

August 2015

# Constitutional Law - Flag Desecration Statutes - Freedom of Expression; Parker v. Morgan

Bruce C. Heslop

Please take a moment to share how this work helps you [through this survey](#). Your feedback will be important as we plan further development of our repository.

Follow this and additional works at: <http://ideaexchange.uakron.edu/akronlawreview>



Part of the [Constitutional Law Commons](#), and the [First Amendment Commons](#)

---

## Recommended Citation

Heslop, Bruce C. (1972) "Constitutional Law - Flag Desecration Statutes - Freedom of Expression; Parker v. Morgan," *Akron Law Review*: Vol. 5 : Iss. 1 , Article 7.

Available at: <http://ideaexchange.uakron.edu/akronlawreview/vol5/iss1/7>

This Article is brought to you for free and open access by Akron Law Journals at IdeaExchange@UAkron, the institutional repository of The University of Akron in Akron, Ohio, USA. It has been accepted for inclusion in Akron Law Review by an authorized administrator of IdeaExchange@UAkron. For more information, please contact [mjon@uakron.edu](mailto:mjon@uakron.edu), [uapress@uakron.edu](mailto:uapress@uakron.edu).

RECENT CASE  
CONSTITUTIONAL LAW—FLAG  
DESECRATION STATUTES—  
FREEDOM OF EXPRESSION

*Parker v. Morgan*, 322 F. Supp. 585 (W.D.N.C. 1971).

**P**ARKER v. MORGAN<sup>1</sup> was an action brought in a United States District Court challenging the constitutionality of a North Carolina statute (N.C.G.S. section 14-381) which makes it a misdemeanor to publicly desecrate the American flag. The object of the statute is to punish anyone who places upon the flag, or who exposes to public view a flag upon which has been placed, "any word, figure, mark, picture, design, drawing, or advertisement" or anyone, "who shall publicly mutilate, deface, defile, or defy, trample upon or cast contempt, either by words or act, upon [the American flag]."<sup>2</sup> The statute broadly defines "flag" to include any flag or representation thereof "evidently purporting to be" the American flag "upon which shall be shown the colors, the stars and the stripes, in any number of either thereof" or where "the person seeing the same, without deliberation, may believe it to represent" the American flag.

It should be noted that the decision in *Parker*<sup>3</sup> focuses upon the broad constitutionality of the statute itself, rather than upon its application to the individual plaintiffs. Therefore, the factual content of this decision need only be considered briefly. Parker was arrested wearing a jacket on the back of which he had sewn an American flag bearing the inscription "Give peace a chance" and the depiction of a hand with the index and middle finger forming a "V" superimposed thereon. He was subsequently charged with having desecrated the American flag in violation of North Carolina General Statute section 14-381. The other plaintiff, Berg, was charged with the same crime for having affixed an American flag to the ceiling of his automobile, in the process of which he had torn the flag about the edges and pierced it with fasteners. Although the warrants against both plaintiffs were subsequently quashed in the state courts, they instituted this action contending that the continued enforcement of N.C.G.S. section 14-381 would infringe upon their constitutionally protected rights. Upon examination of the North Carolina statute, in light

---

<sup>1</sup> 322 F. Supp. 585 (W.D. N.C. 1971).

<sup>2</sup> N.C.G.S. §14-381.

<sup>3</sup> 322 F. Supp. 585.

of the First Amendment and general principles of statutory construction, the Court in *Parker* held the statute unconstitutional for vagueness and overbreadth. In arriving at this decision, the Court developed several constitutional clarifications of the permissible scope of such flag desecration statutes. However, it is the opinion of this writer that the Court's reasoning is, in some instances, insufficient to justify the guidelines which it seeks to formulate. The object of this note will be to identify these guidelines and to evaluate the Court's rationale in developing them. In addition, relevant sections of the Ohio flag desecration statute<sup>4</sup> will be discussed for the purpose of assessing the potential impact of the *Parker* decision upon Ohio Law.

