SMITH V. GOGUEN

SUPREME COURT OF THE UNITED STATES
415 U.S. 566
March 25, 1974
[6 - 3]

OPINION: Justice Powell...The sheriff of Worcester County, Massachusetts, appeals from a judgment of the United States Court of Appeals...holding the contempt provision of the Massachusetts **flag-misuse statute** unconstitutionally vague and overbroad...**We affirm on the vagueness ground [and] do not reach the correctness of the holding [on any other grounds]**.

...Goguen wore a small cloth version of the **United States flag sewn to the seat of his [blue jeans.]...**On January 30, 1970, two police officers in Leominster, Massachusetts, saw Goguen bedecked in that fashion. The first officer encountered Goguen standing and talking with a group of persons on a public street. The group apparently was not engaged in any demonstration or other protest associated with Goguen's apparel. No disruption of traffic or breach of the peace occurred. When this officer approached Goguen to question him about the flag, the other persons present laughed. Some time later, the second officer observed Goguen in the same attire walking in the downtown business district of Leominster.

The following day the first officer swore out a complaint against Goguen under the contempt provision of the Massachusetts flag-misuse statute. The relevant part of the statute then read:

> "Whoever **publicly mutilates, tramples upon, defaces or treats contemptuously** the flag of the United States..., whether such flag is public or private property..., shall be punished by a fine of not less than ten nor more than one hundred dollars or by imprisonment for not more than one year, or both..."

Despite the first six words of the statute, Goguen was not charged with any act of physical desecration. As permitted by the disjunctive structure of the portion of the statute dealing with discretion and contempt, the officer charged specifically and only that Goguen "did **publicly treat contemptuously** the flag of the United States..."

...Goguen was found guilty. The court imposed a **sentence of six months** in the Massachusetts House of Corrections. Goguen appealed to the Massachusetts Supreme Judicial Court, which affirmed. That court rejected Goguen's vagueness argument with the comment that "whatever the uncertainties in other circumstances, we see no vagueness in the statute as applied here."...

After Goguen began serving his sentence, he was granted bail and then ordered released on a writ of habeas corpus by the United States District Court...[which] found the flag-contempt portion of the Massachusetts statute impermissibly vague under the Due Process Clause of the Fourteenth Amendment as well as overbroad under the First Amendment. **In upholding Goguen's void-for-vagueness contentions, the court concluded that the words "treats contemptuously" did not provide a "readily ascertainable standard of guilt."** Especially in "these days when flags are commonly displayed on hats, garments and vehicles...," the words under which Goguen was convicted "leave conjectural, in many instances, what conduct may subject the actor to criminal prosecution." The Court also found that the statutory language at issue "may be said to encourage arbitrary and erratic arrests and convictions."

The Court of Appeals...affirmed...[and] found that the language **failed to provide adequate warning to anyone, contained insufficient guidelines for law enforcement officials, and set juries and courts at large**...

We agree with the holdings of the District Court and the Court of Appeals on the due process doctrine of vagueness... The doctrine incorporates notions of fair notice or warning. Moreover, it requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent "arbitrary and discriminatory enforcement." Where a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts. The statutory language at issue here, "publicly...treats contemptuously the flag of the United States...," has such scope (*Street v. New York*[1]) and at the relevant time was without the benefit of judicial clarification.

Flag contempt statutes have been characterized as void for lack of notice on the theory that **"what is contemptuous to one man may be a work of art to another."** Goguen's behavior can hardly be described as art. Immaturity or "silly conduct" probably comes closer to the mark. But we see the force of the District Court's observation that the flag has become "an object of youth fashion..." As both courts below noted, **casual treatment of the flag in many contexts has become a widespread contemporary phenomenon**. Flag wearing in a day of relaxed clothing styles may be simply for

[1]Case 1A-S-16 on this website.

adornment or a ploy to attract attention. It and many other current, careless uses of the flag nevertheless constitute unceremonial treatment that many people may view as contemptuous. Yet in a time of widely varying attitudes and tastes for displaying something as ubiquitous as the United States flag or representations of it, it could hardly be the purpose of the Massachusetts Legislature to make criminal every informal use of the flag. **The statutory language under which Goguen was charged, however, fails to draw reasonably clear lines between the kinds of nonceremonial treatment that are criminal and those that are not**. Due process requires that all "be informed as to what the State commands or forbids"...and that "men of common intelligence" not be forced to guess at the meaning of the criminal law. Given today's tendencies to treat the flag unceremoniously, those notice standards are not satisfied here. We recognize that in a noncommercial context behavior as a general rule is not mapped out in advance on the basis of statutory language.

