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S.J. RES. 14—PROPOSING AN AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AUTHORIZING CONGRESS TO PROHIBIT THE PHYSICAL DESECRATION OF THE FLAG OF THE UNITED STATES

MARCH 20, 2000.—Ordered to be printed

Mr. HATCH, from the Committee on the Judiciary, submitted the following

REPORT

together with

MINORITY VIEWS

[To accompany S.J. Res. 14]

The Committee on the Judiciary, to which was referred the joint resolution (S.J. Res. 14) to propose an amendment to the Constitution so that "Congress shall have power to prohibit the physical desecration of the flag of the United States," having considered the same, reports favorably thereon, and recommends that the joint resolution do pass.

CONTENTS

79–010

I. SUMMARY

The purpose of Senate Joint Resolution 14 is to restore to Congress the authority to enact a statute protecting the flag of the United States from physical desecration. The resolution reads as follows: "The Congress shall have power to prohibit the physical desecration of the flag of the United States."

The American people revere the flag of the United States as a unique symbol of our Nation, representing our commonly held belief in liberty and justice. Regardless of our ethnic, racial, or religious diversity, the flag represents our oneness as a people. The American flag has inspired men and women to accomplish courageous deeds that won our independence, made our Nation great, and advanced our values throughout the world. From the battlefields of the American Revolution where we won our freedom to the battlefields of World War II where we won freedom for other peoples to the classrooms across our country where our children pledge allegiance to the flag, the American flag has inspired a love and respect for our people and our values that have made our Nation the greatest force for liberty the world has ever known.

For the overwhelming majority of our history, our statesmen, our legislatures, and our courts have recognized the special value of the American flag as a symbol of our sovereignty as a nation and of our commitment to freedom. And through their Federal and State officials, the American people recognized that "love both of common country and of State will diminish in proportion as respect for the flag is weakened." *Halter* v. *Nebraska*. 205 U.S. 34, 42 (1907). Thus, as with numerous other societal interests, the legislatures and the courts balanced society's interest in protecting the flag with the individual's first amendment right to freedom of speech. The legislatures of the Federal Government, the District of Columbia, and some 48 States adopted statutes preventing physical desecration of the flag, and the courts upheld these statutes. Thus,

these statutes, and the judicial opinions that interpreted them, struck the balance in favor of the Government's interest in protecting the flag over the individual actor's interest in choosing physical destruction of the flag as the means to convey a particular message instead of the readily available means of oral or written speech to convey the same message.

In 1989, however, while retaining the traditional balance for numerous other societal interests that affected the first amendment, the Supreme Court broke with legal tradition and restruck the balance in favor of a nearly absolute protection for the interest of the actor in choosing physical destruction of the flag as a means of expressing a particular idea. *Texas* v. *Johnson,* 491 U.S. 397 (1989). After the Supreme Court rejected Congress' statutory response to *Johnson* as unenforceable, *United States* v. *Eichman,* 496 U.S. 310 (1990), an overwhelming majority of the American people wanted a constitutional amendment to protect their flag. The proposed amendment would restore to the flag the traditional balanced approach that existed for most of our history and continues to exist for other societal interests that affect an individual's interest in freedom of speech. Once restored, the balanced approach would protect the physical integrity of the flag, while retaining full protections for oral and written speech through which an individual may convey his particular message.

The effort to enact S.J. Res. 14 is the bipartisan result of a widespread, grassroots call for the adoption of a constitutional amendment permitting Congress to protect the flag from physical desecration. Senators Orrin G. Hatch (R–UT) and Max Cleland (D–GA) are the principal Senate cosponsors. Congressmen Randy Cunningham (R–CA) and John P. Murtha (D–PA) are leading the effort in the House of Representatives on H.J. Res. 33, the House counterpart to S.J. Res.14.

For the reasons set forth in this report, the Judiciary Committee reported S.J. Res. 14 to the full Senate with a favorable recommendation, and urges that it be adopted.

II. Legislative History

On June 21, 1989, the U.S. Supreme Court issued its decision in *Texas* v. *Johnson,* 491 U.S. 397 (1989). In that case, Gregory Lee Johnson had been convicted of violating a Texas statute for the knowing physical desecration of an American flag. Johnson had burned a flag at a political demonstration outside City Hall in Dallas, TX, during the 1984 Republican National Convention. The Texas Court of Criminal Appeals reversed his conviction. *Johnson* v. *State,* 755 S.W.2d 92 (1988). In a 5-to-4 decision, the U.S. Supreme Court affirmed the reversal, holding that Johnson's burning of the flag was expressive conduct, a form of symbolic speech protected by the first amendment.

On July 18, 1989, following the Supreme Court's decision in *Johnson,* Senators Robert Dole, Alan Dixon, Strom Thurmond, and Howell Heflin, as principal cosponsors, introduced Senate Joint Resolution 180, a proposed amendment to the Constitution of the United States, which would have given Congress and the States power to prohibit the physical desecration of the American flag. On July 18, 1989, Senators Joseph Biden, William Roth, and William

Cohen, as principal cosponsors, introduced S. 1338 (The Biden-Roth-Cohen Flag Protection Act of 1989), which proposed to amend the Federal flag desecration statute, 18 U.S.C. 700(a). The Judiciary Committee held hearings on August 1, August 14, September 13, and September 14, 1989, on the proposed legislation and constitutional amendment. Approximately 20 hours of testimony were received from 26 witnesses, including a broad range of constitutional scholars, historians, representatives of veterans' organizations, Members of the Senate, and attorneys from the Department of Justice. On September 21, 1989, the Judiciary Committee approved S. 1338 and ordered the bill favorably reported.

On September 12, 1989, the House of Representatives passed H.R. 2978 (the Flag Protection Act of 1989) in order to protect the physical integrity of the flag of the United States. H.R. 2978 was similar to S. 1338 and also sought to amend 18 U.S.C. 700(a).

On October 5, 1989, the Senate passed H.R. 2978, which was enacted on October 28, 1989. Under this statute, codified at 18 U.S.C. 700(a), "(W)hoever 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." An exception was made for "conduct consisting of the disposal of a flag when it has become worn or soiled."

In the wake of the Flag Protection Act's passage, on October 19, 1989, S.J. Res. 180, the proposed constitutional amendment, failed to obtain the necessary two-thirds vote of the full Senate, by a vote of 51 to 48. It was generally believed that the statute would survive constitutional scrutiny and an amendment was thus unnecessary.

On June 11, 1990, the Supreme Court, however, in *United States* v. *Eichman*, 495 U.S. 928 (1990), struck down the 1989 act under the new rule announced in *Johnson. Eichman* involved individuals who knowingly set fire to several American flags on the steps of the U.S. Capitol while protesting American foreign policy, and other individuals who knowingly burned a U.S. flag in Seattle while protesting passage of the 1989 Flag Protection Act. According to the Court, the first amendment, after *Johnson*, now encompassed the "right" of these individuals to engage in physically destructive conduct toward the flag.

Shortly after the Supreme Court's decision in *Eichman*, the Senate Judiciary Committee held a hearing to consider what measures might be taken to protect the American flag. The Committee heard from eight witnesses, including representatives from the Justice Department.

As a result of those hearings, an amendment to the Constitution of the United States was introduced that would have given Congress and the States the power to prohibit the physical desecration of the flag (Senate Joint Resolution 332). On June 26, 1990, however, the proposed amendment failed to receive the necessary two-thirds vote of the full Senate, by a vote of 58 to 42.

Thus, on March 21, 1995, Senators Hatch and Heflin, as principal cosponsors, along with a bipartisan group of 53 additional cosponsors, introduced Senate Joint Resolution 31, another proposed

amendment to the Constitution identical to that introduced in both 1989 and 1990.

On June 6 1995, a hearing on S.J. Res. 31 was held by the Subcommittee on the Constitution, Federalism, and Property Rights of the Judiciary Committee.

On July 20, 1995, the Committee voted 12 to 6 to report favorably S.J. Res. 31. The House of Representatives voted 312 to 120 in favor of an identical resolution, H.J. Res. 79, on June 28, 1995. On December 12, 1995, however, S.J. Res. 31 failed to obtain the necessary two-thirds vote of the full Senate, by a vote of 63 to 36.

On February 4, 1998, Senators Hatch and Cleland, as principal cosponsors, along with a bipartisan group of 53 additional cosponsors, introduced Senate Joint Resolution 40, another proposed amendment to the Constitution identical to that voted on by the Senate in 1995.

On March 25, 1998, a hearing on S.J. Res. 40 was held by the Subcommittee on the Constitution, Federalism, and Property Rights of the Judiciary Committee. On June 17, 1998, the resolution was polled out of the Subcommittee by a vote of 5 to 3, and referred to the full Judiciary Committee. The Committee took up the legislation on June 24, 1998, and voted 11 to 7 to report favorably S.J. Res 40. Following the full Committee vote, the Committee held a hearing on July 8, 1998. However, the Senate was not able to vote on S.J. Res. 40 before the 105th Congress adjourned.

The previous year, the House Committee on the Judiciary had addressed a similar resolution, H.J. Res. 54, and favorably reported it on May 14, 1997, by a vote of 20 to 9. On June 12, 1997, the House of Representatives voted 310 to 114 in favor of H.J. Res. 54.

Efforts to protect the flag did not end there, however. In response to the continuing groundswell of support by the American people for constitutional protection of the physical integrity of their flag, Senator Hatch, along with Senator Cleland, introduced S.J. Res. 14 on March 17, 1999. S.J. Res. 14, the Senate's most recent effort to pass a constitutional amendment to permit Congress to enact legislation prohibiting the physical desecration of the American flag, is identical to S.J. Res. 40 that was introduced in 1998. Senators Hatch and Cleland were joined by an additional 55 original cosponsors in this effort.

On February 24, 1999, a resolution proposing an amendment identical to that proposed in S.J. Res. 14 was introduced in the House of Representatives as H.J. Res. 33 by Congressmen Randy Cunningam (R–CA) and John P. Murtha (D–PA) and 260 additional original cosponsors.

On April 20, 1999, the Senate Judiciary Committee held a hearing on S.J. Res. 14. The Committee heard testimony from retired Maj. Gen. Patrick Brady, chairman of the Citizens Flag Alliance, Sumner, WA; Maribeth Seely, fifth grade teacher, Branchville, NJ; Prof. Gary May, University of Southern Indiana, Newburgh, IN; Rev. Nathan Wilson, West Virginia Council of Churches, Charleston, WV; retired Lt. General Edward Baca, former chief, National Guard Bureau, Albuquerque, NM; and Professor Richard Parker, Williams Professor of Law, Harvard Law School, Cambridge, MA.

On April 21, 1999, the resolution was polled out of the Subcommittee by a vote of 5 to 3, and referred to the full Judiciary Committee.

On April 28, 1999, the Judiciary Committee held a second hearing on S.J. Res. 14. The Committee heard testimony from Senator John Chafee of Rhode Island; Senator John McCain of Arizona; Senator Bob Kerrey of Nebraska; Senator Max Cleland of Georgia; Senator Chuck Hagel of Nebraska; former Senator John Glenn of Ohio; and Randolf Moss, Acting Assistant Attorney General of the Office of Legal Counsel, Department of Justice, Washington, DC.

The Committee took up the legislation on April 29, 1999, and voted 11 to 7 to report favorably S.J. Res 14 to the full Senate.

III. DISCUSSION

A. A Brief History of the American Flag

1. EARLY COLONIAL AND REVOLUTIONARY FLAGS

Flags and banners have long been used as symbols to unify nations and political or religious movements. "Since time immemorial man has felt the need of some sign or symbol as a mark to distinguish himself, [and] his family or country * * * ." (E.M.C. Barraclough and W.G. Crampton, "Flags of the World", p. 9, 1978). Flags have served that purpose since at least 1,000 years B.C. (Id.). The American flag is no exception.

Even before the Continental Congress adopted a flag for the United States, banners of different designs were used in the Colonies. For example, Pine Tree flags were popular in the New England Colonies; the pine tree was regarded as symbolizing the hardiness of New Englanders. One such flag is widely believed to have been carried by American troops on June 17, 1775, at the Battle of Bunker Hill. Known as the "Bunker Hill Flag," its design had a blue field with a white canton bearing the red cross of St. George and a green pine tree. American naval vessels sailing off of New England sometimes used a flag with a white field with a pine tree at its center and the words "An Appeal to Heaven" emblazoned across the bottom.

The "Moultrie Liberty Flag" is believed to be the first distinctive flag of the American Revolution displayed in the South, in 1775. It had a blue field and a white crescent in an upper corner. Later, the word "Liberty" was added.

Colonel Christopher Gadsen of South Carolina designed one of the various Rattlesnake flags in 1775. It consisted of a yellow field with a coiled rattlesnake in the center, under which the words "Don't Tread on Me" were written. This banner proved to be an important symbol of the inchoate American Revolution.

On January 1, 1776, George Washington, then commander-in-chief of the Continental Army, ordered the raising of a flag with 13 alternating red and white stripes and the Union Jack in the canton at Prospect Hill near Cambridge, MA. This flag was known as the "Grand Union Flag." The revision of part of the British flag was consistent with the oncoming state of war between Great Britain and America. Inclusion of the Union Jack, however, did not prove popular, especially after the signing of the Declaration of

Independence. The Nation needed a new banner to represent its independence.

2. THE BETSY ROSS STORY

Although the origin of the present flag's design is shrouded in the mists of history, one popular story has it that in the spring of 1776, Robert Morris, financier and patriot organizer, Col. George Ross of Delaware, and Gen. George Washington visited Mrs. Betsy Ross in her upholstery shop on Arch Street in Philadelphia. Her husband had died in a gunpowder explosion a few months earlier, after joining the Pennsylvania militia. They showed her a design of a flag on a piece of paper. After suggesting the stars have five rather than six points, she shortly produced a flag said to be the first "national" flag. This story was not made public until 1870, when her grandson read a paper to the Historical Society of Pennsylvania. Affidavits from some of her daughters, nieces, and grandchildren assert that she recounted the story to them many times before her death in 1836.

On June 14, 1777, the Marine Committee of the Second Continental Congress adopted a resolution that read: "Resolved, that the flag of the United States be thirteen stripes, alternate red and white; that the union be thirteen stars, white in a blue field representing a new constellation."

Although the congressional resolution did not specify the arrangement of the stars, a circular pattern became popular. Indeed, one of the earliest known appearances of a flag reflecting this new constellation, occurred 2 months later at the Battle of Bennington. There, Lt. Col. Friedrich Baum commanded a unit of Hessian dragoons attached to the ill-fated army of British Gen. Johnny Burgoyne. The Hessians collided with troops under Gen. John Stark along the Walloomsac River in Vermont. On August 16, 1777, General Stark reportedly rallied his troops: "My men, yonder are the Hessians. They were bought for seven pounds and ten pence a man. Are you worth more? Prove it. Tonight, the American flag floats from yonder hill, or Molly Stark sleeps a widow!"

The Americans triumphed. This battle flag has 1 star in both upper corners of the blue canton, with 11 stars arranged in a semicircle over the numerals "76." The red and white stripes are in reverse order—seven white and six red stripes.

On September 3, 1777, John Marshall, the future Chief Justice, fought under the American flag at the Battle of Cooch's Bridge. Marshall and his fellow soldiers inflicted substantial casualties on the British forces of Lord Cornwallis.

The Nation's flag was first honored by a foreign nation in February 1778, when the French Royal Navy exchanged 13-gun salutes with Capt. John Paul Jones' *Ranger*. It is believed that Captain Jones' *Ranger* displayed the Stars and Stripes for the first time in the fledgling American Navy on July 2, 1777.

In 1791 Vermont was admitted to the Union, followed by Kentucky the next year. To address these additions to the Union, Congress adopted a new measure in 1794, effective May 1, 1795, expanding the flag to 15 stars and 15 stripes, one for each State. The circular pattern of the stars was abandoned. This new flag flew as the official banner of our country from 1794 to 1818. In 1814, while

aboard a British ship moored outside of Baltimore Harbor, Francis Scott Key wrote the Star Spangled Banner as a tribute to the flag flying high above Fort McHenry.

By 1818, five additional States—Tennessee, Ohio, Louisiana, Indiana, and Mississippi—had entered the Union. Realizing that the flag would become too unwieldy if a stripe were added for each new State, it was suggested that the stripes return to 13 in number to represent the original 13 colonies, and that a star be added to the blue field for each new State admitted to the Union. Consequently, on April 14, 1818, President Monroe signed into law a bill providing "that the flag of the United States be 13 horizontal stripes, alternate red and white; that the union have 20 stars, white in a field of blue," and providing that upon admission of each new State into the Union one star be added to the flag on the Fourth of July following the State's date of admission. This marked the beginning of the most detailed legislative provision for the design of the national symbol.

3. ORIGINS OF THE NICKNAME "OLD GLORY"

The nickname "Old Glory" is said to have been given to the flag by Capt. William Driver. Captain Driver first sailed as a cabin boy at age 14, from his home town of Salem, MA. After several more voyages, he became master of the 110–ton brig, *Charles Doggett*, at age 21.

Driver's mother and other women of Salem made an American flag out of cotton, 12 feet by 24 feet in size, as a birthday and farewell gift. They presented it to him during the outfitting of his ship. As the breeze unfurled the flag, and he was asked by its makers what he thought of the flag, he said, "God bless you, I'll call it Old Glory." Driver took this flag with him whenever he went to sea. He retired from sea duty in 1837 and settled in Nashville, TN, where he displayed the flag.

By the time of the Civil War, everyone in and around Nashville recognized Captain Driver's "Old Glory." Possession of any Union flag deep in Confederate territory meant real danger. The Confederates were determined to find and destroy Driver's flag, but repeated searches revealed no trace of Driver's cherished banner.

It was not until February 25, 1862, when Union forces captured Nashville and raised a small American flag over the capitol, that "Old Glory" reappeared. Accompanied by Union soldiers, Captain Driver returned to his home and began unstitching his bedcover. Inside rested the original "Old Glory," where Driver had safely hidden it during the desperate days of war. Gathering up the flag, Captain Driver, with soldiers of the Sixth Ohio Regiment, returned to the capitol of Nashville, and replaced the small flag which fluttered there with his "Old Glory."

B. The Importance of the Flag to the American People

Although the Committee feels no need to expand upon the well-known reverence in which the American people hold their flag, it is important to listen to the voices of the American people throughout the generations of our history expressing their reverence for

the flag. The following are but a few examples of the deep feelings invoked by the American flag in its people.

Richard Reeves, in a July 4, 1995, column in The Baltimore Sun entitled, "A Fourth of July on the Oregon Trail," quoted from the diary of Enoch Conyers. Conyers was part of a wagon train pausing in Wyoming on the Oregon Trail, heading west, in 1852. These are excerpts from his diary:

> July 3—Several of the boys started out this morning for a hunt in the mountains for the purpose of obtaining some fresh meat, if possible, for our Fourth of July dinner. Those who remain in camp are helping the ladies in preparing the banquet. A number of wagon beds are being taken to pieces and formed into long tables.
>
> A little further on is a group of young ladies seated on the grass talking over the problem of manufacturing "Old Glory" to wave over our festivities. One lady brought forth a sheet. This gave the ladies an idea. Quick as thought, another brought a skirt for the red stripes. Another lady ran to her tent and brought forth a blue jacket, saying: "Here, take this, it will do for the field * * *."
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> July 4—The day was ushered in with the booming of small arms, which was the best that we could do under the circumstances, so far away from civilization. Just before the sun made its appearance above the eastern horizon, we raised our 40-foot flagstaff with "Old Glory" nailed fast to the top * * *. Our company circled around the old flag and sang "The Star Spangled Banner." Then three rousing cheers and a tiger were given to "Old Glory" * * *.

The diary excerpts reflect not only the use of the flag's nickname before the Civil War, but also the popularity of "The Star Spangled Banner" nearly four decades after its composition by Francis Scott Key.

At a critical juncture in this Nation's history, Henry Ward Beecher delivered an address entitled, "The National Flag," in May 1861. In that address, when the youthful Nation was soon to be nearly torn-asunder by civil war, he attempted to touch upon the flag's meaning:

> A thoughtful mind, when it sees a nation's flag, sees not the flag, but the nation itself. And whatever may be its symbols, its insignia, he reads chiefly in the flag the government, the principles, the truths, the history, that belong to the nation that sets it forth * * *. When the united crosses of St. Andrew and St. George, on a fiery ground, set forth the banner of old England, we see not the cloth merely; there rises up before the mind the idea of that great monarchy.
>
> This nation has a banner, too, and * * * wherever it [has] streamed abroad men saw day break bursting on their eyes. For * * * the American flag has been a symbol of Liberty, and men rejoiced in it * * *.
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> If one, then, asks me the meaning of our flag, I say to him, it means just what Concord and Lexington meant, what Bunker Hill meant; it means the whole glorious Rev-

olutionary War, which was, in short, the rising up of a valiant young people against an old tyranny, to establish the most momentous doctrine that the world had ever known, or has since known—the right of men to their own selves and to their liberties.

