

## Flag Debate Swings Toward Protective Amendment

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We are now on the verge of a third—and, in all probability, final—stage in the debate about a constitutional amendment restoring the power of Congress to protect the American flag.

To a casual observer, there may seem to have been little progress in the debate over a decade. That is not true. On the contrary, in each of its first two stages, crucial ground has been won for the amendment—ground defined in terms of the issues on which argument is focused. That isn't to say that issues, once resolved, are never revived. But in a debate like this one, periodic revivals of old arguments are little more than quick, nostalgic visits to past battlefields. The real focus of debate has moved on. And, at each stage, it has moved on to issues where, as proponents of a flag amendment, we are in a stronger position.

In the first stage (1989-1990) the key question was whether a constitutional amendment was necessary to correct the mistaken 5-4, court decision invalidating a flag protection law. Opponents insisted that a new statute would do the job. It was hard to counter these smug assurances. So, Congress rejected an amendment, and it enacted a statute. Within months, the same 5-4 Court majority struck it down. The opponents of an amendment were proved wrong. We were proved to have been right. The focus of debate moved on.

In the second stage (1994-1998) it moved to issues having to do with likely effects of amending the constitution. Initially, opponents opened fire with gusto. With scare rhetoric, they insisted that an amendment would lead to tyranny. With haughty disdain, they insisted it would lead to all kinds of absurdities. But, systematically, the wild exaggerations and silly trivializations were exposed. Even the opponents seemed to become embarrassed by these frivolous arguments. By 1998, the original gusto was gone. The focus of debate has moved on again.

Now, the focus is on our issue: Should Congress be authorized, once again, to protect the flag? The opponents—most of whom claimed to support flag protection in 1989-1990—now are reduced to claiming that there is no need for it after all. The American people, they say, honor the flag and are patriotic, so who cares about flag burnings! “There’s no problem,” they now insist. The weakness of their position, and the strength of ours, is due not only to their self-contradiction. For there is now an opening, at long last, for us to set the terms of the debate.

Our terms of debate involve three mutually-reinforcing principles: concern for future generations, moderation and democracy. These are principles that win debates in America.

They are the high ground on which we stand.

*Concern for Future Generations* Yes, most Americans are still patriotic. Yes, most still respect the flag. That’s why 80 percent of the American people support a constitutional amendment. But who can deny that a cultural change has long begun? We who have lived through a good part of

the last half-century recall an aspiration and a commitment to national community that is now absent.

Think of this: If the president elected in 2000 were to urge us to “ask what you can do for your country,” would the response be anything like the response to President Kennedy just forty years ago? Of course, those with no memory—especially children—can have no such sense of loss and, so, no such sense of what might be. For that reason, it is a duty owed by adults to children to try to preserve or restore what we have known to be valuable—not just national parks but national ideals as well.

We needn't use scare rhetoric. We needn't claim a constitutional amendment can cure all ills. (Nothing can.) We need simply point out that the 5-4 court decision forbidding flag protection had a discrete but destructive effect on something we know to be valuable. For it not only permitted but also protected — and thus legitimated—desecration of the symbol of our traditional aspiration to national community. And it is one agent of destruction that—unlike the more diffuse pollutants of our cultural and natural environment—can be undone, relatively directly and relatively easily. The Constitution's framers gave us the tool to undo it. It is called a constitutional amendment.

Our opponents may refuse to take the long view. They may refuse to look backward or forward in time to measure what we have lost, what we may yet lose and what we might still restore. They may be content to passively resign themselves to present gratification and a supposedly inexorable fate. We, however, won't be blinded or passive. We will act like adults. We care about—indeed, we recognize an obligation to—our children and our children's children.

*Moderation* The amendment we propose is moderate. It restores the traditional meaning of the Bill of Rights. It simply returns to Congress the authority to make law, should majorities in both houses (subject to presidential veto) choose to do so. The kind of law it allows Congress to make is also limited. Other than physical desecration of an American flag, words and acts—conveying any message whatever—are entirely beyond its reach. The purpose of any such law would simply be to encourage a moderation of expressive behavior, at the margin.

By contrast, the 5-4 court decision and its champions are extremists. They say: Who cares about two centuries of tradition? Why should Congress ever care about protecting the flag from anything? If someone has a flag and wants attention, let him rip it, burn it, urinate on it, defecate on it, do whatever he wants to it. “Who cares?” That is the very essence of extremism.

*Democracy* In a democracy, when enough people do care about something, they are entitled (at least presumptively) to do something about it. That is the idea of our Constitution and, especially, of its democratic heart— Article V which establishes the popular process of amendment.

When our opponents cry out against “amending the First Amendment,” they give the game away. For it was the 5-4 court decision that “amended” the First Amendment. It is our aim to restore its traditional meaning.

And, in the bargain, it is our purpose to teach our opponents a lesson: That in our constitutional democracy, it is not judges and lawyers who are sovereign. It is—and if we are not to forget it, we must periodically enact it—“We, the People.”