

The Flag Protection Amendment and the Return to First Principles

A new millennium is an appropriate time for thinking about the first principles of American society, and such an effort is now underway, involving all three branches of the United States Government. We are in the midst of the Presidential primary season, and voter turnout is reaching record-breaking levels, as Republican and Democratic Presidential candidates vie over the future course of the nation and its leadership.

The Supreme Court, this spring, will issue the most important series of decisions involving the allocation of power between the state and federal governments that we have seen in decades. And, late in March, the United States Senate will once again address the question whether the American people ought to be permitted to protect their flag.

The importance of who is elected to be Commander in Chief of the most powerful nation left on the earth is obvious, and so are the questions involving abortion, violence against women, and school choice, which the judiciary must soon determine. The Flag Protection Amendment, "Congress shall have the power to prohibit the physical desecration of the Flag of the United States," may not, at first glance, seem to be of equal moment to the issues that must soon be resolved regarding the executive and judicial branches, but it is. The struggle over this Constitutional Amendment, which is now eleven years old, is nothing less than a battle for the soul of the nation.

The Flag Protection Amendment is a restorative measure, designed to correct an error of the United States Supreme Court, and to return the Constitution to where it was for two hundred years before the Court misread it in *Texas v. Johnson* in 1989. That case was the first time in our history that a majority (and a razor-thin majority at that) held that flag "desecration" was "speech" protected by the First Amendment. The Court was wrong in that pronouncement - Chief Justice Earl Warren, Justice Hugo Black, and the four dissenters in *Texas v. Johnson* all could see a profound difference between the kind of utterances the First Amendment was designed to protect and what Justice Rehnquist called the "inarticulate grunt" that is flag desecration.

The significance of this issue to the American people is clear from the fact that forty-nine state legislatures have asked Congress to pass the Flag Protection Amendment. This has never before happened in American History. Public opinion polls indicate that 80% of the American people support the Amendment. The Amendment has twice passed the House of Representatives by the required 2/3 majority, though, so far, it has foundered in the Senate. The critics of the Amendment (and they include most pundits, most academics, and several senators) argue that it is an ill-conceived attempt to legislate respect for the national symbol, and that it is unnecessary, because attempts to desecrate the flag are few and far between. Both arguments miss the mark, and betray a fundamental misunderstanding of the real first principles of the Constitution.

The effort to pass the Flag Protection Amendment is not about legislating respect, it is about restoring to the American people a cherished right their Supreme Court wrongly took from them

- the right to take steps to protect their most treasured national symbol. According to the records kept by the Citizens Flag Alliance, the grass-roots civic organization leading the movement to secure the Amendment's passage, there have been literally hundreds of acts of flag desecration since 1989. If numbers were the test it would be met here, but the number of flag desecration's is not, actually, what is most important.

What is most important is the belief of the vast majority of the American people that responsibilities are as important as rights, and that the Flag Protection Amendment makes an important statement of that belief. In an era when school shootings seem to be becoming more frequent, when the morals of our leaders seem more deficient than they ever have been, when the restraint and decorum that used to characterize our public square have all but vanished, the notion of holding at least something sacred in our national life has great value. Many Americans are still moved to tears by the sight of our flag, and many who have lost loved ones in times of war and strife feel appropriately that attacks on the flag are attacks on what they have sacrificed and what has made our nation great. To them this Amendment is no trivial effort, it is an expression of what's best about America. They feel a great need to make this statement. They feel their flag is entitled to legal protection, as it had been until the Supreme Court, with an ill-advised stroke, struck it away.

The vote in the Senate will be a close one, because the critics of the Amendment have convinced many Senators that this is a "free speech" issue and the idea of "desecration" is too vague. But "desecration" is not a new term, and Constitutional Amendments, which ought to be simple and powerful and elegant in their expression do not normally contain extensive definitions. Moreover, "desecration" has had a fixed meaning for centuries. It means, as Black's Law Dictionary succinctly puts it in its definition of "desecrate," "defacing, damaging, polluting or otherwise physically mistreating in a way that the actor knows will outrage the sensibilities of persons likely to observe or discover his action."

Desecration, it might be said, is the intentional infliction of mental distress on others. It is not speech, it is not the communication of an idea - it is an attempt wrongfully to hurt one's fellow citizens. Intentional infliction of mental distress is now routinely punished by the law of torts, and desecration of the flag has traditionally been punished by the criminal law. Eleven years ago, five justices of the United States Supreme Court made a mistake about a first principle of American government, and about the rights of the American people to protect their flag. That flag still shines as a beacon of liberty to the world, and will fly with our troops as they are deployed on peacekeeping missions or in the defense of free government in the new millennium. As we pursue what our Constitution's framers' believed was the constant need to reaffirm our basic rights and responsibilities the Senate has a unique opportunity to confirm what's best in the American character. We are enjoying an era of unparalleled American prosperity, but the framers, and most Americans, understand that mere material prosperity is not sufficient for a great nation. America, and American liberty, was conceived at a time when virtue, integrity, self-sacrifice, and honor were sacred. That's what the Flag Protection Amendment is all about, and that's why it belongs in the Constitution.

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