

Freedom of Speech and National Pride: Flag Desecration in the United States

Zhiqiu Zhang

School of Humanities and Social Science, The Chinese University of Hong Kong, Shenzhen

zhiqiuzhang@link.cuhk.edu.cn

Abstract. This paper examines the constitutional protection of flag desecration under the First Amendment in the United States. Through an analysis of a series of landmark Supreme Court cases, the author explores both arguments against and in favor of protecting flag desecration as a form of symbolic speech. The paper evaluates the uniqueness of the national flag as a symbol, the government's interest in preserving national pride, and the principles of free expression. Ultimately, it concludes that flag desecration is protected under the First Amendment, despite ongoing public and legislative opposition, highlighting the tension between national symbolism and constitutional rights.

Keywords: Flag Desecration, First Amendment, Constitutional Law, Freedom of Speech, Symbolic Speech

1. Introduction

In the United States, the question of whether flag desecration should be punished has long been controversial (Marshall, 2017). The core of this controversy lies in a US Supreme Court landmark case—*Texas v. Johnson* (1989). Johnson burned a US national flag during a political event in Texas. He was prosecuted for flag desecration and disturbance of the peace. In a 5-4 split, the court held that burning the national flag was protected under the First Amendment. The decision was quickly strengthened by *United States v. Eichman* (1990), which officially banned any flag desecration law on the federal level.

Flag desecration has been protected in the US since the two landmark decisions. However, this may not be forever. Since 1990, the US Congress has tried to amend the Constitution to include flag desecration laws in response to the public's outrage. On top of that, as the US Supreme Court becomes conservative (presumably more so under President Trump's second term), the future of the Johnson decision seems unclear.

The author will investigate this interesting issue. The author will focus on this research question: whether the freedom of speech doctrine shall protect US flag desecration. In the following, the author will first present two arguments against the constitutional protection of flag desecration: the special national identity argument and the *Sui Generis* ("nothing else like it") argument. Then, the author will turn to three arguments for the constitutional protection of flag desecration: the First Amendment protection argument, the rebuttal to the "peace-disturbance" argument, and the rebuttal to the "national pride" argument. Finally, the author will draw a conclusion based on the arguments against and arguments for.

2. Arguments AGAINST: Flag Desecration Is NOT Protected Under the First Amendment

First, flag desecration should not be protected under freedom of speech because the national flag is a unique national symbol. The history of the US national flag during wartime justifies the flag's uniqueness as the national symbol. Some, including Justice Stevens in his dissent, argued that the wartime effect of the national flag ALONE might uphold the prevention of its desecration (Granahan, 2024).

Since the Independence War, the national flag has protected American soldiers, guided the soldiers to fight, and maintained national unity. For example, in the Independence War, American soldiers harassed the British ships in the harbor. Since the soldiers carried a national flag with them, they were considered “prisoners of war.” Without the flag, the British soldiers could hang those American soldiers as “pirates” (Rehnquist, 1989). Another example is the 1812 Civil War. During the Civil War, the national flag still had all the stars on it, though some of the stars represented the 11 rebel states. President Lincoln insisted on keeping the stars. He used the flag as a national symbol and, in the end, kept the nation united (Rehnquist, 1989).

Apart from wartime, the unique symbolic value of the national flag can also be found during peacetime. To many Americans, the national flag has become a “holy symbol” (Marshall, 2017). On the one hand, this comes from the Americans’ religious belief of “one nation under God.” On the other hand, things in America—artworks, songs, literature, and even everyday clothes—are all infused with the national flag as an indispensable element. The Americans believe in the flag’s representation of God, freedom, and anti-tyranny. No other national flag can have the same status to their people as the American flag to the Americans (Marshall, 2017). Justice Rehnquist also states that no national symbol can be this honored as the flag. More importantly, although people in the US have conflicts and polarizations, millions of Americans respect the national flag together. Despite the differences among the Americans, they still see the flag with “an almost mystical reverence” (Rehnquist, 1989).

As a democratic country, the US shall listen to people’s voices. Since the people of America consider the flag a unique national symbol, the US flag should be protected under laws. Various Congress legislatures and US Supreme Court case laws support the protection of the flag and the punishments for flag desecration actions. For example, in 1968, the US Congress passed legislation banning flag desecration. The law stated that people who desecrate the US flag could be fined, sent to prison, or both (§ 700 of 18 U.S.C., 1968). In *Halter v. Nebraska* (1907), the court upheld the important symbolic value of the national flag. The court even forbade the commercial use of the flag. This is because commercial usage might diminish the unique value of the national flag.

