



**SPENCE v. WASHINGTON**  
**SUPREME COURT OF THE UNITED STATES**  
**418 U.S. 405**  
**June 25, 1974**  
**[5 - 4]**

**OPINION:** PER CURIAM...On May 10, 1970, appellant, a college student, hung his United States flag from the window of his apartment on private property in Seattle, Washington. The flag was upside down, and attached to the front and back was a peace symbol...made of removable black tape...The flag...was plainly visible to passersby. The peace symbol occupied roughly half of the surface of the flag.

Three Seattle police officers observed the flag, entered the apartment [and] were met at the main door by appellant, who said: "I suppose you are here about the flag. I didn't know there was anything wrong with it. I will take it down." [The officers]...seized the flag and arrested him. Appellant cooperated with the officers. There was no disruption or altercation.

**Appellant was not charged under Washington's flag-desecration statute.** Rather, the State relied on the so-called "**improper use**" statute...[which] provides, in pertinent part:

"No person shall, in any manner, for exhibition or display:

"(1) Place or cause to be placed any word, figure, mark, picture, design, drawing or advertisement of any nature upon any flag, standard, color, ensign or shield of the United States or of this state...or

"(2) Expose to public view any such flag, standard, color, ensign or shield upon which shall have been printed, painted or otherwise produced, or to which shall have been attached, appended, affixed or annexed any such word, figure, mark, picture, design, drawing or advertisement..."...

Appellant...testified that he put a peace symbol on the flag and displayed it to public view **as a protest against the invasion of Cambodia and the killings at Kent State University**, events which occurred a few days prior to his arrest. **He said that his purpose was to associate the**

## **American flag with peace instead of war and violence:**

"I felt there had been so much killing and that this was not what America stood for. I felt that the flag stood for America and I wanted people to know that I thought America stood for peace."

Appellant further testified that he chose to fashion the peace symbol from tape so that it could be removed without damaging the flag...

**The trial court instructed the jury in essence that the mere act of displaying the flag with the peace symbol attached...was sufficient to convict. There was no requirement of specific intent to do anything more than display the flag in that manner.** The jury returned a verdict of guilty. The court sentenced appellant to 10 days in jail, suspended, and to a \$75 fine. The Washington Court of Appeals reversed the conviction. It held the improper-use statute overbroad and invalid on its face under the First and Fourteenth Amendments...[T]he Washington Supreme Court reversed and reinstated the conviction.

A number of factors are important in the instant case. **First, this was a privately owned flag.** In a technical property sense it was not the property of any government. 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. **Second, appellant displayed his flag on private property.** 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.

**Third, the record is devoid of proof of any risk of breach of the peace.** 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.

**Fourth,...appellant engaged in a form of communication...**The undisputed facts are that appellant "wanted people to know that I thought America stood for peace." 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, for as the Court noted in *United States v. O'Brien*, "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." 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...On this record there can be little doubt that appellant communicated through the use of symbols. The symbolism included not only the flag but also the superimposed peace symbol.

Moreover, the context in which a symbol is used for purposes of expression is important, for the

context may give meaning to the symbol. *Tinker v. Des Moines School District*<sup>1</sup>. In *Tinker*, the wearing of black armbands in a school environment conveyed an unmistakable message about a contemporaneous issue of intense public concern -- the Viet Nam hostilities. In this case, appellant's activity was roughly simultaneous with and concededly triggered by the Cambodian incursion and the Kent State tragedy, also issues of great public moment. A flag bearing a peace symbol and displayed upside down by a student today might be interpreted as nothing more than bizarre behavior, but it would have been difficult for the great majority of citizens to miss the drift of appellant's point at the time that he made it.

...[T]his was not an act of mindless nihilism. Rather, it was a pointed expression of anguish by appellant about the then-current domestic and foreign affairs of his government. An intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it.

**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...

The first interest at issue is prevention of breach of the peace. In our view, the Washington Supreme Court correctly rejected this notion. It is totally without support in the record.

We are also unable to affirm the judgment below on the ground that the State may have desired to protect the sensibilities of passersby. "It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Street v. New York*<sup>2</sup>. Moreover, appellant did not impose his ideas upon a captive audience. Anyone who might have been offended could easily have avoided the display. *Cohen v. California*<sup>3</sup>. Nor may appellant be punished for failing to show proper respect for our national emblem. *Street v. New York*; *Board of Education v. Barnette*<sup>4</sup>.

**We are brought, then, to the state court's thesis that Washington has an interest in preserving the national flag as an unalloyed symbol of our country...** Presumably, this interest might be seen as an effort to prevent the appropriation of a revered national symbol by an individual, interest group, or enterprise where there was a risk that association of the symbol with a particular product or viewpoint might be taken erroneously as evidence of governmental endorsement. Alternatively, it might be argued that the interest asserted by the state court is based on the uniquely universal

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<sup>1</sup>Case 1A-S-18 on this website.

<sup>2</sup>Case 1A-S-16 on this website.

<sup>3</sup>Case 1A-S-20 on this website.

<sup>4</sup>Case 1A-S-9 on this website.

character of the national flag as a symbol. 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." *Board of Education v. Barnette*. 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.