In other words, Mr. Goguen did not likely check the statutes for "flag crimes" before deciding how to dress that day.

In such cases, perhaps the most meaningful aspect of the vagueness doctrine is not actual notice, but the other principal element of the doctrine -- the requirement that a legislature establish minimal guidelines to govern law enforcement. It is in this regard that the statutory language under scrutiny has its most notable deficiencies.

In its terms, the language at issue is sufficiently unbounded to prohibit..."any public deviation from formal flag etiquette..." Unchanged throughout its 70-year history, the "treats contemptuously" phrase was also devoid of a narrowing state court interpretation at the relevant time in this case... **Statutory language of such a standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections**. Legislatures may not so abdicate their responsibilities for setting the standards of the criminal law. In *Gregory v. City of Chicago,* Justice Black, in a concurring opinion, voiced a concern, which we share, against entrusting lawmaking "to the moment-to-moment judgment of the policeman on his beat." The aptness of his admonition is evident from appellant's candid concession during oral argument before the Court of Appeals regarding state enforcement standards for that portion of the statute under which Goguen was convicted:

> "As counsel for appellant admitted, a war protestor who, while attending a rally at which it begins to rain, evidences his disrespect for the American flag by contemptuously covering himself with it in order to avoid getting wet, would be prosecuted under the Massachusetts statute. Yet a member of the American Legion who, caught in the same rainstorm while returning from an 'America -- Love It or Leave It' rally, similarly uses the flag, but does so regrettably and without a contemptuous attitude, would *not* be prosecuted."

Where inherently vague statutory language permits such selective law enforcement, there is

a denial of due process... The language at issue is void for vagueness as applied to Goguen because it subjected him to criminal liability under a standard so indefinite that police, court, and jury were free to react to nothing more than their own preferences for treatment of the flag...

Appellant argues that any notice difficulties are ameliorated by the narrow subject matter of the statute, *viz*., "actual" flags of the United States. Appellant contends that this "takes some of the vagueness away from the phrase, 'treats contemptuously...'" Anyone who "wants notice as to what conduct this statute proscribes...immediately knows that it has something to do with flags and if he wants to stay clear of violating this statute, he just has to stay clear of doing something to the United States flag." Apart from the ambiguities presented by the concept of an "actual" flag, we fail to see how this alleged particularity resolves the central vagueness question -- the absence of any standard for defining contemptuous treatment...

Finally, appellant argues that state law enforcement authorities have shown themselves ready to interpret this penal statute narrowly and that the statute, properly read, reaches only direct, immediate contemptuous acts that "actually impinge upon the physical integrity of the flag..." There is no support in the record for the former point...In any event, Goguen was charged only under the wholly open-ended language of publicly treating the flag "contemptuously." **There was no allegation of physical desecration.**

There are areas of human conduct where, by the nature of the problems presented, legislatures simply cannot establish standards with great precision. Control of the broad range of disorderly conduct that may inhibit a policeman in the performance of his official duties may be one such area, requiring as it does an on-the-spot assessment of the need to keep order. But there is no comparable reason for committing broad discretion to law enforcement officials in the area of flag contempt. Indeed, because display of the flag is so common and takes so many forms, changing from one generation to another and often difficult to distinguish in principle, a legislature should define with some care the flag behavior it intends to outlaw. Certainly nothing prevents a legislature from defining with substantial specificity what constitutes forbidden treatment of United States flags. The statutory language at issue here fails to approach that goal and is void for vagueness. The judgment is affirmed.

