

About The Flag Amendment

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Executive Summary - Flag Amendment

Introduction

These web pages covering the Flag Protection Amendment are designed primarily to present the numerous arguments and justifications for the flag amendment as well as the importance of these arguments to the deliberative process underlying efforts to enact the amendment. Indeed, proponents of the flag amendment - including more than 140 organizations, individual citizens and elected officials at the local, state and federal levels - are utilizing the exacting constitutional amendment process established in Article V of the Constitution to achieve protections for the flag. As discussed below and in the contents of the other pages in this series, the effort is inherently democratic, and - since the Supreme Court decisions in 1989 in *Texas versus Johnson*, 491 U.S. 397 (1989) and in 1990 in *United States versus Eichman*, 496 U.S. 310 (1990) - represents the only remaining, constitutional means for protecting the flag from acts of physical desecration.

Impetus for the National Campaign to Enact a Flag Protection Amendment

The national campaign to enact a flag protection amendment began in 1989 when the Supreme Court ruled, in a 5-4 decision in *Texas versus Johnson*, that flag desecration was a means of public protest in an act of free expression protected by the First Amendment. This decision, in effect, invalidated the laws in 48 states and the District of Columbia that prohibited flag desecration. The Johnson decision also outraged the American people, 75% of whom - according to opinion surveys - favored protections for the flag. A similar number of citizens viewed a constitutional amendment as appropriate to achieve such protections, to which President George Bush and members of both parties in Congress responded by petitioning Congress to adopt a flag protection amendment. Congress responded instead by passing a statute - The Flag Protection Act of 1989, by a Senate vote of 91-9 and a House vote of 380-38.

In 1990 the Supreme Court, in a 5-4 decision in *United States versus Eichman*, struck down the Flag Protection Act as inconsistent with free-expression protected by the First Amendment. Congress, in response to widespread criticism of the Court's decision in *Eichman*, again attempted to enact protections for the flag, this time by constitutional amendment. This effort failed, however, as neither chamber of Congress was able to gain the two thirds majority vote necessary for adoption of a constitutional amendment proposal.

After the 1990 congressional votes on the constitutional amendment, the campaign to mobilize national support for enacting a flag amendment greatly expanded. As part of this effort, The American Legion spearheaded the creation of the Citizens Flag Alliance (CFA), a broad-based, nonpartisan coalition of citizens organizations - currently including over 140 organizations representing millions of Americans - established for the sole purpose of mounting a national campaign to win passage of a constitutional amendment to protect the flag.

The CFA's Nationwide Campaign to Enact a Flag Protection Amendment

The CFA, since its creation in 1994, has waged a full-scale, nationwide grassroots campaign to gain enactment of a flag amendment. In this regard, numerous accomplishments are attributable to the CFA's efforts over the last several years, including -

- enactment by 50 State legislatures of resolutions calling on Congress to pass a flag amendment
- participation by governors and other local, state and national political leaders in policy and media events in support of the flag amendment.
- organization of 50 state teams designed to persuade candidates for federal office to articulate support for the flag amendment.
- recruitment of co-sponsors and votes for Senate and House flag amendment proposals.
- sponsorship of a national constitutional scholars forum in Williamsburg, Virginia in which prominent legal scholars from around the country, representing all facets of the political spectrum, discussed the relative merits of the flag amendment.
- commissioning of both national and state polls on the flag amendment.
- institution of a nationwide outreach program to member organizations and other citizens and political officials through an internet web site, newsletter, telephone and direct mail communications.

Due in large part to the efforts of the CFA, the House of Representatives, in June 1995, adopted a flag amendment by a vote of 312-120, easily surpassing the necessary two-thirds majority. The Senate vote in December 1995 failed to reach the two-thirds threshold by merely three votes - the final vote was 63-36.

Despite the disappointment of the 1995 Senate vote, efforts by proponents of the flag amendment have continued on in earnest. Indeed, on June 12, 1997 the House of Representatives, again far exceeded the necessary supermajority, when it voted 310-114 in favor of H.J. Res 54, the flag protection constitutional amendment. This narrowly-crafted proposal would authorize only Congress, not the states, to enact protections for the flag. Identical amendments passed the House in 1999, 2001, 2003 and 2005. but were defeated in the Senate. Thus the constitutional amendment process has returned to the Congress, where the CFA and other proponents of the flag protection amendment are seeking to achieve the two-thirds majority vote needed to send the amendment to the States.

Reasoned and Rational Adherence to Democratic Processes for Amending the Constitution

The above chronology of initiatives and events speaks to a process - followed by the CFA, its member organizations and by the many individual citizens and elected officials who support the flag amendment - that adheres to the vision of our nation's Founding Fathers and the Constitution's Framers as set out in Article V. This is a deliberative endeavor, one that requires a vast majority of the nation's citizens and elected officials behind it. In most senses, this majority has spoken in favor of the amendment: 80 percent of the nation, according to recent polls, 50 State legislatures, well over a supermajority of the House of Representatives, and more than a simple majority of the Senate.

This majority views the two Supreme Court decisions as incorrect and contrary to 200 years of legal tradition and precedent that never saw flag protection as incompatible with the First Amendment. Moreover, the views of this majority have been articulated by our Founding Fathers, Justices of the Supreme Court, constitutional scholars and by a bipartisan majority of the U.S. Congress. These distinguished citizens have, among other reasons, advocated protections for our flag as a means of protecting our national sovereignty and reaffirming traditional American values. Further they are persuaded that flag desecration is expressive conduct, not speech, and as such can be reconciled with First Amendment constitutional protections.

Proponents of the flag amendment also seek to protect and promote the unity of values embodied in the flag. Our system of democracy, the Constitution, and all of the freedoms, rights and laws which flow from each are based on this unity. And the flag forms the basis and is a symbol of this unity. It remains - in a time when traditional unifying elements of American language, culture and heritage are fraying - a single embodiment of our unceasing struggle for liberty, equality and a basic commitment to others, for all citizens, regardless of language, culture and heritage.

Conclusion

Any analysis of the merits of the flag amendment must be viewed in terms of the underlying adherence by proponents of the amendment to constitutional processes. This is a deliberative and democratic process that the CFA and other Americans - indeed a majority of citizens - are utilizing to seek enactment of protections for the flag. The Constitution, in Article V, confirms that the Supreme Court is not, in every instance, the final word on issues of national importance, especially when the majority of the nation's citizens and their elected officials support a contrary viewpoint. The amendment process is an important part of the Constitution, which affords the people their only opportunity to update the Constitution in those rare cases where it is necessary. All of the material presented in this series of web pages about the flag protection amendment are designed to articulate the viewpoint of those who support the flag amendment and to foster the deliberative dialogue on an issue of critical importance to a vast majority of Americans.

A Constitutional Amendment to Prohibit Physical Desecration of the American Flag

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

The language of the above provision is identical to the language contained in H.J. Resolution 54, the flag protection

constitutional amendment which the House of Representatives adopted on June 12, 1997; on June 24, 1999; on July 17, 2001; on June 3, 2003; and on June 27, 2005.

**Attachment: 1989 Flag Protection Statute (18 U.S.C. 700, 1996)
700 Desecration of the flag of the United States: penalties**

(a)(1) Whoever knowingly mutilates, defaces, physically defiles, burns, maintains on the 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.

(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.

(c) Nothing in this section shall be construed as indicating an intent on the part of Congress to deprive any State, territory, possession, or the Commonwealth of Puerto Rico of jurisdiction over any offense over which it would have jurisdiction in the absence of this section;

(d)(1) An appeal may be taken directly to the Supreme Court of the United States from any interlocutory or final judgment, decree, or order issued by a United States district court ruling upon the constitutionality of subsection (a). (2) The Supreme Court shall, if it has not previously ruled on the question, accept jurisdiction over the appeal and advance on the docket and expedite to the greatest extent possible.

Note: The above language was contained in the Flag Protection Act of 1989, adopted in 1989 by the Senate by a vote of 91-9, and by the House by a vote of 380-38. This statute remains on the books at 18 U.S.C. 700 (1996)

Answers To Top Ten Frequently Asked Questions About Flag Protection Amendment

10. How can you reconcile the flag protection amendment with the First Amendment's guarantee of free speech?

The flag amendment does not limit free speech. The proposed amendment would not prevent anyone from saying anything. By the same token, First Amendment freedoms are not absolute. Until two, very narrow 5-4 decisions by the Supreme Court, punishing flag desecration has been viewed as compatible with both the letter and spirit of the First Amendment. This compatibility was consistent with the views of the Framers of the Constitution, who strongly supported government action to prohibit flag desecration.

Such leading proponents of individual rights as former Supreme Court Justice Earl Warren, Justice Abe Fortas and Justice Hugo Black each have opined that the nation could, consistent with the First Amendment, prosecute physical desecration of the flag. As Justice Black, perhaps the leading exponent of First Amendment freedoms to ever sit on the Supreme Court, stated: "It passes my belief that anything in the Federal Constitution bars...making the deliberate burning of the American flag an offense." "I believe that the States and the Federal Government do have power to protect the flag from acts of desecration and disgrace." Id at 605. Moreover, Justice Fortas opined: "The flag is a special kind of personality. Its use is traditionally and universally subject to special rules and regulations....the States and the Federal Government have the power to protect the flag from acts of desecration." Id at 615-617.

This tradition and precedent are rooted in the principle that flag desecration is expressive conduct as distinguished from actual speech. Expressive conduct, be it burning a draft card or a flag, is afforded a lower level of constitutional protection than actual speech. A statute passed under the proposed amendment will not make it unlawful to say anything, no matter how repugnant the statement might be. What will be proscribed, consistent with First Amendment case law, is certain conduct.

Note: Thomas Jefferson, while serving as George Washington's Secretary of State, instructed American consuls to punish "usurpation of our flag." Moreover, James Madison pronounced a flag defacement in Philadelphia as actionable in court. As Judge Robert Bork described this historic announcement: "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."

