AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 9: Liberalism Divided – Democratic Rights/Free Speech

**Spence v. Washington, 418 U.S. 405** (1974)

*In response to the shooting of a group of protesting students at Kent State University in 1970, college-student Harold Spence hung from his Seattle apartment an American flag with a large peace symbol made out of tape affixed to it. Three Seattle police officers saw the flag and went to Spence’s apartment. Spence indicated that he did not know there was anything wrong with what he had done and offered to take down the flag. Nonetheless, the officers seized the flag and arrested Spence.*

*The state of Washington had a flag-desecration statute on the books, but chose to charge Spence instead with a violation of the improper-use statute, which made it unlawful to place “any word, figure, mark, picture, design, drawing or advertisement” on an American flag and expose it to public viewing. A justice of the peace initially sentenced Spence to 30 days in jail, but he was granted a jury trial in county court. At trial, Spence testified that “I felt the flag stood for America and I wanted people to know that I thought America stood for peace,” and that he had carefully used tape to avoid damaging the flag. The jury convicted Spence of improper use of the flag, and he was fined $75. An appellate court reversed that conviction, but the state supreme court reversed the appellate court and reinstated the conviction. In a 6-3 decision, the U.S. Supreme Court reversed the state supreme court, concluding that the improper use statute was an unconstitutional infringement on Spence’s right of free expression,*

PER CURIAM.

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. . . . We have no doubt that the State or National Governments constitutionally may forbid anyone from mishandling in any manner a flag that is public property. But this is a different case. . . . He engaged in no trespass or disorderly conduct. Nor is this a case that might be analyzed in terms of reasonable time, place, or manner restraints on access to a public area. . . . It was not appellant's purpose to incite violence or even stimulate a public demonstration. There is no evidence that any crowd gathered or that appellant made any effort to attract attention beyond hanging the flag out of his own window. Indeed, on the facts stipulated by the parties there is no evidence that anyone other than the three police officers observed the flag.

[T]he State concedes, as did the Washington Supreme Court, that appellant engaged in a form of communication. . . . To be sure, appellant did not choose to articulate his views through printed or spoken words. It is therefore necessary to determine whether his activity was sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments. . . . But the nature of appellant's activity, combined with the factual context and environment in which it was undertaken, lead to the conclusion that he engaged in a form of protected expression.

. . . .

We are confronted then with a case of prosecution for the expression of an idea through activity. Moreover, the activity occurred on private property, rather than in an environment over which the State by necessity must have certain supervisory powers unrelated to expression. Accordingly, we must examine with particular care the interests advanced by appellee to support its prosecution.

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. . . . For the great majority of us, the flag is a symbol of patriotism, of pride in the history of our country, and of the service, sacrifice, and valor of the millions of Americans who in peace and war have joined together to build and to defend a Nation in which self-government and personal liberty endure. It evidences both the unity and diversity which are America. For others the flag carries in varying degrees a different message. "A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn." It might be said that we all draw something from our national symbol, for it is capable of conveying simultaneously a spectrum of meanings. If it may be destroyed or permanently disfigured, it could be argued that it will lose its capability of mirroring the sentiments of all who view it.

. . . . There was no risk that appellant's acts would mislead viewers into assuming that the Government endorsed his viewpoint. To the contrary, he was plainly and peacefully protesting the fact that it did not. Appellant was not charged under the desecration statute, nor did he permanently disfigure the flag or destroy it. He displayed it as a flag of his country in a way closely analogous to the manner in which flags have always been used to convey ideas. Moreover, his message was direct, likely to be understood, and within the contours of the First Amendment. Given the protected character of his expression and in light of the fact that no interest the State may have in preserving the physical integrity of a privately owned flag was significantly impaired on these facts, the conviction must be invalidated.

*Reversed*.

JUSTICE BLACKMUN concurs in the result.

JUSTICE DOUGLAS, concurring.

. . . .

CHIEF JUSTICE BURGER, dissenting.

