amendment.''

Mr. President, several other constitutional specialists also agree that this initiative will withstand constitutional challenge. A memo by Robert Peck, and Prof. Robert O'Neil and Erwin Chemerinsky concludes that the amendment ''conforms to constitutional requirements in both its purpose and its provisions.''

Mr. President, I ask unanimous consent that the CRS memos, the Bruce Fein letter, and the legal memo from Robert Peck, Professors O'Neil and Chemerinsky, and Johnny Killian be printed in the RECORD at this point.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

GREAT FALLS, VA, *October 21, 1995.*

Senator MITCH MCCONNELL,
U.S. Senate, Russell Senate Office Building, Washington, DC.

DEAR SENATOR: This letter responds for your request for an appraisal of the constitutionality of the proposed ''Flag Protection and Free Speech Act of 1995.'' I believe it easily passes constitutional muster with flying banners or guidons.

The only non-frivolous constitutional question is raised by section 3(a). It criminalizes the destruction or damaging of the flag of the United States with the intent to provoke imminent violence or a breach of the peace in circumstances where the provocation is reasonably likely to succeed. In *Chaplinsky* v. *New Hampshire* (1942), the Supreme Court upheld the constitutionality of laws that prohibit expression calculated and likely to cause a breach of the peace. Writing for a unanimous Court, Justice Frank Murphy explained that such ''fighting'' words ''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.''

In *Brandenburg* v. *Ohio* (1969), the Court concluded that the First Amendment is no bar to the punishment of expression ''directed to inciting or producing imminent lawless action and is likely to incite or produce such action.''

In holding flag desecration statutes unconstitutional in *Texas* v. *Johnson* (1989), the Court cast no doubt on the continuing vitality of *Brandenburg* and *Chaplinsky* as applied to expression through use or abuse of the flag. See 491 U.S. at 409–410.

Section 3(a) falls well within the protective constitutional umbrella of *Brandenburg* and *Chaplinsky*. It prohibits only expressive uses of the flag that constitute ''fighting'' words or are otherwise intended to provoke imminent violence and in circumstances where the provocation is reasonably likely to occasion lawlessness. The section is also sufficiently specific in defining ''flag of the United States'' to avoid the vice of vagueness. The phrase is defined to include any flag in any size and in a form commonly displayed as a flag that would be perceived by a reasonable observer to be a flag of the United States. The definition is intended to prevent circumvention by destruction or damage to virtual flag representations that could be as provocative to an audience as mutilating the genuine article. Any potential chilling effect on free speech caused by inherent definitional vagueness, moreover, is nonexistent because the only type of expression punished by section 3(a) is that intended

by the speaker to provoke imminent lawlessness, not a thoughtful response. The First Amendment was not intended to protect appeals to imminent criminality.

Section 3(a) also avoided content-based discrimination which is generally frowned on by the First Amendment. It does not punish based on a particular ideology or viewpoint of the speaker. Rather, it punishes based on calculated provocations of imminent violence through the destruction or damage of the flag of the United States that are reasonably likely to succeed irrespective of the content of the speaker's expression. Such expressive neutrality is not unconstitutional discrimination because the prohibition is intended to safeguard the social interest in order, not to suppress a particular idea. See *F.C.C.* v. *Pacifica Foundation,* 438 U.S. 726, 744–746 (1978).

I would welcome the opportunity to amplify on the constitutionality of section 3(a) as your bill progresses through the legislative process.

Very truly yours,

BRUCE FEIN,
Attorney at Law.

[Memorandum]

To: Interested parties.

From: Robert S. Peck, Esq.; Robert M. O'Neil, professor, University of Virginia Law School; Erwin Chemerinsky, Legion Lex Professor of Law, University of Southern California.

Re S. 1335, the Flag Protection and Free Speech Act of 1995.

Date: November 7, 1995.