9. Fair enough, but there still are constitutional guarantees for "expressive conduct," are there not?

The Supreme Court has accepted the premise that certain "expressive" acts are entitled to First Amendment protection, based upon the principle that Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. On the other hand, not all activity with an expressive component is now afforded First Amendment protection. Someone who desires, for instance, to protest wildlife conservation laws could not, in the name of free speech, kill bald eagles. The Court has said that certain modes of expression may be prohibited if (1) the prohibition is supported by a legitimate government interest unrelated to suppression of the ideas the speaker desires to express; (2) the prohibition does not interfere with the speaker's freedom to express those ideas by other means, and (3) the interest in allowing the speaker complete freedom among all possible modes of expressions is less important than the societal interest supporting the prohibition (*United States versus O'Brien*, 391 U.S. 367,37(1968)).

Applying these principles, the Supreme Court upheld a statute prohibiting the destruction of draft cards against a First Amendment challenge. *Id.* The Court stated that the prohibition served a legitimate purpose - facilitating draft induction in time of national crisis - that was unrelated to the suppression of the speaker's ideas, since the law prohibited the conduct regardless of the message sought to be conveyed by destruction of the draft card. The prohibition also did not preclude other forms of expression or protest, and the Court held that the smooth functioning of the Selective Service System outweighed the need to extend First Amendment protections to the act itself. *Id.*

Finally, four Supreme Court Justices (Chief Justice Rehnquist and Justices O'Connor, Stevens and White), dissenting in *United States vs Eichman*, stated that Congress could prohibit flag desecration consistent with First Amendment protections. The dissenters reasoned as follows:

The Federal Government has a legitimate interest in protecting the intrinsic value of the American flag, which, "in times of national crisis, inspires and motivates the average citizen to make personal sacrifices in order to achieve societal goals of overriding importance.... and serves as a reminder of the paramount importance of pursuing the ideals that characterize our society." 496 U.S. at 319. According to the dissent, the government's interest in preserving the value of the flag "is unrelated to the suppression of the ideas that flag burners are trying to express" and is "essentially the same regardless of which of many different ideas may have motivated a particular act". *Id.* at 320.

The prohibition does not entail any interference with the speaker's freedom to express his or her ideas by other means. According to the dissent, while other means of expression may be less effective in drawing attention to the speaker's message, this is not itself a sufficient reason for immunizing flag desecration. *Id.* at 322. "Presumably a gigantic fireworks display or a parade of nude models in a public park might draw even more attention to a controversial message, but such methods of expression are nevertheless subject to regulation." *Id.*

The societal interest in preserving the symbolic value of the flag outweighs the interest in an individual choosing to desecrate the flag as the most effective method of expressing his or her views. Although the value of the individual's choice is "unquestionably a matter of great importance," tolerance of flag burning will "tarnish that value." *Id.* at 322.

8. Then why not pass a statute?

Reliance on another federal statute would be reliance on a proven mirage. In 1989, after the Supreme Court held a state flag protection statute unconstitutional in *Texas versus Johnson*, Congress tried this approach. However, the Court, essentially reiterating its 5-4 holding in *Johnson*, struck down the federal statute in the 1990 *United States versus Eichman* case. There is no reason to believe that the Court, as now constituted, would reverse itself. In 1995, Congress accepted this as reality, and it would be unrealistic to alter that assumption now.

7. Would a Flag Protection Amendment reduce our freedoms under the Bill of Rights? Wouldn't this be the first

time in our 200 year history that an amendment has limited the rights guaranteed under the First Amendment?

No on both counts. As indicated in the answer to question 10 above, the flag protection amendment would not reduce our freedoms under the Bill of Rights. Rather than posing a fundamental threat to our freedoms under the Bill of Rights, the proposed amendment would nurture constitutional freedoms. The Bill of Rights is a listing of the great freedoms our citizens enjoy. It is not 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 aspiration to national unity. The amendment would leave it to individuals, in numerous ways, to express their views. But the amendment affirms that there is some commitment to others, beyond mere obedience to the formal rule of law, that must be respected. It affirms that, without some aspiration to national unity, there might be no law, no constitution, no freedoms such as those guaranteed in the Bill of Rights.

In addition, the flag amendment would be interpreted in light of the existing amendments and other constitutional provisions. When the Fourteenth Amendment was proposed, it could have been argued that Congress' power to enforce the Equal Protection Clause might be used to undermine the First Amendment right of free association. However, courts have been able to harmonize the First and Fourteenth Amendments. Likewise, the Ninth and Tenth Amendments have been reassessed in light of other constitutional provisions. The same would be true with a flag 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 and established legal precedent.

6. Can you cite any other existing restrictions that limit the content of speech?

Yes. The government not only may regulate the content of speech, sometimes it should do so in order to protect the system of freedom of speech in general. The Supreme Court has affirmed this principle in several instances, refusing, for instance, to privilege speech that:

-is likely to incite an immediate, violent response, such as face-to-face fighting words likely to cause a breach of the peace, *Chaplinsky versus New Hampshire*, 315 U.S.568 (1942); or words likely to incite a riot, *Feiner versus New York*, 340 U.S. 315 (1951).

-threatens certain tangible, diffuse harm, such as obscenity, which pollutes the moral environment, *Miller versus California*, 413 U.S. 15 (1973); *Roth versus United States*, 354 U.S. 476 (1957).

-criticizes official conduct - i.e. libel - of a public official, when the criticism is known to be false and damages the official's reputation. In this instance, the Court held that such speech should be regulated since it is at odds with the premises of democratic government, *New York Times versus Sullivan*, 367 U.S. 254, 270 (1964).

The Court has said that utterances, such as those set out above "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky versus New Hampshire*, 315 U.S. 568, 572 (1942)

5. What specifically is the legitimate government interest that is being protected by the Flag Amendment?

The government's legitimate interest in protecting the flag has three main components:

-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 our 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.

-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 aspiration to national unity, a free people and constitutional government cannot long endure.

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 Framers of the Constitution 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. In a letter to James Monroe concerning an attack upon an American frigate by a British war ship, James Madison asserted his view that "the dignity offered to the sovereignty and flag of the nations demands...an honorable reparation... [such as] an entire abolition of impressments from vessels under the flag of the United States..." Thomas Jefferson, moreover, considered violation of the flag worthy of a "systematic and severe" course of punishment.

4. How can we be sure that the Flag Amendment will not eventually override First Amendment Freedoms?

As suggested in the responses to questions ten and seven above, the flag amendment is not designed to override First Amendment freedoms, nor would it be likely to do so in the long term. The proposed amendment is not intended to- and does not - discriminate against specific messages or points of view. 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 trashing the flag to get media attention. Laws enacted under the proposed amendment would apply to all such activity, whatever the specific message.

This is a specific amendment proposal, drawn to define a narrow area of the law. It would supersede two Supreme Court cases decided by 5-4 majorities. It is not self-executing, and thus would require an implementing statute. 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 it, physical desecration. Experience justifies confidence in our judicial system to distinguish between the numerous legitimate forms of communication and the act of physically desecrating the flag.

3. Wouldn't any conceivable definitions of "flag" or "desecration" be inherently vague or subject to prosecutorial abuse?

The proposed amendment is not self-executing, so a statute would need to be enacted under the amendment that, presumably would define terms, set penalties and further define actions that would be proscribed. Moreover, judges, law enforcement officials and juries would interpret and refine the law in this area, similar to the development of any new area of the law. Prior to the Texas versus Johnson decision, 48 states 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. In the case of a statute adopted under the proposed amendment, the judicial system would interpret "physical desecration" and "flag of the United States" in light of general values of free speech and established legal precedent. For instance, it is possible, if not likely, that Congress and the courts would interpret "desecration" consistent with Black's Law Dictionary - the long-established desk reference of practicing attorneys - which defines the term as "defacing, damaging, polluting or otherwise physically mistreating." These are the types of terms that raise issues of fact and degree, context and intent, 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.

2. Wouldn't passage of this amendment "open the floodgates" to other amendments?

Amending the Constitution is difficult, as it should be. Two-thirds of both chambers of Congress and a majority vote of three-quarters of the fifty state legislatures is not easy to obtain. But Article V provides a process for amending the Constitution, and it should be utilized in those rare cases where public consensus can be established for such a change.

In this case, 50 state legislatures - due in large part to the efforts of 144 national citizens organizations - have petitioned Congress to approve the amendment. Polls show an overwhelming majority of Americans in favor of the amendment. And the House of Representatives, on June 12, 1997, June 24, 1999, July 17, 2001, June 3, 2003 and June 27, 2005 far exceeded the supermajority required for passage of a constitutional amendment when it adopted the flag protection amendment. No other proposed amendment in the past few years can boast similar support. But the existence of the other proposed amendments should not prejudice the case for the flag amendment. It should be considered on its own merits. And if Congress passes the flag amendment, it will have no impact, one way or the other, on the chances of any other

proposed amendment.

1. So what's the problem getting this Amendment passed, and when would it become part of the Constitution?

There is no problem. Once one gets beyond the slogans, the case for the amendment is overwhelming. After passing the amendment, on Capitol Hill, Congress will send it to the states for ratification.

Legitimate Government Interest In Protecting The American Flag From Physical Desecration

Why Amend the Constitution to Authorize Congress to Prohibit Physical Desecration of the American Flag?

Amending the Constitution is the only Available Means to Further the Government's Legitimate Interest in Protecting the Flag

Amending the Constitution is the only way. While it would be preferable to protect the flag by federal statute, the Supreme Court has, in two narrow 5-4 decisions, breaking from 200 years of precedent - overturned statutes prohibiting physical desecration of the flag. By these definitive rulings, the Court has sent the message that a Constitutional Amendment is the exclusive means for protecting the flag.

