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Frequently Asked Questions About Flag Law

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Frequently Asked Questions About Flag Law

The “flag code” is the federal law that sets forth guidelines for the appearance and display of the U.S. flag (“flag”) by private citizens. These guidelines specify times and conditions for display of the flag, manners and methods of display, and buildings where such display should occur. The guidelines for flag display vary based on the context and occasion, and there are detailed specifications for displaying flags at “half-staff.” The flag code also specifies how to deliver the Pledge of Allegiance to the flag and appropriate conduct while watching a performance of the National Anthem. Most of the flag code contains no explicit enforcement mechanisms, and relevant case law would suggest that the provisions without enforcement mechanisms are declaratory and advisory only.

Efforts by states to punish verbal flag disparagement or prevent disrespectful flag display (“flag-misuse laws”) have been struck down by the Supreme Court in *Street v. New York* and *Spence v. Washington* as free speech violations under the First and Fourteenth Amendments of the U.S. Constitution. Federal and many state laws also specify punishments for physical mistreatment of the U.S. flag (“flag-desecration laws”), although under *Texas v. Johnson* and *United States v. Eichman*, the Court held that application of these laws against expressive conduct violates free speech precepts. A separate issue is that federal and many state flag-misuse laws provide punishment for placing advertising images on a U.S. flag or displaying an image of a flag on merchandise. While these laws have not been challenged on free speech grounds, the Court has reserved the question whether the *Johnson* and *Eichman* holdings would apply in a commercial context, and it seems likely these laws would survive judicial scrutiny. Finally, while federal courts of appeals have rejected Establishment Clause challenges to recitation of the Pledge of Allegiance in classrooms despite language in the Pledge describing “one Nation under God,” the Court in *West Virginia State Board of Education v. Barnette* held that a state law mandating that students participate in a recitation of the Pledge of Allegiance violates free speech precepts.

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What Laws Regulate the Treatment of the U.S. Flag?

The federal law regulating flags (“flag code”)¹ sets forth guidelines for private citizens² on the appearance and display of the U.S. flag (“flag”).³ The flag code also specifies how to deliver the Pledge of Allegiance to the flag⁴ and appropriate conduct while watching a performance of the National Anthem.⁵ Most of the flag code contains no explicit enforcement mechanisms,⁶ and relevant case law would suggest that provisions without enforcement mechanisms are declaratory and advisory only.⁷ Efforts by states to punish either verbal flag disparagement or disrespectful flag display (“flag-misuse laws”) have been struck down under First Amendment free speech precepts⁸ that apply to the states through the Due Process Clause of the Fourteenth Amendment.⁹

¹ 4 U.S.C. §§ 1–10 is sometimes referred to as the U.S. flag code. *Holmes v. Wallace*, 407 F. Supp. 493, 494 (M.D. Ala.), *aff’d without published opinion*, 540 F.2d 1083 (5th Cir. 1976) (referring to the “so-called ‘flag code’”).

² *Id.* § 5.

³ *Id.* §§ 6–9.

⁴ *Id.* § 4.

⁵ 36 U.S.C. § 301.

⁶ 4 U.S.C. § 5 provides that:

The following codification of existing rules and customs pertaining to the display and use of the flag of the United States of America is established for the use of such civilians or civilian groups or organizations as may not be required to conform with regulations promulgated by one or more executive departments of the Government of the United States.

But see id. § 3 (criminal penalties for use of flag for advertising purposes or for mutilation of flag).

⁷ *See e.g.*, *Murphree v. Tides Condo. at Sweetwater by Del Webb Master Homeowners’ Ass’n*, No. 3:13-cv-713-J-34MCR, 2014 U.S. Dist. LEXIS 43560, at *45–47 (M.D. Fla. Mar. 31, 2014) (discussing *Holmes v. Wallace*, 407 F. Supp. 493 (M.D. Ala. 1976), *aff’d without published opinion*, 540 F.2d 1083 (5th Cir. 1976)). In *Holmes*, a U.S. district court in Alabama interpreted language identical to 4 U.S.C. § 5 that was contained in a predecessor code section, 36 U.S.C. § 175. The court in *Holmes* stated:

It is apparent that the sections are a codification of existing ‘rules and customs’ and are intended for the ‘use’ of people not required to conform with other regulations. If the purpose is to compel certain behavior then the selection of the word ‘use’ is odd draftsmanship.

407 F. Supp. at 495 (quoting *State of Delaware ex rel. Trader v. Hodsdon*, 265 F. Supp. 308, 310 (D. Del. 1967); *see also NAACP v. Hunt*, 891 F.2d 1555, 1561 (11th Cir. 1990) (claim of violation of federal law regarding the display of the Confederate flag on the dome of the Alabama State Capitol barred by *res judicata*).

⁸ *See, e.g.*, *Street v. New York*, 394 U.S. 576, 594 (1969) (finding conviction was for protected speech, not for act of burning flag); *Spence v. Washington*, 418 U.S. 405, 415 (1975) (taping of peace symbol to flag was protected expressive conduct); *see also Smith v. Goguen*, 415 U.S. 566, 581–82 (1974) (finding that state flag-desecration statute was unconstitutionally vague).

⁹ *See Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1664 (2015) (citing *Stromberg v. California*, 283 U.S. 359, 368 (1931)) (“The First Amendment provides that Congress ‘shall make no law . . . abridging the freedom of speech.’ The Fourteenth Amendment makes that prohibition applicable to the States.”).

