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The First Amendment and the Flag

Bruce Berner
Valparaiso University School of Law

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The Supreme Court's flag-desecration decision, *Texas v. Johnson*, has set off a storm of reaction: articles decrying the decision as an outrage; calls for curative legislation and/or constitutional amendment and/or impeachment;general harrumphing. My main objective is to locate the flag-burning issue within the basic structure of freedom-of-expression analysis and sharpen the question; my subsidiary objective is to argue briefly that the decision was correct.

Gregory Johnson, as a participant in an anti-Reagan, anti-nuclear protest during the 1984 Republican Convention in Dallas, burned an American flag while singing, "America, the red, white, and blue, we spit on you." Official response to this delightfully crafted composition—in sonata form, no doubt–remains unknown, but the flagburning prompted criminal prosecution under this Texas statute:

> Desecration of Venerated Object:
>
> (a) A person commits an offense if he intentionally or knowingly desecrates:
>
> (1) a public monument;
>
> (2) a place of worship or burial; or
>
> (3) a state or national flag.
>
> (b) For purposes of this section, "desecrate" means deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action.

His conviction was reviewed by the Supreme Court, which held, 5-4, that the statute's application to Johnson violated the first-amendment protection of expression.

The decision was neither "a departure from 200 years of history" nor "inevitable," as characterized by two nationally syndicated columnists from opposite ends of the political spectrum. The Court had never ruled squarely on the issue, though dicta assuming the government's power to so regulate appeared in judicial opinions of such well-credentialed civil libertarians as Earl Warren, Hugo Black, and Abe Fortas. On the other hand, leading constitutional law authorities (John Hart Ely of Stanford and Laurence Tribe of Harvard, among others) state that flag-desecration statutes can only with great torture be made to fit with first-amendment principles as they are currently designed.

Nevertheless, had the 5-4 decision gone the other way, it need not have compromised first-amendment jurisprudence generally because the Court could treat the flag as *sui generis*, an absolutely special case, standing (flying?) alone. Placing the flag in a class by itself would preserve other first-amendment doctrines against the axiom, "hard cases make bad law." But such a special exception, if unaccompanied by principled support, preserves coherence only by admitting incoherence. A constitutional amendment exempting flag desecration from first-amendment protection would, of course, achieve the result its proponents desire. But it would not produce theoretical coherence unless the discourse of public or ratification debate articulated some larger principle which could explain and accommodate both the first amendment and the flag amendment. Nothing in the dissenting opinion suggests this larger principle other than a tour de force that the flag is "special" or "unique". It is a very special, unique, revered symbol, but this does not begin to explain why it should be placed outside the first amendment. Indeed, many believe that a large part of the flag's uniqueness is the majestic, calm assurance with which it tolerates bitter dissent.

At the heart of protection for expression lies the notion that, on balance, it is best to expose all ideas, however contemptible, to the open air of "the marketplace of ideas." Rather than imprison those who speak the thought we hate, this marketplace will often drive them into ideological bankruptcy, can render them, in Justice Douglas's words, "the miserable merchants of unwanted wares." And while we do not shut up Gregory Johnson, neither do we still the voice of Copernicus. Speaking in the 1943 decision banning compulsory flag salute, the Court, through Justice Jackson, stated: "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,

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Bruce Berner *teaches in the School of Law at Valparaiso University.* The Cresset *welcomes him as a new contibutor to "The Nation."*

religion, or other matters of opinion." Several years later at the Nuremberg trials, Justice Jackson would get a close look at a regime which followed a different star.

The following brief and oversimplified summary of the structure of first-amendment analysis might help to locate the flagburning issue and, incidentally, to distinguish other issues often invoked (sometimes erroneously) in the recent literature. The following hypothetical regulations are employed to demonstrate the structure. Assume that each is violated by a defendant through expressive or communicative speech or conduct.

A. No writing communist slogans on the Washington Monument.

B. No writing anything on the Washington Monument.

C. No burning draft cards. (Assume a draft in effect)

D. No loud noises in residential areas.

E. No passing out handbills.

F. No false advertising.

G. No burning the American flag in public or private.

Governmental regulation can abridge expression in either of two ways. First, a regulation may be aimed at the communicative impact of ideas or information because the regulator does not like either the content or effect of their dissemination (e.g., Regulation A). For identification, we shall call these direct regulations of expression. Second, a regulation may be aimed at conduct's noncommunicative impact (e.g., Regulation D aims at noise abatement, not at the message or its effect) but nevertheless incidentally abridge communicative opportunity--both the nonexpressing teenager with a boombox and the expressing electioneer with a loudspeaker are prohibited by Regulation D. This is an indirect regulation of expression.

In cases of indirect regulation, the Court essentially balances the benefit of the regulation (quiet neighborhoods) against the incremental costs to expression (the electioneer must get the word out in other ways); but, because first-amendment interests are involved, the balance is conducted, in Professor Kalven's colorful phrase, "with a thumb on the scale" in favor of expression. Notwithstanding the "thumb,"Regulation D has been found constitutional; likewise, Regulation B (no writing anything on the Washington Monument) properly preserves a unique national landmark and avoids the cost and trouble of sandblasting or other repair even though it removes a channel for communication, be it "Down with the Government" or "Patti loves Johnny." The Court upheld Regulation C (no burning draft cards) only upon a showing that the destruction of cards, whether done publicly for expressive purposes or privately, hampered the administrative effectiveness of the Selective Service System.

