

# The United States Flag Desecration Controversy: A Century-Long Spectacle

ROBERT JUSTIN GOLDSTEIN\*

*Controversy over desecration of the American flag has arisen periodically, particularly in times of war but also in recent years. The flag protection movement had its origins in such organizations as the Daughters and Sons of the Republic at the end of the nineteenth century, protesting commercial exploitation of the flag on the grounds that its use in advertising and political campaigns would degrade its significance. However, the concerns of the movement's leaders may have had more to do with a fear that their traditional position of influence was being threatened by a new class of businessmen and, later, by trade unions, political radicals, and new immigrants. The recent upsurge of the debate reflects not only a collective public insecurity about the state of the country, but also a preoccupation on the part of American political leadership with symbol rather than substance.*

*La profanation du drapeau américain soulève périodiquement la controverse, en particulier en temps de guerre, mais également depuis quelques années. Le mouvement pour la protection du drapeau tire ses origines d'organisations de la fin du XIX<sup>e</sup> siècle telles que les Daughters and Sons of the Republic, qui protestaient contre l'exploitation commerciale du drapeau sous prétexte que son emploi pour des motifs de publicité et de campagne politique en réduirait l'importance. Cependant, les inquiétudes des leaders du mouvement tenaient peut-être davantage à la crainte de voir leur influence traditionnelle menacée par une nouvelle classe d'hommes d'affaires et, plus tard, par les syndicats, les extrémistes politiques et les nouveaux immigrants. La remontée récente du débat témoigne non seulement d'un sentiment d'insécurité collective au sujet de l'état du pays, mais également de ce que les leaders politiques américains se préoccupent de symbole plutôt que de substance.*

WRITING TO A GERMAN FRIEND who had expressed doubt about the importance of flags, Theodore Herzl (1860–1904), the Austrian Jew who is today regarded as the founder of modern Zionism, declared:

\* Robert Justin Goldstein is a professor in the Department of Political Science at Oakland University in Rochester, Michigan.

You might ask mockingly: "A flag? What's that? A Stick with a rag on it?"  
No sir, a flag is much more. With a flag you lead men, for a flag, men live and die. In fact, it is the only thing for which they are ready to die in masses, if you train them for it. Believe me, the politics of an entire people ... can be manipulated only through the imponderables that float in thin air.<sup>1</sup>

Certainly the importance of a flag for both political leaders and the general populations of entire nations has rarely been demonstrated so clearly as in modern United States history. Repeatedly during the last 100 years, controversy has erupted over whether it should be legal to burn or otherwise "desecrate" the flag (that is, to damage it or use it in other unorthodox ways) for the purpose of expressing political protest or for other reasons departing from ordinary display. During the first major phase of the modern American flag desecration controversy, roughly centred on the years from 1895 to 1920, almost all of the American state governments passed laws outlawing flag desecration. During the second "chapter" of the controversy, which erupted during America's intervention in Vietnam (roughly between 1965 and 1975), flag desecration was made a federal crime, and probably more than 1,000 people were prosecuted under the new federal flag desecration law and the earlier state laws.

The flag desecration controversy seemingly died out as American intervention in Vietnam ended in the mid-1970s, but erupted again in 1989 and became a dominant item on the political agenda for an entire year. During this period, the Supreme Court twice declared that flag desecration, specifically including burning a flag for the purpose of expressing political protest, was protected by the First Amendment to the federal Constitution; massive public majorities expressed disagreement in opinion polls; and President George Bush urged the passage of a constitutional amendment to overrule the Court. The Congress of the United States, after literally thousands of pages of hearings and floor debate, rejected the Bush amendment in both 1989 and 1990. (Absolute majorities in both House and Senate voted for it, but these fell far short of the two-thirds endorsement required to send proposed constitutional amendments for ratification to the states, where support by three-quarters, or 38, of the 50 state legislatures would be required before it could become part of the Constitution.) However, in 1989 Congress overwhelmingly passed a new law which sought, through what amounted to legal flimflammy, to circumvent the Court's original 1989 decision (in the case of *Texas v. Johnson*) with an ordinary statute (which requires only a simple majority in both houses of Congress). After the Supreme Court declared the new law unconstitutional in the 1990 case of *U.S. v. Eichman*, the entire issue seemed to disappear almost immediately, only to re-emerge once more in 1995, following the 1994 Congressional elections in which Republicans, who had spearheaded the amendment drive,

1 *New York Times*, October 21, 1993.

gained control of both houses of Congress for the first time in over 40 years. On June 28, 1995, the House of Representatives endorsed, by a vote of 312 to 120, a constitutional amendment designed to overturn the 1989–1990 Supreme Court rulings legalizing flag desecration; six months later, on December 12, the Senate fell three votes short of the needed two-thirds endorsement, supporting it by 63 to 36. Proponents of the amendment promised to make it a major issue during the 1996 presidential and congressional elections and to reintroduce it during the Congress which took office in early 1997. If the flag desecration amendment is ultimately enacted, it will mark the first time in over 200 years of American history that the freedom of expression provisions of the First Amendment, the keystone of American democratic liberties, will ever have been limited.