Federal law¹⁰ and many state laws¹¹ also provide penalties for physical mistreatment of the flag (“flag-desecration” laws),¹² although application of these laws would generally violate the U.S. Constitution.¹³ For instance, the federal Flag Protection Act,¹⁴ which criminalizes flag desecration, was struck down on First Amendment free speech grounds as prohibiting symbolic speech.¹⁵ Some federal and state flag-misuse laws also prohibit placing advertising images on the U.S. flag or displaying the U.S. flag on merchandise;¹⁶ these laws may also be vulnerable to free speech challenges, although the Supreme Court has reserved this question.¹⁷ Finally, there are mandatory state requirements directing the daily recital of the Pledge of Allegiance by teachers that have been upheld against Establishment Clause challenges,¹⁸ although a requirement that students participate in such recitation was struck down as a violation of free speech.¹⁹

¹⁰ 18 U.S.C. § 700(a)(1) (“Whoever knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States shall be fined under this title or imprisoned for not more than one year, or both.”).

¹¹ See, e.g., LA. STAT. ANN. § 14:116.1 (LexisNexis 2018) (imposing a fine of up to \$2,000 for casting contempt upon the United States flag by intentionally setting fire to it); MISS. CODE ANN. § 97-7-39 (LexisNexis 2019) (imposing various penalties for desecration of U.S. or Mississippi flag); CAL MIL. & VET. CODE § 614 (LexisNexis 2019) (misdemeanor for a person to knowingly desecrate the flag); WASH. REV. CODE § 9.86.030 (LexisNexis 2018) (gross misdemeanor to knowingly cast contempt upon a flag by desecration).

¹² *Spence v. Washington*, 418 U.S. 405, 406–07 (1974) (distinguishing between Washington State’s flag-desecration statute and its improper use statute).

¹³ *Texas v. Johnson*, 491 U.S. 397, 420 (1989); *United States v. Eichman*, 496 U.S. 310, 318–19 (1990).

¹⁴ See *supra* note 10.

¹⁵ *Eichman*, 496 U.S. at 317–19.

¹⁶ For instance, 4 U.S.C. § 3 provides that:

Any person who, within the District of Columbia, in any manner, for exhibition or display, shall place or cause to be placed any word, figure, mark, picture, design, drawing, or any advertisement of any nature upon any flag, standard, colors, or ensign of the United States of America; or shall expose or cause to be exposed to public view any such flag, standard, colors, or ensign upon which shall have been printed, painted, or otherwise placed, or to which shall be attached, appended, affixed, or annexed any word, figure, mark, picture, design, or drawing, or any advertisement of any nature; or who, within the District of Columbia, shall manufacture, sell, expose for sale, or to public view, or give away or have in possession for sale, or to be given away or for use for any purpose, any article or substance being an article of merchandise, or a receptacle for merchandise or article or thing for carrying or transporting merchandise, upon which shall have been printed, painted, attached, or otherwise placed a representation of any such flag, standard, colors, or ensign, to advertise, call attention to, decorate, mark, or distinguish the article or substance on which so placed shall be deemed guilty of a misdemeanor and shall be punished by a fine not exceeding \$100 or by imprisonment for not more than thirty days, or both, in the discretion of the court.

See also N.Y. GEN. BUS. LAW § 136 (LexisNexis 2019); ARIZ. REV. STAT. ANN. § 13-3703 (LexisNexis 2019); WIS. STAT. § 946.06 (LexisNexis 2018).

¹⁷ *Eichman*, 496 U.S. at 315, n.4.

¹⁸ See *infra* notes 103–15.

¹⁹ *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

What Are the Voluntary Guidelines for How U.S. Flags Are Displayed?

The flag code provides detailed guidelines for the appearance and display of the flag. The flag is to contain thirteen horizontal stripes, alternating red and white,²⁰ and the union of the flag (the blue field) is to contain one star for each state.²¹ Flags are displayed from sunrise to sunset;²² however, a properly illuminated flag may be displayed at night.²³ The flag should be hoisted briskly and lowered ceremoniously²⁴ and should not be displayed during days of inclement weather unless an all-weather flag is used.²⁵ The flag should be displayed daily on or near the main building of every public institution, in or near polling places on election day, and in or near schools on school days.²⁶ There are guidelines for when a flag is used in a procession,²⁷ displayed on a float²⁸ or motorcar,²⁹ displayed with other flags,³⁰ or displayed from a flagpole.³¹ There are also detailed guidelines for when and how flags are to be displayed at half-staff.³² There are guidelines for when a flag is used to cover a casket³³ and for when a flag is suspended across a building corridor or lobby.³⁴ There is a description of the appropriate conduct of persons during the hoisting, lowering, and passing of the flag,³⁵ and there are directions for how a flag is not to be treated.³⁶ Finally, the President can modify the flag display requirements of the flag code.³⁷

²⁰ 4 U.S.C. § 1.

²¹ *Id.* § 2.

²² *Id.* § 6(a).

²³ *Id.*

²⁴ *Id.* § 6(b).

²⁵ *Id.* § 6(c).

²⁶ *Id.* § 6(e)–(g).

²⁷ *Id.* § 7 (“The flag, when carried in a procession with another flag or flags, should be either on the marching right; that is, the flag’s own right, or, if there is a line of other flags, in front of the center of that line.”).

²⁸ *Id.* § 7(a) & (i) (“The flag should not be displayed on a float in a parade” except “from a staff” or “[w]hen displayed either horizontally or vertically against a wall, the union should be uppermost and to the flag’s own right, that is, to the observer’s left. When displayed in a window, the flag should be displayed in the same way, with the union or blue field to the left of the observer in the street.”).

²⁹ *Id.* § 7(b).