The Government has a Legitimate Interest in Protecting the American Flag from Physical Desecration

- Protecting the flag affirms the most basic condition of our freedom: our bond to one another in our aspiration to national unity. Our system of democracy, the Constitution, and all of the freedoms, rights and laws which flow from each are based on this unity. The flag forms the basis and is a symbol of this unity. The flag remains a single unifying embodiment of our unceasing struggle for liberty, equality, and a basic commitment to others for all citizens, regardless of language, culture and heritage. To protect the laws and freedoms that are based on this unity, we must protect the flag upon which this unity is grounded. An amendment to the Constitution authorizing Congress to Enact a Statute to Prohibit Physical Desecration of the Flag of the United States: Hearing on H.J. Res 54 before the Subcommittee on the Constitution of the House Judiciary Committee.

- The Flag is the "trademark" of our nation. The values that the flag embodies are the "intellectual property" of our nation that the government has an interest in protecting through the "trademark" of the flag. Just as the government has a legitimate interest in protecting ownership rights for inventors, writers and artists, so it also is charged with promoting respect, understanding and adherence to the values which make self-government possible.

- We must protect the flag to protect its role as an incident of sovereignty.

Our Founding Fathers and those who led the nation thereafter did not permit the desecration of the American flag. They knew that America's adversaries would interpret this as a sign that our flag is a symbol that is meaningless, rather than an embodiment of our rights and freedoms. As a result, today, there is a unique respect for the flag of the United States abroad. (This respect for the American flag overseas was demonstrated during the Persian Gulf War, when foreign tankers in the Gulf flew the American flag. An act of aggression against the tankers in the Gulf would have been the equivalent of an attack against the United States and its sovereign interest in protecting allied vessels in wartime). Because our government has a strong interest in the physical protection of American citizens and property abroad, it has a corresponding interest in protecting the flag from physical desecration, on behalf of all Americans who benefit from the rights and freedoms the flag embodies.

- The proposed amendment protects from further injury the fundamental value of aspiration to national unity.

Since the Supreme Court rules that the freedom to physically desecrate the flag is more important than the unity which underlies all freedoms, the flag has been decaying as an embodiment of this unity. This decay justifies the proposed amendment which will restore to the people the right to protect their common objective of democracy which underlies our

freedoms. *United States versus Eichman*, 496 U.S. 310, 323 (1990)

- If the values are worth fighting for, the symbol and embodiment of those values deserves protection

The freedom and ideals of liberty, equality and tolerance that the flag symbolizes and embodies have motivated our nation's leaders, soldiers and activists to pledge their lives, their liberty and their honor in defense of their country. Because our history has demonstrated that these values and ideals are worth fighting for, the flag which uniquely symbolizes their power is itself worthy of protection from physical desecration. *Texas versus Johnson*, 491 U.S. 397, 439 (1989)

AMENDING THE CONSTITUTION TO AUTHORIZE CONGRESS TO PROTECT THE FLAG IS WHOLLY CONSISTENT WITH THE CONSTITUTION.

-Amending the Constitution to authorize Congress to prohibit physical desecration of the flag is entirely appropriate and consistent with the principles set out in the Constitution. The drafters of the Constitution realized changes would be necessary, and provided the Article V amendment process precisely for this purpose. The amendment process is intentionally rigorous and methodical so that only those proposals with overwhelming public support are enacted. Furthermore, the notion of "upholding" the Constitution, which all elected members of Congress swear to do, embodies the privilege of exercising all the rights within it, including the right of the people to amend the Constitution consistent with the Article V process.

- The proposed amendment does not reduce our freedoms under the Bill of Rights, it merely restores the Constitution to the way it had been understood prior to 1989 - to the notion that the people had the right to protect the flag from physical desecration. This is how the Constitution had been interpreted for 200 years. The Article V amendment process is the time-tested manner in which the people express their disagreement with Supreme Court constructions of the Constitution, as was done in the case of the Eleventh, Thirteenth, Fourteenth and Sixteenth Amendments. Protecting the flag is just as important as the issues which resulted in these prior amendments. (Professor Steven B. Presser, Northwestern University School of Law, in a letter to Marty Justis, Executive Director of the Citizens Flag Alliance.

-First Amendment rights have never been absolute. There are existing laws against libel, slander, perjury, obscenity and indecent exposure in public. Just as the government has a legitimate interest in regulating these types of speech and conduct, it has a similar interest in limiting certain conduct which damages an incident of its sovereignty, or infringes on the rights and freedoms embodied in our national symbol, by prohibiting the physical desecration of the flag. *United States vs Eichman*, 496 U.S. 310, 322 (1990) (Stevens, J., dissenting), *Texas vs Johnson*, 491 U.S. 397, 430 (1989)(Rehnquist, C.J., dissenting).

- The First Amendment right to free speech includes a substantive component. The right is not merely process-based and one-dimensional. Rather, it is multi- dimensional, and includes the correlative duty, when one is exercising his/her free speech right, to respect the rights of others. The proposed amendment validates this corresponding responsibility by restoring to the people the right to defend their collective rights. Specifically, this proposal would empower the people to apply their right to protect the flag from physical desecration.

- If free speech is to truly flourish, we must protect the bond that unites us, including the substantive parameters of the right to free expression. We must strengthen the bonds that hold us together, and so make it possible to engage in robust disagreement with each other. Protecting the flag lays the foundation for this objective.

- The proposed amendment would not "amend" the First Amendment. Rather, the proposed amendment and the First Amendment would both be interpreted in light of each other. Just as the Equal Protection Clause of the Fourteenth Amendment is interpreted in light of the First Amendment without any fear of diluting the latter, our courts are equally capable of harmonizing a provision to authorize protection for the flag with the First Amendment.

- The proposed amendment is consistent with Supreme Court precedent. The Supreme Court determined that protecting a flag by statute amounted to the government "choosing sides" in favor of a specific point of view, in violation of the First Amendment. The proposed amendment poses no challenge to the notion that the government is prohibited from "choosing sides" for a specific view. Rather, it questions the assumption that protection of the flag is just another "point of view". The government does not create reverence for the flag when it acts to protect it, for the previous 200 years of history had

already established this reverence. The proposed amendment merely recognizes this respect, and affirms that the flag forms the basis of our aspiration to unity. This aspiration nurtures, rather than undermines, freedom of speech. The Court thus retains the full power to harmonize the two amendments by interpreting the proposed amendment in light of the First Amendment. (Texas vs Johnson, 491 U.S. 397, 429, 434)(1989)(Rehnquist, C.J. dissenting).

- The proposed amendment would reinforce the Constitution. The flag symbolizes our aspiration to national unity and democracy, upon which the Constitution is grounded. Thus, amending the Constitution to authorize Congress to protect the flag would further strengthen the Constitution and the laws and freedoms which come from it.

- The flag is an instrument of expressing honor as well as a symbol of honor. We honor and cherish members of the Armed Services and other individuals through the process of honoring and protecting the flag. Draping a flag over the coffin of a fallen soldier, placing a flag near a grave, or hanging a flag on one's house on Memorial Day are all ways we express our honor and appreciation for those who have fought and died to secure the freedoms we have as Americans. Allowing others to physically desecrate the flag diminishes the honor and recognition that we bestow upon such individuals. Thus, we must protect the flag to respect the substance of what the flag embodies, along with what it symbolizes. To appropriately honor the individual, we must honor the flag.

- Displaying the flag is a medium for demonstrating that the freedoms the flag represents are recognized, protected and upheld. Courtrooms, schools, the halls of Congress, other government building - wherever the flag is displayed signifies that it is a place where the substance of our freedoms and rights is protected. Thus, we must protect the flag to preserve the significance and weight that displaying the flag in such forums conveys.

- The proposed amendment does not regulate speech or discriminate against any specific messages. The proposal would merely regulate one mode of expression - physical desecration of the flag. Regardless of the specific "message" intended, laws enacted pursuant to the proposed amendment would impose a single narrow regulation on the mode of the message: It could not be expressed by physically desecrating the flag. (Texas vs Johnson, 491 U.S. 397, 432 (1989) (Rehnquist, C.J., dissenting).

- The American people deserve the right to choose to protect the flag. The practice of democracy binds our nation. The flag symbolizes and embodies this bond, and thus in turn symbolizes our system of democracy. The American people should be authorized to require a minimal respect for this one symbol that binds us to one another, to protect the freedoms upon which it is based.

Response To Arguments That The Flag Does Not Merit Constitutional Protection

Opponents of the flag amendment have argued that the flag is merely a piece of cloth and lacks the status necessary to receive constitutional protections. In fact, as reflected in various federal statutes and presidential proclamations, the flag has historically been afforded a special status under law and has been accorded a high level of respect. In the words of Justice Abe Fortas - one of the leading proponents of individual rights and liberties on the Supreme Court who viewed flag protection as consistent with free speech protections in the First Amendment - "The flag is a special kind of personality. Its use is traditionally and universally subject to special rules and regulations. A person may "own a flag", but ownership is subject to special burdens and regulations." (Street vs New York, 394 U.S. 576, 615-17 (1969)). Indeed as Justice William Brennan indicated in Texas vs Johnson, "We do not doubt that the government has a legitimate interest in making efforts to "preserve the national flag as an unalloyed symbol of our country." (491 U.S. 397, 418 (1989)(citing Spence vs Washington, 418 U.S. 405, 412 (1974)). The unique character of the flag, as articulated by Justices Fortas and Brennan, can be seen in light of the following federal laws:

- Ceremonies and patriotic customs related to the flag have been codified under federal law, thus manifesting the flag's inherent value. The pledge of allegiance to the flag (36 U.S.C., para 172 (1994), the national anthem sung in the presence of the flag and various patriotic organizations devoted to celebration of the flag, have all been codified under federal law because of their historical and symbolic significance to the country and its people. Indeed, the flag has been deemed important enough to America to merit its own annual day of celebration - Flag Day - Proclamation No. 4757, 45 Fed. Reg.

31,695 (1980); Proclamation No. 7009, 62 Fed. Reg. 31,699 (1997). These federal laws set the standard of respect that has been accorded the flag.

