

May 1971

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Recommended Citation

Robert R. Skinner, *Constitutional Law--Flag Desecration as Symbolic Speech*, 73 W. Va. L. Rev. (1971).

Available at: <https://researchrepository.wvu.edu/wvlr/vol73/iss2/8>

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Constitutional Law—Flag Desecration as Symbolic Speech

In 1966, as a protest against the Viet Nam war, William Hodsdon improperly displayed an American flag. Following an unsuccessful attempt in federal court to enjoin this conduct,¹ Hodsdon was indicted under the Delaware flag desecration statute.² Hodsdon responded with a request in federal district court for declaratory and injunctive relief on first amendment grounds. *Held*, Injunctive relief denied; declaratory relief granted. The Delaware statute was found overbroad and declared unconstitutional. *Hodsdon v. Buckson*, 310 F. Supp. 528 (D. Del. 1970).

In *Hodsdon* the court maintained that, although the law must be invalidated in its entirety because its broad language might deter protected expression, some of the statute's objectives could be realized.³ In support of this position the court referred to the United States Supreme Court decision in *Street v. New York*,⁴ in which the four dissenting Justices implied that flag desecration statutes could prohibit flag burning.⁵ However, *Hodsdon* stated that even though the government's purpose in proscribing flag desecration was legitimate, such purpose could not be achieved by language which stifled peaceful nonverbal communication.⁶ *Hodsdon* cited the Su-

¹ In the Delaware federal district court, an action was brought to enjoin Hodsdon from displaying the American flag in a manner contrary to the flag etiquette provisions of Display and Use of Flag by Civilians; Position and Manner of Display, 36 U.S.C. §175(c) (1953). Hodsdon had displayed a United Nations flag on the right side of his home and a United States flag in a position of inferiority on the left side. In addition, the American flag had been flown at half mast. The district court dismissed the action for lack of jurisdiction. *Delaware ex rel. Trader v. Hodsdon*, 265 F. Supp. 308 (D. Del. 1967).

² 11 Del. C. § 532 (1953). "Whoever publicly mutilates, defaces, defiles, defies, tramples upon or casts contempt either by word or act, upon [the American flag] . . ." is guilty of a misdemeanor. This section has been amended to read "No person shall publicly mutilate, deface, defile, defy, trample upon, or by word or act cast contempt upon any such flag, standard, color, ensign or shield." 11 Del. C. § 533, *as amended*, (Supp. 1970). The nearly identical section of the West Virginia Code is found in W. Va. CODE ch. 61, art. 1, § 8 (Michie 1966), which reads: "Any person who . . . shall publicly mutilate, deface, defile or defy, trample upon or cast contempt, either by words or acts, upon any (American flag) . . . shall be deemed guilty of a misdemeanor . . ."

³ 310 F. Supp. 528, 532 (D. Del. 1970).

⁴ 394 U.S. 576 (1969).

⁵ *Id* at 605, 610, 615.

⁶ 310 F. Supp. 528, 532 (D. Del. 1970).

preme Court decisions of *Stromberg v. California*⁷ and *Tinker v. Des Moines Independent Community School District*⁸ for the rule that in some circumstances peaceful nonverbal communication is recognized as protected expression.

The Government in *Hodsdon* contended that the case was controlled by the rationale of *United States v. O'Brien*,⁹ a draft card burning case, in which the Supreme Court held the government interest in the efficient administration of the selective service system justified a statute prohibiting the deliberate burning of cards. In *O'Brien* the Supreme Court formulated a four-step test for the incidental limitation of nonverbal communication in the furtherance of a governmental interest.¹⁰ In applying this test, *Hodsdon* found the only governmental interest promoted by the Delaware statute was an interest in proscribing expression.¹¹

Hodsdon also declared the statute unconstitutional because it made no attempt to limit the circumstances in which gestures of non-adherence to the political ideas symbolized by the flag were prohibited.¹² *Hodsdon* relied on the Supreme Court case of *West Virginia State Board of Education v. Barnette*¹³ in asserting that the state

⁷ 283 U.S. 359 (1931). In *Stromberg*, the petitioner was a leader at a youth camp where the children pledged daily allegiance to the Soviet flag. Petitioner was convicted of violating a California statute which made it a crime to fly "any flag . . . as a sign, symbol or emblem of opposition to organized government. . . ." *Id.* at 360. The Supreme Court reversed the conviction on the ground that a state could not proscribe symbolic acts for no reason other than to suppress expression.

