

No, The Founders Didn't Intend for Flag-Burning to be Protected

Donald Trump, as is his custom, kicked a considerable amount of dust in the air with a tweet declaring that those who burn the American flag should be punished.

The amount of dust in the air is so thick it is blotting out the light of the Constitution itself.

As soon as Trump's tweet landed in the Twitterverse, a cascade of volleys from both the left and right descended on him, almost all to the effect that flag-burning is protected by the Constitution's plank on freedom of speech. Flag-burning, they insist, is a form of speech and therefore is protected.

But they are, quite simply, wrong. Burning a flag is not speech. It's action. Speech, in contrast, means words actually coming out of your mouth. I give you the definition of "speech" from Merriam-Webster (emphasis mine): "the communication or expression of thoughts **in spoken words**." The First Amendment protects speech, not action.

As John Hinderaker, an attorney who writes frequently on First Amendment issues, says:

[T]he Supreme Court has indeed held that burning the flag is protected political speech, so the legal question is settled for now. But is it settled correctly? Or, put another way, is there anything about the language of the First Amendment or about fundamental First Amendment jurisprudence that requires us to allow flag burning, whether we like it or not?

I think the answer to that question is no.

I understand why the Supreme Court has held flag burning to be protected speech. The court's current position is defensible. But I think the alternative analysis, that the government can ban flag-burning without any infringement on the First Amendment rights of anti-Americans, is at least equally defensible and at least equally consistent with the language of the First Amendment. Under a different Supreme Court, perhaps one with multiple Donald Trump appointees, that view may prevail. I, for one, hope it does.

In particular, the Founders were protecting freedom of political speech in the Bill of Rights. They had come out of a period of time in which the crown sought to repress and punish speech which was critical of its policies. The Founders wanted to ensure that America would always be a place where a free and robust public debate about political ideas would be unhindered and completely free from government interference.

It should be noted in passing that the protection of speech in the First Amendment was not intended by the Founders to be absolute. There is absolutely no First Amendment protection for profanity, libel or pornography, for example, or for yelling "Fire" in a crowded theater. People may be allowed to get away with profanity or pornography, but that's a different matter altogether than claiming they have a constitutional right to such expressions.

Profanity is not political speech, which is what the Founders were protecting. Pornography is not political speech at all. It's not even speech. Taking your clothes off and having sex in front of a camera is not speech. It's action, it's conduct, and finds no constitutional refuge in the First Amendment. Both profanity and pornography can be restricted in any way the elected representatives of the people choose.

Flag desecration laws were so far from being constitutionally suspect that by 1932 every state in the union had a statute banning it on the books. Even Democratic icon Franklin

Roosevelt signed an act of Congress in 1942 that provided crystal-clear guidance as to how the flag was to be respected and treated.

What the Low-to-No Information Media will not tell you is that even Hillary Clinton herself introduced legislation in 2005 to criminalize flag-burning. She also supported another bill in 2006 that would have sent flag-burners to jail for a year. The 2006 bill got 36 Democratic votes, another thing the media will hide from you.

Here's where judicial activists, beginning in the 1940s, pulled a linguistic sleight of hand that we have indulged for far too long. For "freedom of speech," they substituted the phrase "freedom of expression." They've managed to smuggle a host of reprehensible forms of communication and conduct across our moral border by using this gratuitous euphemism, and it's time we call them on it.

Simply put, speech is speech, and in particular, political speech. That's what the First Amendment protects.

So when it comes to flag-burning, the truth is quite simple. It's not speech. It's action, it's behavior, it's conduct, and thus falls outside the purview of the freedom of speech plank in the Constitution. It is the purpose of law to regulate socially destructive conduct and provide appropriate sanctions for behaviors—like speeding in a school zone—that are contrary to public policy. Flag-burning is one of those behaviors.

The bald eagle is an American symbol just like the flag. Shooting a bald eagle as a form of political protest it is not speech. It's action, and can be sanctioned in law. Even our liberal friends who believe in torching a flag would agree with us about destroying an eagle. They ought to agree with us about destroying the flag.

Flag-burning is a truly anti-American act. Virtually the only instances of flag-burning we see are by Muslims overseas and

liberals here, who share together a visceral distaste and even hatred for America.

Many conservatives have argued that flag-burning must be okay because even Antonin Scalia said it was. But while Scalia was an eminent jurist, he could be wrong like any other fallible human being, and he was wrong on this one. Justice Scalia is not the supreme legal authority in the land, the Constitution is. And where the Constitution contradicts Scalia, I'm going with the Constitution.

So if we use the Founders' Constitution (not the one mangled by the Court) there is no constitutional impediment to a prohibition on flag-burning. Whether it should be done is a separate matter, and is the reason why we have a Congress and state legislatures. As elected representatives of the people, it's their job to decide what behaviors ought to be regulated in law. They can certainly regulate flag desecration if they wish. And speaking for myself, I think they should. {eoa}

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