By law and custom, the flag is flown in times of national celebration and mourning in symbolic reflection of the nation's spirit. Federal law and Presidential proclamation urge that the flag be flown on all national holidays such as Memorial Day (half staff), Veterans' Day, President's Day, Mother's Day and Father's Day. (36 U.S.C. 140-170, 174 (1994). As a nation-wide gesture of respect, the flag flies at half-staff in honor and remembrance of the memories of those who served our country. Proclamation No. 3044, 19 Fed. Reg. 1,235 (1954) as amended by Proclamation No. 3948, 34 Fed. Reg. 19,699 (1969), reprinted in 36 U.S.C. 175 (1994). In addition, the flag flies at half-staff in times of national grievance, such as the Oklahoma City bombing, as a demonstration of American solidarity. Proclamation No. 6786, 60 Fed. Reg. 19,999 (1995). In this way, at home and abroad, in times of crisis and celebration, the flag represents a barometer of national circumstance.

- The flag represents our living nation and thus, under federal law, is accorded a high level of reverence. Federal law states that the flag of the United States should be shown no disrespect. (36 U.S.C., para 176) (1994). It should not dip to any persons or thing. No foreign flag appearing with the American flag may be placed in a position of equal or superior prominence. In fact, when displayed, the flag should be held aloft with its folds falling free, never touching the floor, water or objects beneath it. The flag should never be stored, used or displayed in such a way that it could be soiled or damaged. The only way that a flag may be destroyed is if it is burned or put to rest in a suitably dignified manner.

- According to federal law, both abroad and at home, the flag is flown atop federal buildings, U.S. embassies, U.S. consulates, schools and ships on international waters. The sight of the American flag flying atop such buildings and vessels demonstrates that they are safe havens for Americans. Abroad, these buildings and vessels effectively become extensions of the United States beyond our soil, with the flag, as at home, embodying our freedoms and commonalities. See Proclamation No. 4131, 37 Fed. Reg. 9311 (1972), reprinted in 36 U.S.C. para 174 (1994)(emphasizing how important it is for returning citizens and foreign visitors to be welcomed by the U.S. flag at American ports of entry.) Defense Secretary Caspar Weinberger described the U.S. military practice of "reflagging" ships in the Persian Gulf in similar terms. "We obviously feel a particular obligation to ships carrying the American flag... We believe they are entitled to the kind of protection that we give all our citizens."

-Conduct during the playing of the national anthem, the reciting of the pledge of allegiance, and the hoisting or lowering of the flag is dignified and respectful by custom and law. By federal law, citizens, during the national anthem, pledge of allegiance and hoisting or lowering of the flag, should stand at attention, place their right hands at the left shoulder over their hearts, and men remove their hats. (36 U.S.C. para 171, 172, 177 (1994) Persons in uniform should face the flag and render the military salute during these occasions. Even in the flag's absence, citizens are encouraged to act in the same dignified manner as if the flag were there.

The time and occasions for display of the flag are those befitting a revered national icon. Under federal law, the flag should only be displayed during the day, from sunrise to sunset. (36 U.S.C. para 174(a)(1994) Because darkness should never fall on our nation, the flag may only be displayed at night if there is appropriate illumination. To achieve a special nighttime patriotic effect, the flag is displayed at night at the White House and Washington Monument with the proper lighting. Proclamation No. 4000, 35 Fed. Reg. 14,187 (1979), reprinted in 36 U.S.C. para 178 (1994) Proclamation No. 4064, 36 Fed. Reg. 12,967 (1971), reprinted in 36 U.S.C. para 174 (1994). Among the most meaningful occasions for display of the flag is when it covers the casket of one who has died in service for our country. 38 U.S.C.A. 2301 (1986 & Supp 1997). Later, when presented to a family member or friend of the departed, the flag represents an expression of respect, honor and remembrance.

With these federal laws, both Congress and the President have deemed the flag worthy of special attention because of its special quality. While none of these federal laws or presidential proclamations protect the flag from desecration, they do affirm that the flag is a special national symbol transcending the mere cloth from which it is woven and, therefore, deserving of constitutional protection.

Response To Arguments That Flag Protection Amendment Represents A "Tyranny Of The Majority"

"I readily suppose my opinion wrong, when opposed by the majority."

"It is my principle that the will of the majority should always prevail. If they approve the proposed convention in all parts, I shall concur in it cheerfully, in hopes that they will amend it whenever they shall find it works wrong."

Letters from Thomas Jefferson to James Madison (1787, 1788)

Some opponents of the flag amendment have suggested that the effort to amend the Constitution to protect the flag from physical desecration represents a "tyranny of the majority." This argument posits that a tyrannical majority - be it a supermajority of the Members of the House of Representatives voting in favor of such an amendment; 80 percent of the American people supporting the amendment; or the state legislatures in the 50 states adopting resolutions asking the Congress to send them the amendment for ratification - is seeking to impose its will on a more "principled" minority, which opposes the amendment. In fact, as the following suggests, the flag amendment effort is inherently democratic and adheres, not to disingenuous labels, but to the constitutional processes envisioned by the nation's Founding Fathers.

- The flag protection constitutional amendment effort reflects this nation's constitutional processes in action. Efforts to protect the flag of the United States have followed the processes envisioned by our Founding Fathers and Constitution's Framers. Congress, pursuant to Article I requirements, enacted a statute to protect the flag, which the Supreme Court, pursuant to its power under Article III, subsequently overturned. The only remaining option available to proponents of protecting the flag is a constitutional amendment, subject to the processes set out in Article V. Evolution of the flag protection amendment effort, therefore, is illustrative of our constitutional processes functioning as intended.

- The assertion that the flag protection effort is in any sense tyrannical contradicts the inherently democratic debate on the pending flag amendment. The importance of this democratic process has been recognized by opponents of the flag protection measure, as well as by proponents. Rep. Sheila Jackson-Lee (D-TX), an outspoken opponent of the flag protection amendment, said during House floor debate on the amendment proposal: "I certainly acknowledge...that the American people have spoken loudly and resoundingly. There is something great about this debate this afternoon. It is a reflection on what America is all about." Likewise, Rep. Henry Hyde (R-IL), in House floor remarks in support of the amendment stated: "I want to preface my remarks by saying there are good people on both sides of this argument. There are no good guys or bad guys here. A very respectable case has been made by [opponents of this amendment]. But a very good case and, in my judgement, a better case can be made in support of the amendment....[D]emocracy is possible only where a civil society can deliberate the common good freely, openly, publicly."

- Proponents of the flag protection amendment are utilizing a constitutional and democratic process in contrast to certain opponents of the amendment, who use disingenuous labels for the proposal, such as "tyranny of the majority." In fact, given that a supermajority of Members of the House of Representatives, a majority of Senators, 80 percent of the American people, and 50 state legislatures support the amendment, perhaps the use of such negative and inaccurate labels by certain opponents - in many respects the "minority" - as opposed to arguing the merits of their position, is itself action rooted in tyranny.

Response To Argument That Flag Protection Amendment Could Result In Enactment Of Statute That Sets Excessive Penalties

Some opponents of the flag protection amendment have argued that the adoption of such a proposal could result in Congress enacting a statute that sets penalties for flag desecrators that are too draconian. In reality, as suggested below, the federal and state flag protection statutes that remain on the books after the 1989 Supreme Court decision in *Texas vs. Johnson* and the 1990 decision in *United States vs. Eichman* set criminal penalties for flag desecration that are not draconian. Moreover, it is unlikely that Congress would decide - should a constitutional amendment authorize Congress to enact a flag protection statute - to break with modern tradition by adopting penalties for flag desecrators that are too severe.

The federal flag protection statute sets a criminal penalty for flag desecration convictions that is not draconian. Although the Supreme Court has ruled the federal flag protection statute unconstitutional, it remains on the books and provides a strong indication of how Congress might decide to penalize flag desecrators, in the event a constitutional amendment is enacted. The federal statute provides that convicted flag desecrators "shall be fined under this title or imprisoned for not

more than one year, or both." 18 U.S.C. para 700 (1996).

Like the federal statute, state flag protection statutes remaining on the books set penalties that are not severe. Forty-seven of the fifty states continue to have statutes that establish criminal sanctions for flag desecration. In the vast majority of the states, the penalty is no more severe than the federal penalty discussed above, and in 40 out of 47 states, flag desecration is only a misdemeanor offense.

Congress likely will enact penalties for flag desecration consistent with the federal and state flag protection statutes remaining on the books. Upon congressional enactment and state ratification of a flag amendment, Congress will then be confronted with the challenge of crafting legislation to protect the flag. At that time, Congress will most certainly work to ensure that the crime of physical desecration of the American flag receives an appropriate and reasonable punishment.

The flag amendment authorizes only the United States Congress to enact protections for the flag, not the States. The flag amendment currently pending in Congress is narrowly drawn, such that any penalties resulting from the amendment would be federal penalties only. Thus, should Congress enact the flag amendment, the States ratify it, and Congress enacts a statute, the likely result would be a single, federal penalty no more severe than that contained in 18 U.S.C. para 700.

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Halter vs Nebraska, 205 U.S. 34 (1907)

"It is not.....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."

Chief Justice Harlan
205 U.S. at 41, 42

Street vs New York, 394 U.S. 576 (1969)

"I believe that the States and the Federal Government do have power to protect the flag from acts of desecration and disgrace."

Chief Justice Earl Warren
394 U.S. at 605

"It passes my belief that anything in the Federal Constitution bars...making the deliberate burning of the American flag an offense."

Justice Hugo Black
394 U.S. at 610

"The flag is a special kind of personality. Its use is traditionally and universally subject to special rules and regulations....The States and the Federal Government have the power to protect the flag from acts of desecration."

Justice Abe Fortas
394 U.S. at 615-617

Smith vs Goguen, 415 U.S. 566 (1974)

"There is no doubt in my mind that it is well within the powers of Congress to adopt and prescribe a national flag and to protect the integrity of that flag....[T]he flag is an important symbol of nationhood and unity, created by the Nation and endowed with certain attributes."

Justice White
415 U.S. 586-87

"I see no reason why [the government] may not....create a....governmental interest in the flag by prohibiting even those who have purchased the physical object from impairing its physical integrity."

Justice Rehnquist
(joined by Chief Justice Burger)
415 U.S. at 603-04

"The First Amendment affords no shield to Goguen's conduct."