⁸ 393 U.S. 503 (1969). In *Tinker* respondent had promulgated a school regulation which prohibited students from wearing black armbands as a symbol of opposition to the Viet Nam war. In the opinion, Fortas, J. compared the wearing of armbands to "pure speech" which was entitled to comprehensive protection under the first amendment.

⁹ 391 U.S. 367 (1968). The Court said "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *Id.* at 376.

¹⁰ A government regulation is sufficiently justified if (1) it is within the constitutional power of government; (2) it furthers an important or substantial governmental interest; (3) the interest is unrelated to the suppression of expression; (4) the incidental restriction on alleged first amendment freedoms is no greater than is essential to the furtherance of that interest. *Id.* at 376-77.

¹¹ 310 F. Supp. at 533.

¹² 310 F. Supp. at 535.

¹³ 319 U.S. 624 (1943). In *Barnette* school authorities had tried to make compulsory a flag salute in the schools. The Court held that the salute was a form of expression which could not be compelled.

could not compel a symbolic act of adherence to the American flag.¹⁴ The court relied on the *Stromberg* decision¹⁵ in declaring that the state could not proscribe symbolic acts merely for the purpose of suppressing expression. The court concluded the *Barnette* and *Stromberg* rationales protected peaceful symbolic acts rejecting the political ideas represented by the flag.¹⁶

Finally, *Hodsdon* found the statute unconstitutional because it lacked safeguards against the impairment of liberty when public order was not threatened. The court admitted that the state had a legitimate interest in preserving public order, but stated that a statute which sought to regulate conduct must be carefully drafted to prevent abridging freedom of expression.¹⁷ The court declared the attempt by the Delaware authorities to apply the flag desecration statute to *Hodsdon's* acts clearly demonstrated that it impaired freedom of expression.

Comparing *Hodsdon* to other flag desecration cases is difficult because the *Hodsdon* case was approached from a different perspective. In *Hodsdon* the principal question was the permissible *scope* of a flag desecration statute. In the other cases, the courts have emphasized the question of whether the state had a *legitimate interest* in banning flag desecration. The federal district court in *United States v. Ferguson*¹⁸ concluded that the government's interest in protecting national symbols outweighed the individual's interest in using the flag as an act of nonverbal communication. The court said the "necessary and proper" clause of the Constitution gave Congress the authority to select and maintain a national symbol. This authority naturally included the right to enact laws to protect the flag from desecration.¹⁹ *Ferguson* further implied the government had a legitimate interest in using the flag to promote a sense of national loyalty.²⁰ *Hodsdon* on the other hand emphasized that the first amendment guaranteed the right to express attitudes of defiance or contempt toward the government.²¹

¹⁴ 310 F. Supp. at 535. The attorney general in an advisory opinion had indicated the Delaware flag desecration statute could be used to ban gestures of nonadherence to political ideas represented by the American flag — *i.e.*, the "clenched fist" or the "black power" salute at athletic events.

¹⁵ *Stromberg v. California*, 283 U.S. 359 (1931).

¹⁶ 310 F. Supp. at 535.

¹⁷ *Id.* at 535.

¹⁸ 302 F. Supp. 1111 (N.D. Cal. 1969) (Defendants burned a flag at a demonstration).

¹⁹ *Id.* at 1114.

²⁰ *Id.*

²¹ 310 F. Supp. at 535-36.

In *Hoffman v. United States*²² the federal district court stated the government had an interest in protecting the flag from acts of desecration and disgrace.²³ In *Halter v. Nebraska*²⁴ the Supreme Court said "insults to a flag have been the cause of war, and indignities put upon it, in the presence of those who revere it, have often been resented and sometimes punished on the spot."²⁵ Other cases have simply stated that in the exercise of its police power the state could proscribe conduct which threatened the public order.²⁶

Similar to the interest in maintaining public order is the interest in regulating the use of chattels for the protection of the public well-being. For example, Justice Fortas in his *Street v. New York*²⁷ dissent, stated if it were permissible for the state to prohibit the burning of chattels on a sidewalk, then a different rule should not apply to flag burning.²⁸ Justice Fortas also stated that the flag was a special kind of personalty and its use was traditionally subject to special regulations.²⁹ The Government's interest in protecting the flag as a special chattel presumably gave it the power to prohibit flag burning, though the burning was done to convey an idea.

