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Protecting Offensive Speech: The Case Against

Amending the Constitution to Criminalize Flag Desecration

Nazi Germany punished profaning or casting contempt upon that country’s flag with imprisonment (Welch, 98). China incarcerates flag burners for up to three years or fines them more than $6,000 (ACLU). Cuba, Iran, and the former Soviet Union are other tyrannical nations who punish those who destroy their nation’s flag (DHJC). The U.S. Supreme Court ruled that laws similar to the ones existing in those countries criminalizing the destruction of American flags are unconstitutional in 1989 when it overturned the conviction of Gregory Johnson, a member of the Revolutionary Communist Party, on flag desecration charges. He had been indicted for burning a flag in 1984 to protest Ronald Reagan’s re-nomination as Republican candidate for President (Welch, 68). This decision sparked a movement, which continues to this day, to protect the flag by amending the Constitution to make flag desecration laws legal. Although disrespecting the flag offends many Americans, the Constitution should not be amended to criminalize the physical desecration of an American flag because the definition of a flag is too vague, because a law prohibiting such acts could not possibly be consistently enforced, and because flag burning is a legitimate form of speech which should continue to be protected by our constitution.

History of Flag Desecration in America

The movement to protect the flag from misuse was begun only in the late 19th century. Its original goal was to prevent commercial and political mistreatments of the flag, either to sell products or to promote political campaigns (DHJC). At first, courts struck down most of these laws on the grounds that they violated private property rights. However, in 1907 the Supreme Court ruled in Halter v. Nebraska that the flag could not be used to advertise beer, thereby upholding the Nebraska law in question which banned flag desecration (Goldstein, Flag Burning, 30). Soon desire and need to prosecute commercial misuses of the flag all but disappeared.
After about 1910, flag desecration laws began to be used almost exclusively to punish people who expressed minority political views (Goldstein, *Flag Burning*, 25). Although in the first half of the century most of these cases involved disrespecting the flag verbally, a few concerned acts of physical desecration of the flag. In fact, by 1966 flag desecration had become so uncommon that the National Conference of Commissioners on Uniform State Laws, which had recommended flag desecration laws back in 1917, declared such laws “obsolete” (Goldstein, *Flag Burning*, 28). Ironically, increasing numbers of flag desecration cases related to the anti-war movement soon prompted Congress to pass the first federal law prohibiting flag desecration in 1967.

Since the Vietnam War era, flag burning has been an effective way for protesters to create controversy and gain attention in the media. In 1989, the Supreme Court ruled in the landmark case *Texas v. Johnson* that flag burning constitutes symbolic speech protected by the First Amendment and invalidated all of the current flag desecration laws, both state and federal. Congress quickly reacted by passing a new flag desecration law which, it was hoped, could prevent flag burning and other disrespectful uses of the flag and still be constitutional. However, the Supreme Court found this new law to be unconstitutional too in the 1990 case *United States v. Eichman*.

At this point it became clear that the only way to ban flag desecration without violating the constitution would be to amend the constitution to give congress and the states power to legislate against flag desecration. Proposed amendments to achieve this goal were introduced into Congress in 1990, 1995, 1997, 1999, 2000, 2002, and 2003 but never received enough votes to pass both houses of Congress, although they passed in the House of Representatives on multiple occasions (CFA).

**Defining a Flag**

One fundamental problem with a flag desecration law would be the simple definition of a flag. Flag emblems are printed on shirts, coffee mugs, sandals, napkins, and even boxer shorts. When would a flag emblem or representation count as a flag that could be desecrated? Would a proud patriot who wore his favorite old, ripped T-shirt with an American flag on it be guilty of physically desecrating the flag? Would a war veteran who wiped his mouth on an American flag napkin at a Fourth of July barbecue, crumpled it up, and threw it away be guilty of desecrating the flag? These people would be physically damaging a representation of the flag, and under the law they could be convicted of flag desecration.
Flag desecration amendment supporters might argue that the previous examples are ridiculous hypothetical situations: only protesters burning or defiling actual flags would be guilty of desecrating a flag. But the situation is not so clear cut. Is a computer printout of a flag image a “real” flag? Could burning a photograph of a flag be made illegal? Before dismissing these and other examples, consider the following definition of a flag according to the federal law banning flag burning before it was invalidated by Texas v. Johnson:

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

This definition was the law of the land as recently as 1989. This gives a concrete example of just how vague the law can be about the definition of a flag. A red, white and blue stars and stripes napkin would constitute a flag of the United States under this definition, as could virtually anything with our national colors and a few stars and stripes on it!

