Calendar No. 195

104TH CONGRESS, *1st Session* | SENATE | REPORT 104–148

SENATE JOINT RESOLUTION 31

SEPTEMBER 27 (legislative day, SEPTEMBER 25), 1995.—Ordered to be printed

Mr. HATCH, from the Committee on the Judiciary, submitted the following

REPORT

together with

ADDITIONAL, SUPPLEMENTAL, AND MINORITY VIEWS

[To accompany S.J. Res. 31]

The Committee on the Judiciary, to which was referred the Senate Joint Resolution (S.J. Res. 31) to propose an amendment to the Constitution so that Congress and the States shall have power to prohibit the physical desecration of the flag of the United States, having considered the same, reports favorably thereon, and recommends that the joint resolution do pass.

CONTENTS

	Page
I. Summary	2
II. Legislative history	3
III. Discussion	5
A. The flag is a unique symbol of a diverse country	5
1. Brief history of the American flag	5
2. Congress, the States, and the flag	7
B. The place of the flag in the hearts and minds of the American people	8
C. Need for an amendment	20
D. S.J. Res. 31 is a suitable amendment to the Constitution	25
1. S.J. Res. 31 will effectively restore power to Congress and the States denied them in *Texas* v. *Johnson* and *U.S.* v. *Eichman*; S.J. Res. 31 does not "trump" the first amendment or any other constitutional provision	25

a. S.J. Res. 31 will effectively empower Congress and the States to enact statutes prohibiting the physical desecration of the American flag 26
b. S.J. Res. 31 does not amend the first amendment or "trump" any other constitutional provision 26
2. The terms "physical desecration" and "flag of the United States" are precise enough for inclusion in the Constitution 30
3. The flag protection amendment is no precedent whatsoever for any other constitutional amendment or statute 33
4. The American flag deserves legal protection regardless of the number of flag desecrations in recent years 36
5. A so-called "content neutral" constitutional amendment is wholly inappropriate 37
6. Granting States, as well as Congress, power to protect the flag reflects the constitutional principle of federalism and returns us to the status quo ante 1989 41
IV. Vote of the committee 42
V. Text of S.J. Res. 31 43
VI. Cost estimate 43
VII. Regulatory impact statement 44
VIII. Additional views of Mr. Hatch 45
IX. Additional views of Mr. Thurmond 49
X. Supplemental views of Mrs. Feinstein 51
XI. Minority views of Mr. Biden 55
XII. Additional minority views of Messrs. Kennedy, Leahy, Simon, and Feingold 64
XIII. Supplemental minority views of Mr. Kohl 81

I. SUMMARY

The purpose of Senate Joint Resolution 31 is to restore to Congress and to the States the authority to adopt statutes protecting the flag of the United States from physical desecration. It reads simply: "The Congress and the States shall have power to prohibit the physical desecration of the flag of the United States."

The American people revere the flag of the United States as the unique symbol of our Nation and the freedom we enjoy as Americans. As Supreme Court Justice John Paul Stevens said in his dissent in *Texas* v. *Johnson*:

> [A] country's flag is a symbol of more than "nationhood and national unity." It also signifies the ideas that characterize the society that has chosen that emblem as well as the special history that has animated the growth and power of those ideas. * * * So it is with the American flag. It is more than a proud symbol of the courage, the determination, and the gifts of a nation that transformed 13 fledgling colonies into a world power. It is a symbol of freedom, of equal opportunity, of religious tolerance, and of goodwill for other peoples who share our aspirations.

(491 U.S. at 437 (dissenting).)

The American flag represents, in a way nothing else can, the common bond shared by the people of this Nation, one of the most heterogeneous and diverse in the world. Whatever our differences of party, politics, philosophy, race, religion, ethnic background, economic status, social status, or geographic region, we are united as Americans. That unity is symbolized by a unique emblem, the American flag. As the visible embodiment of our Nation and its principles, values, and ideals, the American flag has come to sym-

bolize hope, opportunity, justice, and freedom, not just to the people of this Nation, but to people all over the world.

When an identical amendment was defeated in Congress in 1990, in the aftermath of two Supreme Court decisions nullifying statutory protections of the flag, veterans, patriotic, and other civic organizations, together with individual citizens from all walks of life, initiated a grassroots movement to regain legal protection of the flag. In short, the American people have revived this constitutional amendment.

The effort to enact S.J. Res. 31 is wholly bipartisan. The effort is led by Congressmen Gerald Solomon (R–N.Y.) and G.V. ''Sonny'' Montgomery (D–Miss.) in the House of Representatives. Senators Orrin G. Hatch (R–Utah) and Howell Heflin (D–Ala.) are the principal sponsors in the Senate.

For the reasons set forth in this report, the Judiciary Committee reported S.J. Res. 31 to the full Senate with a favorable recommendation, and urges that it be adopted.