The court in *Hodsdon* delayed its decision so that it would have the guidance of the *Street* decision. In *Street* the petitioner was convicted of flag desecration for burning an American flag in protest of

²² 256 A.2d 567 (D.C. Cir. 1969). Abbie Hoffman attended a Congressional committee meeting wearing a shirt which resembled an American flag. He was arrested and convicted of desecration of the flag of the United States, 18 U.S.C. § 700 (1968). His conviction was affirmed.

²³ *Id.* at 569.

²⁴ 205 U.S. 34 (1907). This is one of the earliest flag desecration cases. It involved a prosecution for violating a statute which made it a crime to use the American flag in advertisement. Most states, including West Virginia, have a statute similar to the one under which Halter was convicted. *See W. VA. CODE* Ch. 61, art. 1, § 8 (Michie 1966).

²⁵ 205 U.S. at 41.

²⁶ *E.g.*, *People v. Cowgill*, 78 Cal. Rptr. 853 (App. Dep't Super. Ct., Los Angeles County 1969), *appeal dismissed sub nom.* *Cowgill v. California*, 396 U.S. 371 (Defendant cut up an American flag, sewed it into his vest, and wore it on the street.); *People v. Street*, 20 N.Y.2d 231, 282 N.Y.S.2d 491, 229 N.E.2d 187 (1967), *rev'd on other grounds sub nom.* *Street v. New York*, 394 U.S. 576 (1969) (Defendant burned a flag as a protest); *People v. Radich*, 53 Misc. 2d 717, 279 N.Y.S.2d 680 (Crim. Ct. N.Y. City 1967) (Defendant was an artist who had built several "constructions" using the American flag. These objects were displayed in a public art gallery. One of the "constructions" was a crucifix topped by an erect penis wrapped in a flag. It was intended to symbolize aggressive American involvement in the Viet Nam war).

²⁷ 394 U.S. 516, 615 (1969).

²⁸ *Id.* at 616.

²⁹ 394 U.S. at 616-17.

the shooting of civil rights leader James Meredith.³⁰ As the flag burned on a streetcorner, Street said, "We don't need no damn flag. . . . If they let that happen to Meredith we don't need an American flag."³¹ These acts occurred in the presence of a policeman and a small group of bystanders. At Street's trial the court admitted testimony concerning his statements while burning the flag. The Supreme Court reversed the conviction because of the possibility that Street might have been convicted for these statements, and such a conviction would have been an unconstitutional abridgment of his freedom of speech. Thus, the Supreme Court neatly sidestepped the question of whether a person could be punished for burning a flag as an act of protest.³² Chief Justice Warren criticized the majority for avoiding this question.³³ The *Street* decision nullified flag desecration statutes which ban verbal desecration; however, it did not resolve the issue of physical desecration.

The peaceful tone of the defendant's acts in *Hodsdon* exposed the overbreadth of the Delaware flag desecration statute. In the other cases discussed, the inflammatory character of the conduct allowed those courts to avoid considering the constitutional limits of flag desecration prohibitions. This variance in conduct probably accounts for the difference in the *Hodsdon* result.

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³⁰ Street was convicted of violating N. Y. Penal Law § 1425(16)(d) McKinney 1944). This statute is substantially identical to the Delaware and West Virginia flag desecration statutes.

³¹ 394 U.S. at 579.

³² *Hodsdon v. Buckson*, 310 F. Supp. 528, 533 (D. Del. 1970): The Supreme Court intimated no opinion in *Street* as to the constitutionality of efforts to punish *acts* alone which "Mutilate, deface, defile or defy, trample upon or cast contempt upon" the flag. Defendants here urge that the "words" portion of the Delaware statute is severable, and that insofar as the "acts" portion is concerned, *Street* made no determination of its validity. This court agrees.

³³ *Street v. New York*, 394 U.S. 576 (1969): Warren, C.J., stated that the Court had "declined to meet and resolve the basic question presented" in the case. *Id.* at 595. He further declared that a reading of the trial record showed that Street was convicted not for his words but for burning the flag and that Street's words were mentioned only to show that he burned the flag with an intent to desecrate it. *Id.* at 596, 599.