Justice Blackman
(joined by Chief Justice Burger)
415 U.S. at 591

Spence vs Washington, 418 U.S. 405 (1974)

"The true nature of the State's interest in this case is not only one of preserving the physical integrity of the flag, but also one of preserving the flag as 'an important symbol of nationhood and unity.' Although the Court treats this important interest with studied inattention, it is hardly one of recent invention and has previously been accorded considerable respect by this Court."

Justice Rehnquist
(joined by Chief Justice Burger and Justice White)
418 U.S. at 421

Texas vs Johnson, 491 U.S. 397 (1989)

"The American flag....throughout more than 200 years of our history, has come to be the visible symbol embodying our Nation. It does not represent the views of any particular political party, and it does not represent any particular political philosophy. The flag is not simply another "idea" or "point of view" competing for recognition in the marketplace of ideas. Millions and millions of Americans regard it with an almost mystical reverence regardless of what sort of social, political, or philosophical beliefs they may have. I cannot agree that the First Amendment invalidates the Act of Congress, and the laws of 48 of the 50 states, which make criminal the public burning of the flag."

Chief Justice William Rehnquist
(joined by Justices O'Connor and White)
491 U.S. at 429

"In my considered judgment, sanctioning the public desecration of the flag will tarnish its value - both for those who cherish the ideas for which it waves and for those who desire to don the robes of martyrdom by burning it. That tarnish is

not justified by the trivial burden on free expression occasioned by requiring that an available, alternative mode of expression - including uttering words critical of the flag....be employed."

Justice John Paul Stevens
491 U.S. at 437

United States vs Eichman, 496 U.S. 310 (1990)

"[I]t is now conceded that the Federal Government has a legitimate interest in protecting the symbolic value of the American flag. Obviously that value cannot be measured, or even described, with any precision. It has at least these two components: in times of national crisis, it inspires and motivates the average citizen to make personal sacrifices in order to achieve societal goals of overriding importance: at all times, it serves as a reminder of the paramount importance of pursuing the ideals that characterize our society."

Justice John Paul Stevens
(joined by Justices Rehnquist, White and O'Connor)
496 U.S. at 319-20

"Thus, the Government may - indeed, it should - protect the symbolic value of the flag without regard to the specific content of the flag burner's speech....It is, moreover, equally clear that the prohibition does not entail any interference with the speaker's freedom to express his or her ideals by other means. It may well be true that other means of expression may be less effective in drawing attention to those ideas, but that is not itself a sufficient reason for immunizing flag burning. Presumably, a gigantic fireworks display or a parade of nude models in a public park might draw even more attention to a controversial message, but such methods of expression are nevertheless subject to regulation."

Justice John Paul Stevens
(joined by Justices Rehnquist, White and O'Connor)
496 U.S. at 321-22

Founding Fathers Equate the American Flag with the Sovereignty of the Nation

Introduction

When the Framers of the Constitution adopted the flag in 1777, they understood the long history of law surrounding the flag as an incident of national sovereignty. The Framers inherited from England a legal tradition of protecting the flag as a practical instrument affecting title to areas of land and water, rights of trade and citizenship, causes of war citable in international law, and similar matters with the utmost weight. Thus, the original intent and understanding regarding the protection of the flag plainly consisted of sovereignty concerns. The Framers considered the flag they adopted and sought to protect, apart from being merely a patriotic or any other type of symbol, as 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.

Historical Perspective

By the pronouncements in the earliest years of the Republic, the Framers made clear that the flag, and its physical requirements, 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 adoption of the flag was tied to concrete legal and historical factors which distinguished it sharply from any asserted ideology, patriotism 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 has pronounced, "from the earliest periods in the history of the human race, banners, standards and

ensigns have been adopted. It is not then remarkable that the American people...early in their history, prescribed a flag as symbolical of the existence and sovereignty of the Nation."(*Halter vs Nebraska*, 205 U.S. 34, 41 (1907). 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*.

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 considered 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 to be engaging in a punishable act for defacing a flag, even domestically and in peacetime. Defacing the flag invaded a sovereign government interest, even when undertaken for reasons of protest. At the time, the colonists saw the need to punish the act in clear sovereignty terms: that defacing the flag would be taken as an act of rebellion, even when unaccompanied by danger of violence or general revolt.

Intent of James Madison and Thomas Jefferson

The original intent of the Framers of the Constitution and the Bill of Rights clearly indicates the importance of protecting the flag as an incident of American sovereignty.

James Madison

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

His earliest pronouncements concerned an incident in October, 1800, when the Algerian ship "Dey of Algiers" forced a United States man-of-war named the "George Washington", to haul down its flag and replace it with that of Algiers. As Secretary of State under 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 vs Eichman*, 496 U.S. 310 (1990) (No. 89-1433)[hereinafter, Brief], citing II *American State Papers* 348 (Lowrie and Clarke ed, 1982).

James 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, Mr. Madison pronounced a 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 4J. 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.Branc: *James Madison:Secretary of State 1800-1809* 413(1953)(quoting British dispatch). A letter by Madison to James Monroe stated Mr. 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). James Madison's statement suggests his belief that protecting the physical integrity of the flag ensured the protection of the nation's sovereignty.

James Madison did not conclude - as some defenders of the right to deface the flag contend - that the First Amendment protected Americans' 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 James 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 James Madison, sovereignty entailed a relationship not only between nations and foreign entities, but between nations and domestic persons in wartime and peacetime.

Thomas Jefferson

Like James 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. As George Washington's Secretary of State, Thomas 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 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. Thomas Jefferson recognized the sovereignty interest in the flag, considered protecting it and punishing its abusers highly important, even after adoption of the Bill of Rights.

James Madison and Thomas 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 against the suppression of expression. James Madison and Thomas 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;" James Madison and Thomas Jefferson would have found such an interest anathema.

Conclusion

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 control of expression. The Framers considered the protection of the flag as an incident of sovereignty, not a suppression of expression.

Constitutional Scholars in Support of Amendment Authorizing Congress to Enact Flag Protection Statute Constitutional Scholars Forum, Williamsburg, Virginia

In August 1994, several constitutional scholars debated the issue of amending the Constitution to authorize Congress to prohibit physical desecration of the American flag. The following scholars spoke in support of a constitutional amendment in this area:

Professor Robert Nagel, University of Colorado School of Law

Professor Richard Parker, Harvard University School of Law

Professor Stephen Presser, Northwestern University School of Law

Generally, Professor Nagel, Parker and Presser agreed that any statute placing substantive or discretionary limits on the

desecration of the American flag will be held unconstitutional and that only a constitutional amendment can restore to the Congress the power to enact a flag-protection law. Other views expressed by these legal scholars were as follows:

-Flag desecration should not invoke the protections of the Constitution. Flag desecration is an inarticulate, headline-seeking means of demonstration that does not rise to a protected form of expression.

-Any proposed amendment should be constructed in a narrowly-tailored fashion so as not to disturb the protections afforded by the First Amendment. Legitimate acts of political protest ought not to be stifled, and critical debate about the role and policies of the federal government ought to be encouraged. Any restriction ought to be a narrow exception carved out for the flag, based upon its unique symbolic value.

-Reliance on Congress to define desecration would not create a chaotic First Amendment crisis. Societal norms now govern several exceptions to the First Amendment, including obscenity, incitement and libel. These exceptions have been developed and defined by legislation as well as case law. Most statutory laws require interpretation. These requirements have not caused the Constitution or the American system of civil justice to lose its effectiveness or broad support from the American public and will not be a barrier to proper implementation of a flag-protection amendment.

-To assure broad acceptance of free expression, society should prevent those acts that are the most egregious and likely to undermine public support for the First Amendment, such as flag desecration. In other words, public support for the First Amendment is likely to remain commensurate with the level of dignified content in the actions of those who invoke its protection.

Other Statements by Legal Scholars in Support of Flag Protection Amendment

Professor Richard Parker, Harvard University School of Law

"I believe that, in a democracy, freedom of speech must be 'robust and wide-open'. Whether freedom of speech is in fact robust and wide-open does not depend solely, or even primarily, on case-by-case adjudication by the courts. It depends most of all on conditions of culture. First, it depends on the willingness and capacity of people to express themselves energetically and effectively in public. Second, it depends on acceptance as well as tolerance, official and unofficial, of an extremely wide range of viewpoints and modes of expression. And third, it depends on respect for very basic parameters that, like constitutional provisions in general, help structure democratic life the better to release its energies. It's because of th[ese] belief[s] that I support a new constitutional amendment, one that would permit the Congress - if it chooses - to protect the flag of the United States against physical desecration."

(Statement before the Subcommittee on the Constitution of the Committee on the Judiciary, United States House of Representatives, on Amending the Constitution to Protect the Flag, April 30, 1997, p. 1.

Professor Stephen Presser, Northwestern University School of Law

"It is now clear that only a Constitutional Amendment can protect the flag...My feeling is that rather than fearing such a Constitutional Amendment [Members concerned about supporting the amendment] should embrace it. It is a profound demonstration of the feeling of the American people, and is the people's time-honored way of correcting erroneous constitutional interpretations of the Supreme Court. the proposed Flag Protection Amendment is no infringement on the Bill of Rights, it is instead, a wonderful exercise in the popular sovereignty the Bill of Rights was designed to protect."

(Letter to Citizens Flag Alliance, October 23, 1995)

Statement by Richard D. Parker, Professor of Law, Harvard Law School Amending the Constitution to Protect the Flag April 30, 1997

I am a civil libertarian. I believe that, in a democracy, freedom of speech must be "robust and wide-open." Indeed, I believe it ought to be MORE robust and wide-open than the Supreme Court has, on some occasions, been willing to grant.

It's because of that belief that I support a new constitutional amendment, one that would permit the Congress - if it so chooses - to protect the flag of the United States against physical desecration.

I.