The Court in *Parker* prefaces its holding by affirming, without discussion, the constitutional power of a state to exercise, on behalf of all its people, reasonable control over flag usage and display to protect the American flag from public acts of desecration.<sup>5</sup> In so doing, it rejects the argument that because the flag represents government and the official policies thereof, such control of usage and display is absolutely forbidden by the First Amendment. On the contrary, the Court justifies its assertion by reasoning that the flag represents those various and diverse viewpoints of all who live under it. However, the Court concludes that North Carolina has unreasonably exercised such power in the challenged statute.

The Court first determines that certain parts of N.C.G.S. section 14-381 are phrased in terms so vague and indefinite as to their meaning and application that the statute is unconstitutional and void.<sup>6</sup> Focusing upon the statutory definition of the word "flag", the Court distinguishes between reasonable flag protection and what it terms "expropriation of color and design".<sup>7</sup> It finds that the North Carolina statute unreasonably attempts the latter because the statute may be applied to prohibit any and all uses of the colors red, white and blue and the stars and stripes which may appear to represent the American flag. The Court finds that there is no valid state interest in proscribing acts such as the wearing of red, white

---

<sup>4</sup> OHIO REV. CODE §2921.05 (1967).

<sup>5</sup> See *Halter v. Nebraska*, 205 U.S. 34 (1907), where the United States Supreme Court held constitutional a flag desecration statute similar to N.C.G.S. section 14-381 and observed that the public mutilation of the flag would "degrade and cheapen the flag in the estimation of the people."

<sup>6</sup> *Lanzetta v. New Jersey*, 306 U.S. 451 (1939). In *Lanzetta*, the Supreme Court held a New Jersey criminal statute unconstitutionally vague and observed at 453:

A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

<sup>7</sup> 322 F. Supp. at 588.

and blue trousers because such trousers are not an American flag.<sup>8</sup> Reasoning that such a definition would imperil anyone who might wear such colors, the Court holds that a valid flag control statute may protect only that which it has explicitly defined to be an American flag.<sup>9</sup> At this point it should be observed that the *Parker* rationale avoids any consideration of those state interests, if any, which justify the protection of a precisely defined American flag. The significance of this omission by the Court will be discussed more fully below. It should also be noted that this rationale would cast doubt upon the constitutionality of the Ohio flag desecration statute. A reading of the Ohio definition of "flag"<sup>10</sup> reveals that it encompasses the same area of protection as N.C.G.S. section 14-381, rather than precisely defining the flag as required by the *Parker* decision.

In *Parker* the Court also found that the North Carolina statute was unconstitutionally vague in prohibiting the placement of any word, mark, picture or design upon the American flag. The Court found that this section of the statute was unclear as to whether it prohibited the placement of all marks or designs upon the flag or only those which may be considered to defile or cast contempt upon the flag. It would appear, then, that *Parker* requires a valid flag desecration statute to precede this particular section with the qualifying term "contemptuously." In this respect, the comparable section of the Ohio flag statute would meet the requirements of *Parker* because its terms are qualified in such a manner.<sup>11</sup>

*Parker* thus holds that a state may constitutionally prohibit the placement of any contemptuous mark or design upon that which it has precisely defined to be the American flag. However, the rationale used by the Court casts uncertainty upon the application of such a prohibition and fails to justify it as furthering a valid state interest. For example, while it assumes that there exists a valid state interest in proscribing contemptuous marks and designs placed upon the flag, the Court proceeds to assert that there may be no such state interest in prohibiting the placement of an "embellishment" such as the Great Seal of the United States upon the

<sup>8</sup> Cf. *State v. Nicola*, 182 N.W. 2d 870 (Sup. Ct. N.D. 1971), which held that the exhibition of a flag with the thirteen red on white stripes and a peace symbol in the blue field did not constitute desecration of the American flag: "It is the flag of the United States which the law seeks to protect, not any flag which may happen to have a prevailing scheme of red and white stripes." *Id.* at 872.

<sup>9</sup> 322 F. Supp. at 588.