CONCURRENCE: Justice White...Although I concur in the judgment of affirmance for other reasons, I cannot agree with this rationale. It is self-evident that there is a whole range of conduct that anyone with at least a semblance of common sense would know is contemptuous conduct and that would be covered by the statute if directed at the flag. In these instances, there would be ample notice to the actor and no room for undue discretion by enforcement officers. There may be a variety of other conduct that might or might not be claimed contemptuous by the State, but unpredictability in those situations does not change the certainty in others.

I am also confident that the statute was not vague with respect to the conduct for which Goguen was arrested and convicted. **It should not be beyond the reasonable comprehension of anyone who would conform his conduct to the law to realize that sewing a flag on the seat of his pants is**

contemptuous of the flag...

Perhaps Justice White has never sewn anything onto his trousers and rarely, if ever, wears blue jeans. That's not fair, for I can agree that the seat of one's pants is a bit disrespectful. However, I would contend there is a high probability that there are many in this country (motorcyclists, cowboys, etc.) who hold very patriotic beliefs and who wear flags on their heads, draped around their shoulders, etc.

The unavoidable inquiry, therefore, becomes whether the "treats contemptuously" provision of the statute, as applied in this case, is unconstitutional under the First Amendment. That Amendment, of course, applies to speech and not to conduct without substantial communicative intent and impact. Even though particular conduct may be expressive and is understood to be of this nature, it may be prohibited if necessary to further a nonspeech interest of the Government that is within the power of the Government to implement. *United States v. O'Brien.*

There is no doubt in my mind that it is well within the powers of Congress to adopt and prescribe a national flag and to protect the integrity of that flag. Congress may provide for the general welfare, control interstate commerce, provide for the common defense, and exercise any powers necessary and proper for those ends. These powers, and the inherent attributes of sovereignty as well, surely encompass the designation and protection of a flag. It would be foolishness to suggest that the men who wrote the Constitution thought they were violating it when they specified a flag for the new Nation...

It is a fact of history that flags have been associated with nations and with government at all levels, as well as with tribes and families. It is also a historical fact that flags, including ours, have played an important and useful role in human affairs. One need not explain fully a phenomenon to recognize its existence and in this case to concede that the flag is an important symbol of nationhood and unity, created by the Nation and endowed with certain attributes. Conceived in this light, I have no doubt about the validity of laws designating and describing the flag and regulating its use, display, and disposition. The United States has created its own flag, as it may. The flag is a national property, and the Nation may regulate those who would make, imitate, sell, possess, or use it.

I would not question those statutes which proscribe mutilation, defacement, or burning of the flag or which otherwise protect its physical integrity, without regard to whether such conduct might provoke violence. Neither would I find it beyond congressional power, or that of state legislatures, to forbid attaching to or putting on the flag any words, symbols, or advertisements. All of these objects, whatever their nature, are foreign to the flag, change its physical character, and interfere with its design and function. There would seem to be little question about the power of Congress to forbid the mutilation of the Lincoln Memorial or to prevent overlaying it with words or other objects. The flag is itself a monument, subject to similar protection.

Justice White is permitting his heart to control his head. Regardless of how one feels about "desecration" of anything "National in nature," to equate a flag owned (or even possibly created) by a citizen with a fixed piece of unique real estate owned by the government is just nonsense.

I would affirm Goguen's conviction, therefore, **had he been convicted for mutilating, trampling upon, or defacing the flag**, **or for using the flag as a billboard for commercial advertisements or other displays.** The Massachusetts statute, however, does not stop with proscriptions against defacement or attaching foreign objects to the flag. It also makes it a crime if one "treats contemptuously" the flag of the United States, and Goguen was convicted under this part of the statute. To violate the statute in this respect, it is not enough that one "treat" the flag; he must also treat it "contemptuously," which, in ordinary understanding, is the expression of contempt for the flag. In the case before us, as has been noted, the jury must have found that Goguen not only wore the flag on the seat of his pants but also that the act -- and hence Goguen himself -- was contemptuous of the flag. To convict on this basis is to convict not to protect the physical integrity or to protect against acts interfering with the proper use of the flag, but to punish for communicating ideas about the flag unacceptable to the controlling majority in the legislature.

