

# *Curious Lawyer: Flag Law*

---

Peter Afrasiabi

One LLP

[www.onellp.com](http://www.onellp.com)



# Agenda of Flag Law (along with the Pledge of Allegiance and the National Anthem)

- Federal laws that relate to display and use of flags.
- Flag desecration laws.
- Flag burning.
- Flags and advertising.
- Pledge of Allegiance laws and First Amendment religion-speech challenges.
- Laws on appropriate conduct during National Anthem.
- State flags with confederate flags in them and confederate flags in jury rooms.

# Overview of U.S. Flag Code, 4 U.S.C. § 1-10

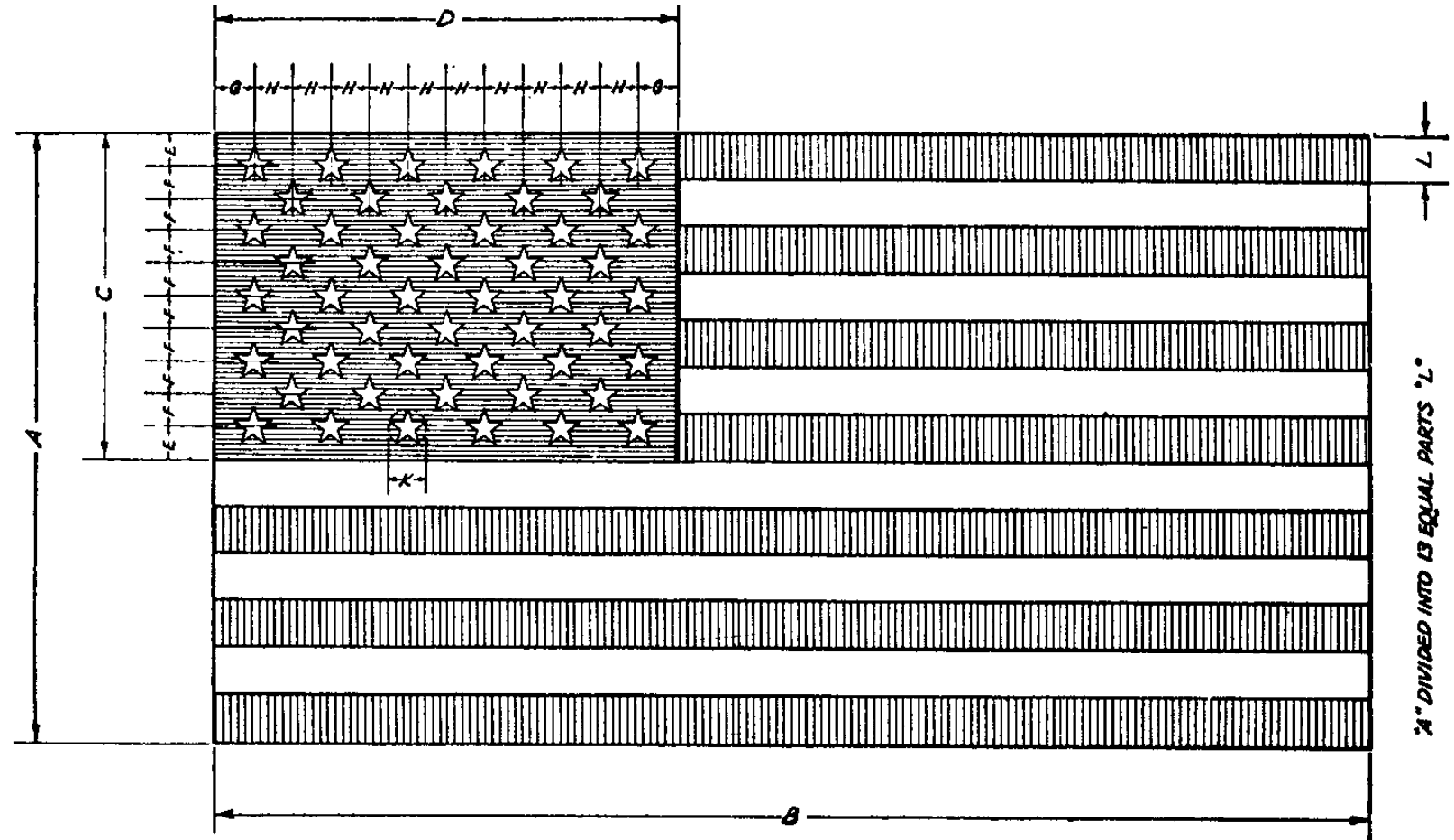
- The federal law regulating flags sets forth guidelines for private citizens on the appearance and display of the U.S. flag.
- Defines how a US flag must look and display times, use in processions and parades, and half-staff use.
- Vests complete authority in President to change Code enactments.
- The 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.