This memorandum will analyze the constitutional implications of S. 1335, the Flag Protection and Free Speech Act of 1995. As its name implies and the legislation states as its purpose, S. 1335 seeks ''to provide the maximum protection against the use of the flag of the United States to promote violence while respecting the liberties that it symbolizes.'' S. 1335, 104th Cong., 1st Sess. §2(b) (1995). This memorandum concludes that the bill conforms to constitutional requirements in both its purpose and its provisions.

It would be a mistake to conclude that S. 1335 is unconstitutional simply because the U.S. Supreme Court invalidated the Flag Protection Act of 1990 in its decision in *United States* v. *Eichman,* 496 U.S. 310 (1990). In this decision, as well as its earlier flag-desecration opinion, the Court specifically left open a number of options for flag-related laws, including the approach undertaken by S. 1335. The Court reiterated its stand in its 1992 cross-burning case, indicating that flag burning could be punishable under circumstances where dishonoring the flag did not comprise the gist of the crime (*R.A.V.* v. *City of St. Paul,* 112 S.Ct. 2538, 2544 (1992)).

Unlike the 1990 flag law that the Court negated, S. 1335 is not aimed at suppressing non-violent political protest; in fact, it fully acknowledges that constitutionally protected right. In contrast, the Flag Protection Act, the Court said, unconstitutionally attempted to reserve the use of the flag as a symbol for governmentally approved expressive purposes. S. 1335 makes no similar attempt to prohibit the use of the flag to express certain points of view. Instead, it both advances a legitimate anti-violent purpose while remaining solicitous of our tradition of ''uninhibited, robust, and wide-open'' public debate (*New York Times* v. *Sullivan,* 376 U.S. 254, 270 (1964)).

Moreover, the statute is sensitive to, and complies with several other constitutional considerations, namely: (1) it does not discriminate between expression on the basis of its content or viewpoint, since it avoids the kind of discrimination condemned by the Court in *R.A.V.*; (2) it does not provide opponents of controversial political ideas with an excuse to use their own propensity for violence as a means of exercising a veto over otherwise protected speech, since it requires that the defendant have a specific intent to instigate a violent response; and (3) it does not usurp authority vested in the states, since it does not intrude upon police powers traditionally exercised by the states. Each of these points will be discussed in greater detail below.

One additional point is worth noting. Passing a statute is far preferable to enacting a constitutional amendment that would mark the first time in its more than two centuries as a beacon of freedom that the United States amended the Bill of Rights. Totalitarian regimes fear freedom and enact broad authorizations to pick and choose the freedoms they allow. The broadly worded proposed constitutional amendment follows that blueprint by giving plenary authority to the federal and state governments to pick and choose which exercises of freedom will be tolerated. On the contrary, American democracy has never feared freedom, and no crisis exists that should cause us to reconsider this path. Because the Court has never said that Congress lacks the constitutional power to enact a statute to prevent the flag from becoming a tool of violence, a statute—rather than a constitutional amendment—is an incomparably better choice.

I. S. 1335 PUNISHES VIOLENCE OR INCITEMENT TO VIOLENCE, NOT EXPRESSIVE CONDUCT

The fatal common flaw in the flag-desecration prosecution of Gregory Lee Johnson, whose Supreme Court case started the controversy that has led to the proposed constitutional amendment, and the subsequent enactment by Congress of the Flag Protection Act of 1989 was the focus on punishing contemptuous views concerning the American flag (*Eichman,* 496 U.S. at 317–19; *Texas* v. *Johnson,* 491 U.S. 397, 405–07 (1989)). In both instances, law was employed in an attempt to reserve use of the flag for governmentally approved viewpoints (i.e., patriotic purposes). The Court held such a reservation violated bedrock First Amendment principles in that the government has no power to ''ensure that a symbol be used to express only one view of that symbol or its referents.'' (Id. at 417.)