II. Legislative History

On June 21, 1989, the U.S. Supreme Court issued its decision in the case of *Texas* v. *Johnson,* 491 U.S. 397 (1989). Gregory Johnson had been convicted of violating a Texas statute for knowingly desecrating an American flag. Johnson had burned an American flag at a political demonstration outside Dallas City Hall during the 1984 Republican National Convention in Dallas. Mr. Johnson's conviction was reversed by the Texas Court of Criminal Appeals (*Johnson* v. *State,* 755 S.W.2d 92 (1988)). In a 5-to-4 decision, the U.S. Supreme Court affirmed the reversal, holding that Johnson's burning of the flag was expressive conduct, a form of symbolic speech protected by the first amendment.

Following the Supreme Court's decision in *Texas* v. *Johnson,* on July 18, 1989, Senators Dole, Dixon, Thurmond, and Heflin, as principal cosponsors, introduced Senate Joint Resolution 180, a proposed amendment to the U.S. Constitution, which would give Congress and the States power to prohibit the physical desecration of the flag of the United States. On July 18, 1989, Senators Biden, Roth, and Cohen, as principal cosponsors, introduced S. 1338 (The Biden-Roth-Cohen Flag Protection Act of 1989), which proposed to amend the Federal flag desecration statute, 18 U.S.C. 700(a).[1] The Judiciary Committee held 4 days of hearings, August 1, August 14, September 13, and September 14, 1989, on the proposed legislation and constitutional amendment. Approximately 20 hours of testimony was received from 26 witnesses, including a broad range of constitutional scholars, constitutional historians, representatives of veterans' organizations and individual veterans, Members of the Senate, and from the Department of Justice. On September 21, 1989, the Judiciary Committee approved S. 1338 and ordered the bill favorably reported.

On September 12, 1989, the House of Representatives passed H.R. 2978 (The Flag Protection Act of 1989), which also sought to

[1] This statute provided that ''[W]hoever knowingly casts contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it shall be fined not more that $1,000 or imprisoned for not more than one year, or both.''

amend 18 U.S.C. 700(a) to protect the physical integrity of the flag of the United States and was similar to S. 1338.

The Senate passed H.R. 2978 on October 5, 1989, and it became law on October 28, 1989. Under this statute, codified at 18 U.S.C. 700(a):

> (W)hoever knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or 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.

An exception was made for "conduct consisting of the disposal of a flag when it has become worn or soiled."

On October 19, 1989, S.J. Res. 180, the proposed constitutional amendment, failed to obtain the necessary two-thirds vote of the full Senate, by vote of 51 to 48.

On June 11, 1990, the Supreme Court, in *United States* v. *Eichman,* 495 U.S. 928 (1990), a consolidated appeal of cases involving individuals who knowingly set fire to several U.S. flags on the steps of the U.S. Capitol while protesting American foreign policy, and other individuals who knowingly burned a U.S. flag in Seattle while protesting passage of the 1989 Flag Protection Act, held that the 1989 act, like the Texas statute struck down in *Texas* v. *Johnson,* violated the first amendment.

The Senate Judiciary Committee held a hearing on June 21, 1990, considering measures to protect the American flag, and heard from eight witnesses, including from the Justice Department.

Following the Supreme Court's decision in *United States* v. *Eichman,* a proposed amendment to the U.S. Constitution, which would give Congress and the States power to prohibit the physical desecration of the flag of the United States, was again introduced (Senate Joint Resolution 332). On June 26, 1990, the proposed amendment failed to receive the necessary two-thirds vote of the full Senate, by vote of 58 to 42.

On March 21, 1995, Senators Hatch and Heflin, as principal cosponsors, along with a bipartisan group of 45 additional cosponsors, introduced Senate Joint Resolution 31, a proposed amendment to the U.S. Constitution, which reads: "The Congress and the States shall have power to prohibit the physical desecration of the flag of the United States."

This is the same language of the amendments voted upon in 1989 and 1990. It presently has a total of 56 sponsors.

A hearing on S.J. Res. 31 was held by the Judiciary Committee Subcommittee on the Constitution, Federalism, and Property Rights on June 6, 1995. The subcommittee heard testimony from Senator Robert Kerrey; Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, Department of Justice; William Detweiler, national commander, The American Legion; Rose Lee, Washington representative, Gold Star Wives of America; Joseph Pinon, assistant city manager, city of Miami Beach; Prof. Stephen B. Presser of Northwestern University Law School; Charles J. Cooper, former Assistant Attorney General, Office of Legal Counsel, Department of Justice; Prof. Richard D. Parker of Harvard Law School; Gene R. Nichol, dean of the University of Colorado Law

School; Bruce Fein, attorney; and Prof. Cass R. Sunstein of the University of Chicago Law School.