³⁰ *Id.* § 7(d) provides that “The flag of the United States of America, when it is displayed with another flag against a wall from crossed staffs, should be on the right, the flag’s own right, and its staff should be in front of the staff of the other flag.” *Id.* § 7(e) provides that “The flag of the United States of America should be at the center and at the highest point of the group when a number of flags of States or localities or pennants of societies are grouped and displayed from staffs.”; *Id.* § 7(f) provides that:

When flags of States, cities, or localities, or pennants of societies are flown on the same halyard with the flag of the United States, the latter should always be at the peak. When the flags are flown from adjacent staffs, the flag of the United States should be hoisted first and lowered last. No such flag or pennant may be placed above the flag of the United States or to the United States flag’s right.

Id. § 7(g) provides that “When flags of two or more nations are displayed, they are to be flown from separate staffs of the same height. The flags should be of approximately equal size. International usage forbids the display of the flag of one nation above that of another nation in time of peace.”

³¹ *Id.* § 7(h) provides that:

When the flag of the United States is displayed from a staff projecting horizontally or at an angle from the window sill, balcony, or front of a building, the union of the flag should be placed at the peak of the staff unless the flag is at half-staff. When the flag is suspended over a sidewalk from a rope extending from a house to a pole at the edge of the sidewalk, the flag should be hoisted out,

union first, from the building.

Id. § 7(i) provides that:

When displayed either horizontally or vertically against a wall, the union should be uppermost and to the flag's own right, that is, to the observer's left. When displayed in a window, the flag should be displayed in the same way, with the union or blue field to the left of the observer in the street.

Id. § 7(j) provides that "[w]hen the flag is displayed over the middle of the street, it should be suspended vertically with the union to the north in an east and west street or to the east in a north and south street."); *id.* § 7(k) provides that:

When used on a speaker's platform, the flag, if displayed flat, should be displayed above and behind the speaker. When displayed from a staff in a church or public auditorium, the flag of the United States of America should hold the position of superior prominence, in advance of the audience, and in the position of honor at the clergyman's or speaker's right as he faces the audience. Any other flag so displayed should be placed on the left of the clergyman or speaker or to the right of the audience.

³² *Id.* § 7(m) provides that:

The flag, when flown at half-staff, should be first hoisted to the peak for an instant and then lowered to the half-staff position. The flag should be again raised to the peak before it is lowered for the day. On Memorial Day the flag should be displayed at half-staff until noon only, then raised to the top of the staff. By order of the President, the flag shall be flown at half-staff upon the death of principal figures of the United States Government and the Governor of a State, territory, or possession, as a mark of respect to their memory. In the event of the death of other officials or foreign dignitaries, the flag is to be displayed at half-staff according to Presidential instructions or orders, or in accordance with recognized customs or practices not inconsistent with law. In the event of the death of a present or former official of the government of any State, territory, or possession of the United States, the death of a member of the Armed Forces from any State, territory, or possession who dies while serving on active duty, or the death of a first responder working in any State, territory, or possession who dies while serving in the line of duty, the Governor of that State, territory, or possession may proclaim that the National flag shall be flown at half-staff, and the same authority is provided to the Mayor of the District of Columbia with respect to present or former officials of the District of Columbia, members of the Armed Forces from the District of Columbia, and first responders working in the District of Columbia. When the Governor of a State, territory, or possession, or the Mayor of the District of Columbia, issues a proclamation under the preceding sentence that the National flag be flown at half-staff in that State, territory, or possession or in the District of Columbia because of the death of a member of the Armed Forces, the National flag flown at any Federal installation or facility in the area covered by that proclamation shall be flown at half-staff consistent with that proclamation. The flag shall be flown at half-staff 30 days from the death of the President or a former President; 10 days from the day of death of the Vice President, the Chief Justice or a retired Chief Justice of the United States, or the Speaker of the House of Representatives; from the day of death until interment of an Associate Justice of the Supreme Court, a Secretary of an executive or military department, a former Vice President, or the Governor of a State, territory, or possession; and on the day of death and the following day for a Member of Congress. The flag shall be flown at half-staff on Peace Officers Memorial Day, unless that day is also Armed Forces Day.

³³ *Id.* § 7(n) provides that: "When the flag is used to cover a casket, it should be so placed that the union is at the head and over the left shoulder. The flag should not be lowered into the grave or allowed to touch the ground."

³⁴ *Id.* § 7(o) provides that:

When the flag is suspended across a corridor or lobby in a building with only one main entrance, it should be suspended vertically with the union of the flag to the observer's left upon entering. If the building has more than one main entrance, the flag should be suspended vertically near the center of the corridor or lobby with the union to the north, when entrances are to the east and west or to the east when entrances are to the north and south. If there are entrances in more than two directions, the union should be to the east.

³⁵ *Id.* § 9 provides that:

During the ceremony of hoisting or lowering the flag or when the flag is passing in a parade or in review, all persons present in uniform should render the military salute. Members of the Armed Forces and veterans who are present but not in uniform may render the military salute. All other persons present should face the flag and stand at attention with their right hand over the heart, or if applicable, remove their headdress with their right hand and hold it at the left shoulder, the hand

Can Prohibitions on Flag Misuse or Desecration Be Enforced?