Neither the United States nor any State may require any individual to salute or express favorable attitudes toward the flag. *West Virginia Board of Education v. Barnette*[2]. It is also clear under our cases that disrespectful or contemptuous spoken or written words about the flag may not be punished consistently with the First Amendment. *Street v. New York.* Although neither written nor spoken, an act may be sufficiently communicative to invoke the protection of the First Amendment (*Tinker v. Des Moines Independent Community School District*[3]) and may not be forbidden by law except when incidental to preventing unprotected conduct or unless the communication is itself among those that fall outside the protection of the First Amendment. In *O'Brien*, the Court sustained a conviction for draft card burning, although admittedly the burning was itself expressive. There, destruction of draft cards, whether communicative or not, was found to be inimical to important governmental considerations. But the Court made clear that if the concern of the law was with the expression associated with the act, the result would be otherwise:

> "The case at bar is therefore unlike one where the alleged governmental interest in regulating conduct arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful. In *Stromberg v. California*[4], for example, this Court struck down a statutory phrase which punished people who expressed their 'opposition to organized government' by displaying 'any flag, badge, banner, or device.' Since the statute there was aimed at suppressing communication

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[2]Case 1A-S-9 on this website.

[3]Case 1A-S-18 on this website.

[4]Case 1A-S-5 on this website.

it could not be sustained as a regulation of non-communicative conduct."

It would be difficult, therefore, to believe that the conviction in *O'Brien* would have been sustained had the statute proscribed only contemptuous burning of draft cards. Any conviction under the "treats contemptuously" provision of the Massachusetts statute would suffer from the same infirmity. This is true of Goguen's conviction. And if it be said that the conviction does not violate the First and Fourteenth Amendments because Goguen communicated nothing at all by his conduct and did not intend to do so, there would then be no evidentiary basis whatsoever for convicting him of being "contemptuous" of the flag. I concur in the Court's judgment...

DISSENT: Justice Rehnquist...Goguen did not testify, and **there is nothing in the record before us to indicate what he was attempting to communicate by his conduct**, or, indeed, whether he was attempting to communicate anything at all. The record before us does not even conclusively reveal whether Goguen sewed the flag on the pants himself, or whether the pants were manufactured complete with flag; his counsel here, however, who was also his trial counsel, stated in oral argument that of his own knowledge the pants were not manufactured with the flag on them. Finally, it does not appear...that he spoke at all...

There is a good deal of doubt on this record that Goguen was trying to communicate any particular idea, and had he been convicted under a statute which simply prohibited improper display of the flag I would be satisfied to conclude that his conduct in wearing the flag on the seat of his pants did not come within even the outermost limits of that sort of "expressive conduct" or "symbolic speech" which is entitled to any First Amendment protection. But Goguen was convicted of treating the flag contemptuously by the act of wearing it where he did, and **I have difficulty seeing how Goguen could be found by a jury to have treated the flag contemptuously by his act and still not to have expressed any idea at all.** There are, therefore, in my opinion, at least marginal elements of "symbolic speech" in Goguen's conduct as reflected by this record.

Many cases which could be said to involve conduct no less expressive than Goguen's, however, have never been thought to require analysis in First Amendment terms because of the presence of other factors. One who burns down the factory of a company whose products he dislikes can expect his First Amendment defense to a consequent arson prosecution to be given short shrift by the courts. The arson statute safeguards the government's substantial interest in preventing the destruction of property by means dangerous to human life, and an arsonist's motive is quite irrelevant. The same fate would doubtless await the First Amendment claim of one prosecuted for destruction of government property after he defaced a speed limit sign in order to protest the stated speed limit. Both the arsonist and the defacer of traffic signs have infringed on the property interests of others, whether of another individual or of the government. Yet Goguen, unlike either, has so far as this record shows infringed on the ordinary property rights of no one.

That Goguen owned the flag with which he adorned himself, however, is not dispositive of the First Amendment issue....[for] a defendant such as Goguen may not escape the reach of the police power of the State of Massachusetts by asserting that his act affected only his own property. Indeed, there

are so many well-established exceptions to the proposition that one may do what he likes with his own property that it cannot be said to have even the status of a general rule...