On July 20, 1995, the committee voted 12 to 6 to report favorably S.J. Res. 31. The House of Representatives voted 312 to 120 in favor of an identical resolution on June 28, 1995.

III. DISCUSSION

A.—THE FLAG IS A UNIQUE SYMBOL OF A DIVERSE COUNTRY

1. Brief history of the American flag

Before the Continental Congress adopted a flag for the United States, flags of different designs were used in the colonies. For example, Pine Tree flags were popular in the New England colonies; the pine tree was regarded as symbolizing the hardiness of New Englanders. One such flag is widely believed to have been carried by American troops on June 17, 1775, at the Battle of Bunker Hill. Known as the Bunker Hill Flag, its design had a blue field with a white canton bearing the red cross of St. George and a green pine tree. American naval vessels off of New England sometimes used a flag with a white field with a pine tree at its center and the words "An Appeal to Heaven" emblazoned across the bottom.

The Moultrie Liberty Flag is believed to be the first distinctive flag of the American Revolution displayed in the South, in 1775. It had a blue field and a white crescent in an upper corner. Later, the word "Liberty" was added.

Colonel Christopher Gadsen of South Carolina designed one of the various rattlesnake flags in 1775. It consisted of a yellow field with a coiled rattlesnake in the center, under which the words "Don't Tread on Me" were written.

On January 1, 1776, George Washington, then commander-in-chief of the Continental Army, ordered the raising of a flag with 13 alternating red and white stripes and the Union Jack in the canton at Prospect Hill, near Cambridge, MA. This flag was known as the Grand Union Flag. Inclusion of the Union Jack, however, did not prove popular, especially after the signing of the Declaration of Independence.

One story has it that in the spring of 1776, Robert Morris, financier and patriot organizer, Col. George Ross of Delaware, and Gen. George Washington visited Mrs. Betsy Ross in her upholstery shop on Arch Street in Philadelphia. Her husband had died in a gunpowder explosion a few months earlier, after joining the Pennsylvania militia. They showed her a design of a flag on a piece of paper. After suggesting the stars have five rather than six points, she shortly produced a flag said to be the first "national" flag. This story was not made public until 1870, when her grandson read a paper to the Historical Society of Pennsylvania. Affidavits from some of her daughters, nieces, and grandchildren assert that she recounted the story to them many times before her death in 1836.

On June 14, 1777, the Marine Committee of the Second Continental Congress adopted a resolution which read:

> Resolved, that the flag of the United States be thirteen stripes, alternate red and white; that the union be thirteen

> stars, white in a blue field representing a new constellation.

Arranging the stars in a circular pattern was popular, although the congressional resolution did not specify this detail. Indeed, one of the earliest known appearances of a flag reflecting to some degree this new constellation, occurred 2 months later at the Battle of Bennington. There, Lt. Col. Friedrich Baum commanded a unit of Hessian dragoons attached to the ill-fated army of British Gen. Johnny Burgoyne. The Hessians collided with troops under Gen. John Stark along the Walloomsac River in Vermont. On August 16, 1777, General Stark reportedly rallied his troops:

> My men, yonder are the Hessians. They were bought for seven pounds and ten pence a man. Are you worth more? Prove it. Tonight, the American flag floats from yonder hill, or Molly Stark sleeps a widow!

The Americans triumphed. This battle flag has 1 star in both upper corners of the blue canton, with 11 stars arranged in a semicircle over the numerals "76." The red and white stripes are in reverse order—seven white and six red stripes.

The Nation's flag was first honored by a foreign nation in February, 1778, when the French Royal Navy exchanged 13 gun salutes with Capt. John Paul Jones' *Ranger*. It is believed that Captain Jones' *Ranger* displayed the Stars and Stripes for the first time in the fledgling American Navy on July 2, 1777.

In 1791 Vermont was admitted to the Union, followed the next year by Kentucky. To address these additions to the Union, Congress adopted a new measure, in 1794, effective May 1, 1795, expanding the flag to 15 stars and 15 stripes, one for each State. The circular pattern of the stars was abandoned. This new flag flew as the official flag of our country from 1794 to 1818. Francis Scott Key wrote the "Star Spangled Banner" in honor of this flag in 1814.

By 1818, five additional States—Tennessee, Ohio, Louisiana, Indiana, and Mississippi—had entered the Union. Realizing that the flag would become too unwieldy if a stripe were added for each new State, it was suggested that the stripes return to 13 in number to represent the original thirteen colonies, and that a star be added to the blue field for each new State admitted to the Union.

On April 14, 1818, President Monroe signed into law a bill providing "that the flag of the United States be 13 horizontal stripes, alternate red and white; that the union have 20 stars, white in a field of blue," and that upon admission of each new State into the Union one star be added to the union of the flag on the Fourth of July following its date of admission. Thus marked the beginning of the most detailed legislative provision for the design of the national symbol.