The Supreme Court has repeatedly struck down the application of flag improper use or desecration laws on free speech grounds. In *Street v. New York*,³⁸ the Court considered a challenge to a law that made it a misdemeanor to “publicly mutilate, deface, defile, or defy, trample upon, or cast contempt upon either by *words or act* [any flag of the United States].”³⁹ In *Street*, the defendant, learning of the shooting of civil rights activist James Meredith, burned a flag on a Brooklyn street corner while stating “Yes; that is my flag; I burned it. If they let that happen to Meredith, we don't need an American flag.”⁴⁰ The Court in *Street* first concluded that the trial record did not establish whether the defendant’s conviction had been for burning the flag or for the accompanying words, so it considered either as possible grounds for the conviction.⁴¹ The Court evaluated the purported governmental interest in punishing the defendant’s words, rejecting

being over the heart. Citizens of other countries present should stand at attention. All such conduct toward the flag in a moving column should be rendered at the moment the flag passes.

³⁶ *Id.* § 8 provides that:

No disrespect should be shown to the flag of the United States of America; the flag should not be dipped to any person or thing. Regimental colors, State flags, and organization or institutional flags are to be dipped as a mark of honor. (a) The flag should never be displayed with the union down, except as a signal of dire distress in instances of extreme danger to life or property. (b) The flag should never touch anything beneath it, such as the ground, the floor, water, or merchandise. (c) The flag should never be carried flat or horizontally, but always aloft and free. (d) The flag should never be used as wearing apparel, bedding, or drapery. It should never be festooned, drawn back, nor up, in folds, but always allowed to fall free. Bunting of blue, white, and red, always arranged with the blue above, the white in the middle, and the red below, should be used for covering a speaker’s desk, draping the front of the platform, and for decoration in general. (e) The flag should never be fastened, displayed, used, or stored in such a manner as to permit it to be easily torn, soiled, or damaged in any way. (f) The flag should never be used as a covering for a ceiling. (g) The flag should never have placed upon it, nor on any part of it, nor attached to it any mark, insignia, letter, word, figure, design, picture, or drawing of any nature. (h) The flag should never be used as a receptacle for receiving, holding, carrying, or delivering anything. (i) The flag should never be used for advertising purposes in any manner whatsoever. It should not be embroidered on such articles as cushions or handkerchiefs and the like, printed or otherwise impressed on paper napkins or boxes or anything that is designed for temporary use and discard. Advertising signs should not be fastened to a staff or halyard from which the flag is flown. (j) No part of the flag should ever be used as a costume or athletic uniform. However, a flag patch may be affixed to the uniform of military personnel, firemen, policemen, and members of patriotic organizations. The flag represents a living country and is itself considered a living thing. Therefore, the lapel flag pin being a replica, should be worn on the left lapel near the heart. (k) The flag, when it is in such condition that it is no longer a fitting emblem for display, should be destroyed in a dignified way, preferably by burning.

³⁷ *Id.* § 10 provides that:

Any rule or custom pertaining to the display of the flag of the United States of America, set forth herein, may be altered, modified, or repealed, or additional rules with respect thereto may be prescribed, by the Commander in Chief of the Armed Forces of the United States, whenever he deems it to be appropriate or desirable; and any such alteration or additional rule shall be set forth in a proclamation.

³⁸ *Street v. New York*, 394 U.S. 576 (1969).

³⁹ *Id.* at 578, n.1 (citation omitted) (emphasis added).

⁴⁰ *Id.* at 579.

⁴¹ *Id.* at 590.

the argument that the government’s intent was to deter the incitement of unlawful acts.⁴² The Court next held that the speech in question was not “fighting words,” i.e., words so inherently inflammatory that they were “likely to provoke the average person to retaliations, and thereby cause a breach of the peace.”⁴³ Nor, the Court concluded, was the statute narrowly drawn to punish only words of that character.⁴⁴ Further, the Court dismissed the argument that government interests in avoiding “shocking” or disrespectful speech outweighed the freedom to express one’s opinions about the flag.⁴⁵ Finally, the Court concluded that freedom of speech protected public expression of opinions about the flag, even if such opinions are defiant or contemptuous.⁴⁶ Because it had sufficient basis to overrule the conviction based on the spoken words alone, the Court declined to pass upon the validity of the New York law as applied to the flag burning.⁴⁷

In the subsequent flag-misuse case of *Spence v. Washington*,⁴⁸ a college student was convicted under a Washington State improper use law for affixing a peace symbol made of removable tape to a U.S. flag and hanging the flag upside down from an apartment window.⁴⁹ The defendant testified that he had put the peace symbol on the flag as a protest against the Cambodian invasion and the killing of students at Kent State University during anti-war protests.⁵⁰ The Court held that the student’s act was symbolic speech, an activity imbued with communication.⁵¹ The Court also held there were no facts to support a breach of the peace, nor was there a valid governmental interest in avoiding offensive speech.⁵² The Court concluded that the flag had not been damaged by the removable tape, so maintaining the physical integrity of the flag was not at issue.⁵³ Thus, the Court concluded that no governmental interest existed to support the conviction within the contours of the First Amendment.⁵⁴

In *Texas v. Johnson*,⁵⁵ a political demonstration participant at the 1984 Republican National Convention in Dallas was convicted of burning a flag in front of Dallas City Hall.⁵⁶ He was convicted under a Texas statute that prohibited the desecration of a venerated object, sentenced to

⁴² *Id.* at 591.

⁴³ *Id.* at 592; see *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942) (upholding criminal punishment of words likely to cause a breach of the peace).

⁴⁴ *Street*, 394 U.S. at 592 (citing *Chaplinsky*, 315 U.S. at 574).

⁴⁵ *Id.* at 592–93.

⁴⁶ *Id.* at 593.

⁴⁷ *Id.* at 594.

⁴⁸ *Spence v. Washington*, 418 U.S. 405 (1974).