<sup>10</sup> OHIO REV. CODE §2921.05 provides:

As used in this section "flag," "standard," "color," or "ensign" includes any flag, standard, color, or ensign or a picture or representation thereof, made of or represented on any substance and purporting to be a flag, standard, color, or ensign of the United States, . . . upon which is shown the colors, the stars, and the stripes in any number thereof.

<sup>11</sup> OHIO REV. CODE §2921.05: "No person shall *contemptuously* print or place a word, figure, mark, picture or design, upon a flag, . . . of the United States." (Emphasis added).

flag.<sup>12</sup> In so doing, it would appear that the *Parker* rationale has introduced into these types of cases the difficult question of whether or not a particular design may be considered an embellishment, which is permissible, or a contemptuous defilement which may be prohibited. In these times, especially, it may be highly debatable whether a person who superimposes a "peace symbol" upon the American flag has embellished or defiled it. In contrast, the approach of Ohio courts has been to prohibit any and all designs placed upon the flag, regardless of whether they might be considered an "embellishment." In *State v. Liska*,<sup>13</sup> an Ohio Municipal Court reasoned that it was demeaning, and hence an act of contempt, to affix any symbol or design to the flag for the purpose of mixed symbolism. Thus, it concluded that because the flag represents various philosophies and opinions, it would be demeaning to affix to the flag either a peace symbol or the picture of a national hero. In this respect it might therefore be contended that Ohio has avoided the ambiguity raised by the *Parker* rationale. However, if the placing of such designs upon the flag is viewed as speech or the expression of opinion in nonverbal form as opposed to non-expressive conduct,<sup>14</sup> the power of a state to constitutionally prohibit such actions may be exercised only to the extent that it furthers a valid state interest.<sup>15</sup> Because of this speech-conduct dichotomy in the area of First Amendment freedoms and protections, it is of crucial importance that the Court failed to examine the possible state interests which may or may not justify a state in prohibiting the placement of contemptuous marks or designs upon the American flag.

The Court in *Parker* also held that the scope of N.C.G.S. section 14-381 was unconstitutionally overbroad because it would prohibit forms of expression protected by the First Amendment. Finding that the statute prohibited the casting of contempt upon the flag by words, the Court held that it was constitutionally void under the holding of *Street v. New*

<sup>12</sup> 322 F. Supp. at 589.

<sup>13</sup> 55 Ohio Ops. 2d 58, 268 N.E. 2d 824 (Ohio Mun. Ct. 1970).

<sup>14</sup> The United States Supreme Court has held that "nonverbal expression" by act or gesture may be a form of speech within the meaning and protection of the First and Fourteenth Amendments. See *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969), (black armbands in school); *Stromberg v. California*, 283 U.S. 359 (1931), (display of red flag).

<sup>15</sup> In *United States v. O'Brien*, 391 U.S. 367 (1968), the Supreme Court held that defendant's conduct in burning his draft card could be proscribed, even though his act was in protest of the Vietnam war, for the reason that there existed a sufficient governmental interest in the prevention of draft card destruction which would justify any limitations on the freedom of expression imposed thereby. The Court observed that: "[w]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *Id.* at 376.

*York*.<sup>16</sup> The Court further considered the statute's prohibition of the expression of contemptuous defiance for the flag, and in holding this prohibition unconstitutional, the Court evolved a new principle relating to the permissible scope of flag desecration statutes. First, it recognized that the First Amendment protects the expression of derisive and even defiant protest toward government and what may be considered, rightly or wrongly, its symbol (the American flag). The Court interpreted *West Virginia State Board of Education v. Barnette*<sup>17</sup> to have established the principle that a state cannot constitutionally compel a person to make affirmative gestures of respect for the American flag. On this basis, it reasoned that it would be inconsistent to say that one is permitted to verbally abuse the flag under *Street*<sup>18</sup> and yet be prohibited from making derisive and defiant gestures toward the flag. Thus, the Court concludes that a state cannot, consistent with the First Amendment, punish an individual who expresses defiant protest toward the flag by gesture or facial expression. Such conduct, according to the *Parker* decision, is constitutionally protected symbolic or nonverbal expression which a state may not prohibit as the North Carolina statute attempted to do by the breadth of its terms.