In solemn conclave our fathers had issued to the world that glorious manifesto, the Declaration of Independence. A little later, that the fundamental principles of liberty might have the best organization, they gave to this land our imperishable Constitution. Our flag means, then, all that our fathers meant in the Revolutionary War; all that the Declaration of Independence meant; it means all that the Constitution of our people, organizing for justice, for liberty, and for happiness, meant. Our flag carries American ideas, American history and American feelings. Beginning with the colonies, and coming down to our time in its sacred heraldry, in its glorious insignia, it has gathered and stored chiefly this supreme idea: Divine right of liberty in man. Every color means liberty; every thread means liberty; every form of star and beam or stripe of light means liberty; not lawlessness, not license; but organized institutional liberty—liberty through law, and laws for liberty!

Similarly, an early American missionary to a foreign land represented the feelings of Americans traveling abroad when he reported:

> I never knew that I was in reality an American, until I walked out one fine morning in Rotterdam along the wharf where many ships lay in the waters of the Rhine. Suddenly my eye caught a broad pendant floating in a gentle breeze over the stern of a fine ship at mizzen half mast; and when I saw the wide spread eagle perched on her banner with the stripes and stars under which our fathers were led to conquest and victory, my heart leaped into my mouth, a flood of tears burst from my eyes, and before reflection could mature a sentence, my mouth involuntary gave birth to these words, "I am an American." To see the flag of one's country in a strange land, and floating upon strange waters, produces feelings which none can know except those who experience them. I can now say that I am an American. While at home in the warmth and fire of the American spirit law in silent slumber in my bosom; but the winds of foreign climes have fanned it into flame.

("History of the Church," Vol. 4: ch. 22, pp. 387–88.)

The identification of the flag with the Nation and its ideals is also reflected in a poem written by Henry Van Dyke during World War I:

AMERICA'S WELCOME HOME

Oh, gallantly they fared forth in khaki and in blue,
America's crusading host of warriors bold and true;
They battled for the right of men beside our brave Allies.
And now they're coming home to us with glory in their eyes.

Oh it's home again, America for me!
Our hearts are turning home again and there we long to be,
In our beautiful big country beyond the ocean bars,
Where the air is full of sunlight and the flag is full of stars.

They bore our country's great word across the rolling sea,
"America swears brotherhood with all the just and free."
They wrote that word victorious on fields of mortal strife,
And many a valiant lad was proud to seal it with his life.

Oh, welcome home in Heaven's peace, dear spirits of the dead!
And welcome home ye living sons America hath bred!
The lords of war are beaten down, your glorious task is done;
You fought to make the whole world free, and the victory is won.

Now it's home again, and home again, our hearts are turning west,
Of all the lands beneath the sun America is best.
We're going home to our own folks, beyond the ocean bars,
Where the air is full of sunlight and the flag is full of stars.

Wartime, not unsurprisingly, has always been a time for our Nation's people to rally around the flag. Perhaps no single moment in American history reflects the Nation's pride in its flag better than that of the victory at Iwo Jima. During World War II, American Marines engaged in fierce combat against Japanese forces on that small Pacific island. The Marines' ascent up Mount Suribachi cost nearly 6,000 American lives. One of the most famous scenes of the war, captured on film and memorialized at the Iwo Jima Memorial in Arlington, VA, occurred when the Marines raised the American flag in victory atop Mount Suribachi. Planting the flag—the Nation's symbol of sovereignty and power—on that small, bloodstained island so far from home, gave America the reassurance that the war was nearly ended.

The heat of battle, however, is not the only circumstance in which Americans revere their flag. On July 24, 1969, American astronauts Neil Armstrong and Edwin "Buzz" Aldrin became the first human beings to walk on the Moon. To mark the moment, those great heros posted an American flag in the soil of that celestial body.

The Citizens Flag Alliance, a grassroots organization consisting of over 100 groups ranging from the American Legion and the Knights of Columbus, to the Congressional Medal of Honor Society and the African-American Women's Clergy Association, approached Senators Hatch and Cleland to urge them to lead a bipartisan effort in the Senate to pass a flag protection amendment. In furtherance of that effort the Committee held several hearings.

The Committee hearings demonstrate that reverence for the flag, even in these times of cynicism, has not waned. On April 20, 1999, before the Committee on the Judiciary, Gen. Edward Baca testified concerning Jose Quintero, an American prisoner of war in a Japanese prison camp during World War II, who risked his life to make an American flag that kept up the morale of the prisoners. General Baca stated:

> Jose so loved his country, that he looked for a way to express that love. He wanted to honor his friends and to make a symbol for himself to prove that he had not been "broken" in spirit. Most of all he wanted to honor what he calls "The real heroes of the war"—those who made the ul-

timate sacrifice, those dying all around him. He began a project which would have meant instant death to him had he been caught.

He began to scrounge material in the form of a red blanket, and white bed sheets stolen from the Japanese Guards. The blue background came from Filipino dungarees. He began to fashion these into an American flag aided by a Canadian soldier, a double amputee who worked in the tailor shop.

At that time, Jose did not even know how many states were in the Union. He had to ask an officer to tell him the significance of the thirteen stripes and the forty-eight stars in the design. The staff was made from a Japanese prod used to discipline the prisoners. The tassels were added later and made from the parachute cord from chutes used to drop supplies into the camp after the war. This flag took him well over one year to complete. He wrapped it in a piece of canvas and kept it buried in the dirt under his bunk.

Close to the end of the war, Jose and his companions heard American bombers approaching the unmarked POW camp. Jose took his flag out in the open and waved it at the incoming aircraft. The pilot in the lead plane saw him, tipped his wing in acknowledgment, and flew past the camp. Through this valiant act, Jose risked his life to save the lives of his fellow prisoners.

* * * Mr. Quintero is what peace and freedom are all about. Heroes like him and those here in the room today are what have made this country great and what makes me so proud to be an American.

I'm sorry that Jose could not be here today to tell you, in his own words, what the flag means to him and his fellow veterans. Were he here today, I am certain his request to you would have been to return legal protections to the flag. I appear humbly, on his behalf, to ask that you pass the flag protection constitutional amendment in the spirit of what lies beneath the motivations of my dear friend, which lead to such astounding acts of heroism and self-sacrifice for our great nation.

(Written statement of Ret. Lt. Gen. Edward Baca, April 20, 1999.)

On April 28, 1999, Senator John McCain, whose faithful service and heroism as a prisoner of war during the Vietnam War have proven to be an inspiration to so many of his Senate colleagues and to many Americans—young and old alike—testified about one of his cell mates at the "Hanoi Hilton" in the Vietnam War. Mike Christian, who sewed an American flag on the inside of his shirt. Mr. Christian would lead his fellow prisoners of war in the pledge of allegiance to the flag. After being severely beaten on account of the flag, Mr. Christian made another flag, not for his own morale, but for the morale of the other prisoners. This flag and the heroics it inspired helped the American prisoners survive their prolonged captivity under brutal conditions. Senator McCain added, "All of us are products of our experience in life * * *, and that is my experi-

ence, and that is my view about the sanctity of the American flag and the way that it should be treated." (Testimony of Senator John McCain, April 28, 1999.) Senator McCain has been a committed advocate for this important measure.

At the April 20, 1999, hearing, Ms. Maribeth Seely, a fifth-grade teacher from Branchville, NJ, testified:

> Now when I teach U.S. history to my ten- and eleven-year-old students, we focus on the * * * values of patriotism and good citizenship. We write to veterans to show that we remember and have donated money to a homeless shelter for veterans. One year, my class invited parents and grandparents who served in the armed forces to participate in a Memorial Day observance. One granddad, Mr. Michael Koch, had seized a Nazi flag from a municipal building in Germany during World War II. The whole school applauded Mr. Koch and the nine others who gathered there that day. It was important to have the faces of these real heroes emblazoned on the flag and forever placed in the memory of the students.
>
> I believe that young people need to have a more personal connection to our flag and to our great country. Are they learning to connect? I feel that the glue that has kept us all together for over 200 years has eroded over time and continues to weaken us. For example many nationalities have their own parades. I feel comfortable with this example because as an Irish American, St. Patrick's Day parades are a must. Thousands turn out. But what about our Memorial Day parades? Many are sparsely attended. Shouldn't all Americans display a greater sense of national pride?
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> * * * * *
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> In America, there are many different opinions, different customs, different lifestyles. We celebrate our differences as part of a great melting pot. I worry that there will not be the glue to keep us together, to unify us. The American flag can be part of the glue, the strength, the reminder of who we are. What legacy are we giving future generations if we will have nothing in common with each other, nothing to bind us together?
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> Perhaps we should ask our children this question. Julie Brehm, age 11, feels so lucky to live in the United States. She writes:
>
> > I could have stayed in South America where I probably would have died. I remember the time in my home country when everything was horrible and full of worry. I was adopted from Colombia. The American flag means freedom to some, but to me it means life. The soldiers that fought for America made sure that I had a great country to come to. Now when I remember the scenes in

South America, I look at the American flag and say, "Thank you."

* * * * *

Molly E. Green, age 10:

The American flag is the greatest symbol I've ever known. People should look deeper into their hearts. They should find true dignity and respect for those who fought for them.

Katie Satter, age 10:

"I pledge allegiance to the flag." These are the first six words you say pretty much every morning. Do you ever think of what those words mean? They meant everything to people who fought for our country. They meant so much, some died over it.

Austin Dolan, age 11:

When we think of the American flag, we see battles, wars and soldiers, but do we see other faces inside of the flag? These people are the volunteers who strived to make America better. Do we see the faces of the people who wrote the Constitution? Do we see the faces of the workers who have changed America from an empty land to a blooming flower? Do we see the farmers who tilled the soil, Congress who protected it, the volunteers who loved it, and the veterans who kept it free? Austin finally asked:

Why do schools teach respect for the flag if there is no law to protect it?

That last question caused me to think. Austin is only 11 years old but he asks a very important question. Why do teachers instruct students to take off their hats and stand when the flag passes in front of them when our own government has not seen fit to pass a flag amendment? If this flag amendment is not passed, how am I going to answer the question, "WHY?" Why, Mrs. Seely, did our Congress not consider the flag to be a national symbol worthy of protection? We have laws against acts of hatred. What about hatred for our country and our flag? Shouldn't it be wrong to desecrate our flag? Kids think so and so does this average American.

Another student, Tim Hennessey, 11, said, "We salute the flag every morning to show respect. I would never desecrate the flag. I am only eleven years old and I know not to. Why do we allow the desecration of the flag?"

(Written statement of Maribeth Seely, Apr. 20, 1999.)

General Norman Schwarzkopf sent a letter to the Committee in support of S.J. Res. 14, which Senator Hatch read the following portion of at the April 28, 1999, hearing:

> I am honored to have commanded our troops in the Persian Gulf War and humbled by the bravery, sacrifice and "love of country" so many great Americans exhibited in that conflict. These men and women fought and died for the freedoms contained in the Constitution and the Bill of Rights and for the flag that represents these freedoms, and their service and valor are worthy of our eternal respect. * * *
>
> I am proud to lend my voice to those of a vast majority of Americans who support returning legal protections for the flag. * * *

(Transcript of hearing, April 28, 1999.)

Further, Gen. Patrick Brady testified on April 20, 1999, that throughout our history there have been more Medal of Honor awards for courage on the field of battle with respect to protecting the flag than any other specific type of action. Moreover, General Brady testified concerning an American F–117A pilot who was recently shot down during the conflict in Kosovo, but later rescued by American troops. The pilot carried an American flag with him and reported that the flag inspired him to survive during his darkest hours behind enemy lines. (Testimony of retired Gen. Patrick Brady, April 20, 1999.)

The American flag is the preeminent symbol of our history, our values, our freedoms, and the price we have paid around the world for these freedoms. Throughout our history, the flag has inspired our soldiers and our people to the great deeds that have won and preserved this Nation's independence. The Government has a vital interest in preserving the symbol that has inspired the actions that have preserved this country and its values.

C. A Brief Legal History of Flag Protection

Throughout our history, our laws have reflected the values represented by the flag and our government's interest in preserving it. From the Colonial era to the founding of the nation to the 20th century, Americans have demanded respect for their flag through law.

1. FLAG PROTECTION IN THE COLONIAL ERA

In America, the tradition that "insults to the flag * * * and indignities put upon it * * * [are] sometimes punished * * *" id., started with one of the earliest prosecutions in American history: *Endecott's Case.*[1] In the 1600's, just as England had proceeded against those who failed to treat properly the flag, so Massachusetts colonists prosecuted, tried, and convicted a domestic defacer of the flag in 1634. The trial court concluded that defacing the flag was an act of rebellion.

Endecott's Case establishes a key historic point: from the earliest days of the legal system in America, the law deemed an individual who defaced a flag, even domestically and in peacetime, to have committed a punishable act. Defacing the flag invaded a sovereign

[1] See 1 John Winthrop, "The History of New England from 1630 to 1649" 175 (James Savage ed., 1953).

governmental interest, even when undertaken for reasons of protest. At the time, the colonists saw the need to punish the act that damaged the Government's sovereignty: defacing the flag would be taken as an act of rebellion, even when unaccompanied by danger of violence or general revolt.[2]

2. FOUNDING FATHERS EQUATED THE AMERICAN FLAG WITH THE SOVEREIGNTY OF THE NATION

When the Constitution's Framers adopted the flag as the fledgling Nation's symbol in 1777, they understood the long history of law surrounding the flag as an emblem of national sovereignty. The Framers inherited from England a legal tradition of protecting flags as practical instruments affecting title to areas of land and water, rights of trade and citizenship, causes of war citable in international law, and similar matters of the utmost weight. Thus, the original intent and understanding regarding the flag's protection consisted of sovereignty concerns. The Framers understood that the flag they adopted and sought to protect, apart from being merely a patriotic or any other type of symbol, was an incident of sovereignty. By recognizing the sovereignty interest in the flag, which historically meant responding to violations of its physical integrity, the Framers sought treatment for the United States, at home and abroad, as a sovereign nation.

By pronouncements in the earliest years of the Republic, the Framers made clear that the flag related to the existence and sovereignty of the Nation and in no way interfered with the rights established by the first amendment. The sovereignty interest in the flag's adoption was tied to concrete legal and historical factors which distinguished it sharply from any particular ideology, loyalty, or viewpoint. The Framers, through their words and actions, demonstrated the historic core of consistency between flag protection and the first amendment. As the Supreme Court subsequently explained:

> From the earliest periods in the history of the human race, banners, standards, and ensigns have been adopted as symbols of the power and history of the peoples who bore them. It is not, then, remarkable that the American people, acting through the legislative branch of the government, early in their history, prescribed a flag as symbolical of the existence and sovereignty of the nation. * * * For that flag every true American has not simply an appreciation, but a deep affection. No American, nor any foreign-born person who enjoys the privileges of American citizenship, ever looks upon it without taking pride in the fact that he lives under this free government. Hence, it has often occurred that insults to a flag have been the cause

[2] *Endecott's Case* reflects the traditional balance between the interest of society in preserving the flag and the interest of the actor in choosing a means of expression. Some have suggested that this case represents an example of the British oppression that prompted the American colonies to declare their independence. However, the Declaration of Independence provides a thorough list of the grievances that prompted the Americans to sever their ties with Great Britain, including taxation without consent, deprivation of the right to trial by jury, and erecting a bureaucracy that financially burdened the people. "The Declaration of Independence par., 15, 12 (U.S. 1776). The Declaration of Independence does not list the deprivation of the right to physically destroy a flag as prompting the American Revolution.

> of war, and indignities put upon it, in the presence of those who revere it, have often been resented and sometimes punished on the spot.

Halter v. *Nebraska*, 205 U.S. 34, 41 (1907).

The original intent of the nation's Founding Fathers clearly indicates the importance of protecting the flag as an incident of American sovereignty.

a. James Madison

James Madison, as an original draftsman of the first amendment, was an authoritative source on sovereignty matters. In this regard, Madison consistently emphasized the legal significance of infractions on the physical integrity of the flag. On three different occasions, Madison recognized and sustained the legitimacy of the sovereignty interest embodied in the flag.

His earliest pronouncements concerned an incident in October 1800, when the Algerian ship *Dey of Algiers* forced a U.S. man-of-war—the *George Washington*—to haul down its flag and replace it with that of Algiers. As Secretary of State under President Thomas Jefferson, Madison pronounced such a situation as a matter of international law, a dire invasion of sovereignty, which "on a fit occasion" might be "revived." Brief for the Speaker and Leadership Group of the U.S. House of Representatives, "Amicus Curiae," at 33 *United States* v. *Eichman,* 496 U.S. 310 (1990) (No. 89–1433) [hereinafter, Brief], citing II "American State Papers" 348 (Lowrie and Clarke ed. 1982).

Madison continued his defense of the integrity of the flag when he pronounced an act of flag defacement in the streets of an American city to be a violation of law. Specifically, Madison pronounced an incident of flag defacement in Philadelphia as actionable in court. As Judge Robert Bork described this historic pronouncement: "The tearing down in Philadelphia in 1802 of the flag of the Spanish Minister "with the most aggravating insults," was considered actionable in the Pennsylvania courts as a violation of the law of nations." Brief at 34, citing 4 J. Moore, "Digest of International Law," 627 (1906) (quoting letter from Secretary of State Madison to Governor McKean (May 11, 1802)).

And, on June 22, 1807, when the British ship *Leopard* fired upon and ordered the lowering of an American frigate's (*the Chesapeake*) flag, Madison told the British Ambassador "that the attack on the *Chesapeake* was a detached, flagrant insult to the flag and sovereignty of the United States." Brief at 34, citing I. Brandt, "James Madison: Secretary of State 1800–1809," 413 (1953) (quoting British dispatch). A letter by Madison to Monroe stated Madison's view that "the indignity offered to the sovereignty and flag of the nation demands * * * an honorable reparation * * * [such as] an entire abolition of impressments from vessels under the flag of the United States * * *." Brief at 35, citing Letter from James Madison to James Monroe (July 6, 1807). Madison's statement demonstrates his belief that protecting the physical integrity of the flag protects the nation's sovereignty.

Madison did not conclude, as some defenders of the right to deface the flag contend, that the first amendment protected Ameri-

cans' rights to tear down a flag, or that defacing the flag was a form of expression protected by the first amendment. On the contrary, it would appear that Madison had an intimate familiarity with the significance of protecting the physical integrity of the flag, especially as such protection related to the first amendment, which he helped draft and move through the First Congress. He knew there had been no intent to withdraw the traditional physical protection from the flag.

Madison's pronouncements consistently emphasized that "insults" to the physical integrity of the flag continued to have the same legal significance in a variety of different contexts— abroad, at sea, and at home. To Madison, sovereignty entailed a relationship not only between nations and foreign entities, but between nations and domestic persons in wartime and peacetime.

b. Thomas Jefferson

Like Madison, Thomas Jefferson sought to protect the sovereignty interest in the flag. Jefferson recognized its complete consistency with the Bill of Rights, and deemed abuse of that interest a serious matter of state, not the suppression of some form of protected expression. Thus, for Jefferson, the flag as an incident of sovereignty involved a concrete legal status with very practical advantages for the Nation and citizens, who obtained those advantages through protecting a flag from usurpation or indignities.

During the period of foreign war and blockades in the 1790's, the American flag was a neutral flag, and the law of trade made foreign ships desire to fly it.[3] As George Washington's Secretary of State, Jefferson instructed American consuls to punish "usurpation of our flag." Brief at 35, citing 9 "Writing of Thomas Jefferson," 49 (mem. ed. 1903). Jefferson stated "you will be pleased * * * to give no countenance to the usurpation of our flag * * * but rather to aid in detecting it * * *." Id.

To prevent the invasion of the sovereignty interest in the flag, Jefferson did not consider the first amendment an impediment to a "systematic and severe" course of punishment for persons who violated the flag. Id. Jefferson recognized the sovereignty interest in the flag, and considered protecting it and punishing its abusers highly important, even after the adoption of the Bill of Rights.

Madison and Jefferson intended for the government to be able to protect the flag consistent with the Bill of Rights. This was based upon their belief that obtaining sovereign treatment was distinct from an interest in protecting speech. Madison and Jefferson consistently demonstrated that they sought commerce, citizenship, and neutrality rights through the protection of the flag. They did not seek to suppress the expression of alternative "ideas," "messages," "views," or "meanings"; Madison and Jefferson would therefore have found that the Government's interest of protecting the sovereignty of the Nation was consistent the interest of protecting an individual's first amendment right to free speech.

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[3] As it did in the time of Thomas Jefferson and James Madison, the flag continues to serve important sovereignty interests on the high seas. During the Persian Gulf War, for instance, foreign tankers in the gulf flew the American flag, so that an act of aggression against the tankers would be the equivalent of an attack against the United States and its sovereign interest in protecting allied vessels in wartime.

Thus, from the time of the *Endecott Case* to the present, protection of the flag has continued to serve the Framers' original intent, as an instrument and embodiment of this Nation's sovereignty. Those who both framed the first amendment and adopted the flag had an original purpose for the flag quite unrelated to controlling expression. Thus, the Founders easily balanced the interest of the Government in protecting of the flag as an incident of sovereignty with the first amendment interest of the individual to freedom of speech.