The very substantial authority of state and local governing bodies to regulate the use of land, and thereby to **limit the uses available to the owner of the land**, was established nearly a half century ago in *Euclid v. Ambler Realty Co.*. Land-use regulations in a residential zoning district typically do not merely exclude malodorous and unsightly rendering plants; they often also prohibit erection of buildings or monuments, including ones open to the public, which might itself in an aesthetic sense involve substantial elements of "expressive conduct." The performance of a play may well constitute expressive conduct or "pure" speech, but a landowner may not for that reason insist on the right to construct and operate a theater in an area zoned for noncommercial uses. So long as the zoning laws do not, under the guise of neutrality, actually prohibit the expression of ideas because of their content, they have not been thought open to challenge under the First Amendment.

As may land, so may other kinds of property be subjected to close regulation and control. A person with an ownership interest in controlled drugs, or in firearms, cannot use them, sell them, and transfer them in whatever manner he pleases. The copyright laws limit what use the purchaser of a copyrighted book may make of his acquisition. A company may be restricted in what it advertises on its billboards...

The statute which Goguen violated, however, does not purport to protect the related interests of other property owners, neighbors, or indeed any competing ownership interest in the same property; the interest which it protects is that of the Government, and is not a traditional property interest.

Even in this, however, laws regulating use of the flag are by no means unique. A number of examples can be found of statutes enacted by Congress which protect only a peculiarly governmental interest in property otherwise privately owned. *18 U.S.C. §504* prohibits the printing or publishing in actual size or in actual color of any United States postage or revenue stamp, or of any obligation or security of the United States. It likewise prohibits the importation of any plates for the purpose of such printing. *18 U.S.C. §331* prohibits the alteration of any Federal Reserve note or national bank note, and *18 U.S.C. §333* prohibits the disfiguring or defacing of any national bank note or coin. *18 U.S.C. §702* prohibits the wearing of a military uniform, any part of such uniform, or anything similar to a military uniform or part thereof without proper authorization. *18 U.S.C. §704* prohibits the unauthorized wearing of service medals. It is not without significance that many of these statutes, though long on the books, have never been judicially construed or even challenged.

My Brother White says, however, that whatever may be said of neutral statutes simply designed to protect a governmental interest in private property, which in the case of the flag may be characterized as an interest in preserving its physical integrity, the Massachusetts statute here is not neutral. It punishes only those who treat the flag contemptuously, imposing no penalty on those who "treat" it otherwise, that is, those who impair its physical integrity in some other way.

Leaving aside for the moment the nature of the governmental interest in protecting the physical

integrity of the flag, I cannot accept the conclusion that the Massachusetts statute must be invalidated for punishing only some conduct that impairs the flag's physical integrity. It is true, as the Court observes, that we do not have in so many words a "narrowing construction" of the statute from the Supreme Judicial Court of Massachusetts. But...[we do have] *Halter v. Nebraska*, which upheld against constitutional attack a Nebraska statute which forbade the use of the United States flag for purposes of advertising...With this guidance,...I think the Supreme Judicial Court of Massachusetts would read the language "whoever publicly mutilates, tramples upon, defaces, or treats contemptuously the flag of the United States..." as carrying the clear implication that the contemptuous treatment, like mutilation, trampling upon, or defacing, must involve some actual physical contact with the flag itself. Such a reading would exclude a merely derogatory gesture performed at a distance from the flag, as well as purely verbal disparagement of it.

If the statute is thus limited to acts which affect the physical integrity of the flag, the question remains whether the State has sought only to punish those who impair the flag's physical integrity for the purpose of disparaging it as a symbol, while permitting impairment of its physical integrity by those who do not seek to disparage it as a symbol. If that were the case, holdings like *Schacht v. United States*, suggest that such a law would abridge the right of free expression.

But Massachusetts metes out punishment to anyone who publicly mutilates, tramples, or defaces the flag, regardless of his motive or purpose. It also punishes the display of any "words, figures, advertisements or designs" on the flag, or the use of a flag in a parade as a receptacle for depositing or collecting money. Likewise prohibited is the offering or selling of any article on which is engraved a representation of the United States flag.