⁴⁹ *Id.* at 406.

⁵⁰ *Id.* at 408.

⁵¹ *Id.* at 410.

⁵² *Id.* at 412.

⁵³ *Id.* at 415.

⁵⁴ *Id.*

⁵⁵ *Texas v. Johnson*, 491 U.S. 397 (1989).

⁵⁶ *Id.* at 400.

a year in jail, and fined \$2000.⁵⁷ Texas conceded that the flag burning was expressive conduct,⁵⁸ but argued that there was sufficient governmental interest in such prohibition.⁵⁹ The Court rejected the argument that the law was designed to prevent breaches of the peace, noting that no such breach occurred in this case and that Texas had not shown that every flag-burning was “directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”⁶⁰ Further, Texas already had a statute that prohibited breaches of the peace.⁶¹

The Court in *Johnson* also held that Texas’s assertion that the law was needed to preserve the flag as a symbol of nationhood and national unity only showed that the law was targeting expression, not conduct.⁶² Further, the law’s application only to severe acts of physical abuse against the flag that were likely to be offensive made clear that the restriction was content-based.⁶³ The Court found Texas’s expressed interest—that flag-burning casts doubts on the meaning of the flag as a national symbol—could not be justified because society found the burning offensive or disagreeable.⁶⁴ Thus, the defendant’s conviction was held to violate the First Amendment.⁶⁵

In response to the *Johnson* decision, Congress enacted the Flag Protection Act of 1989.⁶⁶ Two separate groups of protestors were prosecuted for flag burning under this act, and their cases were considered by the Supreme Court in *United States v. Eichman*.⁶⁷ As the government in *Eichman* conceded that the defendant’s conduct was expressive, the Court limited its decision to whether the Flag Protection Act was constitutionally distinct from the Texas statute in *Johnson*.⁶⁸ The government contended the Flag Protection Act did not target expressive conduct, but was intended to protect the physical integrity of the flag in order to safeguard the flag’s identity “as the unique and unalloyed symbol of the Nation.”⁶⁹ It argued that, unlike the Texas statute in *Johnson* that prohibited only flag desecration “that seriously offend[s]” onlookers, the act’s

⁵⁷ Texas law at the time provided that:

A person commits an offense if he intentionally or knowingly desecrates: (1) a public monument; (2) a place of worship or burial; or (3) a state or national flag. (b) For purposes of this section, ‘desecrate’ means deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action. (c) An offense under this section is a Class A misdemeanor.

TEX. PENAL CODE ANN. § 42.09(a) (1989) (as quoted in *Johnson*, 491 U.S. at 400, n.1).

⁵⁸ *Johnson*, 491 U.S. at 405–06. The Supreme Court noted that expressive conduct occurs based on whether there was “[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.” *Id.* at 405 (quoting *Spence*, 418 U.S. at 410–11 (1974)).

⁵⁹ *Id.* at 407 (“[Where] ‘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.”) (quoting *United States v. O’Brien*, 391 U.S. 367, 376 (1968)).

⁶⁰ *Id.* at 409 (quoting *Brandenburg v. Ohio*, 395 U. S. 444, 447 (1969)).

⁶¹ *Id.* at 410.

⁶² *Id.*

⁶³ *Id.* at 411–12.

⁶⁴ *Id.* at 413–14.

⁶⁵ *Id.* at 420.

⁶⁶ Pub. L. No. 101-131, 103 Stat. 777 (1989).

⁶⁷ *United States v. Eichman*, 496 U.S. 310, 312 (1990).

⁶⁸ *Id.* at 315.

⁶⁹ *Id.* (citation omitted).

prohibitions were not based on motive, intended message, or the likely effects of the conduct on onlookers.⁷⁰

The Court, however, held that the mere destruction of a U.S. flag did not affect the significance of the flag as a symbol of national unity unless that destruction was done with the intent to communicate a message.⁷¹ Further, the language of the act—which prohibits mutilating, defacing, defiling or trampling upon a flag—connotes disrespectful treatment of a flag in order to damage the flag’s symbolic value,⁷² and the exception for disposal of “worn or soiled” flags exempts acts traditionally associated with patriotic respect for the flag.⁷³ Thus, the Court held that the act was a regulation of expressive activity⁷⁴ and, consistent with its decision in *Johnson*, struck it down.⁷⁵

Resolutions were introduced in the 115th Congress proposing a constitutional amendment to authorize Congress to prohibit physical desecration of the flag,⁷⁶ but no similar resolutions have been introduced in the 116th Congress thus far.

Can a U.S. Flag Be Used for Advertising?

Flag-misuse laws sometimes include a prohibition on the use of the U.S. flag for certain forms of commercial speech such as advertising.⁷⁷ Commercial speech, however, has fewer constitutional protections than other forms of speech.⁷⁸ The Supreme Court considers speech commercial when: (1) it is contained in an advertisement; (2) refers to a specific product or service; and (3) the speaker has an economic motivation for making it.⁷⁹ The Court in *Eichman*, when striking down the Flag Protection Act, noted that its opinion did not extend to prohibitions on the commercial exploitation of the U.S. flag.⁸⁰ Thus, the question remains whether prohibitions on the use of flags for advertising purposes violates the First Amendment.

It does not appear that any court has directly addressed whether the use of a U.S. flag in advertising is commercial speech. One difficulty in analyzing this issue is that the display of a flag in advertising appears to add little expressive content to the commercial aspects of the advertisement. In other words, while a U.S. flag may be used in an advertisement and its use may be economically motivated (fulfilling the first and third criteria for commercial speech), the display of a flag is unlikely to convey information about the specific product or service. Rather, the expressive content of displaying the flag would appear to be to link the product or service to a political message such as patriotism or national pride. To the extent that the display of the flag in

⁷⁰ *Id.*

⁷¹ *Id.* at 316.