3. STATUTORY PROTECTION OF THE FLAG

Over the years, Congress and the States have recognized the devotion our diverse people have for the flag. They have enacted statutes that both promote respect for the flag and protect the flag from desecration.

a. Promotion of respect for the flag

In 1940, Congress declared the Star Spangled Banner to be our national anthem. And in 1949, Congress established June 14 as Flag Day—a day expressly set aside to remember and dwell upon the significance of the flag. Congress has also established "The Pledge of Allegiance to the Flag" and the manner of its recitation. The pledge states: "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" (4 U.S.C. 4). The pledge demonstrates the universal understanding that the flag represents the Nation and the ideals of its citizens. It is thus a transcendent symbol of unity and nationhood.

In 1987, Congress chose to honor the flag by designating John Philip Sousa's "The Stars and Stripes Forever" as the national march (36 U.S.C. 304). Further, Congress has not only established the design of the flag (4 U.S.C. 1 and 2), but also the manner of its proper display in the Flag Code (36 U.S.C 173–179). The Flag Code is merely hortatory, however, and is not legally enforceable.

b. Protection for the flag: striking the balance

After a rash of flag desecrations arising from the presidential campaign of 1896, States began to prosecute the commercial use of the American flag, which was deemed disrespectful, as well as verbal and physical desecration of the flag.[4] While some of these older statutes were struck down by activist courts under the now-defunct *Lochner* rationale, dealing with substantive due process

[4] In *Rushtrat* v. *People,* 57 N.E. 41, 46 (Ill. 1900), and *People ex rel. McPike* v. *Van De Carr,* 86 N.Y.S. 644, 91 A.D. 20 (App. Div. 1904), the courts of Illinois and New York struck down statutes prohibiting the certain commercial or advertising uses of the national flag, but permitting other commercial uses. The courts held the statutes were unenforceable based on the implied constitutional right to choose and to carry on one's occupation without governmental interference and based on economic classifications made by the statutes. *Rushtrat,* 57 N.E. at 46; *McPike,* 86 N.Y.S. at 649–50.

This brand of conservative judicial activism, which was used to strike down pro-labor and other economic legislation, came to its fruition in *Lochner* v. *New York,* 198 U.S. 45 (1905). Since Lochner, however, the Supreme Court and the overwhelming majority of the state courts have since abandoned the activist judicial review of economic legislation. See, e.g., *West Coast Hotel Co.* v. *Parrish,* 300 U.S. 379 (1937).

and economic legislation, the courts perceived no first amendment problem with the statutes. [5]

The Supreme Court of the United States, at least with respect to the American flag, eschewed the *Lochner* rationale, and upheld a state flag protection statute in *Halter* v. *Nebraska,* 205 U.S. 34 (1907). The Nebraska statute viewed both commercial use of the flag and physical mutilation of the flag as equally repugnant forms of desecration. Chief Justice Harlan wrote for the Court:

> It is not, then, remarkable that the American people, acting through the legislative branch of the Government, early in their history, prescribed a flag as symbolical of the existence and sovereignty of the Nation.
> * * * [L]ove both of the common country and of the state will diminish in proportion as respect for the flag is weakened. Therefore a state will be wanting in care for the well-being of its people if it ignores the fact that they regard the flag as a symbol of their country's power and prestige, and will be impatient if any disrespect is shown towards it.

Halter, 205 U.S. at 41, 42.

That the Court viewed commercial use of the flag as demeaning the integrity of the Nation's preeminent symbol is made clear by its statement, "Such [commercial] use tends to degrade and cheapen the flag in the estimation of the people, as well as to defeat the object of maintaining it as an emblem of national power and national honor." Id. at 42. Recognizing the importance of the flag to the Nation, the Supreme Court upheld Nebraska's statute that punished commercial and noncommercial desecration of the flag.

Holdings such as *Halter* precipitated the National Conference of Commissioners on Uniform State Laws to approve the Uniform Flag Act in 1917 which was similar to the statute approved in *Halter*. [6] Although the opinion dealt directly only with the commercial desecration portion of the statute, the Commissioners were of the opinion that *Halter* affirmed in all respects the validity of a statute that prohibited all disrespect for the flag, whether by commercial use or by casting contempt on the flag by word or act. Accordingly, the Commissioners drafted a similar model statute. A number of States soon adopted all or part of the Uniform Flag Act as their flag protection statute or as a supplement to previously existing statutes. These States included Arizona, Louisiana, Maine, Maryland, Michigan, Mississippi, New York, Pennsylvania, Rhode Island, South Dakota, Tennessee, Vermont, Virginia, Washington, and Wisconsin. [7]

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[5] In *McPike,* 86 N.Y.S. at 648, the Supreme Court of New York, specifically upheld the portion of the statute that prohibited desecration or casting contempt upon the flag, in a noncommercial context, as a means of preventing breaches of the peace.

[6] Section 3 of the Uniform Flag Act provided: "No person shall publicly mutilate, deface, defile, defy, trample upon, or by word or act cast contempt upon any such flag, standard, color, ensign or shield."

[7] By 1951, these statutes were found in the various state laws as follows: Arizona, A.C.A. §43.2401 (1939); Louisiana, R.S. 14:116, 14:117 (1950); Maine, R.S. c. 128 (1944); Maryland, Code Supp. §2159 (1947); Michigan, Comp. Laws §§750.244–750.247, 750.566 (1948); Mississippi, Code §2159 (1942); New York, McKinney's Penal Law, §1425, subdi. 16; Pennsylvania, 18 P.S. §4211; Rhode Island, Gen. Laws c. 612, §§38, 39 (1938); South Dakota, SDC 65.0601 to 65.0606; Tennessee, Williams' Code §§102–107; Vermont, V.S. §§8590–8605; Virginia, Code

In 1968, in response to the Vietnam War protests, Congress added Federal protection to the long-established State flag protection statutes by enacting 18 U.S.C. 700(a). To avoid infringing upon freedom of speech, Congress limited the 1968 flag statute to *acts* of physical desecration. The language contained in the 1917 law applicable to the District of Columbia that made it a crime to "defy" or "cast contempt * * * *by word* or act" upon the American flag was omitted (emphasis supplied). The 1968 statute provided for a fine of not more than $1,000 or imprisonment for not more than one year, for anyone who "knowingly casts contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning or trampling upon it * * * ."

Indeed, prior to 1989, Congress, along with 48 States and the District of Columbia, had regulated physical misuse of the American flag. These statutes recognized the vital Government interest at stake in preserving the preeminent symbol of our Nation's history and people and reflected a balancing of this interest against the interest of the actor in conveying a message through the particular means of physically destroying the flag instead of through the traditional means of oral or written speech. On balance, these legislatures determined that the Government's interest prevailed.

c. Judicial application of flag protection statutes: respecting the balance

Even after the Supreme Court held that the first amendment's free speech clause applied to the States, *Gitlow* v. *New York,* 268 U.S. 652 (1925), flag desecrations were punished. For example, in 1941, in *State* v. *Schlueter,* 23 A.2d 249 (N.J. 1941), the Supreme Court of New Jersey affirmed a conviction for physical desecration of the American flag. Likewise, in 1942, in *Johnson* v. *State,* 163 S.W.2d 153 (Ark. 1942), the Supreme Court of Arkansas affirmed a conviction for publicly exhibiting contempt for the flag. Of special significance, is the Arkansas court's refusal to accept the dissent's argument that free speech protections prevented prosecution of the defendant's desecration of the flag. Id. at 155–59 (Smith, C.J., dissenting). In *People* v. *Picking,* 42 N.E.2d 741 (N.Y.), cert. denied, 317 U.S. 632 (1942), the Supreme Court of New York affirmed a conviction for flag desecration and the Supreme Court of the United States denied certiorari review, allowing the conviction to stand. The results of these cases reflected the generally accepted legal tradition that punishment of flag desecration represented a balance of society's interest in protecting the flag and the actor's interest in choosing physical desecration as a means to convey a message instead of the traditional means of oral and written speech. The legislatures had struck the balance in favor of protecting society's interest, and the courts respected this balance.

In 1968, in *United States* v. *O'Brien,* 391 U.S. 367 (1968), the Supreme Court upheld a conviction for burning a draft card, even though the conduct was intended to convey a political message. The Court stated: "We cannot accept the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person

§§18–354 to 18–360 (1950); Washington, Rem. Rev. Stat. §§2675–1 to 2675–7; Wisconsin, St. §§348.479–348.484 (1947).

engaging in the conduct intends thereby to express an idea." Id. at 376. The Court balanced society's interest in maintaining an effective draft system against the draft card burner's interest in conveying a message through the particular means of physically destroying a draft card instead of through the traditional means of oral or written speech.[8] On balance, the Court determined that the government's interest prevailed.[9] In 1969, in *Street* v. *New York,* 394 U.S. 576 (1969), the Court overturned a conviction of a defendant who burned a flag while speaking against the flag. The Court overturned the conviction on the narrow ground that the first amendment protected the defendant's verbal expression, but did not address the conduct of burning the flag. Id. at 579.[10] However, in 1971, in *Radich* v. *New York,* 401 U.S. 531 (1971), the Supreme Court affirmed, by an equally divided vote, a conviction based solely on an act of physical desecration of the flag under a New York statute that punished both words and acts of desecration. In so doing, the Supreme Court upheld the traditional balance between society's interest in protecting the flag and the actor's interest in choosing to convey a message by destructive means instead of by readily available oral or written means.

D. Judicial Amendment of the Constitution: Restriking the Balance

In 1974, in two decisions, the Supreme Court began to weaken the *O'Brien* decision with respect to the physical desecration of the American flag and to shift the balance away from the Government's interest in preserving the flag and toward the actor's interest in choosing destruction of the flag as a means to convey a message. In *Smith* v. *Goguen,* 415 U.S. 566, 581–82 (1974), the Court overturned a flag-desecration conviction, stating that the Massachusetts flag-desecration statute, which punished words and acts of desecration, was void for vagueness, but adding "[c]ertainly nothing prevents a legislature from defining with substantial specificity what constitutes forbidden treatment of United States flags."[11] The

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[8] The four-part test announced in *O'Brien* was:

> [A] government regulation is sufficiently justified [1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

391 U.S. at 377.

[9] In *Stromberg* v. *California,* 283 U.S. 359 (1931), and *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624 (1943), the Supreme Court had recognized, respectively, that a flag has communicative value and that school children could not be compelled to salute the flag in violation of their religious beliefs. These cases did not hold, however, that the Government's interest in preserving the preeminent symbol of our history and our people could not be balanced against an actor's interest in conveying a message through the particular means of physically destroying the flag instead of the traditional means of oral or written speech.

[10] Chief Justice Warren, and Justices Black, White, and Fortas all dissented. Chief Justice Warren took the majority to task for avoiding the question of whether the conviction could be premised on the physical desecration of the flag and stated: "I believe that the States and the Federal Government do have the power to protect the flag from acts of desecration and disgrace." *Street* v. *New York,* 394 U.S. 576, 605 (1969) (Warren, C.J., dissenting). Justice Fortas agreed with Chief Justice Warren. Id. at 615 (Fortas, J., dissenting). Justice Black, a well-known absolutist on Bill of Rights freedoms, observed in *Street* that: "It passes my belief that anything in the Federal Constitution bars * * * making the deliberate burning of the American flag an offense." Id. at 610 (Black, J., dissenting). Justice White also opined that the majority erred in avoiding the physical- desecration issue and stated that he would sustain a conviction for flag burning. Id. at 615 (White, J., dissenting).

[11] Justice White concurred in the judgment, but added "I would not question those statutes which proscribe mutilation, defacement, or burning of the flag or which otherwise protect its

Court pointed to the Federal flag protection statute, which punished only acts of desecration, not words, as an example of a constitutional flag protection statute. Id. at 582 n.30. In *Spence* v. *Washington,* 418 U.S. 405 (1974), the Court broke with *O'Brien* by considering the communicative intent of the actor in desecrating his privately owned flag on private property, and issued a narrow, limited holding that the flag misuse statute, as applied to the particular defendant under the particular facts of the case, violated the first amendment.[12] The Court, however, was unwilling to state that there was no Government interest that outweighed the actor's interest in conveying a message through the particular means of physically destroying the flag instead of through the traditional means of oral or written speech.[13]

Nonetheless, there was a dramatic change in Supreme Court jurisprudence. This change was clearly illustrated by the *Radich* case in which, during a 3-year time span, the Federal courts first affirmed and then overturned the exact same conviction based on the intervening changes in Supreme Court jurisprudence. In 1971, the Supreme Court affirmed, by an equally divided Court, Radich's flag-desecration conviction under a statute that punished both words and acts of desecration. *Radich,* 401 U.S. 531. However, by 1974, after the Supreme Court handed down *Smith* v. *Goguen,* 415 U.S. 566, and *Spence* v. *Washington,* 418 U.S. 405, the district court overturned Radich's conviction in a habeas proceeding, citing *Goguen* and *Spence.*[14] *United States ex rel. Radich* v. *Criminal Court of the City of New York,* 385 F. Supp. 165 (S.D.N.Y. 1974).

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physical integrity, without regard to whether such conduct might provoke violence." *Smith* v. *Goguen,* 415 U.S. 566, 587 (White, J., concurring the judgment). Then Associate Justice Rehnquist, joined by Chief Justice Burger, dissented, stating that he believed that the statute at issue passed constitutional muster under the *O'Brien* test and noting that the statute punished flag abuse regardless of whether a communicative intent existed and was thus unrelated to the suppression of free speech. Id. at 599 (Rehnquist, J., dissenting). Justice Blackmun also dissented, stating that the first amendment would not bar the defendant's conviction. Id. at 591 (Blackmun, J., dissenting).

[12] Chief Justice Burger dissented, stating:

> If the constitutional role of this Court were to strike down unwise laws or restrict unwise application of some laws, I could agree with the result reached by the Court. That is not our function, however, and it should be left to each State and ultimately to the common sense of its people to decide how the flag, as a symbol of national unity, should be protected.

Spence v *Washington,* 418 U.S. 405, 416 (1974) (Burger, C.J., dissenting). Then Associate Justice Rehnquist, joined by Chief Justice Burger and Justice White, also dissented, stating:

> The statute under which appellant was convicted is no stranger to this Court, a virtually identical statute having been before the Court in *Halter* v. *Nebraska,* 205 U.S. 34 * * * (1907). In that case the Court held that the State of Nebraska could enforce its statute to prevent use of a flag representation on beer bottles, stating flatly that "a State will be wanting in care for the well-being of its people if it ignores the fact that they regard the flag as a symbol of their country's power and prestige * * *." The Court then continued: "Such use tends to degrade and cheapen the flag in the estimation of the people, as well as to defeat the object of maintaining it as an emblem of national power and national honor."

[13] A few lower courts, however, had begun to anticipate the trend in the Supreme Court's weakening of the traditional balance and had begun to strike down their State's flag desecration statutes. See, e.g., *People* v. *Vaughn,* 514 P.2d 1318 (Colo. 1973).

[14] After issuing its opinions in *Smith* v. *Gougen* and *Spence* v. *Washington,* the Supreme Court affirmed, without an opinion, a lower court's judgment that used the vagueness and overbreadth doctrines to strike down a portion of New York statute that would have broadly prohibited use of representations of the flag as campaign buttons or posters. *Cahn* v. *Long Island Vietnam Moratorium Comm.,* 418 U.S. 906 (1974), aff'g 437 F.2d 344 (2d Cir. 1970). Prior to *Gougen* and *Spence,* the New York Court of Appeals had refused to apply the Second Circuit's holding in *Cahn* to strike down the desecration portion of the New York statute, holding instead, that pho-

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As late as 1982, however, the Supreme Court denied certiorari review of a case involving a conviction for the physical desecration of a flag under the Federal statute that punished only acts, not words, of desecration. *Kime* v. *United States,* 459 U.S. 949 (1982). The certiorari denial, which allowed the flag desecration conviction to stand, came in spite of a strenuous dissent by Justice Brennan to provide absolute protection to the destructive conduct. Id. (Brennan, J., dissenting). The majority of the Supreme Court still refused to abandon completely the traditional balance of society's interest in protecting the flag and the individual's interest in conveying an idea through physically destructive means.

By 1989, however, the Court was prepared to completely abandon *Halter, O'Brien,* and *Radich* and to restrike the constitutional balance against the Government's interest and in favor of the flag desecrator's interest. In *Texas* v. *Johnson,* 491 U.S. 397 (1989), by a 5-to-4 vote, the Supreme Court overturned a conviction for the physical desecration of an American flag on the broad grounds that the government's interest in preserving the Nation's preeminent symbol did not outweigh the interest of the flag desecrator in choosing to convey a message through the particular means of physically destroying the flag instead of through the traditional means of oral or written speech. The Court effectively created for Gregory Lee Johnson an absolute first amendment right to burn and spit on the American flag.[15]

Justice Stevens's eloquent dissent which called for retaining the traditional constitutional balance that had been controlling for decades, stated:

> The Court is * * * quite wrong in blandly asserting that respondent "was prosecuted for his expression of dissatisfaction with the policies of this country, expression situated at the core of our First Amendment values." Respondent was prosecuted because of the method he chose to express his dissatisfaction with those policies. Had he chosen to spray-paint—or perhaps convey with a motion picture projector—his message of dissatisfaction on the facade of the Lincoln Memorial, there would be no question about the power of the Government to prohibit his means of expression. The prohibition would be supported by the legitimate interest in preserving the quality of an important national asset. Though the asset at stake in this case is intangible, given its unique value, the same interest supports a prohibition on the desecration of the American flag.

Johnson, 491 U.S. at 436–39 (Stevens, J., dissenting).

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tographs of a nude draped with a flag did not within the proscription of the flag desecration provision. *People* v. *Keough,* 290 N.E.2d 819 (N.Y. 1972).

[15] Johnson participated in a political demonstration at the 1984 Republican National Convention, protesting policies of the Reagan Administration and certain Dallas-based corporations. Johnson was given an American flag from a fellow protestor, who had taken it from a flagpole. At Dallas City Hall, Johnson unfurled the American flag, poured kerosene on it, and burned it. While the flag burned, protestors chanted: "America, the red, white, and blue, we spit on you." Johnson was convicted of desecration of a venerated object in violation of sec. 42.09 (a)(3) of the Texas Penal Code which, among other things, made illegal the intentional or knowing desecration of a national flag. *Johnson,* 491 U.S. at 499–400.

As Chief Justice Rehnquist, for himself and Justices White and O'Connor, stated in dissent: "For more than 200 years, the American flag has occupied a unique position as the symbol of our Nation, a uniqueness that justifies a governmental prohibition against flag burning in the way respondent Johnson did here." *Johnson,* 491 U.S. at 422 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist continued later in his dissent:

> The uniquely deep awe and respect for our flag felt by virtually all of us are bundled off under the rubric of "designated symbols," that the First Amendment prohibits the government from "establishing." But the government has not "established" this feeling; 200 years of history have done that. The government is simply recognizing as a fact the profound regard for the American flag created by that history when it enacts statutes prohibiting the disrespectful public burning of the flag.

Id. at 434.

In response to this final step in a dramatic change in first amendment jurisprudence, there was a thoughtful debate over whether a so-called facially content neutral flag protection statute would survive the Supreme Court's scrutiny. Legal scholars and many commentators were divided over this question. A number of Members of Congress did not believe any such statute could survive the majority's analysis in *Johnson,* even aside from whether a facially content neutral flag protection statute is desirable as a matter of sound public policy. The *Johnson* majority declared that the government's asserted interest in preserving the flag as a national symbol was insufficient to overcome the actor's newly minted, so-called right to burn or otherwise physically mistreat the flag as part of expressive conduct. *Johnson,* 491 U.S. at 413–19. Nevertheless, it cannot be denied that the principal, if not the only purpose, in enacting a facially content neutral statute is to protect the symbolic value of the flag. Indeed, one underlying purpose of any statutory effort to respond to *Johnson* would be to prohibit "expressive" conduct that physically desecrates the flag. Further, a facially neutral statute which did not permit an exception for disposal of a worn or soiled American flag by burning—which is the preferred way of doing so—would lead to highly undesirable results. Yet such an exception necessarily undermines the purported neutrality of such a statute—indeed, the Court said so in *Johnson.*

Nonetheless, Congress did enact a facially neutral statute in 1989 (the Flag Protection Act of 1989) with an exception for the disposal of worn or soiled flags, as a response to the *Johnson* decision. Based on the new rule announced in *Johnson,* however, the Supreme Court promptly struck it down the statute, by a 5-to-4 vote, in *United States* v. *Eichman,* 496 U.S. 400, 405–06 (1990).

Further, in *R.A.V.* v. *City of St. Paul,* 505 U.S. 377, 385 (1992), the Supreme Court made clear that its newly created, absolute protection for destructive conduct toward the flag is not affected by the "fighting words" doctrine where a statute specifically targets the destructive conduct toward the flag. Accordingly, with respect to the particular medium of the American flag, the Supreme Court will no longer balance society's interest in protecting the flag

against the actor's interest in choosing to convey a message through the means of physically destroying the flag instead of through the traditional means of oral or written speech.