Although the American flag is today a ubiquitous symbol of the United States, displayed widely in front of government buildings, private homes, and commercial enterprises and extensively used as a design springboard for clothing, advertising, and the widest possible variety of products, it attracted little interest or public display for over 80 years after it was first adopted as the symbol of a new nation by the Continental Congress on June 14, 1777. Until the outbreak of the Civil War, the flag was displayed almost exclusively on federal government buildings and forts and on American ships at sea. The flag was not unfurled over schools; as the director of the Betsy Ross house in Philadelphia noted during the 1989–1990 controversy, “It would have been unthinkable to fly an American flag at a private home. It simply was not done.” Because general display of the flag was virtually nonexistent during the antebellum period, the first American full-time commercial flag manufacturer was not established until the Mexican War of 1846–1848 stimulated enough demand to make such a venture worthwhile. In short, as cultural historian Wilbur Zelinsky summarizes, “during its early career, the national flag was remarkably unimportant to the citizenry at large.”<sup>2</sup>

Only the outbreak of the Civil War, symbolically begun by Confederate troops firing on flag-bedecked Fort Sumter, South Carolina, transformed the stars-and-stripes into a true focus for nationalist feelings (although, of course, only in the North). Thus, an 1896 report by the Connecticut Sons of the American Revolution (SAR), a patriotic-hereditary group, declared that, although before 1861 there had been “comparatively but little display” of the flag, with the outbreak of war, “all at once the people of the Northern States of the Union discovered that there was an American Flag and towns and villages, cities and county hamlets blossomed full-bloom with a

2 *Washington Times*, July 4, 1989; Wilbur Zelinsky, *Nation into State: The Shifting Symbolic Foundations of American Nationalism* (Chapel Hill: University of North Carolina Press, 1988), p. 160. For a detailed account of the history of the American flag desecration controversy stressing the pre-1989 period, see Robert Justin Goldstein, *Saving ‘‘Old Glory’’: The History of the American Flag Desecration Controversy* (Boulder, Colorado: Westview, 1995).

most gorgeous display of the Red, White and Blue.’’ The flag’s new status and the desperate passions invoked by the Civil War quickly made it, for the first time, the object of organized and deliberate physical assault by those who opposed the North and sparked governmental efforts to punish such forms of symbolic dissent. In the most startling example of such punishment, a man was hanged before a large crowd in New Orleans on June 7, 1862, after being convicted of treason in a military court for pulling down, dragging in the mud, and tearing to shreds an American flag that had been hoisted over the New Orleans mint.<sup>3</sup>

After the Civil War ended in 1865, the popular status of the flag, at least in the North, remained firmly entrenched among the general public and grew ever greater between 1875 and 1900, fostered by, among other things, numerous historical commemorations such as the 1876 revolutionary centennial. However, this ever-growing popularity by no means led, at first, to the flag being treated as anything like a holy relic or object. No laws placed restrictions on how it could be used and even advisory ‘‘flag etiquette’’ codes did not exist. Politicians thought nothing of continuing to print their names, portraits, and slogans on the flag, as they had been doing on a small scale ever since 1840. Above all, the new popularity of the flag was manifested by its use or depiction, or the use or depiction of flag bunting or decorative designs using its colours, for commercial reasons as the advertising industry developed amidst the rapid industrialization of the nation in the post-war period. According to a pamphlet published in 1895 which vigorously complained about the phenomenon, in Chicago alone over 120 separate types of commercial use of the flag could be viewed, including the decoration or advertising of bicycles, belts, breweries, burlesque shows, door mats, ballet dresses, fish houses, grocery stores, lemon wrappers, pool rooms, saloons, table napkins, tobacco dealers, and whiskey barrels. One advertisement surviving from 1878 depicts an Uncle Sam pointing to a large ham against the backdrop of a flag which has printed across the stripes, ‘‘The Magnolia Ham is an American Institution.’’<sup>4</sup>

Organizers and backers of what will henceforth be termed the flag protection movement, which first emerged after 1890, repeatedly attacked those who they claimed were prostituting the flag for commercial gain, on the grounds that display of the flag for advertising purposes would degrade its significance in the minds of the general population. The authors of an 1895 pamphlet which was the first major publication of the flag protection movement claimed, ‘‘The tender sentiment associated with ... decent use of the

3 Connecticut Sons of the American Revolution, *Report on Desecration of the American Flag* (1968), p. 4; James Parton, *General Butler in New Orleans* (New York: Mason Brothers, 1864), pp. 352–353, 607–609.

4 National Flag Committee of the Society of Colonial Wars in the State of Illinois, *Misuse of the National Flag of the United States of America* (Chicago, 1895), p. 6; Beleslaw and Marie-Louise D’Orange Masta, *The Stars and the Stripes: The American Flag as Art and as History from the Birth of the Republic to the Present* (New York: 1973), pp. 183, 202.

national emblem is sadly marred when we see it shamefully misused as an apron on labor day parades, and as a costume to bedeck stilt walkers, circus clowns, prize fighters and variety players or gaiety girls.”<sup>5</sup>

Often spokesmen for the flag protection movement attacked commercial use of the flag in a highly vehement manner that clearly suggests, together with the general middle- and upper-middle-class nature of the movement’s leadership, that they were at least partly motivated by the fear that their traditional position of influence in the United States, and indeed that “their” America, was being threatened by the growth of a new class of businessmen being thrust forward by the commercial, industrial, and advertising revolutions that followed the Civil War. Thus, in a 1902 pamphlet Charles Kingsbury Miller denounced the “clutch of sordid tradesmen” who had turned the flag into “an article of commerce” by using it as a “medium of deception and fraud to proclaim their defective merchandise, flimsy wares and adulterated goods”. Such “unscrupulous” businessmen were engaging in a “species of barbarism”, Miller proclaimed, and had “polluted” the flag, whose

sacred folds were never designed to be defaced with advertisements of beer, sourkraut candy, itch ointment, pile remedies and patent nostrums, to serve as awnings, horse blankets, merchandise wrappers, pillow and footstool covers or as miniature pocket handkerchiefs, on which to blow noses, or with which to wipe perspiring brows.