Let me begin with general principles. My basic proposition is this: Whether freedom of speech is in fact robust and wide-open does not depend solely, or even primarily, on case-by-case adjudication by the courts. It depends most of all on conditions of culture. First, it depends on the willingness and capacity of people to express themselves energetically and effectively in public. Second, it depends on acceptance as well as tolerance, official and unofficial, of an extremely wide range of viewpoints and modes of expression. And third, it depends on respect for very basic parameters that, like constitutional provisions in general, help structure democratic life the better to release its energies.

This last condition is the one that concerns us now. Everyone agrees that there must be "procedural" parameters of free speech - involving, for example, places and times at which certain modes of expression are permitted. In addition, everyone accepts certain "substantive" parameters of speech content. The following principle, after all, is clear: Government not only may sometimes regulate the content of speech - sometimes it should do so in order to protect the system of freedom of speech in general.

The Supreme Court affirms this principle. It refuses to privilege speech that threatens to cause imminent tangible harm: fact-to-face fighting words, incitement to violation of law, shouting "fire" in a crowded theater. And it does not stop there. It also rules out protection of speech that threatens certain intangible, even diffuse, harm. It has, for instance, described obscenity as pollution of the moral "environment." But what about "political" speech? What about speech critical of the government? Isn't there a bright line protecting that, at least so long as no imminent physical harm is threatened? The answer is: NO. The Court has made clear that the content of speech criticizing the official conduct of a public official may be regulated if it is known to be false and damages the reputation of the official. The Court, indeed, has gone farther and suggested that such speech should be regulated since it is "at odds with the premises of democratic government." This rule was set forth by the Warren court. It was announced in opinions by Justice Brennan, the very opinions that insisted freedom of speech be "robust and wide-open."

Recently, a consensus has been growing around the following proposition: Important "substantive" parameters of public expression, parameters that have been long taken for granted, now need to be restored. The bonds that hold us together - and so make it possible, as in a healthy family, to engage in "robust" disagreement with one another - appear to be disintegrating. On the right, on the left and in the center, it is widely agreed that certain parameters must be reestablished if free speech, in general, is to flourish.

On the right, it's believed that "uncivil" and "unreasoned" speech content needs to be checked. The Supreme Court, on occasion, has interpreted the First Amendment in light of that belief. The problem, of course, is that this tends to invite regulation of speech content that is very broad and vague, suffocating free, spontaneous participation in the marketplace of ideas. On the left, it's believed that "hate" speech - beyond face-to-face harrassment or fighting words - needs to be checked. On occasion, the Court has read the First Amendment in light of that belief as well. The problem again, is that this tends to invite broad and vague regulations suffocating freedom of spontaneity in public speech. What's worse, both these prescriptions - by drawing blunt distinctions among "types" of speech and speakers - may, unintentionally, tend to set us apart from each other, even further disintegrating - instead of reaffirming - the bonds that unite us even in disagreement.

In the center, however, there is widespread support for restoration of a much narrower, more focused parameter: protection of the U.S. flag from physical desecration. This proposal, first of all, avoids of the vices of the broader, vaguer alternatives. It's virtue, moreover is that - by means of an extremely minimal constraint on freedom, taken for granted until recently - it affirms the most basic condition of our freedom: our bond to one another in our aspiration to national unity. It leaves it to individuals, in a thousand other ways, to criticize government and even that aspiration to unity, if they want. But it affirms there is some committment to others, beyond mere obedience to the formal rule of law, that must be respected. It affirms that, without some aspiration to national unity - call it patriotism if you choose - there might be no law, no Constitution, no freedom.

Still, objections abound. Is this "important" enough? Is it "needed?" Is it likely to be "effective?" Aren't there "less drastic alternatives?" Isn't it too "risky?" These questions deserve answers.

II.

A common objection goes like this: True, the aspiration to national unity is vital but, as embodied in the flag, it is just symbolic. What place does symbolism have in the Constitution? The answer is that the framers of the Constitution put symbolism of our unity at the very beginning of the document, invoking "We the People of the United States." And, very near the end, they required that all officials, high and low, be "bound by Oath or Affirmation, to support this Constitution" - a provision that, surely, is less functional than symbolic, yet whose symbolism fulfills, nonetheless, an important function. Animating the whole Constitution of 1787, after all, was the aspiration to call into being a new sense of commitment, a commitment to a broad and deep national unity - despite difference. What was it, at the beginning, but a bold symbolic effort?

But, we hear, that's all over now. The nation exists. What need is there to revisit old ideals? Yet the framers knew that nothing, on its own, lasts forever. Every institution must be reenergized by every generation to meet new challenges. Can we deny that our generation is now challenged to renew our commitment to unity-despite-difference? The aspiration to even a minimal unity is, once more, commonly put in question. We hear that the freedom the flag symbolizes is the freedom to burn it, that our unity consists simply in a celebration of disunity. These claims go to the heart of our Constitution. It is in the Constitution that we must answer them.

We hear that flag desecrators are like a few "naughty, nasty children" trying to "provoke their parents." The rest of the family, we hear, need only "count to ten." Take the analogy seriously for a moment. How healthy is a family in which there are no limits to expressive abuse, in which everything can be trashed and will be tolerated? Desecration of our mutual bonds as a nation may be fairly rare. But so are many wrongs we believe it important to forbid. What is at stake is a principle; a minimal one. It deserves minimal respect - as a matter of principle.

To boil down the fundamental value at stake here; Recall the civil rights movement. Recall not only its invocation of national ideals, but also its evocation of nationhood. Recall the famous photograph of the Selma marchers carrying flags of the United States. The question is: Will the next Martin Luther King have available to him or her a basic means of identification with all the rest of us - an embrace appeal to the bonds that, in aspiration and potential, make us one?

III.

We are told there are other effective ways, short of an amendment, to protect the flag. Specifically, we're told (1) that Congress might do it by statute or (2) that the states might do it by enforcing laws against theft, vandalism or "fighting words" already on the books or (3) that the "voluntary feelings" of the people and "counter-speech" condemning flag desecration now provide plenty of security for this unique symbol. In fact, none of these are effective alternatives.

Reliance on yet another federal statute would be reliance on a mirage - a proven mirage. In 1990, after Johnson, the Congress tried this approach. And swiftly, it was slapped down by a 5-4 vote on the Supreme Court in *Eichman*. There is absolutely no reason to believe that the Court, as now constituted, would reverse itself. In 1995, the Congress accepted this as a fact of life. I trust it is not any more inclined to indulge in fantasy in 1997.

Reliance on enforcement of laws against theft, vandalism and "fighting words" would be hardly less fantastic. Most of the American flags that are physically desecrated are, after all, the property of the desecrators. Thus theft and vandalism are not involved. And "fighting words" prosecutions have long been sharply narrowed by the courts to cases of face-to-face challenges to fistcuffs between specific individuals. Most instances of physical desecration - the ripping of a flag in the rotunda of the Michigan State Capitol in January 1997 was a typical example - involve no such challenge. What's more, reliance on laws like these wouldn't simply be futile. By treating the flag as just another piece of cloth, it would miss the point as well.

The point, of course, is to ensure respect for this unique symbol of our aspiration to unity-despite-difference. To be sure, this respect ought to flourish in the "voluntary feelings" of the people. But that doesn't mean that a law protecting the flag is not now needed. Who can doubt that, very often, legal proscriptions do in fact influence the "voluntary feelings" of the people? (Think for a moment, of the civil rights laws.) Who can doubt that, often, they both express and work to maintain those feelings?

Why isn't it enough, though, to criticize the desecrators or fly the flag ourselves? Ordinarily, I agree, "counter-speech" is the

best response. But this situation is unique, just as the flag is unique. Once it is permissible not just to heap verbal contempt on the flag, but also to burn it, rip it, and smear it with excrement - once such behavior has been specifically protected in law by the Supreme Court - then the flag is already decaying as the symbol of our aspiration to unity underlying freedom. The flag we fly in response is no longer the same thing. We are told, again and again, that someone can desecrate "a" flag but not "the" flag. To that, I simply say, Untrue. This is precisely the way that general symbols like general values are trashed, particular step by particular step. This is the way, imperceptibly, that commitments and ideals are lost.

IV.

What are the risks, if any, of proposing to amend the Constitution this way? All kinds of fears have been stirred up. I'll comment on two. First, I'll address some rather specific fears. Would the proposal "amend" - or "desecrate" - the First Amendment? Then, I'll turn to more generic fears: Would it upset the "delicate balance" of the Constitution as a whole?

The proposal would NOT "amend the First Amendment." Rather, each amendment would be interpreted in light of the other - much as is the case with the guarantees of Freedom of Speech and Equal Protection of the Laws. When the Fourteenth Amendment was proposed, the argument could have been made that congressional power to enforce the Equal Protection Clause might be used to undermine the First Amendment. The courts have seemed able, however, to harmonize the two. The same would be true here. Courts would interpret "physical desecration" and "flag of the United States" in light of general values of free speech. Experience justifies this much confidence in our judicial system.

But, we're asked, is "harmonization" possible? If the principles invoked in Johnson and Eichman to protect flag desecration were rooted in established lines of free speech argument - as they were - how could an amendment correcting those decisions, returning the law to the prevailing interpretation of the preceding two centuries, coexist with "the First Amendment?"

First, it's important to keep in mind that free speech law has within it multiple, often competing lines of argument. The four dissenters in Johnson and Eichman - no less than their five colleagues - invoked principles that were rooted in established arguments about the meaning of freedom of speech. Second, even if the general principles invoked by the majority are admirable in general - as I believe they are - that doesn't mean they were applied properly. That is, we may agree that government may not impose sanctions to "take sides" for or against specific "points of view." Thus, third, the proposed amendment poses no fundamental challenge to the majority's principles. It simply affirms that the flag is SUI GENERIS as the unique symbol of our aspiration to national unity, an aspiration that (as I've read) nurtures - rather than undermines - freedom of speech that is "robust and wide-open."