The *Parker* court emphasizes, however, that its decision should not be construed so as to preclude even minimal state control over the American flag in order to protect it from public acts of physical desecration. The Court notes that the Second Circuit Court of Appeals has apparently held that a state cannot forbid even the physical alteration or destruction of the American flag or prescribe the proper usage thereof in the interest of maintaining the integrity of and proper respect for the

<sup>16</sup> 394 U.S. 576 (1968). In *Street*, the defendant, angered by the shooting of James Meredith by a sniper in Mississippi, had burned an American flag on a street corner and had proclaimed, "We don't need no damn flag." Finding that under the New York flag desecration statute defendant might have been convicted solely on the basis of what he had said about the flag, the Supreme Court declared the statute unconstitutional and held that a state is constitutionally prohibited from punishing a person who publicly casts contempt upon the American flag by words alone.

<sup>17</sup> 319 U.S. 624 (1943). The Supreme Court, in *Barnette*, held it violative of the First Amendment guarantee of free expression for a state to require unwilling school children to salute the American flag. In rendering this decision Mr. Justice Jackson observed:

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 or force citizens to confess by word or act their faith therein.

*Id.* at 641-642.

<sup>18</sup> 394 U.S. 567. In *Street*, Mr. Justice Harlan stated at 593:

We have no doubt that the constitutionally guaranteed "freedom to be intellectually . . . diverse or even contrary," and the "right to differ as to things that touch the heart of the existing order," encompass the freedom to express publicly one's opinion about our flag, including those opinions which are defiant or contemptuous.

flag.<sup>19</sup> The Court in *Parker* rejects this position and, without discussion, appears to affirm the concept that a state has a valid interest in protecting the integrity of what it defines to be the American flag. The Court thus holds that in the furtherance of these unidentified state interests, a state may constitutionally protect the American flag from disrespectful "acts of physical contact such as mutilation, defiling, defacing or trampling"<sup>20</sup> regardless of whether such acts might also be viewed as the symbolic expression of ideas and opinions.

Viewed against the *Parker* rationale, the comparable section of the Ohio flag statute would appear constitutionally firm.<sup>21</sup> This section prohibits only those acts of contemptuous physical contact with the flag which the *Parker* decision would permit. Indeed, the phrase "otherwise cast contempt" included in this section of the Ohio statute has been interpreted as being limited to the prohibition of only those types of physical flag abuse described by the preceding terms of the section.<sup>22</sup>

In concluding that a state may prohibit contemptuous physical contact with the "defined" American flag, the *Parker* rationale again appears deficient in its failure to discuss or even identify precisely those state interests which justify the existence of such power. As indicated previously, this deficiency appears to be of crucial importance in evaluating the applicability of the *Parker* decision in light of First Amendment standards. In permitting a state to prohibit the placement of contemptuous designs or marks on the American flag, *Parker* is consistent with its holding that a state may prohibit contemptuous physical contact with the flag. However, as noted earlier, where such contemptuous physical contact with the flag becomes a medium for the expression of opinion, the constitutional validity of state prohibition thereof will depend upon the state interests furthered thereby.<sup>23</sup> It might be inferred from the *Parker* opinion that the Court recognized a valid state interest in maintaining proper respect for the flag by regulating its usage and display. Other state interests which may be advanced by prohibiting acts of physical flag desecration include the prevention of breaches of the peace

---

<sup>19</sup> See *Long Island Vietnam Moratorium Comm. v. Cahn*, 437 F. 2d 344, 349 (2d Cir. 1970):

Such an interest, while wholesome on its face, has no place in a free society when, as in [the New York statute] it in effect requires worship of the flag by compelling a series of taboos concerning flag display. Thus, in absence of any valid state interest in the many flag uses and alterations which [the New York statute] proscribes, are protected by the First Amendment and cannot constitutionally be forbidden.

<sup>20</sup> 322 F. Supp. at 590.

<sup>21</sup> OHIO REV. CODE §2921.05 provides: "No person shall . . . publicly mutilate, burn, destroy, defile, deface, trample upon, or otherwise cast contempt [upon the American flag]."