Daughters of the American Revolution (DAR) Flag Committee Chairwoman Frances Saunders Kempster similarly bitterly complained that the flag had been “contaminated by the greed of gain until it has been dragged down to the vilest associations” by those who had turned it into a transformer of “patriots’ blood into traders’ gold”.<sup>6</sup>

Above all, originally in reaction to these perceived excesses of the advertising industry and fostered especially by organizations of Union veterans and by members of patriotic-hereditary organizations like the DAR, in 1890 the first significant movement in North American history developed to create deliberately and systematically a “cult of the flag”, which would ideologically transform it into a sacred object to be used only in certain conditions and treated only in a highly reverent manner. An 1898 pamphlet authored by Miller declared that the flag “should be kept as inviolate as was the Holy of Holies in King Solomon’s temple” and at another point referred to “those three sacred jewels, the Bible, the Cross and Flag” which “command national reverence”. According to flag protection movement spokesmen, the flag stood only for the purest of motives and actions. Thus, DAR Flag Chairwoman Alice MacFarlane told the 1915 DAR convention,

5 Society of Colonial Wars, *Misuse of the National Flag*, pp. 16, 21, 26.

6 Charles Kingsbury Miller, *Desecration of the American Flag* (1902), pp. 1–2.

in words that probably would have rather surprised American blacks and Indians, not to mention Mexicans and Filipino rebels, that the flag had “never waved in behalf of tyranny, aggression or injustice”, but had been “unfurled in more movements for the protection, the liberty and the elevation of man than any flag that ever waved”. Twenty years earlier, and only three years before American annexation of the Philippines, the first major publication of the flag protection movement had made similar claims, declaring that the emblem was a “flag of peace” that had never been carried by an army of oppression, and that the flag “means all that is good and true and pure and beautiful in a land of freedom. It is worthier of self-sacrifice and heroic devotion than any goddess of the oldest time.”<sup>7</sup>

While reverence for the flag promised the most wonderful results for the nation and its citizens, failure to protect it from desecration, flag protection movement leaders warned, would result in the most dire calamities. According to the 1914 report of the DAR flag committee chairman, when the flag “is trampled in the dust and no longer respected, then freedom and justice will be at an end”. Allowing disrespect for the flag was seen as leading directly to the most threatening forms of violence and instability. According to a pamphlet published by Miller in 1898, when the memories of the 1894 Pullman strike and the widespread marches of the unemployed and other manifestations of unrest which marked the 1890s were still fresh, tolerating such disrespect “encourages in the leaders of mobs and misguided strikers of labor unions” a general “spirit of lawlessness and license”, resulting in rampant “outlawry and hoodlumism” as well as “anarchy and murderous labor riots”.<sup>8</sup>

Miller’s references to dangers posed to the flag by labour unions, mobs, and fomenters of anarchy reflected a general switch in the alleged sources of threats to the flag stressed increasingly by flag protection leaders after 1895. Whereas at first the main target of movement leaders’ wrath had been essentially “mainstream” and non-political groups such as advertisers and merchants who were viewed as degrading the flag’s purity by using it for commercial purposes, after 1895 the movement shifted its focus primarily to trade unions, political radicals, and “new” immigrants from supposedly “unassimilable” regions like southern and eastern Europe. The earlier commercial offenders were essentially “respectable” groups, but the new targets were clearly viewed by movement leaders as essentially “un-American” threats to the integrity, not only of the flag, but of the country itself, and especially to the traditional leadership of and deference shown to long-standing elites such as themselves. These perceived emerging threats to the

7 Charles Kingsbury Miller, *Desecration of the Flag and Prohibitive Legislation* (1898), pp. 4, 11; *Proceedings of the DAR Continental Congress* (1915), p. 1123; Society of Colonial Wars, *Misuse of the National Flag*, p. 25.

8 *Proceedings of the DAR Congress* (1914), p. 1171; Miller, *Desecration of the Flag and Prohibitive Legislation*, pp. 11–12.

flag were also the same forces blamed for the general turbulence which had rocked and in many ways emotionally dominated American society ever since at least the 1877 railroad riots, followed by such other crises as the Haymarket affair of 1886, the 1892 Homestead Strike, and the Pullman Strike and mass unemployment marches of 1894. All these disturbances had occurred against the background of almost constant recession or depression since 1873 and were accompanied by a sweeping industrialization and urbanization of American life, the rise of the modern labour movement, the emergence of vocal socialist and anarchist movements, and a vast increase in immigration from regions other than the traditional northwestern European sources.<sup>9</sup>

Collectively these developments transformed American society and politics in the post-Civil-War period and inevitably created new social forces which threatened the role of precisely those traditional middle- and upper-middle-class elites who led the flag protection movement. The patriotic-hereditary societies such as the DAR and the SAR, which constituted one of the two major elements in the movement, traditionally sought to assert their alleged special identity as “original” Americans by mining what historian Arthur Schlesinger, Sr., has termed “the unearned increment of ancestral reputations”, as well as asserting their traditional role as elites who had “formed the socially ambitious local gentry in many an American small town”; naturally they felt especially threatened by the new immigration and other forces transforming American society and creating parvenu elites. The second major force in the flag protection movement, veterans’ groups, and especially organizations of Union Civil War veterans such as the Grand Army of the Republic (GAR), were led by men from social strata similar to those of the patriotic-hereditary organizations. Both types of groups viewed themselves as having a special charge and a special right to define what constituted proper Americanism — the hereditary groups because of their lineage and the Civil War veterans because they had successfully defended the Union. As Wallace Davies, the leading historian of the veterans’ and patriotic groups has summarized, by virtue of their physical defence of the Union, the Civil War veterans “thought that they had acquired a first mortgage upon the country”, while the hereditary groups asserted their lineage to create “self-appointed roles” as the “guardians of the American past and interpreters of its ideals”.<sup>10</sup>

Although the actual number of incidents of physical flag desecration by political radicals, trade unions, and “new” immigrants during the pre-World

9 For a general discussion of tensions and rising repressive responses in late-nineteenth-century America, see Robert Justin Goldstein, *Political Repression in Modern America* (Boston: G. K. Hall, 1978).