⁷² *Id.* at 317.

⁷³ *Id.*

⁷⁴ *Id.* at 318.

⁷⁵ *Id.* at 318–19

⁷⁶ S.J. Res. 46, 115th Cong. (2017); H.J. Res. 61, 115th Cong. (2017).

⁷⁷ See, e.g., 4 U.S.C. § 3; N.Y. GEN. BUS. LAW § 136 (LexisNexis 2019); ARIZ. REV. STAT. ANN. § 13-3703 (LexisNexis 2019); WIS. STAT. § 946.06 (LexisNexis 2018).

⁷⁸ *Cent. Hudson Gas & Elec. v. Pub. Serv. Comm’n*, 447 U.S. 557 (1980).

⁷⁹ *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 67 (1983) (“The combination of all these characteristics . . . provides strong support . . . that the [speech at issue is] properly characterized as commercial speech.”).

⁸⁰ *Eichman*, 496 U.S. at 315, n.4. The Supreme Court did hold that a prohibition on using the image of a flag in advertising did not violate the Due Process Clause of the Fourteenth Amendment. *Halter v. Nebraska*, 205 U.S. 34, 45 (1907).

an advertisement communicated an idea such as patriotism, then it might not even be treated as commercial speech but would be analyzed as expressive conduct.⁸¹

Even if advertising using a flag was evaluated as commercial speech, the statute prohibiting it might still be found to violate free speech, as commercial speech does retain some free speech protections. In *Central Hudson Gas & Elec. v. Public Service Commission*,⁸² the Court considered whether the Public Service Commission of the State of New York could order electric utilities in New York State to cease advertising promoting electricity use.⁸³ The Court noted a “common sense”⁸⁴ distinction between speech proposing commercial transactions that occurs in an area traditionally subject to government regulation and other varieties of speech.⁸⁵ Consequently, the Court applied a four-part analysis for commercial speech. First, for commercial speech to be protected, it must concern lawful activity and not be misleading.⁸⁶ Next, there must be a substantial government interest in its regulation.⁸⁷ If both inquiries yield positive answers, the Court must determine whether the regulation directly advances the governmental interest asserted and whether it is “narrowly drawn”⁸⁸ to be no more extensive than necessary to serve that interest.⁸⁹

In *Central Hudson*, the Court held that New York’s interest in reducing inequities in the regulated electricity market that would be caused by increased energy consumption was substantial,⁹⁰ as was the government’s energy conservation interest.⁹¹ The Court went on to hold, however, that it was speculative whether the governmental interest in avoiding inequities would be served, and that this interest was only served if other factors that affected electricity rates remained constant.⁹² The Court did find that the State’s interest in energy conservation was substantial and that the parties did not dispute that advertising would increase sales. The Court, however, struck down the advertising ban as not narrowly drawn to that interest, in that it prohibited not only advertising that would increase energy use but also advertising that would have an energy neutral effect or would lead to a net decrease in energy consumption.⁹³

It should be noted that, despite the more limited protection afforded commercial speech, the Supreme Court has not upheld governmental suppression of truthful commercial speech in more

⁸¹ *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 384 (1973) (“[S]peech is not rendered commercial by the mere fact that it relates to an advertisement.”). For instance, in *New York Times Co. v. Sullivan*, the Supreme Court considered an advertisement in the *New York Times* that contained both criticism of police action against members of the civil rights movement and an appeal for funds to support the movement. 376 U.S. 254, 256–57 (1964). The Court held that freedoms of expression are not forfeited because they are in the form of a paid advertisement. *Id.* at 266.

⁸² *Cent. Hudson*, 447 U.S. 557.

⁸³ *Id.* at 558–59.

⁸⁴ *Id.* at 562 (quoting *Ohralik v. Ohio State Bar Ass’n.*, 436 U.S. 447, 455–56 (1978)).

⁸⁵ *Id.*

⁸⁶ *Id.* at 566.

⁸⁷ *Id.*

⁸⁸ *Id.* at 565.

⁸⁹ *Id.* at 566.

⁹⁰ *Id.*

⁹¹ *Id.* at 568.

⁹² *Id.* at 569.

⁹³ *Id.* at 570. The Court noted that the governmental interest in energy conservation could also be met by a more limited regulation of electricity advertising, such as requiring information about the relative efficiency and expense of the offered service. *Id.* at 570–71.

than twenty years.⁹⁴ Further, several post-*Central Hudson* cases seem to afford more protection to commercial speech than originally contemplated by the case.⁹⁵ For instance, in *City of Cincinnati v. Discovery Network, Inc.*,⁹⁶ the Court, considering a City of Cincinnati regulation banning commercial publications from public newsracks,⁹⁷ rejected the “bare assertion that the ‘low value’ of commercial speech is a sufficient justification for [a] selective and categorical ban on newsracks dispensing ‘commercial handbills.’”⁹⁸ Rejecting the city’s regulation, the Court noted that “the city’s argument attaches more importance to the distinction between commercial and noncommercial speech than our cases warrant and seriously underestimates the value of commercial speech.”⁹⁹ Similarly, in *44 Liquormart, Inc. v. Rhode Island*, Justice Stevens, writing for a plurality, suggested that the First Amendment requires a full, “rigorous review” of any commercial speech regulations “unrelated to the preservation of a fair bargaining process[.]”¹⁰⁰

