

Three Easy (Empty) Excuses

By Richard Parker
Williams Professor of Law, Harvard Law

Once again, a large majority of the U.S. Senate is committed to send the Flag Amendment to the states for an up-or-down vote by representatives of the people. Once again, this majority may be just shy of the required two-thirds. And, once again, a few “swing” senators are coming up with old excuses for stifling a uniquely democratic process of constitutional lawmaking.

These senators say they agree with most Americans: Congress should be allowed, as in the past, to protect the flag from physical desecration. They do not claim it would somehow erode free speech to do so. But, here is where the excuses begin.

First, they insist there’s another way. A flag protection statute, they say, would be better than a constitutional amendment. This misses the point. The point of the constitutional amendment is precisely to permit the enactment of a statute. A senator who supports a statute must support the amendment. There is no way around it.

The reason is that a bare (5-4) majority of the Supreme Court, sixteen years ago, held that specific statutory protection of the flag is impermissible. The five justices said that physical desecration is “speech” and that singling out the American flag for protection amounts, in itself, to favoring one point of view over other competing points of view. Under this reasoning, not just one statute, but any flag protection statute will be invalid.

The “swing” senators claim to disagree with the Court, but they are reluctant to back up their disagreement with their vote. Instead, they want to imagine the Court never did and said what it did and said.

When pressed on this point, some move on to a second excuse for blocking the amendment. The Court, they imagine, will soon change its mind. This is a fantasy.

Several Justices have joined the Court since it last faced the flag protection issue. Of them, Souter, Ginsberg and Breyer would surely stick with the Court’s previous decision. Along with Scalia and Kennedy, who were in the majority fifteen years ago, that makes a continued majority of five. If Thomas were to agree with Scalia as he often does, that would make six. Chief Justice Rehnquist and Justice O’Connor, the most recent ones to leave the Court, along with Stevens were all in dissent on the issue. Their replacement with pro-flag protection successors would make no difference.

Again, there is no alternative. The “swing” senators either must accede to the Court’s continued ban on any statute specifically protecting the flag or, acting on their professed support for flag protection, they must allow the fifty states to vote on the proposed amendment, thus permitting correction of what they say is the Court’s mistake.

Now we come to their third excuse. They may grant that there is, in truth, no way to protect the

flag from physical desecration without a constitutional amendment. But they worry that any alteration of the Constitution is a wrong greater than any wrong it would correct. It is more important, they say, to protect the Constitution than to protect the flag. This, however, poses a false choice. In fact, it turns things upside down.

For one thing, it confuses the Constitution with a controversial “interpretation” of it by the Court. The Flag Amendment would not alter the meaning of the Constitution. It was a handful of Justices who did that. What the amendment would do is restore to the Constitution the meaning it had sixteen years ago, its original meaning. By permitting protection of the flag, the amendment at the same time protects and preserves the Constitution.

For another thing, the process of amendment does not undercut the Constitution. To the contrary, it is prescribed by the Constitution. What is more, the amendment process is essential to the Constitution’s deepest foundation – the principle of popular sovereignty affirmed in its first words: “We the people.” Making use of this process reaffirms, and thus preserves, that foundation.

Of course, an amendment ought not be undertaken lightly. It ought to have sustained, very substantial popular backing before being sent to the states. Not many could pass that test. But the Flag Amendment does. For a decade and a half, the overwhelming bulk of the American people have supported it.

The “swing” senators say they, too, support flag protection. Now, the time has come to see if they really do.