The variety of these prohibitions demonstrates that Massachusetts has not merely prohibited impairment of the physical integrity of the flag by those who would cast contempt upon it, but equally by those who would seek to take advantage of its favorable image in order to facilitate any commercial purpose, or those who would seek to convey any message at all by means of imprinting words or designs on the flag. These prohibitions are broad enough that **it can be fairly said that the Massachusetts statute is one essentially designed to preserve the physical integrity of the flag, and not merely to punish those who would infringe that integrity for the purpose of disparaging the flag as a symbol.** While it is true that the statute does not appear to cover one who simply wears a flag, unless his conduct for other reasons falls within its prohibitions, the legislature is not required to address every related matter in an area with one statute. It may well be that the incidence of such conduct at the time the statute was enacted was not thought to warrant legislation in order to preserve the physical integrity of the flag.

In *United States v. O'Brien, 391 U.S. 367 (1968),* the Court observed:

> "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."

Then, proceeding "on the assumption that the alleged communicative element in O'Brien's conduct was sufficient to bring into play the First Amendment," the Court held that a regulation of conduct was sufficiently justified "if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; **if the governmental interest is unrelated to the suppression of free expression**; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

While I have some doubt that the first enunciation of a group of tests such as those established in *O'Brien* sets them in concrete for all time, it does seem to me that the Massachusetts statute substantially complies with those tests. There can be no question that a statute such as the Massachusetts one here is "within" the constitutional power of a State to enact. **Since the statute by this reading punishes a variety of uses of the flag which would impair its physical integrity, without regard to presence or character of expressive conduct in connection with those uses, I think the governmental interest is unrelated to the suppression of free expression.** The question of whether the governmental interest is "substantial" is not easy to sever from the question of whether the restriction is "no greater than is essential to the furtherance of that interest," and I therefore treat those two aspects of the matter together. I believe that both of these tests are met, and that the governmental interest is sufficient to outweigh whatever collateral suppression of expressive conduct was involved in the actions of Goguen. In so concluding, I find myself in agreement not only with my Brother White in this case, but with those members of the Court referred to earlier in this opinion who dissented from the Court's disposition in the case of *Street v. New York.*

...From its earliest days, the art and literature of our country have assigned a special place to the flag of the United States. It figures prominently in at least one of Charles Willson Peale's portraits of George Washington, showing him as leader of the forces of the 13 Colonies during the Revolutionary War. No one who lived through the Second World War in this country can forget the impact of the photographs of the members of the United States Marine Corps raising the United States flag on the top of Mount Suribachi on the Island of Iwo Jima, which is now commemorated in a statue at the Iwo Jima Memorial adjoining Arlington National Cemetery...

The significance of the flag, and the deep emotional feelings it arouses in a large part of our citizenry, cannot be fully expressed in the two dimensions of a lawyer's brief or of a judicial opinion. **But if the Government may create private proprietary interests in written work and in musical and theatrical performances by virtue of copyright laws, I see no reason why it may not, for all of the reasons mentioned, create a similar governmental interest in the flag by prohibiting even those who have purchased the physical object from impairing its physical integrity.** For what they have purchased is not merely cloth dyed red, white, and blue, but also the one visible manifestation of two hundred years of nationhood -- a history compiled by generations of our forebears and contributed to by streams of immigrants from the four corners of the globe, which has traveled a course since the time of this country's origin that could not have been "foreseen...by the

most gifted of its begetters."...Here Goguen was, so far as this record appears, quite free to express verbally whatever views it was he was seeking to express by wearing a flag sewn to his pants, on the streets of Leominster or in any of its parks or commons where free speech and assembly were customarily permitted. He was not compelled in any way to salute the flag, pledge allegiance to it, or make any affirmative gesture of support or respect for it...*West Virginia Board of Education v. Barnette.* He was simply prohibited from impairing the physical integrity of a unique national symbol which has been given content by generations of his and our forebears, a symbol of which he had acquired a copy. I believe Massachusetts had a right to enact this prohibition.