

The Flag Flap

by Murray N. Rothbard

There are many curious aspects to the latest flag fracas. There is the absurdity of the proposed change in our basic constitutional framework by treating such minor specifics as a flag law. There is the proposal to outlaw "desecration" of the American flag. "Desecration" means "to divest of a sacred character or office." Is the American flag, battle emblem of the U.S. government, supposed to be "sacred"? Are we to make a religion of statolatry? What sort of grotesque religion is that?

And what is "desecrate" supposed to mean? What specific acts are to be outlawed? Burning seems to be the big problem, although the quantity of flag-burning in the United States seems to be somewhere close to zero. In fact, most flag burning occurs when patriotic groups such as the American Legion and the Veterans of Foreign Wars solemnly burn their worn-out American flags in the prescribed manner.

But if burning the flag is to be banned, are we to clap numerous American Legion or VFW people in the hoosegow? Oh, you say that intent is the crucial point, and that you want to outlaw hippie types who burn U.S. flags with a sneer and a curse. But how are the police supposed to figure out intent, and make sure that the majesty of the law falls only upon hippie-sneerers, and spares reverent, saluting Legionnaires?

But if the supporters of the proposed flag amendment are mired in absurdity, the arguments of the opponents are in almost as bad a shape. Civil libertarians have long placed their greatest stress on a sharp difference between "speech" and "action," and the claim that the First Amendment covers only speech and not actions (except, of course, for the definite action of printing and distribution of a pamphlet or book, which would come under the free press clause of the First Amendment).

But, as the flag amendment advocates point out, what kind of "speech" is burning a flag? Isn't that most emphatically an action – and one that cannot come under the free press rubric? The fallback position of the civil libertarians, as per the majority decisions in the flag cases by Mr. Justice Brennan, is that flag burning is "symbolic" speech, and therefore, although an action, comes under the free speech protection.

But "symbolic speech" is just about as inane as the "desecration" doctrine of the flag-law advocates. The speech/action distinction now disappears altogether, and every action can be excused and protected on the ground that it constitutes "symbolic speech."

Suppose, for example, that I were a white racist, and decided to get me a gun and shoot a few blacks. But then I could say, that's OK because that's only "symbolic speech," and political symbolic speech at that, because I'm trying to make a political argument against our current pro-black legislation.

Anyone who considers such an argument far-fetched should ponder a recent decision by a dotty leftist New York judge to the effect that it is "unconstitutional" for the New York subway authorities to toss beggars out of the subway stations. The jurist's argument held that begging is "symbolic speech," and expressive argument for more help to the poor. Fortunately, this argument was overturned on appeal, but still "symbolic arguers" are everywhere in New York, clogging streets, airports, and bus terminals.

There is no way, then, that flag laws can be declared unconstitutional as violations of the First Amendment. The problem with flag laws has nothing to do with free speech, and civil libertarians have gotten caught in their own trap because they do in fact try to separate speech and action, a separation that is artificial and cannot long be maintained.

As in the case of all dilemmas caused by the free speech doctrine, the entire problem can be resolved by focusing, not on a high-sounding but untenable right to freedom of speech, but on the natural and integral right to private property and its freedom of use. As even famed First Amendment absolutist Justice Hugo Black pointed out, no one has the free-speech right to burst into your home and harangue you about politics.

"The right to freedom of speech" really means the right to hire a hall and expound your views; the "right to freedom of press" (where, as we have seen, speech and action clearly cannot be separated) means the right to print a pamphlet and sell it. In short, free speech or free press rights are a subset, albeit an important one, of the rights of private property: the right to hire, to own, to sell.

Keeping our eye on property rights, the entire flag question is resolved easily and instantly. Everyone has the right to buy or weave and therefore own a piece of cloth in the shape and design of an American flag (or in any other design) and to do with it what he will: fly it, burn it, defile it, bury it, put it in the closet, wear it, etc. Flag laws are unjustifiable laws in violation of the rights of private property. (Constitutionally, there are many clauses in the Constitution from which private property rights can be derived.)

On the other hand, no one has the right to come up and burn your flag, or someone else's. That should be illegal, not because a flag is being

burned, but because the arsonist is burning your property without your permission. He is violating your property rights.

Note the way in which the focus on property rights solves all recondite issues. Perhaps conservatives, who proclaim themselves defenders of property rights, will be moved to reconsider their support of its invasion. On the other hand, perhaps liberals, scornors of property rights, might be moved to consider that cleaving to them may be the only way, in the long run, to insure freedom of speech and press.