Since the US flag carries a unique symbolic value in wartime and peacetime, flag desecration should be punished by laws. No protection for flag desecration under the freedom of speech is also in line with the previously created legislatures and case laws. Moreover, the uniqueness of the national symbol outweighs the freedom of speech protection. To further explain this, let us go to the second argument against—the *Sui Generis* argument.

Sui Generis means “nothing else like it.” This argument focuses on the flag’s “uniqueness”. Also, the argument points out the “property” element of the national flag. The first has been fully explained before. Let us investigate the second. The property element means that the national flag, as an expression, is owned by the US government. It is the property of the government. Burning a flag is burning the US government’s property. Therefore, flag desecration should not be protected under the First Amendment.

In *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee* (1987), the court held that the word “Olympic” specifically belongs to the United States Olympic Committee. The court held that when a word or symbol acquires value from the organization, then that organization has a property right to that word or symbol (Powell, 1987). The same rationale should be applied to the national flag. The national flag is a kind of speech delivered by the US government. The value of the national flag lies in the US government. Therefore, the US government owns the national flag.

Some may argue the government does not speak. However, the government can be the speaker. In *Wooley v. Maynard* (1977), the court held that the government could be a speaker that “seeks to communicate.” The court also held that the speeches of the government may communicate the “proper appreciation of history and national pride,” among other things. Patriotism, national pride, and unity are spoken by the US government through its national flag (Fishman, 2001).

The government’s speeches can be divided into “controversial government speech” and “non-controversial government speech.” This classification is not concerned with whether the speech has

a goal. Almost all government speeches have goals. Like an individual speaker, the government wishes to express certain opinions. The government has values to promote (Shiffrin, 1980). Rather, the classification is focused on whether the content is controversial. An example of a controversial government speech is when the government places a religious symbol on a public government building. This is controversial because the speech does not send an equal message to everyone. An example of a non-controversial speech is when the US government built the Lincoln Memorial, which intrigues people's awe and respect for the government. This is non-controversial because it seeks to raise all Americans' patriotic emotions.

Non-controversial governmental symbols are omnipresent. These symbols may include "ceremony swear, oaths of citizenship, Fourth of July celebrations, and the flag." (Fishman, 2001). According to Fishman, the US national flag is a non-controversial government-owned speech, just like the Lincoln Memorial. The flag seeks to speak, just like the Lincoln Memorial. The flag promotes patriotism, just like the Lincoln Memorial. Since we protect the Lincoln Memorial from destruction, we should also protect the national flag from desecration.

All in all, since the US national flag is a unique national symbol that is sacred and indispensable to Americans, and since the flag is a non-controversial, government-owned speech, flag desecration should be punished.

3. Arguments FOR: Flag Desecration Is Protected Under the First Amendment

First, the First Amendment should protect flag desecration because flag desecration is a content-based, non-written expression (Brennan, 1989). Usually, publicly desecrating something is punishable. An established precedent is the O'Brien case. In *United States v. O'Brien* (1968), the court held that burning a draft card in public was guilty. It was not protected under the First Amendment. *Prima facie*, if one can be guilty of burning a draft card, then one can certainly be guilty of burning the national flag. However, the O'Brien case cannot offer guidance here. This is because the O'Brien case is not related to expression. Burning a draft card is an act against the "physical integrity" of the card itself, while flag desecration is concerned with the "communicative impact of an expressive conduct." (Stone, 1990).

Flag desecration is a content-based expression. Certain expressions can be punished because they are not content-based. It may be a property-based, content-neutral expression, as in the O'Brien case. However, Texas punished Johnson because Johnson's action of burning the national flag offended others. In Johnson's words, the message sent through flag desecration was his "dissatisfaction with the policies of this country." (Brennan, 1989). From both perspectives of the recipient and the speaker, flag desecration is fully content-based. (Stone, 1990).

Flag desecration, though non-verbal, is still a protected expression. The First Amendment protects nonwritten forms of content-based expressions. In *Stromberg v. California* (1931), the court held that the young communists holding red flags should be protected under the First Amendment. The red flag served "as a sign, symbol, or emblem of opposition to organized government." The flag has been a nonwritten form of expression ever since. In *Texas v. Johnson*, Johnson's flag desecration action is "intended to communicate" and is "reasonably understood by others as communication." (Brennan, 1989). Therefore, the "expressive, overtly political nature" of flag desecration shall be seen as a nonwritten expression (Goldstein, 1996).