E. S.J. Res. 14 is the Appropriate Constitutional Remedy

1. S.J. RES. 14 WOULD RESTORE THE TRADITIONAL BALANCE TO THE COURT'S FIRST AMENDMENT JURISPRUDENCE

Given the Supreme Court's new interpretation of the Constitution, which rejects the traditional balancing of society's interests with the actor's interest concerning the flag, only a constitutional amendment can restore protection to the flag. S.J. Res. 14 would restore the traditional balance between society's interests and the actor's interest concerning the flag that statesmen, legislatures, and courts have recognized throughout our Nation's history.

It must be remembered that the first amendment only prohibits abridging the "freedom of speech." The contours of this freedom have long been defined in the context of competing societal interests. Restoring the traditional constitutional balance between society's interest in protecting the flag and the actor's interest in destroying it is entirely consistent with a number of other societal interests that affect the first amendment and for which the Supreme Court has retained the balancing approach. Relying on an opinion written by Justice Oliver Wendell Holmes, the Court balances society's interest in public safety with a speaker's interest in falsely shouting "Fire" in a crowded theater and upholds restrictions on such speech. See *Schenck* v. *United States,* 249 U.S. 47 (1919). The Court balances society's interest in public morals with a speaker's interest in transacting in obscenity and upholds restrictions on such speech. *Miller* v. *California,* 413 U.S. 15 (1973). The Court balances society's interest in national security with a speaker's interest in disclosure of state secrets and upholds restrictions on such speech. *Snepp* v. *United States,* 444 U.S. 507 (1980). The Court balances society's interest in shielding people from attacks on their character with a speaker's interest in making defamatory or libelous statements and upholds restrictions on such speech. *Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323 (1974). The Court balances society's interest in maintaining a nonpartisan public workforce with a speaker's interest in engaging in partisan political activity while working for the Federal Government and upholds restrictions on such speech. *United States Civil Service Comm'n* v. *National Ass'n of Letter Carriers,* 413 U.S. 548 (1973). And the Court balances society's interest in protecting children with a speaker's interest in commercially promoting promiscuous activity by minors and upholds restrictions on such speech. *New York* v. *Ferber,* 458 U.S. 747 (1982). Thus, while the Court has recently excepted the American flag from the traditional balancing approach, it regularly uses the balancing approach to uphold numerous other societal interests that affect the first amendment. The proposed amendment would restore the balance between society's interest in preserving the physical integrity of the flag with an actor's interest in choosing to convey a message through a particularly destructive means and would uphold traditional restrictions on the means of such speech.

Thus, S.J. Res. 14 would not reduce our historic freedoms under the Bill of Rights, but would simply displace a few recent judicial modifications of the original first amendment by restoring the traditional legal balance with respect to the American flag. As Professor Parker stated, "[i]t is a restorative amendment—not a transformative amendment * * * [I]t restores the traditional and intended meaning of the First Amendment * * *" (Transcript of Hearing on S.J. Res. 14, Apr. 20, 1999, at 33). And Prof. Stephen Presser, of the Northwestern University School of Law, submitted written testimony to the Committee in which he also recognized: "The Flag Protection Amendment does nothing to infringe the First Amendment. It does not forbid the suppression of ideas, nor does it foreclose dissent. * * * It is an attempt by the people, consistent with a century of their history, to reclaim the right to declare what kind of a society they want to live in." (Written statement of Prof. Stephen B. Presser, submitted Apr. 28, 1999, at 18.)

The Bill of Rights is a listing of the great freedoms our citizens enjoy. It was never intended to be a license to engage in any type of behavior one can imagine. The proposed amendment affirms the most basic condition of our freedom: our bond to one another in our creation of national unity. The proposed amendment would retain current full first amendment protections for any message that the actor wishes to convey with respect to the flag, or any other subject, if the actor chooses to convey that message through the traditional and nondestructive means of oral or written speech. And the proposed amendment affirms that without some aspiration to national unity, there might be no law, no Constitution, no freedoms such as those guaranteed in the Bill or Rights.

2. CONGRESS HAS A COMPELLING INTEREST IN PROTECTING THE FLAG

The Government's legitimate interest in protecting the flag has three main components: (a) preserving the values embodied by the flag; (b) enhancing national unity; and (c) protecting an incident of our national sovereignty.

a. Preserving the values embodied by the Flag

Protecting the flag from physical desecration preserves the values of liberty, equality, and personal responsibility that Americans have passionately defended and debated throughout our history and which the flag uniquely embodies. It is commonly accepted today that the traditional values upon which our Nation was founded, and which find tangible expression in our respect for the flag, are essential to the smooth functioning of a free society. Flag protection highlights and enhances these values and thus helps to preserve freedom and democratic government. Without these values, our children will not be able to distinguish good from bad or right from wrong. By replacing what the Supreme Court has stripped away, the proposed amendment will be a step toward restablishing the values that made this country great.

b. Enhancing national unity

The Government has a fundamental interest in protecting the most basic condition of freedom: our bond to one another in our aspiration for national unity. With traditional unifying elements of

American language, culture and heritage fraying, the flag remains a single unifying embodiment of our unceasing struggle for liberty and equality and our basic commitment to others. The flag affirms that without some desire for national unity, a free people and constitutional government cannot long endure.

c. Protecting an incident of our national sovereignty

Finally, the flag is an important incident of our national sovereignty. The United States—like many other nations—displays the flag to signify national ownership and protection. By pronouncements in the earliest years of the Republic, the Founding Fathers made clear that the flag, and its physical requirements, related to the existence and sovereignty of the Nation and that insults to the flag were matters of great national concern that warranted strict punitive action. James Madison, for instance, stated that desecration of the flag is "a dire invasion of sovereignty." Letter from Secretary of State James Madison to Pennsylvania Governor McKean (May 11, 1802). Thomas Jefferson, moreover, considered violation of the flag worthy of a "systematic and severe course of punishment." Writings of Thomas Jefferson 49 (mem. ed. 1903).

3. THE TERMS "PHYSICAL DESECRATION" AND "FLAG" ARE SUFFICIENTLY PRECISE FOR INCLUSION IN THE CONSTITUTION

S.J. Res. 14 is a narrowly tailored proposal that would control a discrete area of the law. It would supersede *Johnson, Eichman,* and, to the extent necessary, *R.A.V.,* to restore the traditional, balanced protection to the American flag.[16] Among all the various forms of expression, only one can be regulated under the amendment: *desecration.* That regulation, moreover, could extend no further than a ban on one, and only one, extreme instance of this: *physical* desecration.[17] It is not self-executing, and thus would require an implementing statute that would define the terms "desecration" and "flag." Experience justifies confidence in our judicial system to distinguish between the numerous legitimate forms of communication and the act of physically desecrating a flag. Prior to the *Texas* v. *Johnson* decision, the Federal Government, 48 States, and the District of Columbia had laws prohibiting flag desecration, and the history of prosecutions in this area does not suggest abuse by prosecutors or any other sector of the judicial system. See, e.g., *State* v. *Royal,* 305 A.2d 676, 680 (N.H. 1973); *State* v. *Mitchell,* 288 N.E.2d 216, 226 (Ohio 1972); *State* v. *Waterman,* 190 N.W.2d 809, 811–12 (Iowa 1971). Indeed, since the adoption of the Uniform Flag Law in 1917, courts have had little problem defining "flag" and the specific acts of "desecration." There is no new ambiguity that would arise from returning to the well-established definitions of these traditional terms.

[16] Significantly, the flag protection amendment would not disturb Congress' power to determine the design of the flag of the United States. Congress has that authority under Title 4, U.S. Code, Secs. 1 and 2. Assuming that the amendment is ratified, Congress is still free to change the design of the flag, but no State now or in the future will be able to determine the design of the American flag.

[17] Moreover, S.J. Res.14 is even more narrowly tailored than the proposal considered during the 104th Congress. In contrast to that amendment proposal, S.J. Res. 14 would authorize only Congress, not the States, to pass a statute to protect the flag from acts of physical desecration.

In any event, the judicial system would interpret "physical desecration" and "flag of the United States," as used in the amendment, in light of general values of free speech. These are the types of terms that raise issues of fact and degree and context and intent that are comparable to questions that courts resolve, year in and year out, under practically every other constitutional provision. Experience justifies confidence in our judicial system with respect to answering these questions.

Moreover, the Committee is mindful that it is the Constitution we are proposing to amend, not a code of statutes. Drafting the language of a flag protection amendment too narrowly runs a serious risk of thwarting the American people's ability to legislate protection of their flag from the range of acts or conduct which might physically misuse, or physically cast contempt on, the flag. Thus, a constitutional amendment so specific as to authorize, for example, the prohibition of burning or trampling the flag leaves the American people powerless to prohibit the defacing or mutilating of the flag. No supporter of protecting the American flag from physical desecration wishes to amend the Constitution *twice* to achieve that purpose. Thus, the proposed amendment, like other existing amendments is necessarily drafted in broader terms than the implementing legislation would be.

The Senate in the 106th Congress should not subject S.J. Res. 14, which authorizes legislation protecting the American flag, to a higher standard than the Framers subjected the terms of the Constitution and the Bill of Rights in the Philadelphia Convention and in the First Congress. The terms of the flag protection amendment are at least as precise, if not more so, than such terms as "unreasonable searches and seizures," "probable cause," "speedy * * * trial," "excessive bail," "excessive fines," "cruel and unusual punishment," "just compensation," and "due process of law"—all terms from the Bill of Rights. Similarly, the 39th Congress was not deterred from the inclusion of the term "equal protection of the laws" in the 14th amendment by concerns of alleged vagueness. None of these terms are self-executing. All have been eventually explicated by the Judiciary. In addition, we should not lose sight of the fact that all the flag protection amendment does is authorize Congress to enact implementing legislation. Congress would implement the flag protection amendment with specific statutory language which would be subject to constitutional requirements.

Congress had no difficulty in utilizing its constitutional power to legislate sensibly on this subject in 1968 and in 1989. Indeed, at the hearing on April 20, 1999, Chairman Hatch proposed adopting implementing legislation similar to the Flag Protection Act of 1989. Ninety-one Senators agreed on the specific definition of flag and of the acts constituting desecration contained in the 1989 Act.[18] Thus,

[18] The Flag Protection Act of 1989, now codified at 18 U.S.C. 700, provides in pertinent part:

(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.

(2) This subsection does not prohibit any conduct consisting of the disposal of a flag when it has become worn or soiled.

Continued

the Federal flag protection statute that is currently on the books already has an overwhelming consensus on the definitions of "flag" and "desecration." Congress will be able to define what treatment it believes constitutes desecration. Accidental acts are not reachable.

Moreover, the terms "desecrate" and "flag" will not jeopardize carefully crafted implementing legislation under the void-for-vagueness doctrine. In *Smith* v. *Goguen*, 415 U.S. 566 (1974), the Court found a portion of a Massachusetts law void because it was unconstitutionally vague. The Massachusetts statute made illegal publicly mutilating, trampling upon, defacing, or *treating contemptuously* the flag of the United States. The phrase "treats contemptuously"—by word or act—was the offending, unconstitutionally vague phrase.

Yet, in the very same opinion, the Court noted: "Certainly nothing prevents a legislature from defining with substantial specificity what constitutes forbidden treatment of United States flags. The federal flag desecration statute * * * reflects a congressional purpose to do just that * * * [That statute reaches] only *acts* that physically damage the flag." 415 U.S. at 582 (emphasis added). The Court then quoted the Federal statute, as a flag protection statute surviving a due process, void-for-vagueness claim: "Whoever knowingly casts contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it."

In other words, legislation under the flag amendment is subject to the void-for-vagueness doctrine. But that doctrine allows Congress to prohibit contemptuous or disrespectful treatment of the flag so long as there is substantial specificity in spelling out what that treatment is—be it by burning, mutilating, defacing, trampling, and so on. Given the approved 1968 flag protection statute and the even more narrow 1989 statute, Congress should have little difficulty in avoiding a vagueness defect when drafting implementing legislation.

PARADE OF HORRIBLES IS AN ILLUSION

As to the parade of horribles that opponents invoke in opposition to the amendment, there is a straightforward answer. Reliance on the parade of horribles to oppose the amendment would reflect the Senate's fundamental mistrust of the people and of Congress itself, to enact reasonable flag protection statutes.

First, the argument that passage of S.J. Res. 14 would create a "slipperly slope" on which a flood of amendments would follow has little weight. Article V of the Constitution includes supermajority requirements both for Congress to send an amendment to the States and for the States to ratify an amendment. These supermajority requirements have successfully stopped a flood of amendments from leaving Congress for over 200 years.

Second, the argument that the proposed amendment would be the first amendment to change the Bill of Rights is inaccurate. The Bill of Rights has been changed, or amended, in some form on several occasions. For example, the 13th amendment amended the 5th

(b) As used in this section, the term "flag of the United States" means any flag of the United States, or any part thereof, made of any substance, of any size, in a form that is commonly displayed.

amendment as interpreted in *Dred Scott* v. *Sandford*, 60 U.S. (19 How.) 393 (1856), to provide that the former slaves were not property subject to the due process clause, but free men and women.[19] The 14th amendment was interpreted in *Bolling* v. *Sharpe*, 347 U.S. 497 (1954), to have effectively amended the due process clause of the 5th amendment to apply equal protection principles to the Federal Government. Moreover, in *Engel* v. *Vitale*, 370 U.S. 421 (1962), the Supreme Court restricted the first amendment rights of American school children by holding that the establishment clause precluded prayer in public schools.

Each of these constitutional changes substantially modified the rights and correlative duties of affected parties from those originally envisioned by the Framers of the Bill of Rights. Given the long legal tradition of accepting regulation of physically destructive conduct toward the flag, however, the proposed amendment would effect a much smaller change. It would not change the first amendment as originally ratified, but would simply displace a few recent judicial misinterpretations by restoring the historic balance between society's interests in protecting the flag and the actor's interest in choosing a destructive means of communicating a message. The proposed amendment would, of course, retain the full existing protections for oral and written speech against or in a favor of the flag, or any other topic.

Third, the proposed amendment would not automatically supersede all other existing amendments and other constitutional provisions. When the 14th amendment was proposed, it could have been argued that Congress' power to enforce the equal protection clause might be used to undermine the 1st amendment right of free association. However, courts have been able to harmonize the 1st and 14th amendments. Likewise, the 9th and 10th amendments have been reassessed in light of other constitutional provisions. The same would be true with a flag protection amendment. Experience justifies confidence that the courts would interpret the terms "physical desecration" and "flag of the United States" in light of general values of free speech.

As further indication of the lack of merit to criticism that the flag amendment might supersede other parts of the Bill of Rights,

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[19] In the *Dred Scott Case*, 60 U.S. at 452, Scott argued, among other things, that he should be free because he had traveled to the Illinois Territory in which the Missouri Compromise had prohibited slavery. Chief Justice Taney premised his opinion, holding that Scott was still a slave, on three grounds: First, that the Supreme Court of Missouri had held, in a prior parallel State action, that Scott was still a slave. Id. at 427. Second, that the lower Federal courts had no jurisdiction over the Federal action brought by Scott because he was a slave and not a citizen. Id. at 427. Third, that the Federal statute providing the Missouri Compromise was unconstitutional under the fifth amendment's due process clause because the statute deprived slave holders of their "property" (i.e., slaves) when they took property into the free Illinois Territory. Id. at 450. This widely- recognized substantive due process ruling, see, e.g., John E. Nowak & Ronald D. Rotunda, *Constitutional Law* 356 (4th ed. 1991) ("The [Dred Scott] decision, at a minimum, shows a pre-war willingness * * * to adopt substantive due process * * *."); "The Oxford Companion to the Supreme Court of the United States," 759 (Kermit L. Hall ed., 1992) ("*Scott* v. *Sandford*, * * * provided a basis for far-reaching interpretations of substantive due process * * *."), unlike a limited procedural due process ruling, dealt with both the underlying State property right and the Federal substantive protections of that right. *Scott*, 60 U.S. at 451–52 ("[T]he right of property in a slave is distinctly and expressly affirmed in the Constitution."). Chief Justice Taney based his expansive substantive due process holding on the provisions of the Constitution requiring the return of fugitive slaves, article IV, § 2, and allowing the importation of slaves, article I, § 9. Id. By removing the effect of these provisions, the 13th amendment undercut the foundations of the substantive due process ruling of the *Dred Scott Case*, thus changing, or amending, the existing interpretation of the due process clause of the 5th amendment—the Bill of Rights.

consider the 16th amendment. It too is one sentence: "The Congress shall have power to lay and collect taxes on income, from whatever source derived, without any regard to any census or enumeration." This language, ratified in 1913, is remarkably similar to the flag protection amendment in that it says, without more, that a legislative body, "shall have power" to do something. Do the critics of S.J. Res. 14 doubt the applicability of the fourth (no unreasonable search and seizure) and eighth amendments (no excessive bails or fines nor cruel and unusual punishments) to legislation enacted under the income tax amendment? The Committee assumes not.

Fourth, the proposed amendment is not intended to—and would not—discriminate against specific messages or points of view, and is thus "content neutral" to that extent. Those who desecrate the flag may be doing so to communicate any number of messages. They may be protesting a government policy or inactivity, or simply destroying the flag to get media attention. Laws enacted under the proposed amendment would apply to all such activity, whatever the message.

In *R.A.V.* v. *City of St. Paul*, 505 U.S. 377 (1992), the Supreme Court struck down a city ordinance that punished certain bias-motivated conduct, noting that the ordinance: (1) regulated ideas conveyed by the conduct; and (2) discriminated against certain points of view. The Court stated that by regulating disparaging conduct toward race, but not toward political affiliation, the ordinance effected a content-based regulation on speech as to certain subjects, but not as to others. Id. at 391. The Court further stated that by regulating antireligious conduct, but not proreligious conduct, the ordinance discriminated against particular points of view as to the same subject. Id.

To the extent *R.A.V.* is interpreted narrowly to proscribe discrimination against particular points of view, the proposed amendment would not supersede the opinion. For example, under the proposed amendment, it would be unconstitutional to punish only those flag desecrations that were intended to convey antireligious messages, but not those flag desecrations that were intended to convey proreligious messages. However, to the extent *R.A.V.* is interpreted broadly to discriminate against conduct when it conveys any possible message on one subject—the flag—, but not on others, the proposed amendment would supersede the opinion with respect to the narrow subject of the flag. For example, under the proposed amendment, it would once again be permissible to punish any flag destruction, specified in the implementing legislation, that exhibited a message implicating, positively or negatively, the same broad subject encompassing national sovereignty, national unity, and the history of the American people.

Finally, the narrowly tailored flag protection amendment does not authorize legislation which prohibits displaying or carrying the flag at meetings or marches of any group—be they Nazis, Marxists, or anyone else. The amendment does not authorize legislation prohibiting derogatory comments about the flag or cursing the flag, nor does it authorize a prohibition on shaking one's fist at the flag or making obscene gestures at the flag, whether or not such gestures are accompanied by words. The amendment does not author-

ize legislation penalizing carrying or displaying the flag upside down as a signal of distress or flying it at half mast on days other than on officially designated occasions.

5. THE AMERICAN FLAG SHOULD BE PROTECTED TO REMOVE THE GOVERNMENT'S SANCTION OF FLAG DESECRATION

Opponents of this resolution assert that because there are not widespread and continuous flag desecrations, there is no need for a constitutional amendment to prohibit flag desecration. Although the Committee received evidence of between 40 and several hundred acts of flag desecration have taken place over the past decade, the Committee does not believe there is some threshold of flag desecrations during a specified time period necessary before triggering congressional action.[20] Certainly, critics of the amendment cite no such threshold. If it is right to empower the American people to protect the American flag, it is right regardless of the number of such desecrations. For it is not the act of desecration which does the most harm to the love of America that the flag inspires, but the Government's sanction of such desecration. Whether a flag that covered a hero's casket is ripped and stuffed in a toilet, stolen from a veteran's grave, or burnt by a disrespectful individual, it is the Government's protection of such conduct toward the flag that the Government is responsible for protecting that harms our country the most.[21] The proposed amendment would allow Congress to remove the imprimatur of legitimacy from the destruction of the very love of country that Congress itself is responsible for preserving.

By removing the court-imposed governmental protection of destructions of the symbol that the Government is responsible for preserving, the proposed amendment would restore the traditional balance of society's interest in protecting the flag and the actor's interest in choosing a means to convey his message. This traditional balance, which continues to be respected for numerous other societal interests that affect the first amendment, would allow Congress to protect the physical integrity of the American flag while fully upholding the existing constitutional protections for oral and written speech in dissent from or in support of the flag, or any other topic. Our statesmen, our legislatures, and, until recently, our courts have long respected society's interest in protecting the

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[20] The Citizens Flag Alliance submitted to the Committee a list of 74 reports of flag desecrations since 1994. The news articles from which the reports were taken, show that several reports dealt with multiple flag desecrations. For example, in just the last 2 years before the Committee's April 20, 1999, hearing: The Hartford Courant, on June 12, 1998, reported the desecration of 150 flags on veterans' graves at a cemetery in Connecticut; The Harrisburg Patriot, on August 20, 1998, reported the desecration of 100 flags on veterans' graves at cemeteries near Minersville, Pennsylvania; the Courier-Post, on May 18, 1997, reported the desecration of "dozens of American flags" that had draped the caskets of veterans at a cemetery near Beverly, NJ; the Associated Press, on July 3, 1998, reported that 14 flags had been desecrated (some by stuffing them into toilets) in Somers, CT; and the Associated Press, on November 29, 1997, reported the desecration of "many" flags in Appleton, WI.