Enforcing a Flag Protection Law

Even if a proper definition of what a flag is could be agreed upon, any law passed to prevent the physical desecration of the flag would still be impossible to enforce. The proposed amendment to the Constitution reads “The Congress shall have power to prohibit the physical desecration of the Flag of the United States” (CFA). The problem is that “desecrating” a flag is a very subjective thing. For example, the proper way to dispose of an old, worn flag is to burn it. A Boy Scout might dispose of a flag at a troop meeting in this way. This is not considered desecration because the burning is meant to be respectful towards the flag. However, a non-violent protester who burns a flag to make a political statement could be prosecuted under a flag desecration law. Although these two people did the same thing—burning an American flag—only the protester would be prosecuted.

To make matters worse, law enforcement officers have a history of applying flag desecration laws unfairly. During the Vietnam War era, many activists were arrested for wearing flag patches on clothing. The irony is that
many of the police who arrested them had flag patches on the sleeves of their uniforms (Goldstein, *Flag Burning*, 23). A person could be arrested for doing the same thing the person arresting him was doing! Likewise, arrests were often made for less disrespectful acts which were considered desecration by the courts, such as arranging the stars into a peace sign or writing messages on the stripes of the flag. As the Supreme Court noted in *Spence v. Washington*, laws prohibiting these actions, if applied literally, would not allow a veteran’s group to attach battalion commendations to a U.S. flag, but it is obvious that if the local American Legion wrote the words “God Bless America” on the white stripes of a flag that they would never be indicted for desecrating a flag (Goldstein, *Desecrating the American Flag*, 127). These situations illustrate the fact that flag desecration laws were, and would be, only enforced when the person in question voiced an unpopular political viewpoint. Applying these laws truly fairly would put thousands of innocent Americans in jail, yet not applying these laws fairly would mean persecuting Americans based solely upon their political views.

Proponents of a flag desecration amendment claim that laws created under the amendment would only be used to prosecute people willfully disrespecting and physically damaging the flag. But under such a broad amendment, they can not truly predict how law enforcement officials would choose to enforce laws prohibiting flag desecration or how hard it can be to determine a person’s thoughts as they burned a flag. If one wanted to protest the government, would he be safe if he wore a Boy Scout uniform while he did it? Likewise, how could one prove that the old flag they had respectfully burned was not burned in protest of the government? Advocates of an amendment to the Constitution to protect the flag do not realize how impossible any laws enacted to protect flags from desecration would be to enforce fairly. Courts would have to try to determine the thoughts in a person’s head at the time of a flag-burning to determine whether or not they were “desecrating” the flag.

**Free Speech**

The Supreme Court has repeatedly ruled that flag burning is symbolic speech protected by the first amendment (DHJC). Flag burning is a very potent way to send a political message of ultimate disagreement and/or contempt for the United States or the policies of the United States. America has tolerated and permitted criticism of its government for over two hundred years. It has been a source of strength in America to tolerate critical speech and, when criticisms are valid, to change for the better. Tolerance of speech, even if it is unpopular speech, is guaranteed
by the first amendment. Amending the constitution to prohibit flag burning or other acts of desecration of the flag would take away a fundamental right that this country has defended and protected for two centuries. The day America criminalizes non-violent political protest is the day America betrays its democratic ideals and takes a step toward a totalitarian government in which speaking out against the government results in imprisonment.