Johnson had been charged with desecrating a venerated object, rather than any of a number of other criminal charges that he could have been prosecuted for and that would not have raised any constitutional issues. Critical to the Supreme Court's decision in his case, as well as to the Texas courts that also held the conviction unconstitutional, was the fact that ''[n]o one was physically injured or threatened with injury.'' 491 U.S. at 399. The Texas Court of Criminal Appeals noted that ''there was no breach of the peace nor does the record reflect that the situation was potentially explosive.'' *Id.* at 401 (quoting 755 S.W.2d 92, 96 (1988)). Thus, the primary concern addressed by S. 1335, incitement to violence, was not at issue in the *Johnson* case. The *Eichman* Court found the congressional statute to be indistinguishable in its intent and purpose from the prosecution reviewed in *Johnson* and thus also unconstitutional.

In reaching its conclusion about the issue of constitutionality, the Court, however, specifically declared that ''[W]e do not suggest that the First Amendment forbids a State to prevent 'imminent lawless action.'" *Id.* at 410 (quoting *Brandenburg* v. *Ohio,* 395 U.S. 444, 447 (1969)). In *Brandenburg,* the Court said that government may not ''forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.'' 395 U.S. at 447. It went on to state that ''[a] statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from government control.'' *Id.* at 448.

S. 1335 merely takes up the Court's invitation to focus a proper law on ''imminent lawless action.'' It specifically punishes ''[a]ny person who destroys or damages a flag of the United States with the primary purpose and intent to incite or produce imminent violence or a breach of the peace, and in circumstances where the person knows it is reasonably likely to produce imminent violence or a breach of the peace.'' S. 1335, at §3(a). The language precisely mirrors the Court's *Brandenburg* criteria. It does not implicate the Constitution's free-speech protections, because ''[t]he First Amendment does not protect violence.'' *NAACP* v. *Claiborne Hardware Co.,* 458 U.S. 886, 916 (1982).

More recently, the Court put it this way: ''a physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment.'' *Wisconsin* v. *Mitchell,* 113 S.Ct. 2194, 2199 (1993). Under the Court's criteria, for example, a symbolic protest that consists of hanging the President in effigy is indeed protected symbolic speech. Although hanging the actual President might convey the same message of protest, a physical assault on the nation's chief executive cannot be justified as constitutionally protected expressive activity and could constitutionally be singled out for specific punishment. S. 1335 makes this necessary distinction as well, protecting the use of the flag to make a political statement, whether pro- or anti-government, while imposing sanctions for its use to incite a violent response.

Courts and prosecutors are quite capable of discerning the difference between protected speech and actionable conduct. Federal law already makes a variety of threats of violence a crime. Congress has, for example, targeted for criminal sanction interference with commerce by threats or violence, 18 U.S.C. §1951, (1994), incitement to riot, 18 U.S.C. §2101, tampering with consumer products, 18 U.S.C. §1365, and interfering with certain federally protected activities. 18 U.S.C. §245. S. 1335 fits well within the rubric that these laws have previously occupied. It cannot be reasonably asserted that S. 1335 attempts to suppress protected expression.

II. S. 1335 DOES NOT UNCONSTITUTIONALLY DISCRIMINATE ON THE BASIS OF CONTENT OR VIEWPOINT

The Supreme Court has repeatedly recognized that ''above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'' *Police Department* v. *Mosley,* 408 U.S. 92, 95 (1972). On this basis, the Court recently invalidated a St. Paul, Minnesota ordinance that purported to punish symbolic expression when it constituted fighting words directed toward people because of their race, color, creed, religion or gender. Fighting words is a category of expression that the Court had previously held to be outside the First Amendment's protections. *Chaplinsky* v. *New Hampshire,* 315 U.S. 568, 571–72 (1942). In *R.A.V.* v. *City of St. Paul,* 112 S.Ct. 2538, 2543 (1992), the Court gave this statement greater nuance by stating that categories of speech such as fighting words are not so entirely without constitutional import ''that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content.'' Explaining this

concept, the Court gave an example involving libel: ''the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government.'' *Id.*

As a further example, the Court said a city council could not enact an ordinance prohibiting only those legally obscene works that contain criticism of the city government. *Id.* As yet another example, the Court stated that ''burning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not.'' *Id.* at 2544. The rationale behind this limitation, the Court explained, was that government could not be vested with the power to ''drive certain ideas or viewpoints from the marketplace.'' *Id.* at 2545 (quoting *Simon & Schuster, Inc.* v. *Members of the N.Y. State Crime Victims Bd.*, 112 S.Ct. 501, 508 (1991)).