The proposed amendment is not intended to - and does not - discriminate against specific "messages." Those who desecrate the flag may be doing so to communicate any number of messages. They may be saying that government is doing too much - or too little - about a particular problem. They may be burning the flag to protest the views of non-governmental groups, even to support efforts of the government to squash those groups. Or they may simply be trashing the flag to get media attention. Laws enacted under the proposed amendment would apply to all such activity, whatever the specific "message." One, and only one, mode of expression could be regulated: "desecration" of the flag. And regulation could extend no farther than a ban on one, and only one, extreme instance of it: "Physical" desecration.

One objection remains. It involves "desecration." Would this word, evoking profound respect and even sacredness, itself "desecrate" the Constitution? Those who put the objection this way defeat themselves, of course. If the Constitution as a whole is "sacred", as they suggest, then there is no text in which reference to "desecration" of the symbol of the nationhood that undergirds it would be more at home. Beyond the play on words, however, it's useful to keep in mind that this word - like any number of others in the constitutional text - is a term of art. It has no religious connotation. The Constitution of Massachusetts, for instance, provides that the right to jury trial "must be held sacred," and no one reads that as a theological mandate. The question for courts interpreting the proposed amendment would be: What sorts of physical treatment of the flag are so grossly contemptuous of it as to count as "desecration?" This is the type of question - raising issues of fact and degree, context and intent - that they resolve year in and year out, under practically every other constitutional provision.

V.

There is, then, nothing radical about this proposed amendment. What hides its moderation may simply be a generic fear of any proposed constitutional amendment - or, at least, of any that is driven by wide public support. Opponents of a flag

amendment evoke this fear, suggesting the "delicate balance" of the Constitution is in jeopardy. In the ways they make the suggestion, however, they reveal it to be misleading, even perverse.

They tell us that the Constitution is perfect. Or they talk of its fragility. The document, they imply, is too fine or too delicate to amend. But a part of its "perfection" must be Article V, which provides for its amendment. It has, after all, been amended many times. (The framers' generation added ten amendments in one swoop.) And, far from proving fragile, it has proved to have extraordinary tensile strength, enduring by adapting to circumstances - changing and unforeseen - just as, long ago, Chief Justice John Marshall promised it would.

Yet, they tell us, any proposed constitutional language will have unintended consequences - unless we pin down, right now and forever, every jot and title of its meaning. This is sometimes an effective strategy of opposition. It was deployed, for example, against the Equal Rights Amendment, nickled and dined to death in disputes over hypothetical details. The proposed flag amendment is far narrower and, so, far less vulnerable to such opposition. But, those who supported the ERA - and deplored the strategy then - should be loath to use it now. It is, in any event, deeply misguided. For if (as John Marshall taught us), the genius of our Constitution is to endure through adaptation, then any pretense to fix its precise meaning, once and for all, is futile. Few constitutional provisions - few of those in the Bill of Rights, for instance - could pass such a test. Hence, the lesson of our history is: Leave future details of application to the future; trust our judicial system; and stick, for the moment, to issues of fundamental principle.

When all is said, opponents are left with one line of argument. You ought not, they say, "fool with" the Constitution. You should not "tinker" or "fiddle" with it. You must not "trivialize" it. Here is what's fascinating: Such verbs are rarely used to describe judicial interpretations or lawyers' interpretations or academic interpretations of the Constitution. They're reserved, instead, for the process of amendment prescribed by Article V. They're reserved, especially, for amendments proposed not by "experts", but by large numbers of ordinary citizens and their representatives. The disdain in such language is clear. It is, I believe, a disdain for the processes of democracy and for the ordinary people who take part in them. The implication is that the Constitution - which establishes processes for its own amendment - is too elevated, too refined, to be touched by those very processes.

In the end, that's what is at stake here: Our flag symbolizes our nation. It is a nation defined not by any shared ethnicity, but by a political practice, the practice of popular sovereignty, of democracy. It is through democracy that our law, including constitutional law, is made. It is through democracy that our liberties are nurtured and exercised and guaranteed. It is through democracy that we are bonded to one another. Shouldn't the people be authorized, if they choose, to require a very minimal respect for that one symbol, that one value, that one aspiration?

Statements by Senate and House Members in Support of an Amendment Authorizing Congress to Enact a Statute Prohibiting Desecration of the Flag

Statements By Members Of The Senate

Senator Max Baucus (D-MT)

"I disagree with the Court's decision in *United States vs Eichman*. I simply do not believe that the First Amendment protects flag burning...It now appears tht only a constitutional amendment will protect the flag....and I support such a constitutional amendment.

Our flag is a unique national symbol, above politics, which represents our common values, our common aspirations, and the sacrifices millions of Americans have made to preserve our way of life. I agree with Justice Steven's dissent in *Eichman*, that the flag possesses 'uniqueness that justifies a governmental prohibition against flag burning.' Certainly the Montana Legislature's long-standing decision to prohibit flag burning has not inhibited robust political debate in our State. I regret, Mr. President, that these Supreme Court decisions compel a constitutional amendment. But we must protect the flag."

136 Cong. Rec. S7912 (daily ed. June 13, 1990).

Senator Pete Domenici (R-NM)

Senator Domenici was an original cosponsor of the flag protection amendment proposal in both the 101st and 104th Congresses. His position on the amendment is reflected in the following statement:

"I disagree with the Supreme Court's analysis of flag burning. The Supreme Court erred in equating free speech with the desecration of the American flag. The act of desecrating the American flag goes beyond merely expressing a point of view - it is a violent act against the symbol of our Nation. It is not an act of free speech. Every American is free to denounce our Nation and ideals for which the flag stands. Frankly, I think it would be terribly misguided, but if that is what they want to say, they have the right to say it. There is a vast difference, however, between speaking one's mind and desecrating the symbol of our Nation.

I understand the difficulty, and the significance, of seeking to overturn a Supreme Court decision (by amending the constitution). Frankly, I have come to the conclusion that the flag and all it represents deserves the protection of our laws, and that we can protect the flag without undermining the principles of the First Amendment."

136 Cong. Rec. S7693 (daily ed. June 11, 1990)

Senator Dianne Feinstein (D-CA)

"I support a constitutional amendment to restore protection to our national flag. I do so not in deference to political expediency, but because I believe it is the right thing to do. Our national flag has come to hold a unique position in our society as the most important and universally recognized symbol that unites us as a nation. No other symbol crosses the political, cultural and ideological patchwork that makes up this great Nation and binds us as a whole. The evolution of the American flag as the preeminent symbol of our national consciousness is as old and as rich as the evolution of our country itself.

Why then, should it be permissible conduct to urinate on, defecate on, or to burn the flag? That is not my definition of speech. I do not take amending the Constitution lightly. However, when the Supreme Court issued the Johnson decision and then the Eichman decision, those who wanted to protect the flag were forced to find an alternative path.

The right to free speech is not unrestricted. For example, the Government can prohibit speech that threatens to cause imminent tangible harm, including face-to-face "fighting words, incitement to violation of the law, or shouting 'fire' in a crowded theater. Obscenity and false advertising are not protected under the First Amendment, and indecency over the broadcast media can be limited to certain times of the day....Requiring certain individuals to refrain from defacing or burning the flag, I believe, is a small price to pay on behalf of millions of Americans for whom the flag has deep personal significance. Just 5 years ago, when 48 states had laws against flag burning, the First Amendment continued to thrive. I believe that this legislation will protect the integrity of the flag while keeping our First Amendment jurisprudence intact."

141 Cong. Rec. S18339 (daily ed. Dec 11, 1995)

Senator Wendell Ford (D-KY)

"There are many good reasons for protecting the unique symbol of the American flag, from the basic liberties it represents to the promise of a better future it holds out. But, some of the greatest reasons for protecting the flag lie in its ability to bind one generation to the next in their love and respect for this country, so that even as the memories of yesterday's battles begin to fade, the importance of what they secured continues to hold fast in our hearts.

The Supreme Court's action in Eichman made it clear that a constitution amendment is necessary for enactment of any binding protection of the flag. Clearly, no legitimate act of political protest should be suppressed. Nor should we ever

discourage debate and discussion about the federal government. The narrowly written amendment gives Congress the 'power to prohibit the physical desecration of the Flag of the United States,' without jeopardizing these rights of free speech."

141 Cong. Rec. S18275 (daily ed. Dec 11, 1995)

Senator Orrin Hatch (R-UT)

"This amendment, granting Congress power to prohibit physical desecration of the flag, does not amend the First Amendment. The flag amendment overturns two Supreme Court decisions which have misconstrued the first amendment. The first amendment's guarantee of freedom of speech has never been deemed absolute. Libel is not protected under the first amendment. Obscenity is not protected under the first amendment. A person cannot blare out his or her political views at 2 o'clock in the morning in a residential neighborhood and claim first amendment protection. Fighting words which provide violence or breaches of the peace are not protected under the first amendment. The view that the first amendment does not disable Congress from prohibiting physical desecration of the flag has been shared by ardent supporters of the first amendment and freedom of expression."

141 Cong. Rec. S18337 (daily ed. Dec 11, 1997).

Senator Ernest F. Hollings (D-SC)

"I continue to support the proposed constitutional amendment as the optimum long-term solution, its protection would be ironclad and unchallengeable. There is no question, Mr. President, that our flag needs and deserves protection.

"Never in our Nation's history have Americans tolerated wanton desecration of our most cherished and sacred symbol, the flag. Those who characterize (flag desecration) as speech protected by the First Amendment are dead wrong. The First Amendment is not - as was not intended to be - absolute. We have always allowed for commonsense exceptions. The Justices (in Johnson) have confused destruction with freedom, and in the process they have misconstrued the First Amendment. I support reaffirming freedom of speech, and distinguishing it from desecration and destruction."

135 Cong. Rec. S12610 (daily ed. Oct 4, 1989)

Senator Dirk Kempthorne (R-ID)

"Some have claimed the passage of this resolution will weaken the sanctity of the First Amendment. To these people I would ask, was the First Amendment weak during the first 198 years after it's ratification? Until the Supreme Court ruled flag desecration to be protected free speech in 1989, 48 States and the Federal Government had statutes which penalized an individual for desecrating the flag. I do not believe the time in our Nation's history prior to 1989 may realistically be viewed as a dark period in which Americans were denied their constitutional rights. The truth is, protecting the flag of the United States has long been a proud part of our national history. What we are attempting to do...is preserve that history.