[21] Moreover, that a certain course of conduct might also be prosecutable as desecration and as another crime (e.g., theft, vandalism), does not indicate that society's interest in protecting the flag need not be protected in its own right. The argument that unlike the societal interest in preserving private property, the distinct societal interest in preserving the symbol of our Nation's integrity cannot be protected because the people ratified the first amendment to proscribe such protection is false. Under the traditional balancing approach, society's interest in protecting the physical integrity of the flag is consistent with allowing full freedom of oral and written speech while protecting the preeminent symbol of the sovereignty of our Nation, or our oneness as a people, and of the price we have paid for freedom.

flag, and 49 State legislatures and most of the American people want a constitutional amendment to protect the physical integrity of the flag. It is the Committee's considered judgment that S.J. Res. 14 is the appropriate means to maintain the protection for oral and written speech, while restoring balanced protection for our sovereignty, our heritage, and our values that are uniquely represented by the American flag.

IV. VOTE OF THE COMMITTEE

On April 29, 1999, with a quorum present, by rollcall vote, the Committee on the Judiciary voted on a motion to report favorably S.J. Res. 14. The motion was adopted by a vote of 11 yeas and 7 nays, as follows:

Yeas	Nays
Hatch	Leahy
Thurmond	Kennedy
Grassley	Biden
Specter	Kohl
Kyl	Feingold
DeWine	Torricelli
Ashcroft	Schumer
Abraham	
Sessions	
Smith	
Feinstein	

V. TEXT OF S.J. RES. 14

JOINT RESOLUTION proposing an amendment to the Constitution of the United States authorizing Congress to prohibit the physical desecration of the flag of the United States

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within 7 years after the date of its submission for ratification:

"ARTICLE —

"The Congress shall have power to prohibit the physical desecration of the flag of the United States.".

VI. COST ESTIMATE

The Congressional Budget Office has supplied the Committee with the following report estimating the proposed amendment's potential costs:

> By itself, this resolution would have no impact on the federal budget. If the proposed amendment to the Constitution is approved by the states, then any future legislation prohibiting flag desecration could impose additional

> costs on U.S. law enforcement agencies and the court system to the extent that cases involving desecration of the flag are pursued and prosecuted. However, CBO does not expect any resulting costs to be significant. Because enactment of S.J. Res. 14 would not affect direct spending or receipts, pay-as-you-go procedures would not apply.

(Congressional Budget Office, "Cost Estimate, S.J. Res. 14," letter dated Apr. 30, 1999).

VII. Regulatory Impact Statement

Pursuant to paragraph 11(b), rule XXVI of the Standing Rules of the Senate, the Committee, after due consideration, concludes that Senate Joint Resolution 14 will not have direct regulatory impact.

VIII. MINORITY VIEWS

CONTENTS

A. INTRODUCTION: TO HONOR OUR VETERANS AND OUR NATION'S HISTORY, WE MUST PROTECT THE CONSTITUTION

Flag burning is a despicable and reprehensible act. The issue before us, however, is not whether we agree with that truism—we do. Instead, the issue is whether we should amend the Constitution of the United States, with all the risks that entails, and narrow the precious freedoms ensured by the First Amendment for the first time in our history, so that the Federal government can prosecute the tiny handful of Americans who show contempt for the flag. We submit that such a monumental step is unwarranted and unwise.

The majority report relies heavily on the views of distinguished American veterans and war heroes who have expressed to this Committee their love of the flag and support for the amendment. Those who fought and sacrificed for our country deserve our respect. They know the costs as well as the joys of freedom and democracy. But while the majority would like to portray the views of veterans as monolithic, many outstanding veterans oppose the amendment. They do so for a number of reasons.

Above all, they believe they fought for the freedoms and principles that make this country great, not just the symbols of those freedoms. To weaken the nation's freedoms in order to protect a particular symbol would trivialize and minimize their service.

Former Senator John Glenn, who served this nation with special distinction in war and in peace, as well as in the far reaches of space, told the Committee:

> [I]t would be a hollow victory indeed if we preserved the symbol of our freedoms by chipping away at those fundamental freedoms themselves. Let the flag fully represent all the freedoms spelled out in the Bill of Rights, not a partial, watered-down version that has altered its protections.
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> The flag is the nation's most powerful and emotional symbol. It is our most sacred symbol. And it is our most revered symbol. But it is a symbol. It symbolizes the freedoms that we have in this country, but it is not the freedoms themselves. * * *
>
> Those who have made the ultimate sacrifice, who died following that banner, did not give up their lives for a red, white and blue piece of cloth. They died because they went into harm's way, representing this country and because of their allegiance to the values, the rights and principles represented by that flag and to the Republic for which it stands.

(Written statement of former Senator John Glenn, April 28, 1999.)

General Colin L. Powell (USA-Ret.), Chairman of the Joint Chiefs of Staff during the Persian Gulf War, wrote to Senator Leahy on May 18, 1999, in opposition to the proposed flag protection amendment:

> We are rightfully outraged when anyone attacks or desecrates our flag. Few Americans do such things and when they do they are subject to the rightful condemnation of their fellow citizens. They may be destroying a piece of cloth, but they do no damage to our system of freedom which tolerates such dese-

> cration. * * * I would not amend that great shield of democracy to hammer a few miscreants. The flag will still be flying proudly long after they have slunk away.

Professor Gary May, who lost both his legs while serving his country in Vietnam, eloquently made the same point in his testimony before the Committee:

> I am offended when I see the flag burned or treated disrespectfully. As offensive and painful as this is, I still believe that those dissenting voices need to be heard. This country is unique and special because the minority, the unpopular, the dissenters and the downtrodden, also have a voice and are allowed to be heard in whatever way they choose to express themselves that does not harm others. The freedom of expression, even when it hurts, is the truest test of our dedication to the belief that we have that right. * * *
>
> Freedom is what makes the United States of America strong and great, and freedom, including the right to dissent, is what has kept our democracy going for more than 200 years. And it is freedom that will continue to keep it strong for my children and the children of all the people like my father, late father in law, grandfather, brother, me, and others like us who served honorably and proudly for freedom.
>
> The pride and honor we feel is not in the flag per se. It's in the principles that it stands for and the people who have defended them. My pride and admiration is in our country, its people and its fundamental principles. I am grateful for the many heroes of our country—and especially those in my family. All the sacrifices of those who went before me would be for naught, if an amendment were added to the Constitution that cut back on our First Amendment rights for the first time in the history of our great nation.
>
> I love this country, its people and what it stands for. The last thing I want to give the future generations are fewer rights than I was privileged to have. My family and I served and fought for others to have such freedoms and I am opposed to any actions which would restrict my children and their children from having the same freedoms I enjoy.

(Written statement of Professor Gary May, April 20, 1999.) [1]

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[1] Professor May, who has worked as a social worker in Veterans Administration hospitals and outpatient clinics, also reminded the Committee of America's broken promises to those who have served this country in uniform: "If we are truly serious about honoring the sacrifices of our military veterans, our efforts and attention would be better spent in understanding the full impact of military service and extending services to the survivors and their families." (Written Statement of Professor Gary May, April 20, 1999). Answering a follow-up written question from Senator Leahy, Professor May elaborated:

> Veterans and their families need services and opportunities, not symbolism. Recruitment for military service is predicated in part on a quid pro quo—if honorable service is rendered, then meaningful post service benefits will follow. Our record of making good on this contract is not good. The favorable expressed sentiment for veterans by supporters of the flag desecration amendment would be better placed in support of extending and stabilizing services responsive to the day-to-day needs of ordinary veterans and their families.

Keith Kreul, an Army veteran and former National Commander of the American Legion, expressed a similar opinion in a statement he submitted to the Committee for its hearing last year. He disputes the majority's view that the proposed amendment honors the flag:

> American veterans who have protected our banner in battle have not done so to protect a "golden calf." Instead, they carried the banner forward with reverence for what it represents—our beliefs and freedom for all. Therein lies the beauty of the flag.

(Written statement of Keith Kreul, April 20, 1999).

Another veteran who expressed a similar view was Marvin Virgil Stenhammar, veteran of Beirut, Panama, and the Persian Gulf, who is permanently disabled as a result of his 15 years of service. Mr. Stenhammar testified before this Committee as follows:

> I feel that our flag, Old Glory, stands for freedom, justice and liberty. It also symbolizes the blood spilled by American service men and women who have given so much to protect it. Many of my colleagues and friends have died, were injured in training or wounded in action for it. They were really not wounded for it, the flag, but rather for it, liberty, and what the flag really stands for.

(Proposing an Amendment to the Constitution Authorizing Congress to Prohibit the Physical Desecration of the Flag: Hearing on S.J. Res. 40 Before the Senate Comm. on the Judiciary, 105th Cong., 2d Sess. (July 8, 1998) (hereinafter "Hearing of July 8, 1998"), at 28.)

The majority report states (in Part III.E.2.a) that adoption of the amendment will be "a step toward reestablishing the values that made this country great." Many veterans object to this attempt to, in effect, legislate patriotism. Those who testified before the Committee spoke in eloquent terms about the importance of respect and love for country coming from within a citizen or a soldier, not being imposed from without by the government.

Senator Bob Kerrey, the only recipient of the Congressional Medal of Honor currently serving in the United States Congress, stated this view succinctly when he testified: "Real patriotism cannot be coerced. It must be a voluntary, unselfish, brave act to sacrifice for others." (Written statement of Senator Bob Kerrey, April 28, 1999.)

These sentiments were echoed by Keith Kreul: "A patriot cannot be created by legislation. Patriotism must be nurtured in the family and educational process. It must come from the heartfelt emotion of true beliefs, credos and tenets." (Written statement of Keith Kreul, April 20, 1999.)

Similarly, the late John Chafee, a distinguished member of this body and a highly decorated veteran of World War II and Korea,

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Similarly, Major General Patrick Brady responded to Senator Leahy that "the most pressing issues facing our veterans" were "broken promises, especially health care."

We agree with Professor May and General Brady that it is time to honor our veterans with substance not symbolism. If the amount of time, effort, and money devoted to this amendment in the Senate and by outside organizations had been directed toward improving services for veterans, they would be much better off.

pointed out that just as forced patriotism is far less significant than voluntary patriotism, a symbol of that patriotism that is protected by law will be not more, but less worthy of respect and love: "We cannot mandate respect and pride in the flag. In fact, in my view taking steps to require citizens to respect the flag, sullies its significance and symbolism." (Written statement of Senator John Chafee, April 28, 1999.)

John Glenn reminded us that our men and women in the armed services put themselves in danger because of their devotion to the principles of this country. He added: "Without a doubt, the most important of those values, rights and principles is individual liberty: The liberty to worship, to think, to express ourselves freely, openly and completely, no matter how out of step those views may be with the opinions of the majority." (Written statement of former Senator John Glenn, April 28, 1999.)

This is a radical suggestion—that our country's soldiers fight to protect the rights of the minority to do or say things that displease or even offend us. But America was founded on just such radical ideas. Senator Kerrey reminded us that in this country we believe that "it is the right to speak the unpopular and objectionable that needs the most protecting by our government." Speaking specifically of the act of flag burning, he added: "Patriotism calls upon us to be brave enough to endure and withstand such an act—to tolerate the intolerable." (Written statement of Senator Bob Kerrey, April 28, 1999.)

James Warner, a decorated Marine flyer who was a prisoner of the North Vietnamese from 1967 to 1973, made this point in graphic terms:

> I remember one interrogation where I was shown a photograph of some Americans protesting the war by burning a flag . "There," the officer said. "People in your country protest against your cause. That proves that you are wrong."
>
> "No." I said, "that proves that I am right. In my country we are not afraid of freedom, even if it means that people disagree with us." The officer was on his feet in an instant, his face purple with rage. He smashed his fist onto the table and screamed at me to shut up. While he was ranting I was astonished to see pain, compounded by fear, in his eyes. I have never forgotten that look, nor have I forgotten the satisfaction I felt at using his tool, the picture of the burning flag, against him. * * *
>
> We don't need to amend the Constitution in order to punish those who burn our flag. They burn the flag because they hate America and they are afraid of freedom. What better way to hurt them than with the subversive idea of freedom? * * * Don't be afraid of freedom, it is the best weapon we have."

(James Warner, "When They Burned The Flag Back Home," The Washington Post, p.A25, July 11, 1989.)

In these dissenting views, we on the Judiciary Committee who oppose the constitutional amendment concerning flag desecration discuss the basis for our view that the amendment is unnecessary

and ill-advised. We understand that the political pressure for this amendment is strong, but our hope is that the Senate will in the end heed the words of our former colleague, John Glenn, when he urged us to reject the amendment:

> There is only one way to weaken the fabric of our country, and it is not through a few misguided souls burning our flag. It is by retreating from the principles that the flag stands for. And that will do more damage to the fabric of our nation than 1,000 torched flags could ever do. * * * [H]istory and future generations will judge us harshly, as they should, if we permit those who would defile our flag to hoodwink us into also defiling our Constitution.

(Written statement of former Senator John Glenn, April 28, 1999).

B. THERE IS NO "GREAT AND EXTRAORDINARY OCCASION" JUSTIFYING THE PROPOSED AMENDMENT

1. The Constitution should be amended only under very compelling circumstances

James Madison, a great Framer of the Constitution, told posterity that constitutional amendments should be limited to "certain great and extraordinary occasions." It is distressing to find his advice so unheeded that there are already over 50 proposed amendments pending before the 106th Congress, including an amendment to ease the requirements for future amendments. But it is reassuring to recall that since Madison spoke, although more than 11,000 amendments have been offered, only 27 have been adopted, and only 17 since the Bill of Rights was ratified over 200 years ago.

The proposed resolution is offered in direct response to Supreme Court decisions in *Texas* v. *Johnson*, 491 U.S. 397 (1989), and *United States* v. *Eichman*, 496 U.S. 310 (1990). In our system of carefully balanced powers, it is most unusual to overturn decisions of the nation's highest court. On at most four occasions in the history of this country has a constitutional amendment been adopted in response to a decision of the Supreme Court.[2] Significantly, two of these amendments, the Fourteenth and Twenty-Sixth, expanded the rights of Americans, while two involved the mechanics of government. The proposed amendment would be the first amendment to the Constitution that would infringe on the rights enjoyed by Americans under the Bill of Rights.[3]

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[2] *Chisholm* v. *Georgia*, 2 U.S. (2 Dall.) 419 (1793), prompted the adoption of the Eleventh Amendment bar to suits in Federal courts against States by citizens of other States or by citizens or subjects of foreign jurisdictions. In 1868, the Fourteenth Amendment arguably was adopted in response to the Dred Scott decision, *Scott* v. *Sanford*, 60 U.S. (19 How.) 393 (1856), although the introduction of the Black Codes following the Civil War likely was the true catalyst. In 1913, the Sixteenth Amendment was adopted to permit Congress to levy a tax on incomes after the Court's decision in *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895). Finally, the Twenty-Sixth Amendment was a response to the decision in *Oregon* v. *Mitchell*, 400 U.S. 112 (1970), that Congress lacked the power under Article I to lower the voting age to 18 in State as well as Federal elections.

[3] The majority report stretches to find historical mooring for its proposal that "[t]he Bill of Rights has been changed, or amended, * * * on several occasions" (Part III.E.4) by claiming that the Thirteenth Amendment, which outlawed slavery, amended the Fifth Amendment's Due Process Clause as interpreted in the *Dred Scott* case. Putting aside the gross incongruity of equating the interests of slaveholders with the rights of political protesters, the majority's point is not strictly correct. The Thirteenth Amendment altered the State law property interests protected by the Due Process Clause, but did not restrict or otherwise affect the due process right

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Worse, the infringement would fall on the First Amendment, the cornerstone and foundation of all of our rights, of which we must be especially protective. As Senator Leahy stated:

> All of our freedoms, all of our liberties rest on the First Amendment. It is the granite of democracy. It is our bedrock. Without the right to speak out, all our other rights are only so much paper. Without the right to assemble and petition, you literally cannot fight city hall, let alone the State legislature or the Congress or the IRS or anybody else. You are stuck. Without the freedom to worship or not, unmolested, there is a gaping void at the very core of our life. * * *
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> If some disaster were to sweep away all the monuments of this country, the Republic would survive just as strong as ever. But if some disaster * * * some failure of our souls were to sweep away the ideals of Washington and Jefferson and Lincoln, then not all the stone, not all the marble, not all the flags in the world would restore our greatness. Instead, they would be mocking reminders of what we had lost.

(Transcript of Comm. Markup, June 24, 1998, at 34–35).

We should observe special caution in approaching limits on the First Amendment. This unprecedented use of the Constitution of the United States to limit rather than expand the liberties of ordinary Americans defies the long established principle that the Constitution is a limitation on government and not on individuals.

In Federalist No. 43, James Madison wrote that the Constitution establishes a balanced system for amendment, guarding "equally against that extreme facility, which would render the Constitution too mutable, and that extreme difficulty, which might perpetuate its discovered faults." The concern of the Framers that amendments would come too frequently is profoundly conservative, in the best sense of that word, as expressed in Federalist No. 49:

> [A]s every appeal to the people would carry an implication of some defect in government, frequent appeals would, in great measure, deprive the government of that veneration which time bestows on everything and without which perhaps the wisest and freest governments would not possess the requisite stability.

Federalist No. 49 also warns against using the amendment process when "[t]he passions [and] not the reason, of the public, would sit in judgment."

The horror with which the Framers might regard the more than 11,000 amendments offered in our history, or the more than 100 offered in the 105th Congress alone, no doubt is offset by the wisdom of the nation's elected representatives in adopting only 17 amendments since the Bill of Rights. An amendment to the Constitution under the present circumstances would be precisely the sort of act

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itself. In any sense relevant at all here, the Thirteenth Amendment expanded freedom rather than restricted it. The incorporation of equal protection principles into the Fifth Amendment was similarly expansive of individual rights, not restrictive. Finally, the school prayer decision cited by the majority demonstrates only that the Bill of Rights may be interpreted, not that it has been "changed, or amended."

against which the Framers warned. Common sense is enough to tell us that this is not a "great and extraordinary" occasion that justifies invoking the awesome power of amending our fundamental charter. Constitutional amendments are for resolving the profound and structural issues of government. The proposed amendment would be the first amendment ever passed to vindicate purely symbolic interests.

Rather than face the solemn responsibility of justifying an amendment to the Constitution, proponents of S.J. Res. 14 have suggested that Members of the Senate abdicate their responsibility to exercise their judgment and simply forward the amendment to the State legislatures for them to make the final decision. This argument is totally contrary to the conservative conception of amendment that our Constitution establishes. The Constitution intentionally makes it difficult to pass amendments because they are to be permanent and fundamental. Supermajorities are required in both Houses and among the ratifying States. No amendment should pass unless every one of these levels of government overwhelmingly supports it. Our system is undermined if each institution of government does not independently exercise its responsibilities with the utmost care. The purpose of the painstaking and difficult process of amending the Constitution is to be conservative, securing a series of responsible, considered judgments along the way. If the institutions of government with responsibility for amending the Constitution start deferring to each other instead of acting independently—allowing themselves to be led by "[t]he passions [and] not the reason, of the public"—amendments will start coming quickly, easily, and impulsively. While the majority report denies that passage of this amendment will create a "slippery slope" for future thoughtless amendments, that is precisely what they invite by such an abdication of responsibility. In any event, the proponents' suggestion is an abdication of responsibility of our clear, established responsibility on this occasion—and that is enough.

2. There is no epidemic of flag burnings crippling the country

Flag burning is rare. That simple fact keeps re-emerging from the hearings of various proposals over the years to prohibit the practice. There is no crisis to which we should respond with an amendment to our fundamental law.

According to Professor Robert Justin Goldstein, who has written several books on the flag desecration controversy, there have been only about 200 reported incidents of flag burning in the entire history of the country. That is less than one per year. (The Tradition and Importance of Protecting the Flag: Hearing on S.J. Res. 40 Before the Subcomm. on the Constitution, Federalism, and Property Rights of the Senate Comm. on the Judiciary, 105th Cong., 2d Sess. (March 25, 1998) (hereinafter "Hearing of March 25, 1998"), at 36.)

