

Flag Burning

Joi Straight
Honors College

Faculty Sponsor: Marck L. Beggs
Assistant Professor of English

Abstract

Several times in our nation's history, Congress has introduced a bill that would provide for banning flag desecration. Each time, however, the Supreme Court ruled that this act was protected by the First Amendment freedom of speech rights. The debate over this topic continues, with both sides arguing for "the good of the country."



*I pledge allegiance to the flag
of the United States of America
and to the republic for which it stands:
one nation under God,
indivisible, with liberty and justice for all.*

In a 1943 landmark Supreme Court case, Justice Robert H. Jackson wrote, "The freedom to differ is not limited to things that do not matter much" (qtd. in Jacoby et al. 20). This concept can be applied in the debate on whether to amend the Constitution to ban flag burning. When one considers the Constitution and the symbolic meaning of the United States flag, he or she can see that this is one issue that does mean a great deal to the American public. The freedom to differ is of extreme importance in this case, which can be seen as one reviews the reasoning for committing such an act and what it might mean beyond the desecration of a revered national symbol.

The burning of an American flag is not necessarily anti-American or unpatriotic. Sometimes, the greatness and majesty of the flag is better portrayed in the powerful political and societal statement of destroying it. This act can convey the feeling of the American people that their government is not the body it should be or that it is not doing the will of the people. This is probably one of the most emotional actions they can take to get the government's attention. Some of these protestors may even love the flag as much as those who are for banning flag burning, but the burners want to emphasize the seriousness of their complaint. The act of burning a flag may be the people's way of telling the government that it is corrupting their country, one they hold dear, and they would rather burn the flag than participate in some violent act to express their discontent with the government.

Many people are also concerned with the idea that burning flags somehow dishonors those who

fought for this country in the wars. Representative Henry Hyde, chairman of the House Judiciary Committee, said, "Too many men have marched behind the flag, too many have returned in a wooden box with the flag as their only blanket... not to honor and revere that flag" (qtd. in Feder 114). However, these flags were also used to honor these men's lives by protesting some of the very wars they died in; some flag burners so valued their fellow countrymen's lives that they burned the nation's most visible symbol. During the 1960s, those protesting involvement in the Vietnam War burned thousands of flags and destroyed others in several different ways (Relin 18). This was to show that they did not support the war, not that they did not respect those who fought in it for the country they were trying to "better." The flag burners also protested the morality of a war in which the United States destroyed land, blew up homes of innocent people, and burned thousands of people to death. "That, more than anything else, desecrates our flag, making it one of the most distrusted and feared banners around the world. How agitated we become when someone insults our flag, but every day in a hundred different ways we defile it, trample its spirit, drag through the dirt the principles it represents" ("Desecrating" 772).



Some opponents of flag burning also try to equate this issue with that of violent crimes. They say that if America allows flags to be burned, then the same could go for the Constitution and the White House (Moral 2). William H. Rehnquist, Chief Justice of the United States Supreme Court, said, "One of the highest purposes of a democratic society is to legislate against conduct that is regarded as evil and profoundly offensive to the majority of the peopleC whether it be murder, embezzlement, pollution, or flag burning" (qtd. in Speaking 2). First, it is legal for people to burn copies of the Constitution, but it would not be acceptable to burn the *original* Constitution, just as it would be unacceptable to burn the real Old Glory. This is because preservation of our history and of historical documents is extremely important; it is not necessarily because these are essential for our government but because they are our history, not replications of it. These artifacts do belong to the *nation*. Also, the difference between the actions Rehnquist mentions and flag burning is that flag burning does not injure or cause harm to anyone, nor does it destroy someone else's property, as long as the said flag is not stolen. Thus, burning a flag is not a crime like those the Chief Justice mentioned, and it most certainly is not a violent crime.

Perhaps the biggest problem people have with flag burning is they see it as a direct attack on what the country stands for, what it was built on those many years ago; they see the flag as the definition of America. Senator Feingold of Wisconsin said, "I think the key to this whole issue is that we are not a nation of symbols – we are a nation of principles. Principles of freedom, of opportunity, and liberty. These are the principles that frame our history, and these are the principles... that define our great Nation" (1). Our flag is not what this country is built on; America was founded on the idea of freedom, not on reverence for a piece of cloth. In fact, according to Cal Thomas, those in favor of banning flag burning "have placed the American flag in a category and context that is idolatrous. Idolatry is defined as "the worship of a physical object as a god; immoderate attachment or devotion to something" (110). Even George Bushnell, Jr., World War II and Korean War veteran as well as a former president of the American Bar Association, said, "I did not serve my country in order to protect that physical symbol of our great country; I fought to protect the ideals it represents, including the right of free speech –

especially wrong-headed, illconsidered, offensive political speech" (1).



Advocates of allowing flag burning also suggest that the flag has personal symbolic meanings that are varied and more powerful than the national one. They also point out that people love the flag because of these personal ties, not because the Constitution mandates it. "Allegiance that is voluntary is something beyond price. But allegiance extracted by statute – or, worse yet, by constitutional fiat – wouldn't be worth the paper the amendment was drafted on. It is the very

fact that the flag is voluntarily honored that makes it a great and powerful symbol" (qtd. in Feingold 2). The flag would cease to be a symbol of personal liberty and will instead become a symbol of the freedom the American people lost. In the case of *West Virginia State Board of Education v. Barnette*, Justice Robert Jackson stated, "Those who begin coercive elimination of dissent soon find themselves eliminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard... the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings" (qtd. in "Rehnquist" 47).