# When the Confederate flag flies higher than the US flag...

- *Holmes v. Wallace*, 407 F. Supp. 493, 494 (M.D. Ala.), *aff'd without published opinion*, 540 F.2d 1083 (5th Cir. 1976) .
- Facts: Plaintiff alleged that the flying of the flag of the former Confederate States of America immediately below that of the State of Alabama on a halyard atop the Alabama State Capitol in Montgomery, Alabama, together with the flying of the United States flag elsewhere on the Capitol grounds at an elevation lower than that occupied by the Confederate flag, constitutes a violation of 36 U.S.C. § 175. (Old statute, same as 4 U.S.C. § 7(c) today).
- Held: “An examination of the flag code section of Title 36 as a whole leads to the conclusion that §§ 173-178, as well as the associated §§ 170-173, are not intended to proscribe conduct but are merely declaratory or advisory.” (496).
- Point: the law codified customs and etiquette, but is not designed to compel by force of law behavior.

# The US Flag Appearance by Law

- 4 U.S.C. § 1: “The flag of the United States shall be thirteen horizontal stripes, alternate red and white; and the union of the flag shall be forty-eight stars, white in a blue field.”
- 48?!
- But Congress pondered new states.
- 4 U.S.C. § 2: “On the admission of a new State into the Union one star shall be added to the union of the flag; and such addition shall take effect on the fourth day of July then next succeeding such admission.”



# Pledge of Allegiance

“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.”

4 U.S.C. § 4

# First Amendment and Pledge: Establishment Clause challenges to Pledge.

- Part 1: *Newdow v. U.S. Congress*, 328 F.3d 466 (9<sup>th</sup> Cir. 2002), Held: that daily recitations of the Pledge of Allegiance violates the Establishment Clause of the First Amendment. *Newdow* reasoned that the school had placed its students in the untenable position of choosing between participating in the Pledge or protesting it, and that the monotheistic religious content of the Pledge was not de minimis.
- Part 2: SCOTUS: reversed on other grounds, holding that the child's father, who had disputed custody over his child, lacked standing to bring the case.
- Part 3: 9<sup>th</sup> Cir revisited. *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.
- Other circuits have rejected Establishment Clause challenges. See *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.*, 980 F.2d 437, 439 (7th Cir. 1992).

# Time and Manner of Display, 4 U.S.C. § 6

- “It is the universal custom to display the flag only from sunrise to sunset on buildings and on stationary flagstaffs in the open. However, when a patriotic effect is desired, the flag may be displayed 24 hours a day if properly illuminated during the hours of darkness.” § (a)
- “The flag should not be displayed on days when the weather is inclement, except when an all weather flag is displayed.” § (c).
- “The flag should be displayed on all days, especially on New Year’s Day, January 1; Inauguration Day, January 20; Martin Luther King Jr.’s birthday, third Monday in January; Lincoln’s Birthday, February 12; Washington’s Birthday, third Monday in February; National Vietnam War Veterans Day, March 29; Easter Sunday (variable); Mother’s Day, second Sunday in May; Armed Forces Day, third Saturday in May; Memorial Day (half-staff until noon), the last Monday in May; Flag Day, June 14; Father’s Day, third Sunday in June; Independence Day, July 4; National Korean War Veterans Armistice Day, July 27; Labor Day, first Monday in September; Constitution Day, September 17; Columbus Day, second Monday in October; Navy Day, October 27; Veterans Day, November 11; Thanksgiving Day, fourth Thursday in November; Christmas Day, December 25; and such other days as may be proclaimed by the President of the United States; the birthdays of States (date of admission); and on State holidays.” § (d).

# Flags and Polling, 4 U.S.C. § 6

- The flag should be displayed in or near every polling place on election days. § (f)
- The flag should be displayed during school days in or near every schoolhouse. § (g).

# Position and Manner of Display, 4 U.S.C. § 7

(b)The flag should not be draped over the hood, top, sides, or back of a vehicle or of a railroad train or a boat. When the flag is displayed on a motorcar, the staff shall be fixed firmly to the chassis or clamped to the right fender.

(d)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.

(e)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.

(l)The flag should form a distinctive feature of the ceremony of unveiling a statue or monument, but it should never be used as the covering for the statue or monument.