The Congressional Research Service ("CRS") uncovered only 43 flag incidents of whatever kind between January 1995 and January 1999, many of which could already be addressed under existing laws. Even the leading lobbying group in support of S.J. Res. 14, the Citizens' Flag Alliance ("CFA"), could document only 74 incidents of flag "desecration" between March 1994 and January 1999,

and again, most of those incidents were punishable even without S.J. Res. 14.[4]

In light of these figures, the majority report is driven to declare (in Part III.E.5) that a flag amendment is appropriate "regardless of the number of [flag] desecrations." While we agree that even one incident of flag burning merits condemnation and scorn, it just as certainly does not create a reason to amend our Constitution. It does not call on this Congress to be the first Congress in the history of the United States to restrict the liberties of Americans with a narrowing amendment to the Bill of Rights.

The majority report also argues (in Part III.E.5) that "it is not the act of desecration which does the most harm to the love of America that the flag inspires, but the government's *sanction* of such desecration" (emphasis added). But toleration does not equate to approval; obviously, the government does not support or endorse everything it does not punish. We who oppose the flag amendment deplore any act of flag desecration and hold the flag in high regard. But we believe that this cherished emblem is best honored by preserving the freedoms for which it stands.

Even if there were a problem of flag desecration in this country, amending the Constitution would still be a totally disproportionate response. To propose an amendment when in fact there is no problem betrays a woeful and unworthy loss of perspective. As John Glenn observed, S.J. Res. 14 is "a solution looking for a problem." (Written statement of former Senator John Glenn, April 28, 1999).

Senator Glenn's observation finds unintended support from some of the principal proponents of S.J. Res. 14. Asked what the penalty should be for burning an American flag, CFA Chairman Patrick Brady responded:

> I would handle it like a traffic ticket. The individual who received the ticket for burning the flag * * * could pay the fine or he could * * * go to school. * * * I would send them to a class, and I would tell them this is what the flag means to the people of America, this is what it means to veterans, and that would be it.

(Transcript of Hearing, April 29, 1999, at 81–82).[5]

Lieutenant General Edward Baca agreed that flag burning should be a misdemeanor offense. (Id. at 83). A third pro-amendment witness, Professor Richard Parker, opined that "a jail term is probably not reasonable." (Id. at 89).

The notion that we should amend the Constitution of the United States and carve out an exception to the fundamental freedom of the First Amendment in order to issue a ticket and send someone to a class on "respect" takes one's breath away. As Bruce Fein observed about amending the Constitution, "It is a matter of prudence and judgment and degree." (Hearing of March 25, 1998, at 21). To amend the Constitution in order to issue tickets and lec-

[4] The majority report asserts (in Part III.E.5) that the Committee "*received evidence* of between 40 and several hundred acts of flag desecration [that] have taken place over the past decade" (emphasis added). What the Committee "received" was CRS's list of 43 incidents, CFA's list of 74 incidents, and an unsubstantiated claim that there have actually been "hundreds and hundreds" of unreported incidents. (Transcript of Hearing, April 20, 1999, at 98).

[5] We know of only one country—the Socialist Republic of Vietnam—that punishes flag desecration by "reeducation".

tures is to abandon utterly all prudence, judgment and degree. In the words of Keith Kreul, past National Commander of the American Legion, "It is a radical approach to a near nonexistent dilemma akin to atom bombing a sleeping city because a felon may be in the vicinity." (Written statement of Keith Kreul, April 20, 1999).[6]

3. Outlawing flag desecration could increase rather than decrease such conduct

The principal incitement to flag burning appears, from all of the evidence, to be the very efforts to make it illegal. That is because outlawing flag burning in a highly publicized way, or attempting to do so, tends to assure flag burners of the very attention they crave, lending national visibility to their crackpot causes and offensive behavior.

According to Professor Goldstein there have been more than twice as many flag burning incidents since this became a news item in 1989 than in the entire history of the American republic. Professor Goldstein has established that the number of incidents peaked between June 1989 and June 1990, when the first attempts were made to overturn the *Johnson* ruling by constitutional amendment, and that the rate of incidents has more than tripled since the revival of the issue in the mid-1990s. (Hearing of March 25, 1989, at 36).[7] These facts are undisputed.

Based on past experience, then, passage of a flag amendment would likely lead to an increase in the number of flags-burning incidents, as well as an increase in the variety of distasteful acts involving the flag which no doubt would be committed to test the vague and uncertain boundaries of any new law.

If we want to stop people from burning the flag, the most effective way would be to stop daring them to do it. Passage of the proposed amendment—and the ensuing ratification debates—would do just the opposite.

4. Existing legal and social sanctions are adequate to deter and punish flag desecration

There is a huge misunderstanding underlying the push for a flag protection amendment. As Senator Feingold explained during a Committee markup on S.J. Res. 14:

> The American people have been * * * bamboozled into believing that you can walk across the street, grab an American flag off of somebody's building and burn it, and that is protected. That is not the case. (Transcript of Comm. Markup, April 29, 1999, at 26).

The States and the Federal government can and do prohibit and punish most acts of physical destruction of a flag, and with more

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[6] The approach is all the more radical given its admitted limitations. The majority report acknowledges (in Part III.E.4) that the proposed amendment "does not authorize legislation prohibiting derogatory comments about the flag or cursing the flag, nor does it authorize a prohibition on shaking one's fist at the flag or making obscene gestures at the flag." Yet these acts may be as offensive, and as deserving public censure, as some of the acts of "physical desecration" that may be covered by the proposed amendment.

[7] Even with the increase brought on by the agitation for bans on flag burning, of course, the actual number of incidents remains exceedingly low. See supra Part VIII.B.2.

than a citation or a compulsory class on respect. No one has the right to steal a flag or to defile a flag belonging to another. Burning a flag, even one's own flag, will not shield a violent or disorderly protester from arrest. The First Amendment protects speech, expressive conduct, peaceful demonstration. It is not a sanctuary for thieves, vandals, or hooligans.

Most of the 74 flag "desecrations" identified by CFA are linked to other behavior that violates existing laws—including laws relating to theft, vandalism, destruction of property, breach of the peace, and arson—and are therefore punishable regardless of any message that the flag desecrator might have been trying to send. For example, included among CFA's list of 74 are the following incidents:

—April 1, 1997, Buffalo, New York: The starting goalie for the Buffalo Bandits, having just won a playoff-clinching game, climbed over a fence at the naval park and tore down the American flag, breaking the flagpole. Charged with criminal trespass and criminal mischief, the man eventually pled guilty and paid a fine. ("Bandits goalie pleads guilty in naval park case," Buffalo News, October 24, 1997.)

—Spring/summer 1997, Wallingford, Connecticut: Flags hanging from downtown homes and porches were set on fire at night, endangering residents and damaging property. Several teenagers were arrested in connection with these incidents, charged with reckless burning, conspiracy to commit reckless burning, and criminal attempt to commit reckless burning. ("Second teen accused in Wallingford flag burnings," The Hartford Courant, September 4, 1997.)

—July 4, 1997, Springfield, Illinois: A man celebrated the Fourth of July by cutting the rope on the Federal Building flag pole and hauling down the flag. The man was arrested and jailed on charges of theft and criminal damage to government property. ("One man celebrates by stealing," The State Journal-Register (Springfield, IL), July 9, 1997.)

—August 7, 1998, Minersville, Pennsylvania. Two cemeteries were vandalized; the vandalism included the burning of American flags on veterans' graves. A 19-year old was arrested, along with four juveniles, and charged with institutional vandalism, criminal mischief, attempted burglary, trespassing, criminal conspiracy, and corruption of minors. ("Man jailed in vandalism spree," The Harrisburg Patriot, August 20, 1998.)

—September 10, 1998, Boulder, Colorado. A city flag was set on fire while atop a very tall flagpole. The Boulder police had no doubt they could arrest the arsonist, since "burning someone's else's flag—in this case the city's—is definitely against the law." ("Flag arsonist sought," Denver Post, September 11, 1998.)

No constitutional amendment was needed to protect the people of Buffalo, Wallingford, Springfield, Minersville, or Boulder. Their State laws performed that function quite well.

Similarly, no constitutional amendment was necessary to punish Gregory Lee Johnson, the defendant in the Supreme Court's 1989 case. Johnson accepted stolen private property (a flag) and destroyed it by setting it on fire in a busy public place. The State of Texas could have prosecuted Johnson for possession of stolen prop-

erty, destruction of private property, and other crimes which the State routinely punishes without regard to speech; instead, the only criminal offense with which Johnson was charged was "desecration of a venerated object." The Supreme Court, while holding that Johnson's conviction for that offense could not stand, emphasized that its opinion "should [not] be taken to suggest that one is free to steal a flag so long as one later uses it to communicate an idea." 491 U.S. at 412 n.8.

Much has been made of a Wisconsin youth, Matthew Janssen, then 18, who stole a number of flags and defecated on one, and whose conviction for flag desecration under an old, pre-*Johnson* statute, was eventually overturned. See *Wisconsin* v. *Janssen,* 219 Wis.2d 362 (1998). That does not mean, however, that Janssen went unpunished for his despicable act. In fact, he was prosecuted successfully for the message-neutral crimes he committed, and sentenced to nine months in jail and 350 hours of community service. Perhaps more important, he was ostracized, and had to go about his community with the shame of his act before him at all times. No fine, no class on respect, and no martyrdom at the hands of the central government could equal the punishment Janssen received.

Senator Feingold raised the question with Wisconsin State Senator Roger Breske:

> Isn't this the ideal case to demonstrate that there is no need to amend the First Amendment? This young man was punished both by the State and by his community through harsh social sanctions, as well as criminal sanctions. This punishment was so severe that the young man publicly apologized and admitted that his actions were abominable * * *. If this is the case, what else can be gained by amending the Bill of Rights?

Senator Breske responded, "He probably should have got a little more." (Hearing of March 25, 1998, at 46). "A little more" is no reason to amend the Constitution of the United States.

General Colin Powell summarized the point as follows:

> If they are destroying a flag that belongs to someone else, that's a prosecutable crime. If it is a flag they own, I really don't want to amend the Constitution to prosecute someone for foolishly desecrating their own property. We should condemn them and pity them instead.

(Letter from General Colin Powell to Senator Patrick Leahy, May 18, 1999.)

5. Existing constitutional limitations on free expression are applicable to acts of flag desecration

The decision of the Supreme Court in *Johnson* did not give carte blanche to protesters to burn flags however, whenever and wherever they please, even for expressive purposes. The First Amendment leaves ample room for Congress and the States, just as they may reasonably limit other forms of expression on a content-neutral basis.

For example, expression that is directed to inciting or producing "imminent lawless action" may be limited under *Brandenburg* v. *Ohio,* 395 U.S. 444, 447 (1969), and limits also can be placed on

"fighting words," those likely to provoke the average person to whom they are addressed to retaliation. *Chaplinsky* v. *New Hampshire,* 315 U.S. 568, 574 (1942). The fact that these circumstances were not present in *Johnson*—it appears that those most likely to be incited by the conduct wisely had ignored the demonstration altogether, as did most other people—does not limit the government's authority to respond to imminent violence. As the Supreme Court noted in *Johnson*:

> The State need not worry that our holding will disable it from preserving the peace. We do not suggest that the First Amendment forbids a State to prevent "imminent lawless action."

491 U.S. at 410. States remain free to prevent acts of violence. What a State cannot do is apply prior restraint on certain views by assuming that, because the speech is so offensive to some, it will provoke ordinary citizens to violence.

Finally, established principles of First Amendment jurisprudence provide room, albeit limited, for Congress to enact legislation protecting the flag, so long as that legislation is sufficiently specific to avoid the problem of vagueness and satisfy the Fifth Amendment Due Process Clause, and so long as it is sufficiently content-neutral to satisfy the First Amendment. We do not suggest that this is an easy task. The same problems may plague legislative drafters if this amendment is adopted, however (see infra Part VIII.E), and the American people would be far better served if the proponents of S.J. Res. 14 addressed this difficult task squarely and honestly at the outset by proposing a carefully crafted statute rather than toying with the Constitution.

On April 30, 1999, Senator Mitch McConnell and others introduced the Flag Protection Act of 1999, S. 931, to provide for the maximum protection against the use of the flag to promote violence, while respecting the liberties that it symbolizes. The Act would ensure that incidents of deliberately confrontational flag burning are punished with stiff fines and even jail time. Experts at the Congressional Research Service and several constitutional scholars have opined that S. 931 respects the First Amendment and would be upheld by the courts. (See Record, at S4487–S4493.) We believe that Congress should consider this statutory alternative, and that the Court should address it, before we again take up a constitutional amendment on this issue.[8]

C. THE PROPOSED AMENDMENT WOULD DIMINISH THE RIGHTS WE CURRENTLY ENJOY UNDER THE FIRST AMENDMENT

1. The proposed amendment would restrict free expression

The proposed amendment unquestionably would restrict rights currently enjoyed by Americans under the First Amendment. Indeed, that is its purpose.

Proponents of the amendment argue that they seek to bar flag burning only as "conduct" and not as "speech," but that would-be

[8] Although the Committee held a hearing on the proposed constitutional amendment on April 20, 1999, and heard from Senators and the Department of Justice about it on April 28, 1999, no attention whatever has been paid to Senator McConnell's legislative proposal, nor to alternative legislative ideas grounded in intellectual property principles.

distinction is not workable. Expressive conduct is speech. Because the flag serves as a symbol, use of the flag symbolically is expressive. Indeed, the State of Texas conceded this point when arguing the Johnson case before the Supreme Court, see 491 U.S. at 405, as did the United States the following year, see Eichman, 496 U.S. at 315.

Professor Goldstein explained the expressive aspect of flag desecration in his 1995 book, *Saving "Old Glory"*:

> [A]ll forms of communication, including oral and written speech, are ultimately "symbolic" (since letters and words have no meaning, by themselves, but only represent other things) and they all involve conduct—opening one's mouth, printing and circulating a book, and so on. Unless flag desecration results in burning down a building or blocking a public street, it is, in practice, just as "purely" symbolic and purely expressive as are other forms of communication and therefore deserves equal protection. If the argument that only "pure" speech and writing are protected by the principles of constitutional democracy was accepted, then people who use sign language would have no rights, and neither would actors, dancers, musicians, painters, movie producers, or anyone else who communicated in any other way.

(Robert J. Goldstein, *Saving "Old Glory": The History of the American Flag Desecration Controversy* xii-xiii (1995).)

As Professor Goldstein notes, the conduct/expression distinction is meaningful under the First Amendment only in the sense that the behavior in question can cause harm to real interests that the government can protect. For instance, burning a flag causes harm to the owner's property interest in that flag: people label that which causes this real, tangible harm as the "conduct" element in the behavior. It is precisely such harm-causing, "conduct" elements of flag desecration that can already be prohibited, and that routinely and effectively are in fact punished by the courts. The argument that desecration is "conduct" does not support the amendment at all—quite the contrary. To the extent that desecration is "conduct," it can already be regulated. The whole point of the amendment is to regulate "expression" (or, the "expressive" element in the behavior) when it does not cause real, tangible harm, but is only offensive. Invoking illusory distinctions like conduct-versus-expression does not change that reality.

2. The first amendment protects above all the right to speak the unpopular and objectionable

Ultimately, the debate over S.J. Res. 14 and the earlier attempts to amend the Constitution to ban flag desecration turns on the scope we think proper to give to speech which deeply offends us. As one Senate sponsor candidly remarked, "This isn't about whether or not we can limit freedom under the First Amendment, free speech. It is about what free speech we want to limit." (Transcript of Hearing, April 20, 1999, at 71).

For Congress to limit expression because of its offensive content is to strike at the heart of the First Amendment. "If there is a bed-

rock 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." *Johnson,* 491 U.S. at 414. Indeed, it is the right to speak the offensive and disagreeable that needs the most protecting. Justice Holmes wrote that the most imperative principle of our Constitution was that it protects not just freedom for the thought and expression we agree with, but "freedom for the thought that we hate." *United States* v. *Schwimmer,* 279 U.S. 644, 654 (1929). "[W]e should be eternally vigilant," he taught us, "against attempts to check the expression of opinions that we loathe * * * *"Abrams* v. *United States,* 250 U.S. 616, 630 (1919). Justice Robert Jackson echoed this thought in *West Virginia Bd. of Educ.* v. *Barnette,* 319 U.S. 624, 642 (1943), a flag salute case:

> [F]reedom 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.

One opponent of the amendment, conservative scholar Bruce Fein, cited President Thomas Jefferson's first inaugural address, when the nation was bitterly divided. That giant among the Founders lectured on the prudence of tolerating even the most extreme forms of political dissent:

> If there be any among us who would dissolve the Union or * * * change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left to combat it.

Mr. Fein also cited, as an example of the Enlightenment spirit that undergirds the First Amendment, Voltaire's famous statement, "I disapprove of what you say, but I will defend to death your right to say it." (See Hearing of March 25, 1998, at 21).

John Glenn stated the argument in more colloquial terms:

> To say that we should restrict speech or expression that would outrage a majority of listeners or move them to violence is to say that we will tolerate only those kinds of expression that the majority agrees with, or at least does not disagree with too much. That would do nothing less than gut the First Amendment.

(Written statement of former Senator John Glenn, April 28, 1999.)

To restrict speech and political expression to only those areas that Congress approves is to limit, as China now does, the freedom of worship to only those churches of which that government approves. That is not freedom at all. As free speech philosopher Alexander Meiklejohn cautioned, "To be afraid of ideas, any ideas, is to be unfit for self-government." (Alexander Meiklejohn, *Freedom of Speech and Its Relation to Self-Government* 27 (1948).)

The nation's faith in free speech is grounded ultimately in a confidence that the truth will prevail over falsehood, a faith that has sustained our thought since Milton wrote his *Areopagitica* in 1644.

> [T]hough all the winds of doctrine were let loose to play upon the earth, so truth be in the field, we do injuriously,

> by licensing and prohibiting, to misdoubt her strength. Let her and falsehood grapple, whoever knew the truth put to the worse in a free and open encounter.

(John Milton, *Areopagitica, A Speech for the Liberty of Unlicensed Printing to the Parliament of England* (1644).)

3. The American people can and do answer unpopular speech with tolerance, creativity and strength

The lesson of Milton is practiced every day in America. Flag burning is not the only form of expression that is utterly abhorrent to the large majority of Americans. The instinctive answer of the American people, however, is not trying to ban speech that we find offensive. That is the response of weakness. Justice Louis Brandeis observed, "Those who won our independence * * * eschewed silence coerced by law—the argument of force in its worst form." *Whitney* v. *California,* 274 U.S. 357, 375–376 (1927) (Brandeis, J., concurring).

The American people respond with strength. The majority report (in Part III.E.2) contends that requiring respect for the flag will "enhanc[e] national unity" and "help[] to preserve freedom and democratic government." The rare occasions of flag desecration have not, and cannot, subvert our sense of unity. Our institutions are not threatened by the exercise of First Amendment freedoms.

More fundamentally, respect cannot be coerced. It can only be given voluntarily. Some may find it more comfortable to silence dissenting voices, but coerced silence can only create resentment, disrespect and disunity. As Justice Jackson wrote in *Barnette,* 319 U.S. at 640–642.:

> Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men.* * * Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard. * * *
>
> 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.

What unifies our country is the voluntary sharing of ideals and commitments. We can do our share toward that end not by enforcing conformity but by responding with responsible actions that will justify respect and allegiance, freely given. Justice Brennan wrote in *Johnson,* "We can imagine no more appropriate response to burning a flag than waving one's own." 491 U.S. at 420. That is exactly how the American people respond.

Justice Brennan described the aftermath of Gregory Lee Johnson's contemptible act in 1984, when he burned a flag at a political demonstration in Dallas, Texas, in front of City Hall. "After the

demonstrators dispersed, a witness to the flag burning collected the flag's remains and buried them in his backyard." Id. at 399. [9]

Senator Feingold has pointed to the example of Appleton, Wisconsin, where Matthew Janssen committed his particularly repugnant act of flag desecration, and where each year, 20,000 to 30,000 Americans join in the largest Flag Day parade in the nation. Senator Durbin has cited the example of the people of Springfield, Illinois, who faced the prospect of a Ku Klux Klan rally:

> For each minute that the Ku Klux Klan rally goes on, each of us pledges a certain amount of money to be given to B'nai B'rith and to the NAACP and other organizations. So the longer they go, the more money is being [raised] in defense of the values of America. I think that is what America is all about. (Transcript of Comm. Markup, June 24, 1998, at 23).

In June 1998, an African American was brutally tortured and murdered in Jasper, Texas, apparently on account of his race. The Ku Klux Klan decided to hold a rally in Jasper because of the murder. Even in all of their pain over the incident, the good citizens of Jasper, led by their African American mayor, let the Klan speak. They let them march, and they even let them wave American flags. The good citizens of Jasper quietly spurned the Klan, and the Klan slithered out of town.

Again, on July 18, 1998, in Couer D'Alene, Idaho, white supremacists obtained a permit for a "100–Man flag parade" and marched carrying American flags and Nazi banners side by side. As in Springfield the local residents turned "Lemons into Lemonade," and raised $1,001 for each minute of the white supremacists' march, money for donations to human rights organizations. A few citizens loudly spoke back to the marchers, but most simply stayed away. Steve Meyer, owner of The Bookseller, made it a point to keep his store open, observing that "Nazis were burning books in the 1930s, and I don't want them closing stores in the '90s."