Outlawing flag burning is inconsistent with the Bill of Rights. The fact that a constitutional amendment is needed to criminalize flag desecration is proof. Promoters of a flag protection amendment argue that we should amend the constitution because 80% of Americans are in favor of such an amendment (CFA). This argument has no merit at all in this country. An amendment to the Constitution prohibiting a form of speech that many people disagree with would contradict the very spirit of the rest of the Constitution, indeed the spirit of American democracy. As Justice William Brennan said in the decision of United States v. Eichman, “Any suggestion that the Government's interest in suppressing speech becomes more weighty as popular opposition to that speech grows is foreign to the First Amendment.” The first amendment was not created to protect popular speech because popular speech by definition does not need protection. As Supreme Court Justice Robert Jackson wrote in West Virginia State Board of Education v. Barnette, in which the court ruled that Jehovah’s Witness schoolchildren could not be made to salute the flag:

The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One’s right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections… (qtd. in Goldstein, Desecrating the American Flag, 75)

The first amendment was created to protect minority viewpoints, views that the majority of Americans might not agree with. The first amendment was a first in the world: it provided for a government that would protect dissent, unpopular speech, and a person’s freedom to voice their own opinions. This freedom was one of the things that made America unique and special, and it continues to set our nation apart from many others in the world today. To infringe on this right would go against one of the major principles that this country was founded upon.

Another argument that proponents of the amendment raise is that millions of veterans of the armed forces died “for the flag”. This is simply untrue. The flag may have inspired our soldiers during battle, but as former
Senator John Glenn said, “Those who have made the ultimate sacrifice … did not give up their lives for a red, white and blue piece of cloth” but rather “because of their allegiance to the values, the rights, and the principles represented by the flag” (qtd. in Goldstein, *Flag Burning*, 236). Our soldiers fought and died—and continue to fight and die—to defend the country that the flag represents. They fought to protect the liberties and rights afforded to every citizen of the United States, including the right to protest and freedom of speech. There are, in fact, many veterans of wars who do not support an amendment to the constitution prohibiting flag desecration (Goldstein, *Desecrating the American Flag*, 232). While the flag symbolizes the country our soldiers fight for, the flag itself is not what they fight for.

The flag is a symbol of our nation, nothing more and nothing less. To many people, the flag symbolizes a great nation, as well as morality, justice, and national unity. But there are others who see the flag as a symbol of a nation of greed, corruption, and violence. Bob Avakian, the Chairman of the Revolutionary Communist Party, explained his hatred of the American flag when he said:

> The flag was painted on Fat Boy, the atomic bomb dropped on Hiroshima; it flew over American slavery; it rode with the cavalry in the wars of genocide against the American Indians and the theft of Mexican land; the flag graced the sides of the planes that dropped napalm on the Vietnamese people; and is sewn on the uniforms of the [U.S.’s] ‘advisors’ of the ‘Contras’ in Central America. (qtd. in Welch, 77)

Clearly, there are people who strongly disagree with many of America’s past and current policies. The most forceful way that they could possibly express their discontent peacefully is by burning the symbol of the nation they disagree with. Although that act offends many people who have great respect for the flag, the thing that makes our country truly great is that it guarantees tolerance for both points of view, no matter how unpopular either one is. Burning a symbol of our nation does not hurt our country; in fact it makes it stronger by testing our country’s tolerance and resilience. Perhaps Rep. Gary Ackerman (D-NY) said it best: "If a jerk burns a flag, America is not threatened. If a jerk burns a flag, democracy is not under siege. If a jerk burns a flag, freedom is not at risk and we are not threatened. My colleagues, we are offended; and to change our Constitution because someone offends us is, in itself, unconscionable" (qtd. in Apel). Granted, most Americans consider flag burning despicable, but suppressing dissent in the form of flag desecration by amending the Constitution is not the answer to the problem. As Americans, we must tolerate speech that we do not agree with, not stifle it.


Goldstein, Robert Justin, ed. Desecrating the American Flag: Key Documents of the Controversy from the Civil War to 1995. Syracuse: Syracuse University, 1996.
