

Why Flag-Burning Should Not Be Permitted by Luke

Sage New

As recently as a year and a half ago, on June 27, 2006, the Senate defeated—by a single vote—a proposed constitutional amendment to prohibit desecration of the flag. The text of the proposed amendment was this: “The Congress shall have power to prohibit the physical desecration of the flag of the United States” (qtd. in Hulse A1). I want to explain why, if I had been in the Senate, I would have voted for the proposed amendment.

First, let’s look at the reasons offered *against* the proposal. Newspaper editorials made two points against the proposed amendment. First, they argued that flag-burning is passé; it was fairly common during the Vietnam era, but there has been only a handful of reported instances in the last year or two. But if we were talking about, say, torturing a gay man or a lesbian woman, who would say that that the *number* of offenses was relevant? A single case would be one more than enough to criminalize the action.

Second, the editorials arguing against the proposal claimed that it was incompatible with the protection of freedom of speech that the Constitution offers. In fact, however, the Constitution says nothing at all about desecrating the flag. The First Amendment guarantees freedom of speech, but burning a flag is not speech by any reasonable definition. Yes, the Supreme Court ruled that it is “symbolic speech” (*Texas v. Johnson*) but “speech” means (or should mean) something like the coherent use of words. Further, the Constitution guarantees free speech because it wants to guarantee the free exchange of political ideas. It does *not* guarantee “free expression”; if it did, people who believed that they can express themselves best by walking naked through the streets or by urinating in public would have a constitutional right to do so. Suppose someone said that, by way of freedom of expression, as a protest against the war in Iraq he wanted to dance on the grave of a buried American soldier in Arlington National Cemetery. Would we say that this action is “symbolic speech” and is therefore protected by the Constitution? Surely not: flag-burning is *conduct*, not speech.

Probably most people will agree that the Constitution does not guarantee all kinds of conduct including conduct that is said to be “self-expression.” The flag-burners by their behavior may well be expressing their feelings, but they are hardly engaging in political argument, hardly behaving in a way that might conceivably change someone’s mind. In fact, flag-burning is counterproductive: far from changing the opinions of someone who (for instance) supports the war in Iraq, flag-burning is likely to cause such a person to support it even more strongly.

Flag-burning, in short, is *not* speech, and we should recognize that to call it speech is to use words in a Humpty Dumpty *Alice in Wonderland* fashion: “When I use a word . . . it means just what I choose it to mean—neither more nor less” (Carroll). But let’s now look at arguments

supporting the amendment to forbid burning the flag. First of all, various polls indicate that at least 70 percent of the people of the United States support it. Many articles in newspapers say that *if* the Congress does pass such a bill and then allows state legislatures to vote, the states will surely approve. It seems to be widely agreed that a vast majority of Americans would like to see flag-burning criminalized. In short, members of Congress should support the proposal because they are the representatives of the people, and their constituents support it. ⁹²

Second, the flag is something very special. No one argues that protesters should not be allowed to burn an effigy of the president of the United States, or that stand-up comics should not be allowed to make political jokes about politicians, or that the general public should not be allowed to write angry letters to newspapers. No, we are talking about something very special, the American flag. Yes, it is only a piece of cloth, and it may even have been manufactured in China, but it is something that people have literally died for, *literally* died for. We have all seen the photograph of marines raising the American flag on Iwo Jima, a battle that cost hundreds of American lives. And we have seen flag-draped coffins of Americans who died in battle and whose bodies are being returned to the country they gave their lives for. Respect for the dead, and for their families and friends, would be a good enough reason to criminalize flag-burning. There are other ways of protesting, such as speaking and writing, and even burning the Constitution. That is, if someone wants to argue that a particular action of the government shows disregard for the Constitution—for example, wire-tapping—they might burn a copy, indicating that in their view the present administration no longer respects the Constitution. Such action would be disturbing and thought-provoking, but probably no one would call it sacrilegious. But the flag, perhaps because it has literally been carried into battle and has draped the coffins of fallen soldiers, is something richer in symbolism, richer in the emotional chords that it touches, than even the Constitution.

Our nation recognizes that certain kinds of violation of the emotions of others should indeed be criminalized. We recognize what are called “hate crimes”: we recognize that there is something criminal about assaulting people because of their race or their religion or their sexual identity. Surely the attachment that most Americans have to their flag, like their attachment to their religion, is something that our government ought to protect against assaults. Again, no one is saying that protesters cannot say whatever they want about any issue, or any politician, or any particular political administration, or even about America in general. If someone wants to say that they think America has lost its way, is no longer the America envisioned by the Founding Fathers, they are free to say so and we will listen, and respond. We may even be persuaded. But they should not be free to burn our flag, to desecrate the symbol that Americans have died for.