No such danger exists under S. 1335. Both the patriotic group that makes use of the flag to provoke a violent response from dissenters and the protesters who use the flag to provoke a violent response from loyalists are subject to its provisions. A law that would only punish one or the other perspective would have the kind of constitutional flaw identified by the Court in *R.A.V.* Moreover, the legislation recognizes, as the Supreme Court itself did (''the flag occupies a ''deservedly cherished place in our community,'' 491 U.S. at 419) that the flag has a special status that justifies its special attention. Similarly, the *R.A.V.* Court noted that a law aimed at protecting the President against threats of violence, even though it did not protect other citizens, is constitutional because such threats ''have special force when applied to the person of the President.'' *Id.* at 2546. The rule against content discrimination, the Court explained, is not a rule against underinclusiveness. For example, ''a State may choose to regulate price advertising in one industry but not in others, because the risk of fraud is in its view greater there.'' *Id.* (parenthetical and citation omitted).

The federal laws cited earlier that make certain types of threats of violence into crimes are not thought to pose content discrimination problems because they deal with only limited kinds of threats. To give another example, federal law also makes the use of a gun in the course of a crime grounds for special additional punishment. See 18 U.S.C. §924(c). In *Brandenburg*, the Court found that a Ku Klux Klan rally at which guns were brandished and overthrow of the government discussed remained protected free speech. Because guns were used for expressive purposes in *Brandenburg* and found to be beyond the law's reach there does not mean that the law enhancing punishment because a gun is used during the commission of a crime unlawfully infringes on any expressive rights.

The gun law makes the necessary constitutional distinctions that the Court requires, and so does S. 1335's concentration on crimes involving the American flag rather than protests involving the flag. S. 1335 properly identifies in its findings the reason for Congress to take special note of the flag: ''it is a unique symbol of national unity.'' §2(a)(1). It notes that ''destruction of the flag of the United States can occur to incite a violent response rather than make a political statement.'' §2(a)(4). As a result, Congress has developed the necessary legislative facts to justify such a particularized law.

In its only post-*R.A.V.* decision on a hate-crimes statute, the Court upheld a statute that enhanced the punishment of an individual who ''intentionally selects'' his victim on the basis of race, religion, color, disability, sexual orientation, national origin or ancestry. *Wisconsin* v. *Mitchell*, 113 S. Ct. 2194 (1993). A fair reading of the Court's unanimous decision in that case supports the conclusion that the Court would not strike down S. 1335 on *R.A.V.* grounds. In *Mitchell*, the Court concluded that the statute did not impermissibly punish the defendant's ''abstract beliefs,'' *id.* at 2200 (citing *Dawson* v. *Delaware*, 112 S. Ct. 1093 (1992)), but instead spotlighted conduct that had the potential to cause a physical harm that the State could properly proscribe. S. 1335 similarly eschews ideological or viewpoint discrimination to focus on the intentional provocation of violence, a harm well within the government's power to punish.

III. S. 1335 DOES NOT ENCOURAGE A HECKLER'S VETO

First Amendment doctrine does not permit the government to use the excuse of a hostile audience to prevent the expression of political ideas. Thus, the First Amendment will not allow the government to give a heckler some sort of veto against the expression of ideas that he or she finds offensive. As a result, the Court has observed, ''in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide 'adequate breathing space' to the freedoms protected by the First Amendment.'' *Boos* v. *Barry*, 485 U.S. 312, 322 (1988). Any other approach to free speech ''would lead to standardization of ideas either by legislation, courts, or dominant political or community groups.'' *Terminiello* v. *Chicago*, 337 U.S. 1, 4 (1949). Thus, simply because some might be provoked and respond violently to a march that expresses hatred of the residents of a community, that is insufficient justification to overcome the First Amendment's protection of ideas, no matter how noxious they may be deemed. See, e.g., *Collin* v. *Smith*, 578 F.2d 1197 (7th Cir.), Cert. denied, 436 U.S. 953 (1978).