Even applying the *Hudson* analysis, there are arguments that flag-misuse laws regarding advertising would violate free speech. Assuming such advertising neither involved an inherently unlawful activity nor was intended to mislead a viewer (the first prong of the *Central Hudson* test),¹⁰¹ the law would be subject to the remaining three prongs of *Central Hudson*: whether there is a substantial government interest, whether the law directly advances that governmental interest and whether the law is “narrowly drawn.” While this analysis would occur in the context of commercial speech, the Court’s analysis of restrictions on symbolic speech, which is similar to the analysis of commercial speech, would be relevant.¹⁰²

For instance, while concerns about avoiding a breach of the peace is a substantial governmental interest, it seems unlikely that, after *Spence* and *Johnson*, the Court would find that prohibiting using a flag for commercial advertising was intended to avoid a breach of the peace. Similarly, preserving the flag as a symbol of national unity, while it might be a substantial governmental interest, would also seem unlikely to be significantly damaged by the use of flags for commercial activity. Finally, as in *Eichman*, preserving the physical integrity of a privately owned flag would be unlikely to be a sufficient government interest to outweigh the suppression of expressive conduct. Thus, a court would be likely to find that enforcement of a flag-misuse statute against a commercial advertisement violates precepts of free speech.

⁹⁴ Martin H. Redish and Kyle Voil, *False Commercial Speech And The First Amendment: Understanding The Implications Of The Equivalency Principle*, 25 WM. & MARY BILL OF RTS. J. 765, 774 (2017).

⁹⁵ *Id.* at 775 (The Court now affords more protection to commercial speech than it had previously.); Robert D. Cahill Jr., *City of Cincinnati v. Discovery Network, Inc.: Towards Heightened Scrutiny for Truthful Commercial Speech?*, 28 U. RICH. L. REV. 225 (1994) (The Court has signaled a move away from its previous assertions that commercial speech occupies a subordinate position.).

⁹⁶ *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 412 (1993).

⁹⁷ *Id.* at 415.

⁹⁸ *Id.* at 428.

⁹⁹ *Id.* at 419.

¹⁰⁰ *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996) (plurality opinion) (striking Rhode Island’s statutory prohibition against advertisements of alcoholic beverages retail prices).

¹⁰¹ For instance, if a flag was used in an advertisement in such a way as to imply that the federal government endorsed or supplied a product, this misleading advertisement might not be protected by the First Amendment.

¹⁰² “Commercial speech and expressive conduct are [both] prominent categories of speech that can receive an intermediate level of First Amendment protection.” Note, *Making Sense Of Hybrid Speech: A New Model For Commercial Speech and Expressive Conduct*, 118 HARV. L. REV. 2836, 2836 (2005).

Can Schools Require Teacher-Led Recitation of the Pledge of Allegiance?

Teacher-led recitations of the Pledge of Allegiance have been challenged as violations of the Establishment Clause of the First Amendment. Specifically, a variety of federal courts have addressed whether the use of the phrase “one Nation under God” in the Pledge of Allegiance renders a recitation of the Pledge by a teacher to students unconstitutional.¹⁰³ For instance, the U.S. Court of Appeals for the Ninth Circuit Court (Ninth Circuit) held that daily recitations of the Pledge of Allegiance violates the Establishment Clause of the First Amendment. That decision was overturned by the Supreme Court on other grounds, however, and a later decision by the Ninth Circuit reached the opposite conclusion.

In *Newdow v. United States Congress*,¹⁰⁴ the Ninth Circuit considered a case brought by a father that argued the Pledge of Allegiance recitation by his daughter’s public school teacher violated the Establishment Clause of the First Amendment.¹⁰⁵ The father did not claim that his daughter was compelled to recite the Pledge, but argued that his daughter was compelled to watch her state-employed teacher proclaim that there is a God and that the United States is nation under that God.¹⁰⁶

The Ninth Circuit considered this challenge using the “coercion test,” first articulated in the case of *Lee v. Weisman*,¹⁰⁷ which held that “the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise to act in a way which establishes a state religion or religious faith, or tends to do so.”¹⁰⁸ In *Weisman*, the court concluded that “the graduation prayers bore the imprint of the State and thus put school-age children who objected in an untenable position.”¹⁰⁹ The Court also considered the “heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools,”¹¹⁰ holding that the school district’s supervision and control of the graduation ceremony put impermissible pressure on students to participate in, or at least show respect during, the prayer.¹¹¹ The court in *Newdow* similarly reasoned that the school had placed its students in the untenable position of choosing between participating in the Pledge or protesting¹¹² and that the monotheistic religious content of the Pledge was not de minimus.¹¹³

¹⁰³ *Freedom from Religion Found. v. Hanover Sch. Dist.*, 626 F.3d 1, 13–14 (1st Cir. 2010); *Myers v. Loudoun Cty. Pub. Sch.*, 418 F.3d 395, 408 (4th Cir. 2005); *Newdow v. U.S. Congress*, 328 F.3d 466 (9th Cir. 2002), *rev’d sub nom.*, *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 961 (2004); *Sherman v. Cmty. Consol. Sch. Dist. 21*, 980 F.2d 437, 439 (7th Cir. 1992).

¹⁰⁴ *Newdow*, 328 F.3d 466.

¹⁰⁵ *Id.* at 482.

¹⁰⁶ *Id.* at 483.

¹⁰⁷ *Lee v. Weisman*, 505 U.S. 577, 599 (1991) (holding unconstitutional the practice of including invocations and benedictions in the form of “nonsectarian” prayers at public school graduation ceremonies).