10 Arthur Schlesinger, *The Rise of the City, 1887–1898* (Chicago: Quadrangle, 1961), p. 410; Wallace Davies, *Patriotism on Parade: The Story of Veterans’ and Hereditary Organizations in America, 1783–1900* (Cambridge, Mass.: Harvard University Press, 1955), pp. 354–355.

War I era appears to have been miniscule, the leaders of the flag protection movement made as a major theme in their rhetoric after 1895 the alleged threat that such elements posed to the flag and, by clear extension, to American society. Thus, in 1898 Miller declared:

The multitude of uneducated foreigners who land upon our friendly shores are ignorant of everything pertaining to American institutions, ... while the world's enemies, the anarchists, flock to this country.... As a result of these changes we observe our flag no longer protected by the sentiment of a century ago, but treated with open disrespect.... The seeds of contempt sown by public disrespect have already sprung up and grown into plants, manifested in part by anarchy and murderous labor riots. These noxious weeds of disorder are spreading with the increase of our multifarious population. Experience of past centuries impels us to ... sound a warning note in demanding that the desecration of the American flag be stopped by law, before our people discover that the clenched fist of lawlessness has become the mailed hand of defiance.<sup>11</sup>

Flag protection movement backers were largely or entirely responsible for obtaining passage of laws banning flag desecration in all of the state legislatures between 1897 and 1932 (with 31 states enacting such measures during the peak of the movement's activities between 1897 and 1905). The laws generally outlawed three major types of activities:

- 1 placing any kind of marking, lettering or pictures on the flag, whether for commercial, political, or other purposes, or displaying, selling, or distributing such altered flags;
- 2 using the flag or representations of the flag in any form of advertising, such as selling a product with a picture of the flag on it or on an attached label, or depicting the flag in an advertisement for a product;
- 3 publicly mutilating, trampling, defacing, defiling, "defying", or casting "contempt" either "by words or act" upon the flag.

Most of the laws defined "flag" in an extraordinarily broad way, typically including anything that even vaguely resembled a flag "made of any substance whatever" and "of any size".<sup>12</sup>

The U.S. Supreme Court seemingly definitively upheld the legality of such laws in an 8 to 1 ruling issued on March 4, 1907, in the case of *Halter v. Nebraska*. The Court's decision was filled with patriotic oratory and in effect provided an extraordinary official definition of how "true" Americans should feel about their flag:

<sup>11</sup> Miller, *Desecration of the Flag and Prohibitive Legislation*, pp. 7–8, 11–12.

<sup>12</sup> A collection of the texts of all state flag desecration laws passed before 1913 can be found in American Flag Association, *Circular of Information, 1909–1913*.



For that flag every true American has not simply an appreciation but a deep affection. No American, nor any foreign born citizen who enjoys the privileges of American citizenship, ever looks upon it without taking pride in the fact that he lives under this free government. ...to all lovers of the country it signifies government resting on the consent of the government, liberty regulated by law; the protection of the weak against the strong; security against the exercise of arbitrary power; and absolute safety for free institutions against foreign aggression.<sup>13</sup>

The overwhelming majority of flag desecration arrests and prosecutions following the *Halter* case were directed at perceived political dissenters, while only a tiny fraction involved advertisers or mainstream political parties who had incorporated the flag in their commercial or political campaigns. Of the total of about 55 flag desecration prosecutions uncovered by the author between 1907 and 1964, approximately 45 clearly involved perceived political dissent. This focus upon incidents with political significance is further highlighted by the clustering of cases around the periods of World War I and the 1919 Red Scare and World War II, which were accompanied by intensified patriotic-nationalistic fervour and decreased tolerance for dissent. Thus, of the approximately 45 flag desecration incidents which clearly targeted political dissent, about 35 occurred during the 1914–1920 and the 1939–1945 periods; in other words, about 80 per cent of incidents occurred during less than 15 of the almost 60 years involved.

Of the 45 or so politically oriented flag desecration cases between 1907 and 1964, almost half involved simply oral disrespect for the flag. The largest single cluster of such prosecutions occurred during World War I. Thus, in two cases in April 1917 in New York City, one man was sentenced to 20 days in the county jail for using profane language about the flag (despite a futile attempt to prove his patriotism by wearing a flag in his buttonhole during a court appearance), and another was sent to the workhouse for a month for “making improper remarks” about the flag. Unquestionably the most extreme penalty for oral flag desecration resulted from a case brought under Montana’s World War I sedition law, which provided a maximum penalty of 20 years in jail for flag desecration. E. V. Starr was arrested under the law for refusing a mob’s demands that he kiss the flag (a favourite wartime vigilante punishment for the allegedly disloyal) and for terming it “nothing but a piece of cotton” with “a little paint” and “some other marks” on it which “might be covered with microbes”. Starr was given the unbelievable sentence of 10 to 20 years at hard labour in the state penitentiary, along with a \$500 fine. During the entire pre-Vietnam-War period, apparently only one prosecution for flag burning occurred, involving a pacifist New York City clergyman named Bouck White, who led the Church of the Social Revolution. White presided over a ritual burning of the

13 *Halter v. Nebraska*, 205 U.S. 34 (1907).

