

Why the United States Congress Has a Duty to Pass the Flag Amendment

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May 2006 - Each member of Congress, when he or she begins to serve, takes an oath to support the U.S. Constitution, as required by Article VI of that fundamental document. That oath ought properly to be regarded as an obligation to recapture the Constitution through the passage of constitutional amendments when the U.S. Supreme Court misconstrues it. Constitutional amendments have been rather rare in our history (only 27 so far in a little more than 200 years), but at least three of those have been passed in order to correct Supreme Court decisions regarded as erroneous. The most notorious of those decisions overruled by a constitutional amendment was the Dred Scott decision of 1857, which declared that black men and women should not be regarded as citizens of the United States, a decision that had much to do with plunging the nation into Civil War. It was corrected by the 14th Amendment, one of the most important provisions in the entire Constitution. The two other amendments that reversed Supreme Court decisions forbade some lawsuits against state governments (the 11th) and permitted a progressive income tax (the 16th). Depending on one's point of view, just as the 14th Amendment did much to further American popular sovereignty, freedom and equality, so did the others reinforce the basic idea of the Constitution – Lincoln's notion that ours is a government of, by and for the people.

This summer, Congress will have one more opportunity to further popular sovereignty by passing, in both chambers for the first time, the flag amendment. The flag amendment is a simple and elegant addition to the Constitution, providing, in pertinent part, that "The Congress shall have power to prohibit the physical desecration of the Flag of the United States." The need for the amendment flows from the Supreme Court's misconstruction of the Constitution in the 1989 case of *Texas v. Johnson*. In that case, overturning more than a century of American tradition, a five-person majority of the Court declared that desecration of the flag – the act of maliciously destroying the flag by such acts as tearing, burning, defecation or urination, in a manner calculated to cause outrage among any person observing the act – is speech protected by the First Amendment.

Until 1989, even the greatest champions of the First Amendment – men such as justices Earl Warren and Hugo Black – understood that desecrating the flag was a noxious act, and not a form of speech. Indeed, in his powerful dissent to *Texas v. Johnson*, then-Chief Justice Rehnquist observed that flag desecration is more like an "inarticulate grunt" than any form of coherent speech. Some acts – wearing a black armband, for example – may well qualify as protected speech, but other acts, such as threatening the president or scrawling graffiti on federal buildings, might well have some expressive content but would still not be recognized as speech protected by the First Amendment.

Perhaps for some Americans, and, alas, for five members of the Supreme Court, the flag is apparently little more than a piece of colored cloth, and thus for them, malicious harm to the flag is regarded as simply a not-particularly-noteworthy political statement. But since *Texas v. Johnson*, we've learned that is not the view of most of the American people. For most Americans, and particularly for those who have fought our nation's battles or lost loved ones in

such a struggle, the flag is a cherished symbol of the self-sacrifice and even the sacred nature of the service many Americans have given their nation. To condone desecration of the flag strikes this majority of Americans as fundamentally wrong. For them, flag desecration is not speech; it is an outrageous, uncivil and odious act that undermines the respect, admiration and gratitude that most Americans believe is due to those who have sacrificed on behalf of the rest of us. For them, to dishonor the flag is nothing less than literally and figuratively tearing at the fabric that holds us together.

It is curious that a majority of the Supreme Court finds it difficult to understand these truths, which are obvious to most Americans. Subsequent to *Texas v. Johnson*, in 2003's *Virginia v. Black* (2003), the Supreme Court ruled that cross burning, another expressive act, is not necessarily protected speech but rather can be criminally punished when it is intended to intimidate and create fear of physical harm among a group of citizens. Flag desecration, of course, is a similar act of defiance and intimidation, but perhaps the Court, in its marble palace on Capitol Hill – along with many academics in their ivory towers – has lost the sense of the effect of flag desecration on ordinary Americans. Opinion polls do show that up to 80 percent of Americans believe it is appropriate to punish those who desecrate the flag and that a constitutional amendment that accomplishes this is a worthy undertaking. Indeed, with a unanimity unprecedented in U.S. history, 50 state legislatures have indicated their support for such an amendment.

Given this overwhelming public expression of support for such an amendment, given the inconsistent behavior of the Supreme Court in this area of constitutional law, and given the importance of the issue to most Americans – particularly the men and women who serve or who have served in our armed forces – it is not difficult to understand that once again the men and women serving in the House of Representatives and the Senate have a duty to preserve and protect the Constitution by passing the flag amendment, sending it on for a speedy ratification by the states. Three quarters of the state legislatures must vote to ratify an amendment, but since all have indicated their support for the measure this should not be a problem.

For Congress to do its duty in passing the flag amendment and overturning the Court's dubious decision in *Texas v. Johnson* would send a powerful message to all Americans: that just as the first three words of that document suggest, the ultimate authority on the Constitution is "we the people." In our nation, our only sovereign is the sovereign people themselves, and it is their representatives in Congress who have the burden of acting on the people's behalf in matters of Constitution correction.

The objections to such an amendment that have been raised over the years by many senators and some representatives, objections that will be heard again this summer, have never been persuasive but deserve some mention in order to rebut them. Some members of Congress believe the flag ought to be protected, but that a statute could do it and no constitutional amendment is necessary. Unfortunately, this experiment was tried the year after *Texas v. Johnson*, but the Supreme Court simply reiterated that it meant what it said: any statute seeking to prevent flag desecration runs afoul of the First Amendment. Only a constitutional amendment, then, can clarify that flag desecration is not speech but a harmful act. Some have also argued that if the flag amendment passes it will open the floodgates to constitutional amendments, making it

inevitable that our noble and succinct Constitution will be inundated with partisan amendments. This slippery-slope argument is incorrect, however, as the barriers to constitutional amendments remain considerable, and only an overwhelmingly popular amendment such as this one stands a chance of passage. Indeed that is the way it should be.

Others have objected that crafting an appropriate statute to protect the flag will be difficult, and that any measures could be overbroad, perhaps criminalizing the wearing of flag boxer shorts, flag motorcycle jackets or flag bunny slippers. Such an objection is, of course, premature, since no legislation has yet been passed – the flag amendment would permit such legislation, but does not require it, and Congress would likely take great care in the drafting of such a measure. Fear of the chilling effect of such a statute seems overblown, however, given that legislation dealing with flag desecration was on the books for more than a century without noticeable effect on citizen action or civil liberty.

A final objection sometimes offered by ostensible friends of the flag is that to pass such an amendment will only invite disaffected souls to engage in more flag desecration, to express their dismay at the amendment and their contempt for the measure. But by this twisted logic one should never make any acts criminal lest one encourage their commission. No society can long endure if that is its philosophy of criminal legislation. The real issue with the flag amendment is what our guiding national philosophy should be: whether there are some things that ought to be sacred and revered, and whether the American people and their representatives have the power and the duty to declare what those things are. The real issue, in other words, is nothing less than popular sovereignty itself. To some Americans, committed probably in good faith to a society in which the maximization of individual will and expression is the only good, the flag amendment might seem an unwise burden imposed on free expression. To most Americans, however, who understand, as did our framers, that some things are more important and enduring than individual self-actualization, who understand that duty, respect, self-sacrifice and service to the community ought to take precedence, the passage of the 28th Amendment, the flag amendment, will be celebrated as a wise return to our traditions and to the original understanding of the Constitution.