¹⁰⁸ *Id.* at 587.

¹⁰⁹ *Id.* at 590.

¹¹⁰ *Id.* at 592.

¹¹¹ *Id.* at 593.

¹¹² *Newdow*, 328 F.3d at 488.

¹¹³ *Id.*

The Supreme Court, however, overturned the *Newdow* case on other grounds, holding that the child’s father, who had disputed custody over his child, lacked standing to bring the case. Subsequently, the Ninth Circuit, considering a Pledge of Allegiance passed by Congress after the *Newdow* decision (but using the same words), concluded that its previous opinion in *Newdow* was no longer binding precedent, that Supreme Court Establishment Clause case law had subsequently changed, and that Congress, when passing the new version of the Pledge of Allegiance, established a secular purpose for the use of the terms “Under God.”¹¹⁴ Thus, the Ninth Circuit upheld the recitation of the Pledge of Allegiance by public school teachers. Other United States Courts of Appeals have also rejected Establishment Clause challenges to the recitation of the Pledge of Allegiance in public schools.¹¹⁵

Do Students Have to Recite of the Pledge of Allegiance?

The flag code provides that the Pledge of Allegiance shall be rendered standing at attention facing the flag with the right hand over the heart.¹¹⁶ Many states have statutes providing that schools provide for an opportunity for the daily recitation of the Pledge by public school students.¹¹⁷ The Court in *West Virginia State Board of Education v. Barnette*,¹¹⁸ however, held that that mandating that a student participate in a recitation of the Pledge of Allegiance violates free speech principles under the First Amendment.¹¹⁹

As noted previously, the federal “flag code” specified conduct when delivering the Pledge of Allegiance is voluntary.¹²⁰ In *West Virginia State Board of Education*, the Supreme Court considered a West Virginia Board of Education (Board) mandate for public school students to perform the Pledge on a daily basis.¹²¹ A child who would not participate was expelled until such

¹¹⁴ *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1041–42 (9th Cir. 2010). The court held that Congress had two main purposes for keeping the phrase “Nation under God” in the Pledge: (1) to underscore the political philosophy of the Founding Fathers that God granted certain inalienable rights to the people which the government cannot take away; and (2) to add the note of importance which a pledge to our nation ought to have and which in our culture ceremonial references to God arouse. *Id.* at 1028.

¹¹⁵ *Freedom From Religion Found. v. Hanover Sch. Dist.*, 626 F.3d 1, 13–14 (1st Cir. 2010); *Myers v. Loudoun Cty. Pub. Sch.*, 418 F.3d 395, 408 (4th Cir. 2005); *Sherman v. Cmty. Consol. Sch. Dist. 21*, 980 F.2d 437, 439 (7th Cir. 1992).

¹¹⁶ 4 U.S.C. § 4 provides:

The Pledge of Allegiance to the Flag: “I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.” should be rendered by standing at attention facing the flag with the right hand over the heart. When not in uniform men should remove any non-religious headdress with their right hand and hold it at the left shoulder, the hand being over the heart. Persons in uniform should remain silent, face the flag, and render the military salute. Members of the Armed Forces not in uniform and veterans may render the military salute in the manner provided for persons in uniform.

¹¹⁷ Michael Blank, Note, *Disestablishing Deism: Advocating Free Exercise Challenges to State-Induced Invocations of God*, 31 WASH. U.J.L. & POL’Y 157, 171 (2009). Most of these statutes allow students to decline to participate. *See, e.g.*, N.J. STAT. § 18A:36-3 (LexisNexis 2019); TENN. CODE ANN. § 49-6-1001 (LexisNexis 2018); TEX. EDUC. CODE ANN. § 25.082 (LexisNexis 2017); VA. CODE ANN. § 22.1-202 (LexisNexis 2019); KY. REV. STAT. ANN. § 158.175 (LexisNexis 2018); A.C.A. § 6-16-108 (LexisNexis 2019). *But see* 105 ILL. COMP. STAT. 5/27-3 (LexisNexis 2019).

¹¹⁸ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

¹¹⁹ *Id.* at 642.

¹²⁰ 4 U.S.C. § 4.

¹²¹ *W. Va. State Bd. of Educ.*, 319 U.S. at 626.

time as they complied and the child’s parent or guardian could be fined \$50 or jailed for up to 30 days.¹²² The Court concluded that the requirement, that students perform a stiff-arm salute and recite the Pledge,¹²³ was a violation of the free speech protections of the First Amendment.¹²⁴

The plaintiffs in *Barnette* were Jehovah’s witnesses whose religious beliefs conflicted with the requirement of pledging allegiance to the laws of a secular government.¹²⁵ The Court analyzed the Board requirement as compelled speech¹²⁶ holding that the mandated flag salute was a form of symbolic utterance.¹²⁷ The Court also noted that remaining passive during a flag salute did not present the kind of clear and present danger that would justify regulation.¹²⁸ The Court also discounted arguments that the Pledge fostered national unity, noting that “[a]uthority here is to be controlled by public opinion, not public opinion by authority.”¹²⁹ The Court held that these precepts applied regardless of whether there was a religious basis for the student’s objection to performing the Pledge.¹³⁰

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¹²² *Id.* at 629.

¹²³ *Id.* at 628.

¹²⁴ *Id.* at 642.

¹²⁵ *Id.* at 629.

¹²⁶ *Id.* at 631.

¹²⁷ *Id.* at 632.

¹²⁸ *Id.* at 632–33.

¹²⁹ *Id.* at 641.

¹³⁰ *Id.* at 634–35.