# Half-Staff Rules, 4 U.S.C. § 7(m)

“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.

...

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.”

**(m)(1) “the term “half-staff” means the position of the flag when it is one-half the distance between the top and bottom of the staff.”**

# 4 U.S.C. § 8, Respect for Flag: Many “Flag Should Never” requirements, Sampling

(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.

(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.

(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.

# State Laws that Prohibit Flag Desecration

- 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).

# Flag Desecration, First Amendment and SCOTUS: Part 1

- In *Street v. New York*, 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. 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.” 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. The Court evaluated the purported governmental interest in punishing the defendant’s words, rejecting the argument that the government’s intent was to deter the incitement of unlawful acts. 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.” Nor, the Court concluded, was the statute narrowly drawn to punish only words of that character. 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. Finally, the Court concluded that freedom of speech protected public expression of opinions about the flag, even if such opinions are defiant or contemptuous. 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.

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

## Part 2: Spence v. Washington

- In the case of *Spence v. Washington*, 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.
- 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.
- The Court held that the student's act was symbolic speech, an activity imbued with communication. 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. 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. Thus, the Court concluded that no governmental interest existed to support the conviction within the contours of the First Amendment.

418 U.S. 405 (1974).

# Part 3: *Texas v. Johnson*, 491 U.S. 398 (1989)

- Facts: Gregory Lee Johnson burned an American flag outside of 1984 Republican National Convention in Dallas, Texas. Johnson burned the flag to protest the policies of President Ronald Reagan. He was arrested and charged with violating a Texas statute that prevented the desecration of a venerated object, including the American flag, if such action were likely to incite anger in others. A Texas court tried and convicted Johnson. Issue: Whether flag burning constitutes "symbolic speech" protected by the First Amendment.
- Held (5-4): Expression may not be prohibited on the basis that an audience that takes serious offense to the expression may disturb the peace, since the Government cannot assume that every expression of a provocative idea will incite a riot but must look to the actual circumstances surrounding the expression. Burning a flag is not inciting a riot or imminent fistcuffs trigger.
  - “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.
  - To conclude that the government may permit designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernible or defensible boundaries. Could the government, on this theory, prohibit the burning of state flags? Of copies of the Presidential seal? Of the Constitution? In evaluating these choices under the First Amendment, how would we decide which symbols were sufficiently special to warrant this unique status? To do so, we would be forced to consult our own political preferences, and impose them on the citizenry, in the very way that the First Amendment forbids us to do.

# Dissent in *Texas v. Johnson*

- Dissent (Rehnquist): “The American flag, then, throughout more than 200 years of our history, has come to be the visible symbol embodying our Nation... Far from being a case of "one picture being worth a thousand words," flag burning is the equivalent of an inarticulate grunt or roar that, it seems fair to say, is most likely to be indulged in not to express any particular idea, but to antagonize others...The Texas statute deprived Johnson of only one rather inarticulate symbolic form of protest -- a form of protest that was profoundly offensive to many -- and left him with a full panoply of other symbols and every conceivable form of verbal expression to express his deep disapproval of national policy.”
- Dissent Rationale & Hate Speech: willing to restrict speech that was offensive to many because of nature of the importance of the speech at issue (flag), and so saw a path to restricting speech based on its level of offensiveness.

# Using the Flag for Advertising? 4 U.S.C. § 3

“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.”

“The words “flag, standard, colors, or ensign”, as used herein, shall include any flag, standard, colors, ensign, or any picture or representation of either, or of any part or parts of either, made of any substance or represented on any substance, of any size evidently purporting to be either of said flag, standard, colors, or ensign of the United States of America or a picture or a representation of either, upon which shall be shown the colors, the stars and the stripes, in any number of either thereof, or of any part or parts of either, by which the average person seeing the same without deliberation may believe the same to represent the flag, colors, standard, or ensign of the United States of America.”

# Enforceable as against First Amendment?

- No court has directly addressed whether the use of a U.S. flag in advertising is commercial speech.
- Does flag add to expressive content of commercial advertising and convey any information about a product-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.
- Even with lower First Amendment protection for commercial speech, likely would be lawful. For instance, while concerns about avoiding a breach of the peace is a substantial governmental interest, it seems unlikely that, given SCOTUS commercial speech law, the Court would find that prohibiting using a flag for commercial advertising was intended to avoid a breach of the peace or any idea about preserving the physical integrity of a privately owned flag would be unlikely to be a sufficient government interest to outweigh the suppression of expressive advertising conduct.