The positive examples of the citizens of Wisconsin, Illinois, Texas, and Idaho show the America for which soldiers have fought and died. This is the strength and unity that no statute, no amendment can compel or embellish.

A similar example of a powerful response to flag burning that protects the speech of everyone was given, ironically, by a witness testifying in support of the amendment. The incident was the center of the testimony of Los Angeles Dodger General Manager Tommy Lasorda, the proponents' star witness in the 105th Congress. In 1976, a father and son ran onto the field during a baseball game at Dodger Stadium and attempted to set fire to a flag. The attempt was unsuccessful (the flag was never burned) and the protestors appear to have been punished with stiff fines under the content-neutral laws against running onto playing fields. Significantly, the crowd was in no way demoralized by the attempt, nor was their love for the flag or for our country diminished in the least. Far from it. As Mr. Lasorda recounted:

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[9] We are pleased to identify and give full credit to Korean War veteran Daniel Walker for this quietly gallant act. See Robert J. Goldstein, *Burning the Flag: The Great 1989–1990 American Flag Desecration Controversy* 33 (1996).

> The fans immediately got on their feet * * * and without any prompting that I can remember the whole crowd stood and began to fill the stadium with an impromptu rendition of "God Bless America." (Hearing of July 8, 1998, at 27).

That was an answer on which Congress cannot improve.

It can be painful that the Klan and others try to associate themselves with the principles of our nation by displaying the flag. It can be painful to see the crudeness and poverty of understanding of those who try to burn the flag. Vietnam veteran Stan Tiner told the Committee of "the political factions and sects that fly the American flag over their own various causes—the Communists, to the Birchers, to David Koresh and his followers—all seeking to imply that their particular brand of Americanism is the one righteous brand." He concluded:

> [I]n a curious way, they are right. America is all of these things, or at least a haven for freedom, where all kinds of thinking can occur and where people can speak freely their minds without fear.

(Hearing of March 25, 1998, at 48).

Therein lies part of the greatness of America. All voices, however hateful and obnoxious, can be heard, but it is the quiet nobility of the ordinary citizens of Appleton, Springfield, Jasper, and Couer D'Alene, and the spontaneous singing of "God Bless America" at a baseball game that wins the debate. The First Amendment works.

4. The proposed amendment would set a dangerous precedent for future amendments to the Bill of Rights

Supporters of S.J. Res. 14 argue that the flag is a special case—that its adoption would not open the floodgates to other amendments. We are not so sure. Already, scores of constitutional amendments are proposed each year, many of which would alter the Bill of Rights. Some of these proposed amendments command significant support, including support from sponsors of the current proposal. Establishing a precedent that the First Amendment can be restricted by constitutional amendment would give supporters of other restrictive amendments ammunition and momentum, and weaken public respect and support for safeguarding the enduring principles in our Bill of Rights.

Charles Fried, Solicitor General under President Reagan, cautioned us in 1990 that it is dangerous to make exceptions in matters of principle:

> Principles are not things you can safely violate "just this once." Can we not just this once do an injustice, just this once betray the spirit of liberty, just this once break faith with the traditions of free expression that have been the glory of this nation? Not safely; not without endangering our immortal soul as a nation. The man who says you can make an exception to a principle, does not know what a principle is; just as the man who says that only this once let's make 2+2=5 does not know what it is to count.

Measures to Protect the American Flag: Hearing Before the Senate Comm. on the Judiciary, 101st Cong., 2d Sess. (June 21, 1990) (hereinafter "Hearing of June 21, 1990"), at 113.)

Senator Chafee also took a dim view of the consequences of S.J. Res. 14 when he asked the Committee, "What will be next?":

> Will we next see a constitutional amendment demanding the standing to attention when the national anthem is played? Will there be a list of worthy documents and symbolic objects for which desecration is constitutionally prohibited? Should there be a Constitutional Amendment to protect the Bible? What about other religious symbols such as the crucifix or the Menorah; what about the Constitution, itself? Surely, the Constitution embodies the same significance as the flag!

(Written statement of Senator John Chafee, April 28, 1999.)

These are not hypothetical concerns; the Texas statute in the *Johnson* case treated the flag as just one of a number of "venerated objects."

Even if we could draw the line after one restrictive amendment, the damage would be done. John Glenn testified, that "The Bill of Rights * * * is what has made [the United States] a shining beacon of hope, liberty of inspiration to oppressed peoples around the world for over 200 years. In short, it is what makes America, America." (Written statement of former Senator John Glenn, April 28, 1999). The proposed amendment would dim that beacon, as Senator Leahy described:

> We are being asked to say that it is okay for the United States government to suppress at least some political expression merely because we find it offensive. And when governments like that of Cuba or China decide that certain forms of political expression are offensive and should be prohibited, when they prosecute their pro-democracy dissidents or jail journalists who criticize their leaders, what will we say then? If it is okay for the United States to criminalize an unpopular form of political expression why should other countries not do the same with respect to expression they find offensive?
>
> The United States is the most powerful country in the world in large measure because it is the most free. We are a world leader in the struggle for human rights, including the right to freedom of speech for all. This administration and past administrations, Democrat and Republican, have strongly criticized foreign governments that limit free speech, censor the press and suppress other fundamental human rights. If we succumb to the temptation of silencing those who express themselves in ways that we find repugnant, what example do we set for others around the world?

(Written statement of Senator Patrick Leahy, April 20, 1999.)

The First Amendment boldly proclaims that "Congress shall make no law * * * abridging the freedom of speech." The proposed amendment would turn the "no" into an "almost no"—a singular erosion of the principle for which the First Amendment stands.

Perhaps that is why the vast majority of Americans do not support the proposed constitutional amendment once they know of its unprecedented impact on the First Amendment.[10]

D. THE *JOHNSON* DECISION WAS CONSISTENT WITH GENERATIONS OF CONSTITUTIONAL DOCTRINE

1. The Supreme Court has never accepted limitations on the first amendment for peaceful protests involving flag desecration

In beating the drum for the first amendment to the First Amendment, the majority report perpetuates another myth that has been fueling the flag protection movement since 1989, namely, that the Supreme Court's decision in *Johnson* "broke with legal tradition" (Part I) and worked "a dramatic change in First Amendment jurisprudence" (Part III.D). There quite simply is no "legal tradition" of upholding bans on flag desecration against First Amendment challenges—just the opposite is true. The strained efforts of the majority to manufacture such a tradition underscore just how wrong it is in its characterization of American legal history.

a. Endecott's case

The majority report begins (in Part III.C.1) with *Endecott's Case,* a 1634 action of the Massachusetts Bay Colony in which "a domestic defacer of the flag" was prosecuted. In that case, John Endecott cut the cross of St. George from an English flag in apparent protest against the tyranny of Charles I and Bishop Laud. At the time, the Bay Colony offered no First Amendment rights. Freedom of speech was denied, as were freedom of assembly and freedom from the establishment of religion. Indeed, there were no written or even customary laws at this date: punishment was imposed by then-governor Winthrop and his allies in accordance with their view of morality and Scripture ("Thou shalt not suffer a witch to live.")[11] It is remarkable that the actions of the British colonial government repressing American patriots should be the model and precedent for what the Senate should do now. Yet that, amazingly, is the logic of the proposed amendment.

Endecott's Case is, of course, properly seen as an example of the tyranny against which the Founders rightly rebelled, and Endecott's "desecration" as a very early step on the long movement toward independence from England. The case also is an early analog to a similar "desecration" of the English flag by George Washington to create the first flag of the Continental Army. On taking command of the army on July 3, 1775, Washington took an English flag and, after removing both the cross of St. George and the cross

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[10] While the sponsors of S.J. Res. 14 purport to be responding to "the continuing groundswell of support by the American people for constitutional protection of their flag" (Part II), recent polling data on this issue is mixed. One 1999 poll showed Americans to be about evenly divided when asked whether the Constitution should or should not be amended to prohibit burning or desecrating the American flag, with 51 percent answering "should," and 48 percent answering "should not." According to the same poll, 90 percent of those answering "should" reconsidered their answer and said that the Constitution should not be amended when informed that, if the amendment were approved, it would be the first time any of the freedoms in the First Amendment had been amended in over 200 years. See State of the First Amendment 1999 Questionnaire, <http://www.freedomforum.org/first/sofa/1999>.

[11] This same regime presently banished Roger Williams (1635) for urging religious liberty, and Anne Hutchinson (1638) and Rev. Roger Wheelright (1637) over doctrinal differences. Hawke, *The Colonial Experience,* 143–146, 689 (1966).

of St. Andrew, sewed six white stripes onto the remaining red field. By this "desecration," George Washington created the 13 red and white stripes that remain to this day. Hart, *The Story of the American Flag,* 58 Am. L. Rev. 161, 167 (1924). We frankly are astonished that the majority report would cast aspersions on, in Patrick Henry's phrase, such gauntlets cast in the face of tyranny.[12]

b. James Madison and Thomas Jefferson

The next examples cited by the majority report (in Part III.C.2.a) are also completely irrelevant to freedom of speech and the First Amendment. The majority report cites as part of its "legal tradition" a characterization by former Judge Robert Bork regarding James Madison's opinion that the tearing down of the flag of the Spanish minister in Philadelphia in 1802 was actionable. The characterization is misleading. The incident refers, of course, to assaults on property (a Spanish flag) within a foreign embassy, and to the view that such assaults as entering uninvited into the ambassadorial residence, destruction of a painting, or destruction of a flag are equivalent to attacks on the foreign minister. 4 Moore, Digest of International Law 627 (1906). The section cited deals with "Protection of Diplomatic Officers" and has nothing to do either with peaceful protest, the flag of the United States or the decision in *Johnson.* Indeed, destruction of another's property, whether a flag or otherwise, remains a crime throughout the United States.

The majority report misses the point again when it cites Madison for the unremarkable proposition that for a foreign ship to menace a ship of the United States, fire upon a ship of the United States, and force it to haul down the colors is a "dire invasion of sovereignty." The harm comes from firing upon a United States military vessel; the treatment of the flag, to the extent that it could be isolated from the grievous physical coercion of American sailors involved in lowering it, simply added insult to a great injury. If the British had simply shot at United States servicemen and left the flag alone, surely Madison would not have shrugged his shoulders and let the matter pass. Again, the example has nothing whatever to do with peaceful protest or the First Amendment. The United States can and does still strike back against those who attack Americans at home and abroad; *Johnson* had no effect on that principle.

Equally unrelated is the majority's citation (in Part III.C.2.b) of a letter from Thomas Jefferson dealing with the use of the U.S. flag by foreign ships to avoid English sanctions against trade with France during the 1790s. Jefferson was writing to our Consul in Canton, China, to urge him to cooperate with other nations to detect such smugglers flying under false colors. Lipscomb, ed., 9 *Writings of Thomas Jefferson* 49–50 (1903). This has nothing to do with peaceful protest, freedom of expression, or the First Amendment. The United States can and does still cooperate with other nations to limit the use of its flag; *Johnson* had no effect on that principle.

[12] The debate over *Endecott's* case was joined in an earlier report on the proposed amendment. S. Rpt. No. 298, 105th Cong., 2d Sess. 7, 9 (1998) (majority); id. at 56–57 (minority). While the majority revised its views in other respects, it failed to strike or justify its bizarre reliance on *Endecott's* case.

The suggestion that our Founders viewed flag desecration as a heinous offense clearly worthy of severe penalties falls flat when we notice that the Constitution never mentions either the flag or flag desecration, and that neither the Founders nor any other Federal legislators saw fit to outlaw flag desecration until 1968.

c. Statutory protection for the flag

In its search for supportive "legal tradition," the majority (in Part III.C.3.b) leaps from 18th century foreign policy over a century to the adoption of the first flag protection legislation. As Professor Goldstein describes in his scholarly history of the flag protection movement, an extensive campaign engineered in the late 19th century by various veterans groups led to the adoption of flag desecration laws in every State, beginning in 1897. While the flag protection movement was successful in obtaining passage of the State flag protection laws, however, in early cases where those laws were challenged, they were overwhelmingly invalidated. See Goldstein, *Saving "Old Glory,"* ch. 1.

Curiously, the majority report cites these early statutes and the decisions invalidating them as evidence of a centuries-old tradition supporting flag protection. In fact, this history reveals that efforts to iconize and afford legal protection to the flag are quite recent, and that such efforts have always been controversial and often unsuccessful.

The majority report relies heavily on *Halter* v. *Nebraska,* 205 U.S. 34 (1907), in which the Supreme Court upheld a Nebraska statute forbidding the use of representations of the flag for purposes of advertisement. The citation is far off target. The defendants in *Halter,* who were convicted of using the flag as an advertisement on a bottle of beer, challenged the Nebraska statute on three grounds: (1) as infringing their personal liberty guaranteed by the Fourteenth Amendment; (2) as depriving them of privileges impliedly guaranteed by the Constitution to citizens of the United States; and (3) as unduly discriminating and partial in its character. Id. at 39. The defendants did not challenge the statute on free speech grounds, nor did the Court give any consideration to First Amendment issues. Indeed, *Halter* was decided nearly 20 years before the Supreme Court concluded that the First Amendment applied to the States by virtue of the Fourteenth Amendment (see *Gitlow* v. *New York,* 268 U.S. 652 (1925)), and nearly 70 years before the Court extended First Amendment protection to commercial speech, such as the beer advertisement at issue in *Halter* (see *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Counsel, Inc.,* 425 U.S. 748 (1976)).

Similarly inapposite is the majority's remark (in Part III.C.3.b) that the *Lochner*-era courts that struck down early State flag protection statutes "perceived no First Amendment problem with the statutes." Those courts did not consider the First Amendment implications of the statutes—nor could they have—since the First Amendment did not, at that time, apply against the States.

The majority report rounds out its historical survey by citing three State court cases, all decided shortly after the attack on Pearl Harbor, in which flag-related convictions were upheld. See Part III.C.3.b (citing *State* v. *Schleuter,* 23 A.2d 249 (N.J. 1941); *People*

v. *Picking,* 42 N.E.2d 741 (N.Y. 1942); *Johnson* v. *State,* 163 S.W.2d 153 (Ark. 1942)). In two of those cases, *Schleuter* and *Picking,* the courts did not deal with the constitutional validity of the criminal statutes, as no constitutional contentions were advanced.[13] Indeed, the New Jersey Supreme Court distinguished *Schleuter* on this very ground, when, 32 years later, it struck down New Jersey's flag protection statute as unconstitutional. See *State* v. *Zimmelman,* 301 A.2d 129, 284 (N.J. 1973).

The third case, *Johnson,* did not involve the physical desecration of a flag—indeed, the flag at issue was never even touched. The defendant in *Johnson* went to the local Welfare Commissary to procure commodities for himself, his wife, and his eight children. The head of the Commissary, who testified that he was "'sworn not to give to anyone who wasn't a loyal American citizen'" (163 S.W.2d at 155) asked the defendant to salute the flag. The defendant, who had religious objections to saluting the flag (id. at 154), refused. According to two witnesses, the defendant also exhibited contempt for the flag by saying that it meant nothing to him and was only a "rag". Based on this statement, which the defendant denied having made, the Arkansas Supreme Court affirmed the conviction. Id. at 154. The case provides no support for S.J. Res. 14, the purported purpose of which is to protect the physical integrity of the flag, while retaining full protections for oral and written speech.[14]

The majority also cites two Federal cases involving convictions under the Federal flag protection statute. In the first, involving an art dealer who sold "constructions" composed in part of U.S. flags, the conviction eventually was set aside by a district court applying established principles of Supreme Court First Amendment jurisprudence. See *United States* v. *Radich,* 385 F. Supp. 165 (S.D.N.Y. 1974). The second citation is to the Supreme Court's denial of certiorari in *Kime* v. *United States,* 459 U.S. 949 (1982), which is of no precedential value. See *Teague* v. *Lane,* 489 U.S. 288, 296 (1989) ("The 'variety of considerations [that] underlie denials of the writ,' counsels against according denials of certiorari any precedential value."; citation omitted).

Disregarded or discounted in the majority report are the many decisions that go the other way. During the Vietnam era in particular, numerous courts were called upon to determine the relationship between statutes prohibiting acts of flag desecration and the First Amendment's guarantee of freedom of speech. In case after case, courts overturned flag desecration convictions on a variety of First Amendment and other grounds, rejecting the alleged State interest in protecting the symbolic integrity of the flag. See Goldstein, *Saving "Old Glory,"* at 139–151.[15] By 1974, flag desecra-

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[13] *Picking,* like *Halter,* involved a commercial use of the flag—it was painted on the sides of an automobile under four loudspeakers and the words "Travel America"—and the commercial speech doctrine did not yet exist.

[14] *Johnson* was decided during the brief period between *Minersville Sch. Dist.* v. *Gobitis,* 310 U.S. 586 (1940)—in which the Supreme Court refused to enjoin enforcement of a compulsory flag salute law—and *West Virginia Bd. of Educ.* v. *Barnett,* 319 U.S. 624 (1943), which overruled *Gobitis* and enjoined such enforcement. These cases are discussed infra, in Part VIII.D.2.

[15] Professor Goldstein discusses, for example, *Long Island Vietnam Moratorium Comm.* v. *Cahn,* 437 F.2d 344 (2d Cir. 1970) (flag emblem with peace symbol superimposed), aff'd, 418 U.S. 907 (1974); *People* v. *Keough,* 31 N.Y.2d 281 (1972) (photograph of nude draped with flag); *People* v. *Vaughan,* 183 Colo. 40 (Colo. 1973) (flag patch worn on trousers).

tion laws had been struck down as unconstitutional in whole or part in eight States. See Goldstein, *Saving "Old Glory,"* at 148.

2. The Supreme Court protected unpopular speech connected to the Flag long before Johnson

Far more significant in the real legal tradition is the fact that, in the 75 years that it has applied the First Amendment to the States, the Supreme Court has never upheld a conviction for anything amounting to flag desecration. Contrary to the majority report's claim, the roots of the *Johnson* decision lie deep in American jurisprudence. As former Solicitor General Fried testified the year after *Johnson* was decided:

> The [*Johnson*] decision was not some aberration, some momentary quirk of the Justices. Generations of constitutional doctrine led naturally and directly to the Supreme Court's decision in that case. * * * If you want to unravel [our constitutional] jurisprudence so as to keep it from covering flag-burning you would have to unravel decades of doctrine, scores of cases.

(Hearing of June 21, 1990, at 111–112).

The Supreme Court squarely held as early as 1931 that laws forbidding the display of certain flags (here, the red flag) violated the First Amendment. *Stromberg* v. *California,* 283 U.S. 359 (1931). The *Stromberg* decision made clear, as have many other decisions, that the First Amendment protects expressive conduct (waving a flag) as well as written or spoken speech.

Although the Court briefly allowed the expulsion from American classrooms of young children who, as Jehovah's Witnesses, were forbidden by their faith from pledging allegiance to the flag, *Minersville Sch. Dist.* v. *Gobitis,* 310 U.S. 586 (1940), the Court quickly reconsidered and removed the stain that Gobitis had placed on the First Amendment with its decision in *West Virginia Bd. of Educ.* v. *Barnett,* 319 U.S. 624 (1943).[16] There, Justice Jackson wrote:

> The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own. Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization.

Id. at 641. The *Barnett* decision, like *Stromberg,* assured protection for expressive conduct (remaining seated during class flag salute) as well as written or spoken speech.

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[16] The aftermath of the decision in *Gobitis* offers a sober warning to those who think government restrictions on unpopular speech strengthen the social fabric and "unify" the country:

> [The *Gobitis*] ruling, along with American entry into the war in December 1941, helped to foster a new wave of expulsions of child [Jehovah's] Witnesses [from public schools] and a large and often extremely violent eruption of harassment, beatings, and arrests of adult Witnesses. The American Civil Liberties Union reported that, between May and October 1940, almost 1,500 Witnesses were the victims of mob violence in 355 communities in 44 states, and that no religious organization had suffered such persecution "since the days of the Mormons.
>
> (Goldstein, *Saving "Old Glory,"* at 94.)

Following the decision in *Barnett,* the Supreme Court consistently overturned convictions under flag desecration statutes in *Street* v. *New York,* 394 U.S. 576 (1969) (flag burned to protest shooting of James Meredith), *Spence* v. *Washington,* 408 U.S. 404 (1974) (peace symbol taped to flag), and *Smith* v. *Goguen,* 415 U.S. 566 (1974) (flag patch on pants seat).[17] Certainly, each of these convictions was overturned with appropriate distaste for the conduct at issue, and the decisions were narrowly framed. Nonetheless, by the time *Johnson* was decided, the direction of the law was plain.