Not surprisingly, the Court views direct regulation with much more suspicion. Although the first amendment is not "absolute" in even these cases (witness defamatory speech or falsely shouting "Fire!" in a crowded theater), the governmental interest in the regulation must be powerful or "compelling" to support it, as with speech carrying a "clear and present danger" of inciting to riot. To extend Kalven's metaphor, the Court calls on itself, in direct regulation cases, to stand on the scale in favor of expression. (This is another good reason not to appoint judicial lightweights.) Regulation A (no writing communist slogans on the Washington Monument) could not pass muster. Note that it explicitly regulates a particular brand of political expression. What legitimate interest does the Government have to keep "Hooray for Stalin" off the monument that would not also seek to exclude "To Hell with the Mets"? Regulation B (no writing anything on the Washington Monument), the indirect regulation discussed earlier, would constitutionally prohibit both inscriptions even though it is aimed at neither but at preserving government property against vandalism. Regulation F (no false advertising), while directly aimed at the effect of disseminated information, has obvious compelling justification. Moreover, though commercial speech is protected, it is political expression which is at the core of the first amendment.

This two-track analytical structure raises a complicating feature: since scrutiny is much less stringent in indirect- regulation cases, regulators might try to disguise a direct regulation as indirect. Some have argued that this occurred in the draft-card-burning case, that physical integrity of the cards had nothing to do with the smooth functioning of the system but was a subterfuge to suppress unorthodox expression during the Vietnam War. Regulation E (no passing out handbills) might be advanced as an anti-litter regulation (indirect), but context and timing could indicate it is aimed at particular persons with particular messages (direct).

Regulation G (no burning the American flag in public or private), one of the proposed legislative reactions to the Johnson deci-

sion, is instructive. If its motivation were perceived as a subterfuge for direct regulation of abhorrent expressive conduct (and, come on, what else is it?), it is controlled by Johnson and, therefore, unconstitutional. If, alternatively, we naively took the proponents at their word and accepted the regulation as protecting "the physical integrity of the cloth and emblem even against its owner from destruction of any kind, public or private, expressive or not," we would have to concede that it is only an indirect regulation aimed not at expression but at preserving this cloth. So far, so good. But, the moment the regulation is applied against an expressive flagburning, the Court must weigh the expression interest (together with thumb) against the interest in this cloth. But how weighty is the government's interest in preventing people from burning their own flags in the privacy of their own homes? Is it afraid we'll run out and forget how to make more? This "interest" sounds like H.L. Mencken's definition of Puritanism: "The haunting fear that somebody, somewhere, is doing something naughty."

The Government may, of course, clearly prohibit any defacing of particular flags, like the ones on the Capitol or Fort McHenry, to preserve historical relics or merely to defend its own property. And surely the theft statute covers stealing or vandalizing others' flags. These regulations aim at any kind of misuse, expressive or not.

The Texas desecration statute is clearly a direct regulation of expression. The dissenting justices and the State of Texas concede that it does not apply to closet flagburnings but only to those public ones which "seriously offend" others. It is not sufficient, therefore, to argue that the interest in preserving the flag's dignity outweighs the interest in permitting this form of expression. However offensive and gratuitous the message of the flagburner is (and Texas concedes that Johnson was engaged in symbolic expression), the government must state a "compelling" justification for stifling it.

When the Court engages in this stand-on-the-scale balancing of direct regulation, the strength, appropriateness, or value of the expression is not relevant. All expression has the same constitutional weight–to evaluate it is to miss the whole point. Of course Johnson's expressive conduct was offensive, gratuitous, even heartbreaking. The dissent evokes this well with reference to the rich history and meaning of the flag–Francis Scott Key, Iwo Jima, parades, even the entire text of Whittier's "Barbara Frietchie": "Shoot if you must, this old grey head, But spare your country's flag . . . ." What really upsets us is that Johnson is co-opting the flag for his own purposes. Most of us believe him insensitive and wrong. Say so. Tell one another. Tell him. Tell him why. The cure is more speech, not less.

The Court next analyzed the governmental purposes for this direct regulation. The State of Texas advanced two: preventing breaches of the peace; and preserving the flag as a symbol of nationhood and national unity. As to the first, Texas already has a "disturbing-the-peace" statute and, at any rate, the demonstration was in all respects peaceful. As to the second, burning a flag makes the flag no less a symbol of nationhood. And why should Americans be interested in national unity produced by compulsion? The profound thrill at parades is not that everyone stands when the flag passes, but that everyone wants to stand.

Beyond that, long before Johnson desecrated the flag, we have trivialized it–on candy bars, advertisements, litter bags announcing "Smith for Alderman", and so on. And some desecrate the flag by wrapping themselves in it. All of this makes it difficult to accord "compelling" weight to the unique-symbol argument. It is simply not enough that flag desecration makes us feel awful.

None of this is to say that Johnson did not minimize the flag or our reverence for it. He meant to and he did. The people who claim hurt and outrage are not all posturing and cannot be responsibly dismissed as unenlightened. The first-amendment guarantee, like freedom itself, is not free. It entails real, painful costs, and some people bear more than their fair share. That we must pay these costs is a sad truth; history records that the failure to pay them reveals sadder ones.

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Corrections:

The Editor regrets that footnote numbers were omitted from the text of Jon Pahl's article on antinomianism in the September *Cresset.* Readers who would like to know for certain where the footnotes were placed are invited to request a corrected copy of the article.