If the constitutional role of this Court were to strike down unwise laws or restrict unwise application of some laws, I could agree with the result reached by the Court. That is not our function, however, and it should be left to each State and ultimately the common sense of its people to decide how the flag, as a symbol of national unity, should be protected.

JUSTICE REHNQUIST, with whom CHIEF JUSTICE BURGER and JUSTICE WHITE join, dissenting.

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"[T]he right of free speech is not absolute at all times and under all circumstances." *Chaplinsky v New Hampshire* (1942). . . . The right of free speech, though precious, remains subject to reasonable accommodation to other valued interests.

Since a State concededly may impose some limitations on speech directly, it would seem to follow *a fortiori* that a State may legislate to protect important state interests even though an incidental limitation on free speech results. Virtually any law enacted by a State, when viewed with sufficient ingenuity, could be thought to interfere with some citizen's preferred means of expression. But no one would argue, I presume, that a State could not prevent the painting of public buildings simply because a particular class of protesters believed their message would best be conveyed through that medium. Had appellant here chosen to tape his peace symbol to a federal courthouse, I have little doubt that he could be prosecuted under a statute properly drawn to protect public property.

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The statute under which appellant was convicted is no stranger to this Court, a virtually identical statute having been before the Court in *Halter* v. *Nebraska* (1907). In that case the Court held that the State of Nebraska could enforce its statute to prevent use of a flag representation on beer bottles, stating flatly that "a State will be wanting in care for the well-being of its people if it ignores the fact that they regard the flag as a symbol of their country's power and prestige . . . ." . . .

. . . . [I]f the Court is suggesting that *Halter* would now be decided differently, and that the State's interest in the flag falls before any speech which is "direct, likely to be understood, and within the contours of the First Amendment," that view would mean the flag could be auctioned as a background to anyone willing and able to buy or copy one. I find it hard to believe the Court intends to presage that result.

Turning to the question of the State's interest in the flag, it seems to me that the Court's treatment lacks all substance. The suggestion that the State's interest somehow diminishes when the flag is decorated with *removable* tape trivializes something which is not trivial. The State of Washington is hardly seeking to protect the flag's resale value, and yet the Court's emphasis on the lack of actual damage to the flag suggests that this is a significant aspect of the State's interest. Surely the Court does not mean to imply that appellant *could* be prosecuted if he subsequently tore the flag in the process of trying to take the tape off. Unlike flag-desecration statutes, which the Court correctly notes are not at issue in this case, the Washington statute challenged here seeks to prevent personal *use* of the flag, not simply particular forms of *abuse.* The State of Washington has chosen to set the flag apart for a special purpose, and has directed that it not be turned into a common background for an endless variety of superimposed messages. The physical condition of the flag itself is irrelevant to that purpose.

The true nature of the State's interest in this case is not only one of preserving "the physical integrity of the flag,” but also one of preserving the flag as "an important symbol of nationhood and unity.” Although the Court treats this important interest with a studied in-attention, it is hardly one of recent invention and has previously been accorded considerable respect by this Court. . .

. . . . What appellant here seeks is simply license to use the flag however he pleases, so long as the activity can be tied to a concept of speech, regardless of any state interest in having the flag used only for more limited purposes. I find no reasoning in the Court's opinion which convinces me that the Constitution requires such license to be given.

The fact that the State has a valid interest in preserving the character of the flag does not mean, of course, that it can employ all conceivable means to enforce it. It certainly could not require all citizens to own the flag or compel citizens to salute one. It presumably cannot punish criticism of the flag, or the principles for which it stands, any more than it could punish criticism of this country's policies or ideas. But the statute in this case demands no such allegiance. Its operation does not depend upon whether the flag is used for communicative or noncommunicative purposes; upon whether a particular message is deemed commercial or political; upon whether the use of the flag is respectful or contemptuous; or upon whether any particular segment of the State's citizenry might applaud or oppose the intended message. It simply withdraws a unique national symbol from the roster of materials that may be used as a background for communications. Since I do not believe the Constitution prohibits Washington from making that decision, I dissent.