American and other flags as a protest against nationalism during the period of increasing tension leading to American entry into World War I. White was given the maximum penalty under New York's law of 30 days in jail and a \$100 fine; he was given the same penalty for a separate flag desecration offence involving his circulation of flyers with an anti-militarist cartoon depicting a flag on the ground near a bag of money, with both objects entwined by a serpent bearing the legend "War". In sentencing him for the cartoon offence, the judge told White, "Why don't you go off and live in some other country?"<sup>14</sup>

The overwhelming concentration of post-*Halter* prosecutions upon flag desecration associated with political dissent, as opposed to commercial misuse, mirrored by a change in the targets and rhetoric of the flag desecration movement, is extremely strong evidence that by the World War I era the entire focus of the flag protection movement had moved away from flag protection towards suppression of what was perceived as radical political opposition. This increasingly suppressive focus of the flag protection movement had what might be termed periodic "spillover" effects in the broader society that reflected ever more clearly the political intolerance that formed the heart of the movement by World War I and which became its major long-term legacy for American society. During three of the greatest periods of domestic political tension in the United States between 1907 and 1945 — World War I, the 1919–1920 Red Scare, and the period leading up to and including American participation in World War II — the flag protection movement had stirred up such sentiments as the conception that the American flag was sacred, that any true American would gladly pay homage to it, and that no true American would give greater homage to any other flag, especially one associated with radicalism and "un-Americanism". These sentiments led to widespread demands, often enforced by government authority, that went far beyond the command that the flag not be desecrated to include also that the flag be kissed or saluted on demand and that no flag associated with radical political opposition even be displayed.

During World War I, scores of suspected political dissidents, as in the Starr case, were attacked by mobs which sought to compel them to kiss the flag. Government officials generally looked the other way or even joined in during these events. During the 1919–1920 Red Scare, official requirements for acceptable behaviour towards flags were expanded beyond proper reverence for the American flag to outlawing the display of flags — usually but not only defined as red flags — viewed as subversive. Amidst absurdly exaggerated fears of an imminent communist revolution in the United States, 32 states and a number of cities such as New York and Los Angeles banned the display of such flags.<sup>15</sup>

14 *New York Times*, June 2, 1916; March 15 and April 10, 1917; *Ex Parte Starr*, 263 F. 145 (1920).

15 On forced flag kissings during World War I, see H. C. Peterson and Gilbert Gite, *Opponents of War, 1917–1918* (Seattle: University of Washington Press, 1957), pp. 45–46, 84, 152–153. On red flag laws, see Robert Murray, *Red Scare* (New York: McGraw-Hill, 1955), pp. 233–234; Elmer Million, "Red Flags and the Flag", *Rocky Mountain Law Review*, vol. 13 (1940–1941), pp. 47–60.

In addition to the outbreak of forced flag kissings during World War I and the epidemic of red flag laws passed during the 1919–1920 Red Scare, a third period which highlighted the intolerance spawned by the flag protection movement occurred during the late 1930s and the early part of American participation in World War II. During this period, hundreds of American school children who refused, in violation of state or school requirements, to salute the flag (mostly Jehovah's Witnesses who acted out of religious convictions) were expelled from school, and in scores of incidents mobs, often acting with official approval, attacked Jehovah's Witnesses because their opposition to saluting the flag was viewed as evidence of insufficient patriotism. The American Civil Liberties Union reported that between May and October, 1940, almost 1,500 Witnesses were the victims of mob violence in 355 communities in 44 states. Before a June 1943 Supreme Court decision called a halt to compulsory flag saluting in schools, a total of 2,000 students had been expelled for refusing to comply with such demands.<sup>16</sup>

In short, the flag protection movement, which had originated primarily for the purpose of opposing essentially "mainstream" political uses of the flag that were viewed as insufficiently reverential, evolved into movements that sought to suppress political dissent, demanded ritual obeisance to the flag, even by those who did not wish to give it, and which forbade any display of allegedly "subversive" flags. What had started out as a movement to protect the American flag from all forms of perceived misuse ended up mainly as a movement to suppress dissent and, at times, to forcibly compel symbolic allegiance to a flag whose primary virtue was held to be that it stood for freedom. Ironically — but from the standpoint of constitutional democracy very justly — some of the worst and most undemocratic excesses spawned by the flag protection movement, namely the red flag and compulsory flag salute laws, eventually led directly to Supreme Court decisions in 1931 and 1943 which established the basic legal principles upon which the Court relied in 1989 and 1990 to strike down all laws outlawing flag desecration.

In the 1931 case of *Stromberg v. California*, a red flag law prosecution, the Court effectively struck down all such laws on the grounds that to forbid the display of emblems used to foster "peaceful and orderly opposition" to government was an unconstitutional violation of the freedom of speech clause of the First Amendment. In the 1943 case of *West Virginia Board of Education v. Barnette*, the Court, citing the *Stromberg* precedent among others, struck down compulsory flag salute and Pledge of Allegiance requirements in schools on the grounds that a child required by state laws to attend public schools could not be forced by public authorities "to utter what is not in his mind". In what remains probably the most eloquent and

16 On the flag salute controversy, see David Manwaring, *Render Unto Caesar: The Flag Salute Controversy* (Chicago: University of Chicago Press, 1962); Leonard Stevens, *Salute! The Case of the Bible vs. the Flag* (New York: Coward, McCanna & Geoghegan, 1973).

apposite paean to democratic principles ever penned by the Court, Justice Robert Jackson declared:

Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.... Freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order. If there is any fixed star in our constitutional constellation it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion.<sup>17</sup>