<sup>22</sup> *State v. Saionz*, 23 Ohio App. 2d 79, 268 N.E. 2d 135 (1969).

<sup>23</sup> *Supra* notes 14 and 15.

or the protection of the sensibilities of passers-by who might be offended by an act of flag desecration.<sup>24</sup> In Ohio, certain flag uses considered as desecrations have been prohibited on the theory which was apparently approved of in *Parker*, that there is a valid state interest in maintaining proper respect for the flag.<sup>25</sup> Although the validity of these interests have been unquestioned where elements of symbolic expression are not involved, there has been diverse opinion where an act such as flag burning is intended by the burner to express an opinion.<sup>26</sup> Under the *Parker* rationale a state could prohibit and punish such an act without consideration as to whether such prohibition and punishment may stifle those guarantees of free expression in the First Amendment. However, there is case authority to the effect that where an act of flag burning is viewed as "symbolic speech" the state interests in preventing breaches of the peace, in maintaining proper respect for the flag, or in protecting the sensibilities of others may be insufficient, in a given context, to justify a state in prohibiting and punishing the act.<sup>27</sup> The writer should not be interpreted as contending that the *Parker* court correctly or incorrectly reserved certain powers of flag protection to the state. On the basis of the preceding discussion, it is this writer's opinion that the reservation of such powers to the state by the Court in *Parker* is of questionable validity because it is left unbuttressed by a searching examination of the state interests which may be furthered by the exercise of such power.

Viewed in its broad perspective, *Parker v. Morgan* has further clarified and circumscribed the constitutional limits of the state's power to

<sup>24</sup> 394 U.S. at 591.

<sup>25</sup> See *State v. Bunch*, 54 Ohio Ops. 2d 354, 268 N.E. 2d 831 (Ohio Mun. Ct. 1970). The Court in *Bunch* held that defendant, who had folded and tied an American flag to make a knapsack in which he carried personal items, and who had spread the flag out on the ground, was guilty of casting contempt on the flag in violation of the Ohio flag statute. Although the defendant testified that he was carrying the flag in memory of his friends in Vietnam, the Court stated:

His intent was clear; he was acting out his discontent by treating the national symbol of a government under laws and not of men in a disrespectful and contemptuous manner—he was doing his thing at the expense of all other citizens. . . .

*Id.* at 355, 268, N.E. 2d at 832.

<sup>26</sup> See *Sutherland v. DeWold*, 323 F. Supp. 740 (S.D. Ill. 1971), holding the Illinois flag desecration statute constitutional as applied to plaintiffs, who publicly burned an American flag, in view of the state interests in preserving the public peace and in preserving the flag as a symbol of unity on national ideals and purposes. *Contra*, *Crossen v. Silver*, 319 F. Supp. 1084 (D. Ariz. 1970), which held that plaintiff's burning of the American flag was protected "symbolic speech" under the First Amendment and that such conduct could not be constitutionally prohibited because it did not affect the state's interest in preventing breaches of the peace.

<sup>27</sup> See *Crossen v. Silver*, 319 F. Supp. 1084 (D.C. Ariz. 1970). By way of dictum the District Court observed that a state does not have the power to prohibit physical acts of flag desecration based on its interests in preserving loyalty or patriotism, insuring proper respect for the flag, protecting the sensibilities of passers-by, or on the theory that such acts may stimulate viewers who sympathize with the opinions of the desecrator to engage in unlawful acts such as rioting.

protect the American flag from public acts of desecration. In this respect it may be considered to provide further insight into the constitutional questions involved in this relatively untouched area of the law. However, until authoritative consideration has been given to the nature and source of those protective powers which are reserved to a state, *Parker v. Morgan* cannot be regarded to have drawn the ultimate lines of demarcation for the constitutional validity of flag desecration statutes. A meaningful attempt to draw such lines must find its premise in the identification and searching examination of the state interests to be furthered by the prohibition and punishment of flag desecration.

BRUCE C. HESLOP