Furthermore, the First Amendment aims to protect those unwanted, unpopular, and anti-mainstream speeches. The purpose of this law is to protect those unpopular or even offensive opinions (Young, 1972). As Justice Brennan put it, the "bedrock principle" of the First Amendment is for people to have the right to be not punished for their ideas simply because "the society finds the idea offensive or disagreeable." Therefore, flag desecration shall be protected under freedom of speech.

Second, the "disturbance of peace" argument does not stand. One of the strongest arguments for punishing flag desecration is it may disturb peace. However, no evidence was found that peace was disturbed due to Johnson's flag desecration action (Brennan, 1989). The only evidence presented in

the appeal court was some witnesses' testimony. These people said they were offended. Yet, no actual peace disturbance occurred.

Even if evidence could show peace disturbance, banning flag desecration for peace disturbance would be against case laws. In *Tinker v. Des Moines Independent Community School Dist.* (1969), a school forbade students to wear black armbands to protest the Vietnam War. The school argued that other students were intrigued by the armbands. The students did a protest that disturbed the peace. However, the court held that the school's regulations were unconstitutional. The court affirmed the principle decided in *Terminiello v. Chicago* (1949) that freedom of speech must "take the risk." The school might need to maintain peace and order. However, peace disturbance was not enough to overcome the First Amendment protection. As Justice Brennan puts it, freedom of speech is used to "invite dispute" and, to some extent, disturb the peace.

Third, the "national pride" argument does not stand. To begin with, Johnson was not even prosecuted for harming the country's pride. He was prosecuted for his political expression, which had disturbed public order and peace. He was expressing his dissatisfaction with the current administration. Yes, burning a flag was offensive. Yet, the context was suitable. Burning a flag at a political convention was a politically charged expression. Though offensive to some, it should be protected under the First Amendment.

During the trial, the state claimed its special interest in preserving national pride. However, case laws do not support this argument. In *Street v. New York* (1969), the court held that speaking bad words against the flag was not punishable. The court held that the "bedrock principle" of the First Amendment was to protect those ideas that were diverse, contrary, defiant, or even contemptuous (Brennan, 1989). In *Spence v. Washington* (1974), the court held that taping a peace sign to the national flag was legally protected. Modifying the flag was an expression protected under the First Amendment. The court held that the state's interest in promoting national pride should not infringe on an individual's right to speak freely.

Moreover, although national pride is important, we should not use it as a weapon against freedom of speech. A country's national pride embedded in its national flag is important. A country can and perhaps should promote the correct treatment of the flag. For example, the US Congress has passed laws to promote people's respect for the national flag. The laws may guide and teach the citizens how to display the flag (36 U. S. C. §§ 173-177). The country will educate the children to respect the flag. Every child in America knows they should put their right hand in front of their left chest when the flag is rising. However, these cannot be sufficient to punish flag desecration as a political expression. There is a large gap between saying the government has an interest in promoting national pride based on the proper treatment of the flag and saying the government has an interest in forbidding political expression based on the mistreatment of the flag (Brennan, 1989).

All in all, flag desecration is a political, non-written, content-based expression. It is protected under the First Amendment. The government cannot use the "peace disturbance" argument or the "national pride" argument to ban individuals from expressing their opinions. Although national pride and peace-keeping are important, they cannot outweigh people's constitutional rights.

4. Conclusion

With arguments from both sides, the author now concludes. Flag desecration, socially speaking, is something that will cause disturbance, offense, and even trouble. However, that's exactly why the First Amendment protects flag desecration. Yes, national pride is unique and important. However, freedom of speech is a more fundamental right. Many legal arguments against First Amendment protection are rebutted. In conclusion, flag desecration in the US is protected under the First Amendment, as decided by the US Supreme Court.

Legal scholars usually find the Johnson decision sound. The legal reasoning has been persuasive to many. From a legal scholar's point of view, flag desecration is based on the "well-established" freedom of speech doctrine (Henderson, 1996). However, the public may find the Johnson decision

contrary to common sense. Flag desecration is “particularly sensitive and attacks on their national symbols.” (Marinthe, 2023). This issue will foreseeably continue to be controversial.

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