

BURNING THE AMERICAN FLAG:  
POLITICAL PROTEST WITH CONSTITUTIONAL PROTECTION

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This month's column reviews the very controversial decision by the United States Supreme Court which found desecration of the American flag to be symbolic speech protected by the First Amendment. This decision has prompted proposed federal legislation and calls for an amendment to the Constitution to ban desecration of the American flag. With or without such remedial legislation, the flag burning controversy will probably be with us for the foreseeable future.

When it does occur, flag burning or other forms of flag desecration is likely to take place in public parks or squares. Traditionally, the courts have found that public parks are a particularly appropriate forum for individuals to exercise their First Amendment free speech rights. As a result, public park agencies and administrators may benefit from a passing familiarity with the general principles of constitutional law illustrated by the *Johnson* decision described herein.

In addition to the spoken word, the free speech guarantee of the First Amendment extends to symbolic speech; i.e., conduct intended to express an idea. Generally, governments may place reasonable time, place, and manner restrictions on the exercise of free speech rights. Reasonable time, place and manner restrictions, however, must be content neutral, i.e. regulating the medium, rather than the message.

Further, government may not curtail free speech rights where the message has the *potential* to cause violence. Such governmental suppression of free speech rights is permissible, however, where the message incites or produces an *imminent* breach of the peace. In the *Johnson* case, the defendant violated a state criminal statute when he desecrated the American flag under circumstances which did not involve an imminent threat of violence.

FREE SPEECH INVITES DISPUTE

In the case of *Texas v. Johnson*, \_\_\_ U.S. \_\_\_, 109 S.Ct. 2533 (1989), the United States Supreme Court held that a state conviction for flag desecration was inconsistent with the First Amendment. The vote was five to four. The facts of the case were as follows:

While the Republican National Convention was taking place in Dallas in 1984, Gregory Johnson participated in a political demonstration dubbed the "Republican War Chest Tour." As explained in the literature distributed by the demonstrators and in speeches made by them, the purpose of this event was to protest the policies of the Reagan administration and of certain Dallas-based corporations. The demonstrators marched through the Dallas streets, chanting political slogans and stopping at several corporate locations to stage "die-ins" intended to dramatize the consequences of nuclear war. On several occasions they spray-painted the walls of buildings and overturned potted plants, but Johnson himself took no part in such activities. He did, however, accept an American flag handed to him by a fellow protestor who had taken it from a flag pole outside one of the targeted buildings.

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 Texas Penal Code section 42.09. After a trial, he was convicted, sentenced to one year in prison, and fined \$2,000.

Texas Penal Code section 42.09 entitled "Desecration of Venerated Object" provided as follows:

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.

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. An offense under this section is a Class A misdemeanor.

The Texas Court of Criminal Appeals reversed Johnson's conviction holding that "the State could not, consistent with the First Amendment, punish Johnson for burning the flag in these circumstances." The United States Supreme Court granted review of this decision.

Writing the opinion for the majority, Justice William Brennan stated that the issue before the Court was "whether Johnson's burning of the flag constituted expressive conduct, permitting him to invoke the First Amendment in challenging his conviction." Specifically, the issue was whether Johnson's "conduct was expressive," and if so, "whether the State's regulation is related to the suppression of free expression." In determining "whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play," the Court stated it would consider "whether an 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." Applying these principles to the facts of the case, the Court found that "Johnson's burning of the flag was conduct sufficiently imbued with elements of communication to implicate the First Amendment."

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. The expressive, overtly political nature of this conduct was both intentional and overwhelmingly apparent. At his trial, Johnson explained his reasons for burning the flag as follows: "The American flag was burned as Ronald Reagan was being renominated as President. And a more powerful statement of symbolic speech, whether you agree with it or not, couldn't have been made at that time.

Having found that Johnson's "conduct was expressive," the Court then considered whether the state criminal statute was "related to the suppression of free expression." As noted by the Court, "the Government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word." On the other hand, the Court acknowledged that a state "may not, however, proscribe particular conduct *because* it has expressive elements."

What might be termed the more generalized guarantee of freedom of expression makes the communicative nature of conduct an inadequate *basis* for singling out that conduct for proscription. 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.

The Court, therefore, had to determine "whether Texas asserted an interest in support of Johnson's conviction that is unrelated to the suppression of expression." In this particular instance, Texas argued that the governmental interest at stake in the flag desecration statute was two-fold "preventing breaches of the peace, and preserving the flag as a symbol of nationhood and national unity." Under the circumstances of this case, the Court found that "no disturbance of the peace actually occurred or threatened to occur because of Johnson's burning of the flag."

Although the State stresses the disruptive behavior of the protestors during their march toward City Hall, it admits that no actual breach of the peace occurred at the time of the flagburning or in response to the flagburning. The State's emphasis on the protestors' disorderly actions prior to arriving at City Hall is not only somewhat surprising given that no charges were brought on the basis of this conduct, but it also fails to show that a disturbance of the peace was a likely reaction to *Johnson's* conduct. 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... On the contrary,... a principal function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger...

Thus, we have not permitted the Government to assume that every expression of a provocative idea will incite a riot, but have instead required careful consideration of the actual circumstances surrounding such expression, asking whether the expression is directed to inciting or producing imminent lawless action and is likely to incite or produce such action... We do not suggest that the First Amendment forbids a State to prevent imminent lawless action.

The Court, therefore, rejected Texas's argument that "its interest in preventing breaches of the peace justifies Johnson's conviction for flag desecration."

The Court then considered "whether the State's interest in preserving the flag as a symbol of nationhood and national unity justifies Johnson's conviction." According to the Court, "nothing in our precedents

suggests that a State may foster its own view of the flag by prohibiting expressive conduct relating to it."

Johnson was not... 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... Whether Johnson's treatment of the flag violated Texas law... depended on the likely communicative impact of his expressive conduct... [T]his restriction on Johnson's expression is content-based... 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...

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. We have not recognized an exception to this principle even where our flag has been involved... [T]he constitutionally guaranteed freedom to be intellectually diverse or even contrary and the right to differ as to things that touch the heart of the existing order encompass the freedom to express publicly one's opinions which are defiant or contemptuous.

Nor may the Government, we have held, compel conduct that would evince respect for the flag... 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.

The Court, therefore, refused "to create for the flag an exception to the joust of principles protected by the First Amendment."

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 so.

There is, moreover, no indication - either in the text of the Constitution or in our cases in 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.

According to the Court, "the way to preserve the flag's special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong."

To say that the Government has an interest in encouraging proper treatment of the flag, however, is not to say that it may criminally punish a person for burning a flag as a

means of political protest... If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence... We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents.

The Supreme Court, therefore, affirmed the judgment of the Texas Court of Criminal Appeals reversing Johnson's conviction.

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.

Quoting from Francis Scott Key's "Star Spangled Banner" and John Greenleaf Wittier's poem "Barbara Frietchie" ("Shoot if you must, this old grey head,/ But spare our country's flag," she said.), Chief Justice William Rehnquist wrote a dissenting opinion. According to Rehnquist, flag burning is not symbolic speech worthy of constitutional protection. On the contrary, Rehnquist found "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."

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 philosophy. The flag is not simply another "idea" or "point of view" competing for recognition in the marketplace of ideas. Millions and millions of Americans regard it with an almost mystical reverence regardless of what sort of social, political, or philosophical beliefs they may have. I cannot agree that the First Amendment invalidates the Act of Congress [18 U.S.C. § 700(a)] and the laws of 48 of the 50 States [all except Wyoming and Alaska], which make criminal the public burning of the flag.