The *Stromberg* and *Barnette* rulings dealt with flags, but they did not directly address the issue of flag desecration — indeed the Court never dealt with the issue again after its 1907 *Halter* ruling until the Vietnam War era, and therefore lower courts almost invariably upheld flag desecration convictions during the interim on the basis of the *Halter* case. When the Court finally revisited flag desecration as a legal issue for the first time in 60 years in the 1969 case of *Street v. New York*, it relied heavily upon the *Stromberg* and *Barnette* rulings to strike down any flag desecration law provisions which outlawed verbal disrespect for the flag, holding that such prior rulings had clearly established the principle 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.” Subsequently, in the 1989–1990 flag burning cases of *Texas v. Johnson* and *U.S. v. Eichman*, the Court, building explicitly on *Stromberg*, *Barnette*, and *Street*, declared unmistakably that the same principles which invalidated banning oral disrespect for the flag in the *Street* case also applied to outlawing physical destruction of the flag for the purpose of expressing political dissent. Facing squarely a question which it had ducked in *Street*, the Court held in *Johnson* that any distinction between “written or spoken words and nonverbal conduct” is “of no moment where the nonverbal conduct is expressive” because: “If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” The line of Court principles and decisions which began with *Stromberg* and *Barnette* thus led directly to *Street*, *Johnson*, and *Eichman*. In short, the very excesses of the flag protection movement spurred the Supreme Court to establish in 1931 and 1943 the principles which led it in 1989–1990 to declare unconstitutional the original purpose — the outlawing of flag desecration — which had given the movement birth almost exactly 100 years earlier.<sup>18</sup>

17 *Stromberg v. California*, 283 U.S. 359 (1931); *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943).

18 *Street v. New York*, 394 U.S. 576 (1969); *Johnson v. Texas*, 491 U.S. 397 (1989); *U.S. v. Eichman*, 496 U.S. 310 (1990).

Issues related to flags and flag desecration, including saluting the flag in public schools, gradually faded as matters of general concern after World War II. Only the use of flags in unorthodox ways to express protest against the Vietnam War returned the flag desecration issue to the public arena. The issue was literally “reignited” by the burning of a flag in New York City’s Central Park during an anti-war protest on April 15, 1967. This incident became especially significant because, unlike other anti-Vietnam War protests involving the flag, it was photographed; the photograph was widely circulated and stirred bitter opposition from pro-war and pro-military elements. Thus, pictures of the Central Park burning were repeatedly cited during the subsequent Congressional debate as the most important factor which led to the 1968 enactment of the first federal (as opposed to state) flag desecration law in American history. For example, commenting on the furore caused by pictures of the burning, Rep. Louis Wyman of New Hampshire declared that the number of flag desecrators was “very limited”, but “it is not the number of actors, it is the wideness of distribution of the public impression of a single act that is the crux of the problem for Congress.” Rep. Dan Kuykendall of Tennessee asked, “Which is the greater contribution to the security of freedom: The inspiring photo of the marines raising the flag at Iwo Jima or the shameful pictures of unshaven beatniks burning that same flag in Central Park?”<sup>19</sup>

The Vietnam War hovered over the entire flag desecration debate, with backers of a flag desecration law repeatedly claiming that passage would support American soldiers fighting for “freedom” and dying to protect the flag, and that tolerating flag burners would undermine their morale and prolong the war by encouraging America’s enemies. Thus, the Louisiana legislature (which about 100 years earlier had seceded from the Union and violently sought to overthrow the American government and its flag in order to uphold wealthy planters’ “freedom” to own slaves) petitioned Congress to act to stop “seditious elements” from engaging in “reprehensible, loathsome and disgusting” acts of flag desecration while the “valiant defenders of Freedom” were fighting “the insidious hordes of atheistic communism” in Vietnam.<sup>20</sup>

Literally hundreds of Americans were prosecuted for flag desecration between 1965 and 1975 under the new federal (or more often) the older state laws. Although the exact number of such prosecutions is unknown, the *Christian Science Monitor*’s estimate in 1973 that “some 1,000” flag desecration cases had been prosecuted during the Vietnam War is almost certainly low. Among a sample of 60 prosecutions studied by the present author, about 60 per cent ultimately culminated in acquittals, with acquittals increasingly likely after 1972, when American ground combat involvement in

19 House Judiciary Committee, *Hearings on H.R. 271 and Similar Proposals to Prohibit Desecration of the Flag*, 90th Congress, 1st Session, Serial No. 4, 1967, p. 118; *Congressional Record*, 1967, p. 16446.

20 *Congressional Record*, 1967, p. 11977.

Vietnam had begun to decrease markedly and there was a growing general consensus that the war had been an error. The 60 cases were divided into four basic types: flag burnings; “wearing” the flag or flag simulations, usually as a trouser’s seat patch, but also occasionally as a poncho, shirt, or vest; “superimposing” symbols, usually the “peace sign” (a trident surrounded by an oval) over the flag or a portion of it; and a wide variety of miscellaneous charges such as publishing a picture of a burning flag, driving a car painted with the flag’s colours, pouring paint over a flag, and displaying a flag at half mast in an inferior position to the United Nations flag.

The general picture presented by judicial consideration of flag desecration during the Vietnam War was chaotic, highly discretionary law enforcement and contradictory court decisions. Thus, in some instances, “wearing” the flag as a patch on the seat of the pants or as a vest or cape led to convictions, but in other prosecutions the same behaviour led to acquittals. In one case, an Ohio appeals court upheld a lower court conviction of a man who wore a flag patch sewn on his back pants pocket, partly because wearing the flag “over the anus ... a part of the human body universally and historically considered unclean ... was a clear act of defilement”, but the Ohio Supreme Court overturned the conviction on the grounds that no physical damage had been done to the flag in question and, in any case, as a matter of anatomy a patch over a pants pocket was not “over the anus”.<sup>21</sup>

The most disturbing aspect of the flag desecration cases was the arbitrary manner in which such prosecutions were almost invariably used against “peace” demonstrators, while “establishment” and “patriotic” individuals who wore flag pins in their lapels (including President Nixon and the White House staff and the police departments of Boston and New York City) or flag patches on their shoulders and who placed flag decals on their windows and cars by the tens of millions, often in technical violation of flag desecration statutes, invariably were unhindered. A cartoon in the October 24, 1970, *New Yorker* magazine noted the subtle but growing “establishment” pressure to display flags by depicting a business executive telling an employee, “Naturally, X, the company doesn’t care whether its employees have little flags on their desks or not. It’s purely a voluntary thing. We just wondered why you happened to be the only person who hasn’t got one.” In 1970 folksinger John Prine satirized the growing cult of flag patriotism in a song that began, “Your flag decal won’t get you into heaven any more; it’s already overcrowded from your dirty little war.”

