CENSORSHIP

Is ‘the flag on the floor’ valid speech?

Politicians and war veterans screamed foul when Chicago’s School of the Art Institute displayed a work by student Scott Tyler that placed an American flag on the floor.

In response, the U.S. Senate unanimously passed a bill making it a crime to display the flag on the floor or the ground, while the Chicago City Council passed an ordinance with similar restrictions.

Defenders of civil liberties denounced the angry mobs, claiming they were more enamored with the flag than the freedoms it embodies.

Northwestern Law Professor Anthony D’Amato believes censorship of works like Tyler’s thwarts fundamental rights and suppresses intellectual debate.

Conservative Bruce Fein argues that flag desecration, like fighting words, serves no valid purpose and therefore is not protected by the First Amendment.

YES: ANTHONY D’AMATO

People tend to think that a legal answer exists to any question. But the nature of art is to be radical, while the nature of law is conservative.

Art looks forward; law looks backward at statutes and precedents. Good art instills in us new thoughts and new emotions, upon which, by definition, the law has not taken a position.

I would prefer to say that art—as well as morality and ethics—should lead rather than follow the law. Indeed, the law should step back and let innovation guide us.

Most people would agree that a good work of art attacks us emotionally. Scott Tyler’s performance piece is a work of art because it creates an emotional dilemma in the viewer: to sign a guest book (an egotistical desire), you must first step on the American flag (a bad or illegal act).

As soon as this emotional conflict is experienced, the work of art is complete. There is no need to go beyond this and actually step on the flag or sign the book in order to appreciate Tyler’s intentions.

Freedom of expression under the First Amendment is one of the things that make America great. The freedoms to talk, to write, to be uninhibited in creating works of art are not just narrow freedoms affecting a few people.

Rather, freedom of expression carries over to other realms of personal freedom—to privacy, to the right to live one’s life free from the heavy hand of government. Visit any nation that denies freedom of expression, and you will find a cramped and constraining attitude in matters other than speech.

If we allow self-proclaimed censors in our country to destroy free expression, someday those censors will find that they have created a governmental monster that restricts their own freedoms.

In the 1970s, the American Nazi Party won the right to march in Skokie. That was as hard for the people of Skokie to accept as the American flag exhibit is for the veterans groups today. But we learned from the Skokie affair that the only time free speech needs the protection of the law is when it is blatantly offensive to many people.

FREEDOM FIGHTERS

The history of freedom is written in incidents that were, in their day, enormously controversial. The Art Institute exhibit is today one of those incidents that play a formative role in our culture of freedom.

During the Vietnam War, a student named Spence pasted a large “peace symbol” over the stars of an American flag and displayed the flag publicly. Spence was convicted under a Washington state law that specified forcibly forbade the attachment of figures or symbols to a U.S. flag. Yet the Supreme Court, in a 1974 decision, reversed the conviction, holding that Spence was communicating a political opinion and criticism of Vietnam policy.

Robert Bork, who was rejected as a nominee to the Court, might distinguish Spence’s case from the Art Institute situation as follows: Spence was engaged in political speech, and if the First Amendment protects any speech at all, it protects political speech. But the student at the Art Institute is not engaged in political speech; he simply created a work of art. Art, Bork would say, is not protected by the First Amendment.

Although some lawyers might agree with Bork, I find his position narrow and cramped. All art is in a sense political. On the other hand, many people think politics is artful. If the veterans and politicians who are protesting the Art Institute exhibit do not look upon it as artistic, then their reaction ironically guarantees the legal protection that Scott Tyler seeks—even for judges who agree with Bork’s narrow view of the First Amendment that it protects only political speech.

It is almost a commonplace of art history that some works that were unveiled to scorn and outrage have later been acclaimed as masterpieces. We should not rush to prohibit or destroy Tyler’s art, but leave its evaluation to the future.
NO: BRUCE FEIN

A nation lives by symbols. Flag desecration statutes deserve respect because they symbolize a commitment to fight for the national sovereignty of the United States and its ideals.

To paraphrase Justice Benjamin Cardozo in *Baldwin v. G.A.F. Seelig Inc.*, 294 U.S. 511 (1935), the flag symbolizes the constitutional philosophy that our nation “must sink or swim together, and that in the long run prosperity and salvation are in union and not division.”

Flag desecration laws leave freedom of speech undisturbed. They eschew compulsion to salute or praise the flag, or to endorse the ideals it symbolizes. They honor the constitutional principle announced in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), that “if there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodoxy in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”

Defiling the flag advances no legitimate free-speech mission. It seeks to unleash intolerant passions and frenzy in the community, not sober reflection or contemplation of the government, customs, ethos, or shortcomings of the United States.

But as Supreme Court Justice Louis Brandeis observed in *Whitney v. California*, 274 U.S. 357 (1927), the Constitution aims to make arbitrary forces subservient to the deliberative both in and out of government. The Founding Fathers intended to promote powers of reason to safeguard liberty.

Desecration of the flag, however, is not an appeal to reason. It is tantamount to “fighting words”—those that inflict injury or tend to incite an immediate breach of the peace. As the Supreme Court declared in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), the epithet, the insulting or the libelous “are no essential part of any free exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.” The same reasoning applies to flag desecration.

**ALTERNATIVE CHANNELS**

To protect the physical integrity of the flag is not to squelch debate or dissent. There is no disparaging idea that cannot be vehemently communicated through language, parody or skit. As Justice Stevens elaborated in *FCC v. Pacifica Foundation*, 438 U.S. 675 (1978), these types of alternative channels of expression undermine the claim that flag desecration laws inhibit the content of serious communication.

Chief Justice Warren Burger recently lectured in *Bethel School District v. Fraser*, 478 U.S. 375 (1986), that a central mission of public school education is the inculcation of values necessary to fortify democracy, including sanctions for methods of discourse “highly offensive or highly threatening to others.” The adult community also needs habits of civilized discourse, a goal furthered by sanctions against physical attack on the flag that inflames the passions of millions who risked their lives so the nation would live.

The power to regulate the manner of expressing ideas, of course, like any other exercise of authority, can be abused to suppress speech that fosters intellectual growth and reflection.

But the proper safeguard is the Constitution’s independent federal judiciary, not excision of power. As Justice Oliver Wendell Holmes tartly responded in *Panhandle Oil Co. v. Mississippi*, 277 U.S. 218 (1928), to the argument that a power to tax should be nullified because it might be exerted to destroy, “Not ... while this Court sits.”

History teaches that enlightened self-government is endangered when custom and law are unable to perceive a sharp free-speech distinction between appeals to reason and appeals to emotions. Flag desecration laws admirably preserve the distinction by targeting only the latter.