**But we need not decide in this case whether the interest advanced by the court below is valid. We assume, *arguendo*, that it is. The statute is nonetheless unconstitutional as applied to appellant's activity. 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. The judgment is reversed.**

**CONCURRENCE:** Justice Douglas...I would reverse the [conviction] for substantially the same reasons given by the Iowa Supreme Court in *State v. Kool*. In that case the defendant hung a peace symbol made of cardboard and wrapped in tinfoil in the window of his home and hung a replica of the United States flag behind the peace symbol but in an upside-down position. The state statute made it a crime to "cast contempt upon, satirize, deride or burlesque the flag."

The court held that defendant's conduct constituted "symbolic speech." The court, in reversing the conviction, said:

"Someone in Newton might be so intemperate as to disrupt the peace because of this display. But **if absolute assurance of tranquility is required, we may as well forget about free speech.** Under such a requirement, the only 'free' speech would consist of platitudes. That kind of speech does not need constitutional protection."

That view is precisely my own. Hence I concur in reversing this judgment of conviction.

**DISSENT:** Chief Justice Burger...**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.

**DISSENT:** Justice Rehnquist/Burger/White...Although I agree with the Court that appellant's activity was a form of communication, I do not agree that the First Amendment prohibits the State from restricting this activity...

"The right of free speech is not absolute at all times and under all circumstances." *Chaplinsky*<sup>5</sup>. This Court has long recognized, for example, that some forms of expression are not entitled to any protection at all under the First Amendment, despite the fact that they could reasonably be thought protected under its literal language. The Court has further recognized that even protected speech may be subject to reasonable limitation when important countervailing interests are involved. Citizens are not completely free to commit perjury, to libel other citizens, to infringe copyrights, to incite riots, or to interfere unduly with passage through a public thoroughfare. 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 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.

Yet the Court today holds that the State of Washington cannot limit use of the American flag, at least insofar as its statute prevents appellant from using a privately owned flag to convey his personal message. Expressing its willingness to assume, *arguendo*, that Washington has a valid interest in preserving the integrity of the flag, the Court nevertheless finds that interest to be insufficient in this case. To achieve this result the Court first devalues the State's interest under these circumstances, noting that "no interest the State may have in preserving the physical integrity of a privately owned flag was significantly impaired on these facts..." The Court takes pains to point out that appellant did not "permanently disfigure the flag or destroy it," and emphasizes that the flag was displayed "in a way closely analogous to the manner in which flags have always been used to convey ideas." The Court then restates the notion that such state interests are secondary to messages which are "direct, likely to be understood, and within the contours of the First Amendment." In my view the first premise demonstrates a total misunderstanding of the State's interest in the integrity of the American flag, and the second premise places the Court in the position either of ultimately favoring appellant's message because of its subject matter, a position about which almost all members of the majority have only recently expressed doubt, or, alternatively, of making the flag available for a limitless succession of political and commercial messages. I shall treat these issues in reverse order...

In *Halter v. Nebraska*, 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

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<sup>5</sup>Case 1A-S-8 on this website.

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..." The Court then continued: "Such a use tends to degrade and cheapen the flag in the estimation of the people, as well as to defeat the object of maintaining it as an emblem of National power and National honor."

The Court today finds *Halter* irrelevant to the present case, pointing out that it was decided almost 20 years before the First Amendment was applied to the States and further noting that it involved "commercial behavior," a form of expression the Court presumably will consider another day. Insofar as *Halter* assesses the State's interest, of course, the Court's argument is simply beside the point. But even as the argument relates to appellant's interest, I find it somewhat difficult to grasp. The Court may possibly be suggesting that political expression deserves greater protection than other forms of expression, but that suggestion would seem quite inconsistent with the position taken in *Lehman v. Shaker Heights*, by nearly all Members of the majority in the instant case. Yet if 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 inattention, it is hardly one of recent invention and has previously been accorded considerable respect by this Court. In *Halter*, for example, the Court stated:

"As the statute in question evidently had its origin in a purpose to cultivate a feeling of patriotism among the people of Nebraska, we are unwilling to adjudge that in legislation for that purpose the State erred in duty or has infringed the constitutional right of anyone. On the contrary, it may reasonably be affirmed that a duty rests upon each State in every legal way to encourage its people to love the Union with which the State is indissolubly connected."

There was no question in *Halter* of physical impairment of a flag since no actual flag was even involved. And it certainly would have made no difference to the Court's discussion of the State's interest if the plaintiff in error in that case had chosen to advertise his product by decorating the flag with beer bottles fashioned from some removable substance. It is the character, not the cloth, of the flag which the State seeks to protect...

Justice Fortas...noted in *Street v. New York* that "the flag is a special kind of personalty," a form of property "burdened with peculiar obligations and restrictions." Justice White has observed that "the flag is a national property, and the Nation may regulate those who would make, imitate, sell, possess, or use it." *Smith v. Goguen*<sup>6</sup>. I agree. 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. *Board of Education v. Barnette*. 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 non-communicative 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.

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<sup>6</sup>Case 1A-S-26 on this website.