The proposed amendment would overturn *Johnson* and its successor case, *United States* v. *Eichman,* but its effect on First Amendment jurisprudence would not end there. If effectively implemented, S.J. Res. 14 also would overturn *Street* v. *New York, Smith* v. *Goguen and Spence* v. *Washington,* each of which involved a physical act that could fall within a statutory definition of desecration. The amendment thus would overturn decades of consistent interpretation of the First Amendment, and certainly would cast a shadow over other flag-related decisions, such as *Barnett.* It would also, according to the majority report (in Part III.E.3), "supersede * * * to the extent necessary, *R.A.V.* [v. *City of St. Paul,* 505 U.S. 377 (1992)]," in which the Supreme Court, in an opinion by Justice Scalia, reaffirmed the principle, fundamental to the First Amendment, that content-based regulations are presumptively invalid. See infra Part VIII.E.4. Indeed, the amendment could work great mischief in areas far removed from flags and *R.A.V.*; there is the risk that it could be seized on as a basis for treating mere offensiveness as an interest that may justify government censorship.

In sum, by excepting certain unpopular speech from First Amendment protection, S.J. Res. 14 would have severe implications for free speech jurisprudence in general.

E. THE PROPOSED AMENDMENT IS VAGUE AND ITS EFFECT ON CIVIL LIBERTIES UNCERTAIN

1. There Is No Consensus or Clarity on the Definition of "Flag"

The proponents of S.J. Res. 14 have failed to offer a clear statement of just what conduct they propose to prohibit, or to advise the American people of the actions for which they may be imprisoned. Instead, they have asked that we trust to the wisdom of future Congresses[18] and the courts.[19] The American people deserve more from their Congress, this Congress, before they alter the Constitution of the United States.

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[17] The majority erroneously asserts (in Part III.D) that the Court in *Smith* "pointed to the Federal flag protection statute . . . as an example of a constitutional flag protection statute." In fact, the Court simply noted that the Federal statute "reflects a congressional purpose" to define with specificity what constitutes forbidden treatment of United States flags, in order to avoid invalidation on grounds of vagueness. 415 U.S. at 581–582 & n.30.

[18] Unlike earlier proposals for a constitutional amendment prohibiting flag desecration, S.J. Res. 14 may be implemented by Congress only, not by the States. The majority report mentions this major language change in a footnote (in Part III.E.3), but does not bother either to explain or to justify it.

[19] Three times the majority report assures us (in Parts III.E.3 and III.E.4) that "[e]xperience justifies confidence" in our courts, to distinguish between legitimate and illegitimate forms of flag-related expression, and to interpret the terms of a constitutional amendment. We are delighted with the majority's expression of confidence in our courts, even if made only to avoid accountability and deflect charges of vagueness.

Far from offering any consensus, the proponents of this amendment have displayed a striking range of disagreement over what they intend to stop. Senator Feinstein attempted a clear and careful definition of a flag to include only the "official" flag itself:

> I know people have made undergarments out of flags. They have made neckties out of flags. But once that pattern is in the form of a flag and able to hang as a representation of our nation, I really think it takes on a whole different connotation. * * * [T]he flag is so precise that if one were to change the colors, the orientation of the stripes or the location of the field of stars, it would actually no longer be an American flag.

(Transcript of Comm. Markup, June 24, 1998, at 16–17.)

The definition of Senator Feinstein would leave unrestricted a wide range of activities that involved burning, or worse, of "substitute" flags, items with 51 stars, with 12 or 14 stripes, or with a purple field, even under circumstances clearly intended to communicate the most bitter disrespect for this nation and for its flag.

Even this definition leaves essential questions unanswered, and the issue of what would make a flag "official" still would force Americans to act at their peril. Must the flag be of cloth? Must it be of a certain size, or would it include child's-size flags such as are used at many patriotic outings? What flags are "able to hang as a representation of our nation"?

The majority report (in Part III.E.3) equivocates on this issue, passing the buck to future Congresses and to the courts, while noting one proponent's suggestion that Congress could simply adopt the definition contained in the Flag Protection Act of 1989. Meanwhile, the 1997 House Report on a proposed flag amendment identical to S.J. Res. 14 offered a definition directly contrary to Senator Feinstein's interpretation:

> [A] "flag" could be anything that a reasonable person would perceive to be a flag of the United States even if it were not precisely identical to the flag as defined by statute. This would allow states and the Congress to prevent a situation whereby a representation of a United States flag with forty-nine stars or twelve red and white stripes was burned in order to circumvent the statutory prohibition.

(H. Rep. 121, 105th Cong., 1st Sess. (1997), at 8–9.)

Expansive definitions of the flag have been used regularly in statutes that have prohibited flag burning. The Wisconsin statute, for example, defined "flag" as "anything which is or purports to be the Stars and Stripes, the United States shield, the United States coat of arms, * * * or a copy, picture, or representation of any of them." Wis. Stat. § 946.05(2). The Uniform Flag Law defined "flag" to include "any flag, standard, color, ensign or shield, or copy, picture or representation thereof, made of any substance or represented or produced thereon, and of any size, evidently purporting to be such flag * * * of the United States * * * or a copy, picture or representation thereof." The 1968 Federal Flag Desecration Law provided:

> The term "flag of the United States" * * * shall include any flag, standard, colors, ensign, or any picture 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, standard, colors, or ensign of the United States of America.

The proposed amendment could empower Congress to prohibit "desecration" of any of these; and, indeed, a protester certainly could offend the sensibilities of all of us by an act of desecration of any of these. [20]

Senator Feingold told the Committee about his own recent experience at a Capitol Hill restaurant, where the menu is a very large representation of the American flag. He was eating his dinner, when a big commotion erupted on the other side of the restaurant:

> We turned to see a woman frantically trying to put out a fire that had started when her oversized American flag menu had gotten too close to the small candle on the table. It caught on fire. * * * This thing looks exactly like an American flag, in size, in color, representation. I hope she wasn't arguing about Kosovo because somebody might want somebody to look at it.

(Transcript of Comm. Markup, April 29, 1999, at 25).

Are we to amend the Constitution and punish people who burn pictures of the flag? If a protestor, chanting the words that Gregory Lee Johnson spoke, "Red white and blue, we spit on you," burned not a flag but an image of a flag, would anyone fail to be offended?

The majority report expresses shock at the idea that Congress might be less than wise in formulating any definition of the flag. But the wide disagreement among the proponents of S.J. Res. 14 shows the compelling need for a clear statement to the American people as to what conduct they intend to criminalize, if they in fact can create such a definition at all.

2. There is no consensus or clarity on the definition of "desecration"

Just as there is no clear definition of "flag", the definition of "desecration" will invite a literally infinite catalogue of possible disputes. The Uniform Flag Law, while separately banning "mutilation" of the flag, defined "desecration" to include:

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[20] On the other hand, courts could interpret the amendment narrowly, permitting Congress to prohibit physical desecration only of "the flag of the United States," as defined by statute and Executive Order, and not of items intended to be perceived as such. In that case, the purpose and effectiveness of the amendment could be evaded by persons who burned a flag that varied slightly from the official design of the U.S. flag or who, upon being charged with flag burning, simply claimed that this is what they had done. The ability to raise the factual defense that it was not the U.S. flag that was burned but simply a piece of cloth that was meant to look like the flag would mean that successful prosecutions would depend, as now, on the applicability of other laws, including laws against theft, vandalism and public disturbance.

(a) Place or cause to be placed any word, figure, mark, picture, design, drawing or advertisement of any nature upon any flag * * *;

(b) Expose to public view any such flag * * * upon which shall have been printed, painted or otherwise produced, or to which shall have been attached * * * any word, figure, mark, picture, design, drawing or advertisement; or

(c) Expose to public view for sale, * * * or sell, give or have in possession for sale * * * an article of merchandise * * * upon which shall have been produced or attached any such flag * * * in order to advertise, call attention to, decorate, mark or distinguish such article or substance.

We presume that the majority does not consider the Uniform Flag Law to be "silly" or an unreasonable guide. Each of its prohibited behaviors involves a physical act of desecration, and Congress likely could adopt such a statute under the proposed constitutional amendment. The scope of such a ban would affect significantly not only speech, but also American commerce and life. The cover of the Washington Post's Home section of July 2, 1998, included a photograph of picnic equipment with a flag motif—disposable "flags," within the meaning of most statutes, and certain, indeed designed, to be soiled with food and thrown into the trash—in other words to be desecrated. Are we to amend the Constitution to prohibit such picnic trivia?

Noted television actor John Schneider, who testified in 1998 for the majority, observed that if someone did "purposeful" harm to a flag lapel pin, "they have desecrated the flag and that [should be] a punishable offense just as if they had harmed any other United States Flag intentionally." (Hearing of July 8, 1998, at 147.)

Mr. Schneider captured the difficulty of defining the essential terms of the proposed amendment when, having included lapel pins in his definition of a flag, he recommended against allowing representations of the flag on tissues or underwear, but for allowing shirts or jackets representing the flag. "These are just clothing and not really the "Flag." I'm not certain why this is true but it falls under the category of being right because it is." (Id.)

Another proponent of the amendment, Professor Richard Parker, considered this view to be "wacky," and would not prohibit even the display of a photograph of the flag indelicately touching a nude male, which has been prosecuted in this country. (Id. at 149.)

Vietnam veteran Stan Tiner observed that the worst crimes against the flag are committed by "well-intentioned or perhaps simply thoughtless persons" who, for example, place hundreds of small flags around a city to honor America and the leave them to the wind and weather. (Hearing of March 25, 1998, at 48).

The fact is that the proposed amendment is not in the least limited to flag burning. It prohibits "desecration," and the core idea of desecration will persist in any implementing statute: the diversion of a sacred object to a secular use. People wrap flags around themselves or around manikins and the like in political marches. It is a step from there to wearing a flag like a shawl. People pin flags up in storefront displays. People use flags in what they consider to be artistic presentations, make paintings of flags and use flag images. A venerable African American quilt maker uses bits of flags

in her work. Flags are used in movies and plays in all kinds of dramatic ways. Any of these uses may have political or cultural overtones that offend someone. All of them are nonconforming, nonceremonial uses of flags.

Testifying before the Committee in opposition to S.J. Res. 14, Senator John Chafee gave two examples of the amendment's hidden pitfalls:

> In my State of Rhode Island, there is a highly-prized work of art at the Rhode Island School of Design. It is a hooked rug, carefully and conscientiously made by patriotic American women some 100 plus years ago, and its design is the American flag. These women made it as a symbol of their national pride; yet it is a rug—which by definition is to be walked on! Is that "desecration?" Should those patriotic craftswomen have gone to jail?
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> The handbook of the Boy Scouts of America, of which more than 34 million copies have been printed since 1910, instructs young boys to "Clean the flag if it becomes soiled. Mend it if it is torn. When worn beyond repair, destroy it in a dignified way, preferably by burning." With the passage of this proposal, would we put thousands of patriotic young Scouts in jail?

(Written statement of Senator John Chafee, April 28, 1999.)

The most powerful example of the vagueness and mischief of this amendment came last year from Senator Durbin, who noted that many people would consider it desecration to sit on a flag. Certainly, each of us can imagine circumstances in which such conduct would be an outrage. Senator Durbin then pointed out that in one of our greatest and most moving monuments to freedom, the Lincoln Memorial, Abraham Lincoln sits—on the American flag. (Transcript of Comm. Markup, June 24, 1998, at 24.)

3. Use of the word "desecration" in S.J. Res. 14 undermines the first amendment religion clauses

Increasing numbers of religious leaders and people of faith are expressing real concern with the proposed constitutional amendment. Reverend Nathan Wilson, head of the West Virginia Council of Churches, stated the problem quite plainly when he testified before the Committee: "Desecration of an object is possible only if the object is recognized as sacred." (Written statement of Rev. Nathan Wilson, April 20, 1999.) In our constitutional system, the government should not be in the business of defining for its people what is sacred.

This is not simply a matter of semantics. It goes right to the heart of the significance of the government, under force of this amendment, giving an exalted status to an object, even an object as important and worthy of respect as the American flag. As over 140 religious leaders wrote to the Committee, in a letter dated April 29, 1999:

> Although we represent diverse faiths, it is unique to religious traditions to teach what is sacred and what is not. No government should arrogate to itself the right to declare "holy" and capable of "desecration" that which is not

> associated with the divine. To do so is to mandate idolatry for people of faith by government fiat. Our First Amendment has guaranteed to people of faith or to those with no faith that the government would not be arbiter of the sacred.

In light of this criticism, the flag amendment threatens not only our freedom of political expression but also our freedom of religious expression. In this country, our private religious institutions, not the government, determine what is sacred. That principle underlies both the Establishment and the Free Exercise Clauses of the First Amendment. This amendment gives a sacred status to the flag. As much as we love the flag, that is not a power that our government was granted by the framers of the Constitution, nor should it ever have that power.

Professor Cass Sunstein underlined this point in his testimony before the Committee in 1995:

> [The word "desecration"] intermingles the flag with the divine—an intermingling that is in serious tension with the existing constitutional structure, in particular with the religion clauses. Under our system, the state is not identified with a religion. Under our system, there is no such thing as blasphemy law. At least for purposes of federal law, the nation is not "sacred." "Desecration" is therefore an inappropriate word to apply to destruction of the flag.

(Proposing a Constitutional Amendment Authorizing the States and Congress to Prohibit the Physical Desecration of the Flag: Hearing Before the Subcomm. on the Constitution, Federalism, and Property Rights of the Senate Comm. on the Judiciary, 104th Cong., 1st Sess. (June 6, 1996), at 70.)

Another constitutional scholar, Professor Robert Cole, echoed this concern in a letter to the Committee dated April 28, 1999:

> It is no accident that the proposed amendment prohibits "desecration," the core meaning of which is to convert a sacred object to a secular use. But flags are secular objects; they are political emblems to be loved if one chooses but not to be sanctified. It is a dangerous confusion of the political with the sacred to think in terms of sanctifying our national flags, or even subconsciously to do so.

Professor Cole concluded, "For the sake of religious faith at least as much as for the neutrality of government, the sacred must be reserved for things having to do with the divine."

4. There is no consensus or clarity on the issue of content-neutrality

The Supreme Court has frequently condemned discrimination among different users of the same medium for expression. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of Chicago* v. *Mosley,* 408 U.S. 92, 95 (1972).

Proponents of S.J. Res. 14 have demonstrated an alarming ambivalence whether it would permit Congress to restrict flag-related expression on the basis of its content. This year's majority report

insists (in Part III.E.4) that the proposed amendment "is not intended to—and would not—discriminate against specific messages or points of view." A few pages earlier, however, the majority report states that S.J. Res. 14 would "supersede * * * to the extent necessary" the Supreme Court's 1992 decision in *R.A.V.* v. *City of St. Paul,* which held that even when the First Amendment permits regulation of an entire category of speech or expressive conduct, it does not necessarily permit the government to regulate a subcategory of the otherwise proscribable speech on the basis of its message. Moreover, the majority report in the 105th Congress on exactly the same proposed amendment included a full section entitled "A 'Content Neutral' Constitutional Amendment is Wholly Inappropriate," specifically attacking the notion, central to the First Amendment and fundamental to a free people, that the government should maintain neutrality as to the content or message of political speech. (See S. Rpt. No. 298, 105th Cong., 2d Sess. (1998), at 39–42.)

Senator Leahy asked the majority's principal academic witness, Professor Richard Parker, whether Congress could pass legislation under S.J. Res. 14 that outlawed only those flag burnings intended as a protest against incumbent officeholders. Professor Parker replied, "There is a clear answer there. That would be a violation of the First Amendment." (Hearing of April 20, 1999, at 88). This result obtains, however, if and only if the proposed amendment is understood to confer powers that are limited by the *R.A.V.* principle. This, apparently, is Professor Parker's understanding; he wrote to the Committee on April 27, 1999, in response to a follow-up question by Senator Feingold, that "the *R.A.V.* rule would not be affected in the slightest by ratification of the amendment." But if S.J. Res. 14 "supersedes" *R.A.V.*, as the majority report says, then the proponents' answer to Senator Leahy's question appears to be quite the opposite.

Senator John Chafee discussed the dangers of content-based restrictions in his statement to the Committee. He asked whether the amendment's proponents intended "that when some bearded, untidy protestor burns an American flag outside a convention hall, he should go to jail—but three blocks away, a Boy Scout burns the flag in a dignified manner, he will go free?" If so, he said, then we are getting into "a messy area indeed." (Written statement of Senator John Chafee, April 18, 1999).

We share Senator Chafee's concern that in real life, the amendment and its implementing statute would be enforced on the basis of content. Police and prosecutors would inevitably select for punishment those flag desecrators whom they, or their constituents, found insufficiently reverent, patriotic, or conformist. Other, more respectable desecrators would likely be overlooked—if they were not already frightened into silence.

That is, content-neutral legislation prohibiting flag desecration would work an additional kind of mischief. Such legislation—if it survived vagueness and overbreadth challenges (assuming such challenges could be brought)[21]—would inevitably inhibit, silence, or

[21] Acting Assistant Attorney General Randolf Moss, who testified for the Administration against S.J. Res. 14, noted the "profound difficult[y]" of identifying just how much constitutional doctrine the amendment would supersede. (Written statement of Randolf Moss, April 28, 1999.)

punish a great range of expressive behavior, much of which most people consider innocent or acceptable. In short, the amendment would create havoc for free expression for the purpose of solving no real problem.

5. The difficulties that attend a statutory approach to flag burning would remain even after a constitutional amendment

Proponents of S.J. Res. 14 argue, unconvincingly, that no statutory alternative is available to address the issue of flag burning. As noted above (in Part III.D.2), one statutory alternative has already been proposed in this Congress. Beyond that, however, the same problems that complicate the drafting of such a statute, and specifically of affording Americans the specificity demanded by the Due Process Clause of the Fifth Amendment, also attend the proposed amendment.

As the Supreme Court wrote in *Smith* v. *Goguen,* 415 U.S. 566, 572–573 (1974), discussed in the majority report (in Part III.D), the due process doctrine of vagueness incorporates notions of fair notice or warning:

> [I]t requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent "arbitrary and discriminatory enforcement." Where a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts.

Where vague statutory language permits selective law enforcement, there is a denial of due process.

A statute enforcing this amendment either would be found unconstitutional for vagueness or else, as demonstrated above, silence or capture as criminals hundreds of well-meaning American citizens and businesses whose patriotism is beyond question. The majority report indirectly acknowledges as much (in Part III.E.3) by blithely claiming that its language is just as clear as "such terms as 'unreasonable searches and seizures;' 'probable cause;' 'speedy * * * trial;' 'excessive bail;' 'excessive fines;' 'cruel and unusual punishment;' 'due process of law;' [and] 'just compensation.'" Of course, these terms have required and continue to require literally thousands and thousands of cases for their interpretation. But more important, we tolerate and even embrace their generality because in each and every case the terms protect our liberty and limit the ability of government to search, seize, hold and punish American citizens; the question always is whether they extend additional protection to us. An open-ended criminal statute is another matter entirely; there is no suggestion that it would enlarge our freedoms. The question, rather, would be whether we dare to speak in pursuance of our rights. Vagueness is intolerable where it frightens people into silence and empowers government to search, seize, hold and punish American citizens.

We do not know, for instance, whether the amendment is intended, or would be interpreted, to authorize enactments that otherwise would violate the due process "void for vagueness" doctrine, or the First Amendment "overbreadth" doctrine.

The impulse to punish ideas which permeates the majority report leads only to endless entanglement. Even with the large increase in the number of flag burnings that could be expected if this amendment were adopted, and even without the inventiveness in mistreatment of the flag and near-flags that could be predicted, there would be no end to the litigation under any statute. The amendment, the ensuing litigation, and the inevitable erratic pattern of results, would demean rather than protect the flag.

Do we really want to open a constitutional can of worms, and invite a parade of hairsplitting court cases over whether burning a picture of the flag or putting the flag on the uniforms of our Olympic team or stepping on a lapel pin amounts to desecration? The biggest threat to the dignity of the flag may be such efforts to construct an impermeable legal barrier to protect it.

F. CONCLUSION

There is no need to amend the Constitution. The flag has a secure place in our hearts. The occasional insult to the flag does nothing to diminish our respect for it; rather, it only reminds of our love for the flag, for our country, and our freedom to speak, think and worship as we please. The laws against everyday hooliganism allow ample scope for States to jail those who need to be jailed regardless of their message or cause, but the punishment meted out by the law is nothing compared to the condemnation and ostracization by their fellow citizens that flag burners face.

Even more precious than the flag, however, are the freedoms that it represents. Our soldiers fought not for a flag but for freedom, freedom for Americans and for others across the globe. It would be the cruelest irony if, in a misguided effort to honor the symbol of that freedom, we were to undermine the most precious of our freedoms, the freedoms of the First Amendment.

This amendment is a wrong-headed response to a crisis that does not exist. It would be an unprecedented limitation on the freedom Americans enjoy under the First Amendment, and would do nothing to bolster respect for the flag. Respect for the flag flows from the freedoms we enjoy and from the sacrifices of those who have protected and spread that freedom. Freedom is what we should cherish. Freedom is what we should protect.

We respectfully urge that S.J. Res. 14 not be approved by the Senate.

PATRICK LEAHY.
TED KENNEDY.
HERB KOHL.
RUSS FEINGOLD.
ROBERT G. TORRICELLI.

IX. CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, the Committee finds no changes in existing law caused by passage of Senate Joint Resolution 14.

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