The Vietnam War flag desecration controversy died down along with the end of American military involvement in the war during the mid-1970s. Although a few incidents of flag desecration were reported between 1975 and 1989, none of them attracted substantial media or public attention. The flag desecration controversy was revived only in 1989 when the Supreme Court’s ruling in *Texas v. Johnson*, arising from a largely ignored flag

21 *State v. Kasnett*, 383 N.E. 2d 636 (Ohio 1972); *State v. Kasnett*, 297 N.E. 2d 537 (Ohio 1973).

burning in Dallas in 1984 involving a man named Gregory Lee Johnson, received massive media and political attention. In its *Johnson* ruling, the Supreme Court for the first time clearly and directly declared that physical flag desecration, when used to express political protest, was a form of free speech protected under the First Amendment.<sup>22</sup>

In response to the ruling, President George Bush demanded that Congress pass a constitutional amendment to overturn it, and scores of congressmen, joined by a number of state legislatures, denounced the Court's ruling. Congressional committees in both houses held extensive hearings on proposals to circumvent the Court's decision and hours of floor debate ensued. Although the proposed constitutional amendment was temporarily killed when it obtained a majority, but not the required two-thirds vote, in the Senate on October 19, 1989, both houses of Congress overwhelmingly passed the Flag Protection Act (FPA) in 1989, which outlawed physical flag destruction under all circumstances and effectively sought to overturn the *Johnson* ruling via a combination of legislative legerdemain and political pressure on the Supreme Court. However, the Court refused to bow to such pressure, reiterating its basic *Johnson* determination in its 1990 *U.S. v. Eichman* ruling, which effectively declared the FPA unconstitutional. Renewed attempts to pass a constitutional amendment to outlaw flag desecration obtained majority support, but not the required two-thirds backing, in both houses of Congress in 1990. The flag desecration controversy temporarily disappeared from the political arena once more, until the Republican congressional election victories in 1994 gave that party control of both houses for the first time in over 40 years and created a much more hospitable political climate for reconsideration of the issue. Flag desecration amendment supporters, bolstered by a highly organized campaign by the American Legion, America's largest organization of veterans, and by resolutions passed by 49 of the 50 state legislatures, obtained endorsement of their proposal from the House of Representatives on June 28, 1995, by 310 to 120, far more than the required two-thirds. Although the Senate's failure to provide the needed two-thirds support on December 12, 1995, once again temporarily killed the proposal, amendment proponents promised to bring the issue up once more during the 1996 elections and in the new Congress scheduled to take office in early 1997.<sup>23</sup>

Superficially, the movement to outlaw flag desecration in the United States, from its beginnings during the late nineteenth century through the Vietnam War era and up until the present, reflects American pride and patriotism. When one examines them more carefully, however, particularly given the lack of evidence that flag desecration has ever caused any con-

22 *Texas v. Johnson*, 491 U.S. 397 (1989).

23 *U.S. v. Eichman*, 496 U.S. 310 (1990). On the 1989–1990 and 1995 controversies, see Robert Justin Goldstein, *Burning the Flag: The Great 1989–1990 American Flag Desecration Controversy* (Kent, Ohio: Kent State University Press, 1996).

crete harm of any kind, it is difficult to avoid the conclusion that, just beneath the surface, these periodic eruptions have in truth reflected insecurity and doubt rather than pride and confidence, especially in light of their historical association with such events as the attempt to ban the display of red flags and to force unwilling schoolchildren and citizens to salute or kiss the flag. More widespread repressive excesses such as the 1919–1920 Red Scare, the “McCarthy” phenomenon, and the massive abuses of the American intelligence agencies during the post-1940 period in monitoring and often attempting to disrupt the peaceful and legal activities of millions of American citizens have frequently revealed a governing elite and large segments of the broader public which feared political dissent far more than they loved political freedom. Similarly, the recurrent attempts to jail people for verbally or physically abusing American flags have demonstrated that, at a fundamental level, a large segment of the American political leadership and citizenry is simply unwilling to accept, much less welcome, the very sort of unpopular political expression that the Constitution and the entire system of American democracy is designed to protect and cherish in a way that is supposed to distinguish the United States among the nations of the world.

The use of advertising involving the flag before World War I and the scattering of supposed incidents involving dissident symbolic use of the flag during that era posed no threat of any kind to American democracy, no more than did the single flag burnings in New York City in 1967 and in Dallas in 1984 which led directly to the Congressional passage of federal flag desecration laws in 1968 and 1989. The real significance of the flag controversies which peaked during 1895 to 1920, 1965 to 1974, 1989 to 1990, and 1995 was not that flag desecration actually posed any real threat to anything, but rather in the reactions it evoked, reflecting the fact that these four major furores all erupted during periods of grave and widespread doubts about and divisions over the fundamental health of American politics and society. In short, in all four periods, flag desecration or the threat of it symbolically poured salt on an already wounded society.