The Supreme Court's flag-burning decisions applied this principle. In *Johnson*, the state of Texas attempted to counter the argument against its flag-desecration prosecution by asserting an overriding governmental interest; it claimed that the burning of a flag ''is necessarily likely to disturb the peace and that the expression may be prohibited on this basis.'' 491 U.S. at 408 (footnote omitted). The Court rejected this argument on two grounds: (1) no evidence had been submitted to indicate that there was an actual breach of the peace, nor was evidence adduced that a breach of the peace was one of Johnson's goals; *Id.* at 407, and (2) to hold ''that every flag burning necessarily possesses [violent] potential would be to eviscerate our holding in *Brandenburg* [that the expression must be directed to and likely to incite or produce violence to be subject to criminalization].'' *Id.* at 409.

S. 1335 avoids the problems that Texas had by requiring that the defendant have ''the primary purpose and intent to incite or produce imminent violence or a breach of the peace, . . . in circumstances where the person knows it is reasonably likely to produce imminent violence or a breach of the peace.'' S. 1335, at §(a)(a). If Texas had demonstrated that Johnson had intended to breach the peace and was likely to accomplish this goal, Johnson could have been convicted of a crime for burning the U.S. flag. Texas, however, never attempted to prove this.

Moreover, S. 1335 does not enable hecklers to veto expression by reacting violently because it requires that the defendant have the specific intent to provoke that response, while at the same time taking away any bias-motivated discretion from law enforcers. The existence of a scienter requirement and a likelihood element is critical to distinguishing between a law that unconstitutionally punishes a viewpoint because some people hate it and one that legitimately punishes incitement to violence.

IV. S. 1335 IS CONSISTENT WITH FEDERALISM PRINCIPLES

Earlier this year, the Supreme Court held that the Gun-Free School Zones Act of 1990, 18 U.S.C. §922(q)(1)(a) unconstitutionally exceeded the power of Congress to regulate commerce. *United States* v. *Lopez*, 63 U.S.L.W. 4343 (1995). In doing so, the Court reaffirmed the original principle that ''the powers delegated by the [] Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.'' *Id.* at 4344 (quoting The Federalist No. 45, pp. 292–293 (C. Rossiter ed. 1961) (James Madison)).

S. 1335 respects these principles by directing its sanctions only at preventing the use of the national flag to incite violence, preventing someone from damaging an American flag belonging to the United States, or damaging, on federal land, an American flag stolen from another person. Each of these acts have a clear federal nexus and remain properly within the jurisdiction of the federal government. Moreover, the bill concedes jurisdiction to the states wherever it may properly be exercised. S. 1335, at §3(a)(d).

V. CONCLUSION

S. 1335 is carefully crafted to avoid constitutional difficulties by being solicitous of federalism and freedom of speech by focusing on incitement to violence. By doing so, it meets all constitutional requirements.

CONGRESSIONAL RESEARCH SERVICE,
THE LIBRARY OF CONGRESS,
Washington, DC, October 23, 1995.

To: Hon. Robert F. Bennett (Attention: Lisa Norton).

From: American Law Division.

Subject: Constitutionality of flag desecration bill.

This memorandum is in response to your request for a constitutional evaluation of S. 1335, 104th Congress, a bill to provide for the protection of the flag of the United States and free speech and for other purposes.

Briefly, the bill would criminalize the destruction or damage of a United States flag under three circumstances. First, subsection (a) would penalize such conduct when the person engaging in it does so with the primary purpose and intent to incite or produce imminent violence or a breach of the peace and in circumstances where the person knows it is reasonably likely to produce imminent violence or a breach of the peace.

Second, subsection (b) would punish any person who steals or knowingly converts to his or her use, or to the use of another, a United States flag belonging to the United States and who intentionally destroys or damages that flag. Third, subsection (c) punishes any person who, within any lands reserved for the use of the United States or under the exclusive or concurrent jurisdiction of the United States, steals or knowingly converts to his or her use, or to the use of another, a flag of the United States belonging to another person and who intentionally destroys or damages that flag.