# The National Anthem, 36 U.S.C. § 301

- Star-spangled banner is the official National Anthem. § (a)

(b) Conduct During Playing.—During a rendition of the national anthem—  
(1) when the flag is displayed—(A) individuals in uniform should give the military salute at the first note of the anthem and maintain that position until the last note;

(B) members of the Armed Forces and veterans who are present but not in uniform may render the military salute in the manner provided for individuals in uniform; and

(C) all other persons present should face the flag and stand at attention with their right hand over the heart, and men not in uniform, if applicable, should remove their head dress with their right hand and hold it at the left shoulder, the hand being over the heart; and

(2) when the flag is not displayed, all present should face toward the music and act in the same manner they would if the flag were displayed

# *Lipeles v. City of Sacramento*, 20-1328 (E.D. Cal. 2020)

- 1928 City ordinance on the books that required residents to stand and salute the American flag while The Star-Spangled Banner was performed.
- Had been enacted at request of Veterans of Foreign Wars organization.
- Plaintiff sued.
- City repealed the ordinance.

# Right to Display Flag privately? HOA lawsuits!

- 4 U.S.C. § 5: “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.”
- *Costanza v. Tchefuncte Harbour Ass’n, Inc*, 31 F.Supp.3d 849, 851 (E.D. La. 2014).
- Held: “Noticeably absent from the text of the Act is an express creation of a private right of action, any explicit enforcement mechanism or remedy, or any reference to penalties or sanctions to be imposed for violations. The Act is simply an example of poor draftsmanship.”
- No enforcement mechanism, therefore private rules can delimit right to fly flag.

# Unique Vesting of Power in Executive

“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.” 4 U.S.C. § 10.

# When state confederate flags are challenged. *Moore v. Bryant*, 853 F.3d 245 (5<sup>th</sup> Cir. 2017).

- Facts: Mississippi state flag had Confederate battle flag in the upper left corner. Plaintiff, a state prosecutor, sued and said that the use of the Confederate symbol amounted to state-sanctioned racial discrimination. “Plaintiff first alleges that he is unavoidably exposed to the state flag and that the flag's message is “painful, threatening, and offensive” to him, makes him “feel like a second-class citizen,” and causes him both physical and emotional injuries.” At its core, Plaintiff's injury theory is that the Mississippi state flag stigmatizes him.” *Id.* at 249. Plaintiff also alleged having to see flag at place of work (court) was a hostile work environment.
- Held: (1) “[E]xposure to a discriminatory message, without a corresponding denial of equal treatment, is insufficient to plead injury in an equal protection case.” (*Id.* at 250) (2) “Plaintiff's exposure to the Mississippi flag in courtrooms where he practices and his alleged physical injuries resulting from that exposure demonstrate that he strongly feels the stigmatic harm flowing from the flag...[but] Plaintiff's hostile workplace and physical injury theories are insufficient to plead injury in fact.” (*Id.* at 251-52).

# Confederate flags in jury room? *State v. Gilbert*, No. CR-14803 (Crim . Ct. App. Tenn. Aug 10, 2021)

- Facts: All white jury deliberates a criminal case against a black defendant, and Confederate flag was in jury room. Guilty and six-year sentence. Gilbert argued “that using a room maintained by the U.D.C. [i.e., the United Daughters of the Confederacy] and ornamented with relics of the Confederacy for jury deliberations exposed the jury to extraneous prejudicial information and violated his constitutional right to a fair trial by an impartial jury, due process, and equal protection under the law.”
- Held: “Defendant was prejudiced by the jury’s exposure to the Confederate memorabilia in the U.D.C. Room”; and so granted Gilbert a new trial.
- Rationale: Flags “communicate messages pertaining to, say, a government’s identity, values, and military strength.” Flags have been used “throughout history to communicate messages and ideas.” Thus, the flag itself is what conveyed “extraneous information” to the jury and created prejudice.

# Conclusions: Flag, National Anthem, and Pledge of Allegiance

---

- Detailed federal laws on use and treatment of flag have been held to be unenforceable as positive law and so are declaratory and aspirational.
- Flag burning has been upheld by SCOTUS under the First Amendment, 5-4 as of late 1980's but over vigorous dissents.
- Required Pledge of Allegiance does not violate Establishment Clause.
- Codified National Anthem is the same, and laws requiring standing to it have been rejected.
- Confederate flags in jury rooms deny fair trial, but confederate flags as part of state flags are not actionable as equal protection injuries.