Between 1895 and 1920, traditional American elites and newly emerging business and political elites felt especially threatened by the rise of “new” immigrants, trade unions, and political radicalism. The Vietnam War era, which involved not only an eventually highly divisive foreign conflict but a perceived general rise in social disintegration as reflected in such developments as growing crime rates and the emergence of the youth “counter-culture” and of militant black organizations, similarly caused enormous anxiety and feelings of insecurity among many members of the American political elite and large segments of the general public. (Such feelings clearly helped to elect Richard Nixon in 1968 and eventually to bring Ronald Reagan to power in 1980.)

Although the early period of the Reagan administration was associated with a general sense of a return of American self-esteem, by the late 1980s



there was a deepening sense in American society that the United States had entered a period of profound economic and political decline, both domestically and in terms of its power abroad and in the world marketplace. That perception, which would subsequently increase dramatically, strongly contributed to the defeat of President George Bush in 1992, despite the American military victories in the Panama invasion of early 1990 and the Persian Gulf War of early 1991, and contributed substantially to the atmosphere which fostered both the 1989–1990 and 1995 flag desecration controversies. Such perceptions helped to make best-sellers out of books like Paul Kennedy's *The Rise and Fall of the Great Powers* in 1987, whose theme was that America was on the brink of a major decline, and a book published in 1992 whose title, *America: What Went Wrong?*, is self-explanatory.

In analyzing the 1989–1990 flag controversy, Terrence McDonald, history professor at the University of Michigan, noted that, while in the twentieth century “it’s always been a good idea for a politician to wrap himself in the flag,” the post-*Johnson* flag eruption was especially “linked to the perceived decline in American power in relation to the rest of the world” since “when reality gets too hard to handle, you can fall back on symbols of nationhood.” Similarly, Richard Madsen, a sociologist at the University of California at San Diego, declared that the 1989 flag controversy reflected “great insecurity about our own values and unity. Many people have a sense of America in decline, a sense of intractable problems from drug abuse to the environment. Under these conditions, people get doubly upset when the flag is desecrated.”<sup>24</sup>

In assessing the 1989–1990 flagburning furore, Democratic Rep. Don Edwards lamented, “To think that a nincompoop in Dallas, Texas could do something that could trigger this reaction is rather distressing.” Whether or not Gregory Lee Johnson was a “nincompoop”, the “reaction” displayed by both the American public and especially the American political elite to this incident, as well as to earlier and later controversies involving flag desecration, certainly says some “distressing” things about the health of the American body politic in general and also about the lack of basic political courage or understanding of fundamental democratic principles. Whatever one’s view of the wisdom of burning flags, it can hardly be doubted that such behaviour is a form of political expression which has no real adverse consequences. Every bit of evidence from all four major eruptions of controversy over flag desecration in American history suggests that, rather than diminishing the symbolic value of the flag in the eyes of the vast majority of the population, flag desecration has exactly the opposite effect; surely no one American has done as much for patriotism in recent times as Gregory Lee Johnson. Even if mass flag burnings were to become everyday occurrences, such actions could do no real harm and indeed would probably provide a service to political leaders by informing them that grievances were

24 *New York Times*, August 1, 1989; *Seattle Times*, October 14, 1989.

spreading among the population and needed attention. In any case, sending flag abusers to jail is hardly going to turn them into patriots convinced of the wonders of American liberties, nor will it produce any other positive effects.

Since burning the flag is a form of harmless political expression which is clearly protected by the Constitution, aside from reflecting a collective public insecurity about the state of the country, the recurrent episodes of virtual hysteria over flag desecration also suggest one of the major reasons for that insecurity: that the American political leadership, especially during the television era, is far too often consumed with symbols rather than substance and, either out of inability or unwillingness, has far too frequently preferred to engage in ultimately non-productive and often divisive public relations extravaganzas about non-issues rather than to tackle real problems. As Senator Bob Kerrey, a veteran of Vietnam where he won the Congressional Medal of Honor, pointed out about the flag desecration rumpus in 1989:

Where does it lead? When you're all done arguing, what have you got? Have you built a house? Have you helped somebody? Have you created a better world? Have you fought a battle worth fighting? Or are you banging into the shadows on the wall of a cave? It seems to me there's nothing produced from it and you've divided the nation.

The *Seattle Times* similarly observed that, above all, the 1989 furore amounted to a distraction of attention away from real issues that reflected poorly about the quality of the nation's leaders:

Into a nation plagued by inadequate housing, rampant drug abuse, a mammoth federal budget deficit and the growing specter of AIDS, those wonderful folks in Washington, D.C. have introduced a flag law.... The real desecration of democracy occurs when people don't have places to live or work or adequate health insurance.... Those kind of issues don't seem to play well in the nation's capital. Maybe it's because they require real statecraft and that's in a lot shorter supply than the hype and rhetoric that's been conjured up around a non-issue like flag burning.<sup>25</sup>

Although certainly the American people as a whole cannot escape some responsibility for the massive amount of time and energy that has been devoted to fighting the "threat" posed by flag desecration, ultimately the American political leadership sets the tone and must bear the bulk of the blame. If diverting public and political attention away from real issues and pandering to the public's worst instincts is a far too frequent instinctive reaction of American political leaders in the late twentieth century, a much

25 *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943).

more serious charge against them, one with even greater potentially disastrous consequences for the nation, is that of apparently having little or no faith in or understanding of the most basic democratic principles: a “free marketplace” of ideas and of tolerance of even the most unpopular and offensive political dissent. This fundamental democratic lesson was elaborated with unequalled eloquence by Justice Jackson in the *Barnette* case: “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein.” It is a sad commentary that in the last decade of the twentieth century American political leaders still need to learn this lesson and, even more importantly, to reflect it in their daily actions and words.