Of course, the bill is intended to protect the flag of the United States in circumstances under which statutory protection may be afforded. The obstacle to a general prohibition of destruction of or damage to the flag is the principle enunciated in *United States v. Eichman*, 496 U.S. 310 (1990), and *Texas v. Johnson*, 491 U.S. 397 (1989), that flag desecration, usually through burning, is expressive conduct if committed to ''send a message,'' and that the Court would review

limits on this conduct with exacting scrutiny; legislation that proposed to penalize the conduct in order to silence the message or out of disagreement with the message violates the First Amendment speech clause.

Rather clearly, subsections (b) and (c) would present no constitutional difficulties, based on judicial precedents, either facially or as applied. The Court has been plain that one may not exercise expressive conduct or symbolic speech with or upon the property of others or by trespass upon the property of another. *Eichman,* supra, 496 U.S., 316 n., 5; *Johnson,* supra, 412 n. 8; *Spence v. Washington,* 418 U.S. 405, 408–409 (1974). See also, *R.A. v. City of St. Paul,* 112 S.Ct. 2538 (1992) (cross burning on another's property). The subsections are directed precisely to the theft or conversion of a flag belonging to someone else, the government or a private party, and the destruction of or damage to that flag.

Almost as evident from the Supreme Court's precedents, subsection (a) is quite likely to pass constitutional muster. The provision's language is drawn from the ''fighting words'' doctrine of *Chaplinsky v. New Hampshire,* 315 U.S. 568 (1942). That case defined a variety of expression that was unprotected by the First Amendment, among the categories being speech that inflicts injury or tends to incite immediate violence. Id., 572. While the Court over the years has modified the other categories listed in *Chaplinsky,* it has not departed from the holding that the ''fighting words'' exception continues to exist. It has, of course, laid down some governing principles, which are reflected in the subsection's language.

Thus, the Court has applied to ''fighting words'' the principle of *Brandenburg v. Ohio,* 395 U.S. 444 (1969), under which speech advocating unlawful action may be punished only if it directed to inciting or producing imminent lawless action and is likely to incite or produce such action. Id., 447. This development is spelled out in *Cohen v. California,* 403 U.S. 15, 20, 22–23 (1971). See also *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 928 (1982); *Hess v. Indiana,* 414 U.S. 105 (1973).

A second principle, enunciated in an opinion demonstrating the continuing vitality of the ''fighting words'' doctrine, is that it is impermissible to punish only those ''fighting words'' of which government disapproves. Government may not distinguish between classes of ''fighting words'' on an ideological basis. *R.A.V. v. City of St. Paul,* 112 S.Ct. 2538 (1992).

Subsection (a) is drafted in a manner to reflect both these principles. It requires not only that the conduct be reasonably likely to produce imminent violence or breach of the peace, but that the person intend to bring about imminent violence or breach of the peace. Further, nothing in the subsection draws a distinction between approved or disapproved expression that is communicated by the action committed with or on the flag.

In conclusion, the judicial precedents establish that the bill, if enacted, would survive constitutional attack. Subsections (b) and (c) are more securely grounded in constitutional law, but subsection (a) is only a little less anchored in decisional law.

Because of time constraints, this memorandum is necessarily brief. If, however, you desire a more generous treatment, please do not hesitate to get in touch with us.

JOHNNY H. KILLIAN,
Senior Specialist,
American Constitutional Law.

Mr. MCCONNELL. I know my colleagues and their allies who support the constitutional amendment are motivated by the highest ideals and principles.

I share their reverence for the flag and the values and history it represents. But even a constitutional amendment won't succeed in coercing proper respect for the flag. It will, however, do damage to the Constitution and the cause of freedom.

After all, is that not what the flag signifies—freedom? That is what it signifies.