Another argument opponents of flag burning make is that this act is not provided for in the First Amendment since it is not *speech*. Major General Patrick H. Brady, the Citizen's Flag Alliance Board Chairman states, "Burning a flag is not speech, it is conduct. You can't burn a flag with your tongue. It is an insult to the intelligence of the vast majority of common sense Americans to call flag burning speech" (1). Chief Justice William Rehnquist, in his dissenting opinion in the *U.S. v. Eichman* flag burning case, said, "Flag burning is the equivalent of an inarticulate grunt or roar," denying that flag burning communicates anything at all. However, one can make the point that whatever flag flying means, then flag burning means the opposite (Kinsley 4).

Flag burning is no less a part of the First Amendment rights than nonverbal communication is. In fact, burning a flag is nonverbal communication; there is definitely a message being sent and one being received. The *United States v. O'Brien* Supreme Court case stated, "conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea" (qtd. in "Flag" 3).

Furthermore, opponents of flag burning make the case that several forms of speech are already prohibited by law. George Bush stated, "The law books are full of restrictions on speech," and Oliver Wendell Holmes backed him up by pointing out that it is not permissible to yell fire in a crowded movie theater (qtd. in Isaacson 17). This fact is irrelevant since these forms of prohibited speech are illegal because they have the potential to cause harm. The Supreme Court



has allowed only for flag burning as an expression of dissent; it specifically excluded protection in cases where vandalism is involved or in which the act incites violence (Wall 643). In effect, this says that only flag burning which is symbolic political speech may be protected.

Also, the Constitution, not necessarily the First Amendment, does provide for peaceful assembly which already allows the Ku Klux

Klan and Neo Nazis to gather together. When they wear paraphernalia which associates them with such a group, they are making an obvious statement. However, these people are not barred from meeting, even though many people may find their gatherings distasteful. As long as a demonstration or protest is peaceful, then why is it not Constitutional? Perhaps what those who support banning flag burning really want is for the government to outlaw anything they find offensive; this could encompass a plethora of issues. However, this is not what the First Amendment is supposed to do, "nor can [it] ensure that free expression will always comport with the views of a majority of the American public or the American Government" (Feingold 4). In his majority opinion in the Supreme Court decision in *Texas v. Johnson*, Justice William J. Brennan said, "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" (qtd. in Wall 643). Brennan went on to conclude, "Punishing desecration of the flag dilutes the very freedoms that make this emblem so revered" (qtd. in Relin 18).

Another issue in this debate is whether approving an amendment, to the Constitution, which bans flag burning would be amending the First Amendment. According to the 1989 United States Supreme Court verdict in the case of *Texas v. Johnson*, adding this amendment would put stipulations on the First Amendment since the Court found that "burning of the United States Flag is protected under the First Amendment to the Constitution" (Court 1). Passing an amendment to ban flag burning would overrule a Supreme Court decision. This in and of itself may seem close to being unconstitutional since it is the courts' expressed power to interpret the Constitution, not the legislature's. However, a provision exists in Article III, Section 2, of the Constitution, which states, "In all the other cases before mentioned the Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make" (qtd. in "Burning" 12). This provision is seldom used, and is not seriously considered as an option since the Congress would have to be sure the majority of the public supported such an action.

Of course, knowing if the majority of the people really do support this idea is harder than one might think. Those that favor the ban claim that over 60 percent of citizens would support this amendment. However, when people were asked how they viewed the amendment once they knew it would be "the first in our nation's history to restrict freedom of speech and freedom of political protest, the results were dramatically differentC a majority of Americans opposed such an amendment" (Bushnell 1).

As with many political issues, the slippery slope fallacy comes into play. In this debate, those in favor of allowing flag burning convey the idea that if the amendment to ban desecration of the flag is passed, then no replica, portion, or component of the flag will be allowed on clothing, accessories, advertisements, napkins, cakes, etc. This would mean that a person could not even have a red and blue handkerchief with white stars on it because that would be a desecration of the flag. This concern does have some basis. The American Legion Flag Education and Etiquette: Flag Code states, "The flag should never be used for advertising purposes in any manner whatsoever. It should not be embroidered on such articles as cushions or handkerchiefs and the like, printed or otherwise impressed on paper napkin or boxes or anything that is designed for temporary use and discard." It also states, "The flag represents a living country and

is itself considered a living thing" (6). However, the American flag was painted on the atomic bomb dropped on Hiroshima (Garbus 370). So, the interpretation for what could and could not be "desecrated" would be a vital aspect of the amendment.

This issue is one that will probably continue to reappear in debates of all kinds. However, as Feingold said, "This Nation was born of dissent and, contrary to the view that it weakens our democracy, this Nation stands today as the leader of the free world because we tolerate those varying forms of dissent, not because we persecute them" (5). Justice Anthony Kennedy said, "It is poignant and fundamental that the flag protects even those who hold it in contempt" (qtd. in Relin 17).



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Biography

Joi Straight is a sophomore English/Communications major and member of the Honors College. As part of her numerous organizational involvements, she is co-editor of the *Oracle*, Vice-President External of the Student Government Association, co-chair of the Honors Council, and Secretary/Treasurer of the Residence Hall Association.

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