"I do not believe any of us here today wants to limit or restrict the right of Americans to speak out in an appropriate manner. In fact, numerous Members of this body on both sides of the aisle have taken advantage of this right to speak out against Government policies, and undoubtedly, will continue to do so whether or not they are members of the Senate. I simply believe the physical mutilation of the flag falls outside the range of speech which should be protected. I also believe the citizens of the United States should have the opportunity to decide for themselves, whether they also feel the flag deserves special protection."

141 Cong. Rec. S18385 (daily ed. Dec 12, 1995)

Senator Harry Reid (D-NV)

"As our national symbol, the U.S. flag deserves to be honored and protected. Freedom of speech is one of the most

cherished and defended rights of the American people; however, desecration of our flag goes beyond the premise of free speech."

141 Cong. Rec. S9820 (daily ed. July 12, 1995)

Senator Reid went on to quote from an article written by Mike O'Callaghan, former two-term Governor of Nevada and executive editor of the Las Vegas Sun, which read in part:

"I'm more than a little insulted by the....argument that such constitutional change will be an infringement on our right of free speech. That argument, made by many who oppose an amendment to protect the flag, has little or nothing to do with damaging the First Amendment. A person can write and talk all day long and into the night about the shortcomings of our city, state and nation. That same person, if angry enough, can renounce his or her citizenship without being worried about being jailed. Millions of Americans believe public desecration of our nation's symbol is taking it one step beyond acceptable behavior and is an act beyond the bounds of free speech."

-Senator Tim Johnson (D-SD)

"America is the dream of unity and everlasting respect. When then, are there demonstrations burning the very flag in which we should gratefully salute, burning the very idea of our forefathers worked, fought and died for. The authors of the Constitution did not attempt to establish a government and a symbol for all to honor so that one day their descendants could flagrantly burn and degrade their accomplishments."

142 Cong. Rec. E592 (daily ed. Apr 19, 1996)

-Senator Bob Graham (D-FL), who initially opposed the constitutional amendment proposal, but in 1990, switched his vote citing the "need to protect the flag as the nation's foremost unifying symbol."

-Senator John Rockefeller (D-WV), who cosponsored and voted for a flag protection constitutional amendment in 1990 and 1995, stated: "I'm very comfortable with my vote on that; I reject the purism that caused others to support the Supreme Court ruling that flag burning statutes violate the First Amendment. To me, flag burning is not a passive act, it's a.... destructive act."

David Broder, Rockefeller Must hone Presidential Message, St. Louis Post- Dispatch, July 14, 1991 at C3.

STATEMENTS BY MEMBERS OF THE HOUSE OF REPRESENTATIVES

Rep. Bob Clement (D-TN)

"I believe in free speech. But I also believe that the flag embodies ideals that Americans have sacrificed their lives to protect for more than 200 years. Neither I, nor any of my colleagues in the House of Representatives would want to stifle anyone's right to freely speak their mind. A constitutional amendment would not restrict anyone from saying anything they want about any issue. I just believe that the ideas flag burners want to communicate can be expressed without burning our beautiful flag."

141 Cong. Rec. H6441 (daily ed. June 18, 1995)

Rep. Martin Frost (D-TX)

Like Rep. Barbara Kennelly (R-CT) (discussed below), Congressman Frost also changed his position on the constitutional amendment question. During the 101st Congress, Rep. Frost stated that opposing the amendment proposal "will best protect the freedoms and values that we hold dear."

136 Cong. Rec. H4015 (daily ed. June 21, 1990)

However, Rep. Frost cosponsored and voted for the flag protection amendment proposal during the 104th Congress and is an original cosponsor of the proposed amendment adopted by the house on June 12, 1997. Moreover, on April 30, 1997, Rep. Frost testified in a hearing before the Constitution Subcommittee of the House Judiciary Committee in favor of H.J. Res. 54, a constitutional amendment authorizing Congress to enact a statute to prohibit the physical desecration of the Flag of the United States.

Rep. Henry Hyde (R-IL)

During the June 12, 1997 House consideration of the flag protection amendment, Rep. Hyde provided the following remarks:

"There are two questions in this dispute: First, is flag burning conduct "imbued with speech" and hence protected by the First Amendment? To burn an object in order to demonstrate one's contempt for it is not speech, it is the antithesis of speech. It is not a form of argument - it is an act of contempt for the very idea of reasoned argument. Flag burning is no more speech than a child's temper tantrum, and to suggest that the Founders and Framers intended to protect such public displays of childish pique - to suggest this is what the First Amendment free speech clause protects - is demeaning and degrading. Free speech has never been absolute, as our laws against libel, slander and copyright infringement prove....what our highest court has done, by a margin of one vote no less, is draw the line between speech and conduct at a point that maximizes expression, lest anyone's personal fulfillment be stifled. But America cannot long survive the selfishness of autonomous individuals as its highest value. There is another value - that with our rights come responsibilities - a value well expressed and embodied in our national symbol, the flag.

"The second question is why do we need this amendment now? Is there a rash of flag burning going on? No, happily, there is not, but I believe we live in a time of serious disunity - our society is pulled apart by the powerful centrifugal force of racism, ethnicity, language, culture, gender and religion. Diversity can be a source of strength, but disunity is a source of peril. We Americans share a moral unity, expressed profoundly in our country's birth certificate, the Declaration of Independence.....and what is the symbol of our moral unity amidst racial, ethnic, and religious diversity? The flag....Old Glory...The Stars and Stripes. In seeking to provide constitutional protection for the flag, we are seeking to protect the moral unity that makes American democracy possible....the flag is the symbol - the embodiment - of the unity of the American people, a unity built on those "self-evident" truths on which the American experiment rests - the truths which our nation's claim to be a just society."

143 Cong. Rec. H3745 (daily ed. June 12, 1997)

Rep. Joseph Kennedy (D-MA)

"[R]ather than a process for limiting speech, this amendment is a democratic vehicle for the highest expression of free speech. The amendment is a way for people, through their elected representatives, to establish a baseline, a national standard for robust and wide open freedom of speech. Simply put, amending the Constitution is a way of protecting the first amendment as it now stands."

143 Cong. Rec. H3739 (daily ed. June 12, 1997)

Rep. Barbara Kennelly (D-CT)

Rep. Kennelly indicated her opposition to the constitutional amendment proposal during House floor debate on the issue in the 101st Congress.

During the 104th Congress, however, Rep. Kennelly changed her vote. Her reasons for doing so are as follows:

"[S]ome years ago, I voted against [the flag protection] amendment because I felt - and still do - that the Constitution should be amended only as a last recourse. I had hoped a statute prohibiting desecration of the flag would reach the same end. The statute passed but was overturned by the Supreme Court.

It is not that my views about the flag have changed, I have always felt that desecration should be against the law. And it is not that my views about the Constitution have altered; changes to this document must be kept to a strict minimum. But given the fact that a law will not stand, I believe a constitutional amendment is warranted...[and] do not believe we endanger our freedoms by protecting the flag.

To Americans, our flag is unique. This amendment recognizes this uniqueness in our Constitution in a special way. I have only once before supported a Constitutional amendment, believing that the Constitution was a near-perfect document. I now believe that the Constitution will be brought even closer to perfection by adding to it a special place for our flag."

141 Cong. Rec. H6418 (daily ed. June 28, 1995)

Rep. Jim Sensenbrenner (R-WI)

During House consideration of the flag protection amendment in the 101st Congress, Rep. Sensenbrenner provided the following remarks:

"Speaker after speaker on the other side has seemed to imply that this joint resolution denigrates the Constitution and the Bill of Rights of the United States. It does not do that, because the framers of the Constitution put in an article on how the Constitution could be amended. That is what is being utilized here, the amendment process set forth in Article V of the Constitution. What this amendment does is overturn two Supreme Court decisions with which many Americans disagree, and it is the only way that those Supreme Court decisions can be overturned, because the Court has been quite clear that they cannot be overturned through the passage of a statute

Overturning Supreme Court decisions by constitutional amendment has been done three times in the history of our country: the 11th Amendment, which overturned *Chisholm vs Georgia*; the 13th Amendment which overturned the *Dred Scott* decision; and the 16th Amendment which overturned the decision that said that the income tax was unconstitutional....I submit that this is a serious enough issue to do it the fourth time."

136 Cong. Rec. H4078 (daily ed. June 21, 1990) Rep. Charlie Stenholm (D-TX)

Rep. Stenholm delivered the following statement in support of the proposal during the 104th Congress: "In reviewing Chief Justice Rehnquist's dissenting opinion [in the *Eichman* case], I found myself in agreement with his perspective when he wrote:

The flag is not simply another 'idea' or 'point of view' competing for recognition in the marketplace of ideas. Millions of Americans regard it with an almost mystical reverence regardless of what sort of social, political or philosophical beliefs they may have. I cannot agree that the First Amendment invalidates the act of Congress and the laws of the 48 out of 50 states, which make criminal public burning of the flag.

I always have believed that physical desecration of the flag should be prohibited. At the same time, I sincerely have hoped that we could protect our flag without amending our beloved Constitution. After much deliberation, a review of recent court history, and a deep concern about a growing, negative and disrespectful national attitude, I have come to the conclusion that the way to honor the flag is by amending the Constitution."

141 Cong. Rec. H6425 (daily ed. June 28, 1995)

On June 12, 1997, the House, by a vote of 310 to 114, adopted H.J. Res. 54, proposing an amendment to the Constitution of the United States authorizing the Congress to prohibit the physical desecration of the flag of the United States. In addition, Representatives Corrine Brown (D-FL) and Nick Smith (R-MI) who missed the vote, stated that they would have voted for the amendment had they been present, and Representative Clay Shaw (R-FL) stated that he mistakenly voted against H.J. Res. 54

143 Cong. Rec. H3756 (daily ed. June 12, 1997)