Who can forget the pictures of the fall of the Berlin Wall, as nation after nation of Eastern Europe threw off the shackles of communism for freedom? The American flags flying over our embassies in the countries behind the Iron Curtain held the hopes and dreams of those subjugated under communism.

Spreading freedom is uniquely our American creed. In our history, we have seen freedom triumph over our colonial forbearers, over the slave holders, over the Fascists and over the dictators.

To narrow the Bill of Rights, even in the name of the flag and patriotism, constricts freedom and would reverse the 200-year American experiment with freedom that has made our Nation the envy of the world.

Let us not give flag-burners—the miscreants who hate America and the freedom we cherish—more attention than they deserve. Do not let these few scoundrels with nothing better to do than burn our flag chase freedom from the shores of America.

I urge adoption of my statutory alternative to punish those who desecrate the flag, rather than a constitutional amendment that strikes at the heart of our most cherished freedoms.

So, Mr. President, in all likelihood, we will be voting on this amendment sometime either Monday or Tuesday, depending on whether a unanimous-consent agreement is entered into. I hope that the amendment will be given serious consideration by the Senate as an alternative approach which clearly would meet constitutional standards to amending the Constitution.

Mr. President, on another matter, I ask unanimous consent to proceed as in morning business.

The PRESIDING OFFICER (Mr. INHOFE). Without objection, it is so ordered.

BURMA

Mr. MCCONNELL. Mr. President, last week, in yet another remarkable act of courage, Daw Aung San Suu Kyi announced her party, the National League for Democracy, will not participate in the constitutional convention called by the State Law and Order Restoration Council, SLORC.

As many who have followed Burma in recent years know, remaining true to the people who elected her and the NLD in 1990, Suu Kyi declared,

> A country which is drawing up a constitution that will decide the future of the state should have the confidence of the people.

a standard SLORC clearly does not and cannot meet.

In fact, SLORC has already stacked the constitutional deck against the NLD and Suu Kyi. Convention participants have been forced to accept guidelines that will preserve a leading role for the military in Burma's political life and would exclude anyone married to a foreigner from assuming the office of president. As we all know, this would prevent Suu Kyi from assuming the position she was elected in 1990 to fulfill since she is married to a British scholar.

Mr. President, at the end of my comments, I will insert two articles which appeared on November 30 in the Washington Post and the New York Times regarding the current situation in Burma—there is no question that the decision to boycott has increased the level of tension in Rangoon. SLORC has now charged Suu Kyi and her supporters as engaging in confrontational politics, but, as Suu Kyi is quick to point out:

> What they have termed confrontational is that we have asked for dialogue, which we want in order to prevent confrontation. To silence the views of people whose opinions are different by putting them in prison is far more confrontational.

Let me assure my colleagues that Suu Kyi's understanding of the deteriorating situation in Burma is not a lonely minority view. Last week the United Nations, once again, took up the question of Burma's political and human rights record. Once again, the Special Rapporteur, Dr. Yokota, issued a report which few may actually read, but it is a powerful voice for the thousands and thousands of Burmese citizens who continue to suffer at the hands of SLORC.

Let me briefly tick off the observations made in the report.

In describing the constitutional convention, Dr. Yokota noted that in spite of his efforts to meet privately with political leaders who still planned to participate in the process, SLORC would only permit visits supervised by SLORC officials. He stated in unequivocal terms, the National Convention ''is not heading toward restoration of democracy.''

While the Special Rapporteur welcomed the release of Suu Kyi and three other senior officials, he criticized the continued imprisonment of several hundred political prisoners and the complex array of security laws allowing SLORC sweeping powers of arbitrary arrest and detention—authority that they continue to use—I might argue abuse—weekly.

Yokota also condemned the severity of court sentences without regard to fair trials, access to defense lawyers or any consideration of proportionality between offense and punishment. After sentencing, he drew attention to the fact that conditions in prisons are impossible to monitor because SLORC continues to stonewall the International Red Cross Committee and its request for access to detention sites.

In his March 1995 report, Dr. Yokota confirmed that military officials have carried out arbitrary killings, rape,