The nickname "Old Glory" is said to have been given the flag by Capt. William Driver. Captain Driver first sailed as a cabin boy at age 14, from his home town of Salem, MA. After several more voyages, he became master of a 110-ton brig, the *Charles Doggett*, at age 21.

His mother and other women of Salem made an American flag of cotton, 12 feet by 24 feet in size, as a birthday and farewell gift. They presented it to him during the outfitting of his ship. As the

breeze unfurled the flag, and he was asked by its makers what he thought of the flag, he said, "God bless you, I'll call it Old Glory."

Driver took this flag with him whenever he went to sea. He retired form sea duty in 1837 and settled in Nashville, TN, where he displayed the flag.

By the time of the Civil War, everyone in and around Nashville recognized Captain Driver's "Old Glory." Possession of any Union flag deep in Confederate territory meant real danger. And the Confederates were determined to find and destroy Driver's flag, but repeated searches revealed no trace of Driver's cherished banner.

It wasn't until February 25, 1862, when Union forces captured Nashville and raised a small American flag over the capitol, that "Old Glory" reappeared. Accompanied by Union soldiers, Captain Driver returned to his home and began unstitching his bedcover. Inside rested the original "Old Glory," where Driver had safely hidden it during the desperate days of war.

Gathering up the flag, Captain Driver, with soldiers of the Sixth Ohio Regiment, returned to the capitol of Nashville, and replaced the small flag which fluttered there with his "Old Glory."

2. Congress, the States, and the flag

Congress has, over the years, reflected the devotion our diverse people have for Old Glory. During the Civil War, for example, Congress awarded the Medal of Honor to Union soldiers who rescued the flag from falling into Confederate hands.

In 1931, Congress declared the Star Spangled Banner to be our national anthem. In 1949, Congress established June 14 as Flag Day. Congress has established "The Pledge of Allegiance to the Flag" and the manner of its recitation. Congress designated John Philip Sousa's "The Stars and Stripes Forever" as the national march in 1987.

Congress has not only established the design of the flag (4 U.S.C. 1 and 2), but also the manner of its proper display in the Flag Code (36 U.S.C 173–179). The Flag Code itself is hortatory; it is not legally enforceable.

Congress, along with 48 States, had regulated physical misuse of the American flag until the Supreme Court's 1989 decision in *Texas* v. *Johnson*. Indeed, some of these laws originated nearly a century ago.

In 1968, Congress enacted a nationwide flag desecration statute, codified at 18 U.S.C. 700(a). To avoid infringing upon freedom of speech, Congress limited the 1968 flag statute to *acts* of physical desecration, and omitted language contained in the 1917 law it had enacted applicable to the District of Columbia which made it a crime to "defy" or "cast contempt * * * *by word* or act" upon the American flag (emphasis supplied). The 1968 statute provided for a fine of not more than $1,000 or imprisonment for not more than 1 year, for anyone who "knowingly casts contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning or trampling upon it * * *."

These congressional and State actions reflect the people's devotion to the flag; Congress and the States did not create these feelings and deep regard for the flag among our people.

B.—THE PLACE OF THE FLAG IN THE HEARTS AND MINDS OF THE AMERICAN PEOPLE

The committee recognizes that members of the Senate need no words from it to explain the special bond between the American people and their beloved flag as a unique symbol of their aspirations to national unity, and the principles, values, ideals, and history of their country. Still, because that bond is the basis for S.J. Res. 31, the voices of the American people in expressing their reverence for their flag are properly heard in this report, voices which echo down the generations of our history.

Richard Reeves, in a July 4, 1995, column in The Sun entitled, "A Fourth of July on the Oregon Trail," quoted from the diary of Enoch Conyers. Conyers was part of a wagon train pausing in Wyoming on the Oregon Trail, heading west, in 1852. These are excerpts from his diary:

> July 3—Several of the boys started out this morning for a hunt in the mountains for the purpose of obtaining some fresh meat, if possible, for our Fourth of July dinner. Those who remain in camp are helping the ladies in preparing the banquet. A number of wagon beds are being taken to pieces and formed into long tables.
>
> A little further on is a group of young ladies seated on the grass talking over the problem of manufacturing "Old Glory" to wave over our festivities. One lady brought forth a sheet. This gave the ladies an idea. Quick as thought, another brought a skirt for the red stripes. Another lady ran to her tent and brought forth a blue jacket, saying: "Here, take this, it will do for the field. * * *"
>
> July 4—The day was ushered in with the booming of small arms, which was the best that we could do under the circumstances, so far away from civilization. Just before the sun made its appearance above the eastern horizon, we raised our 40-foot flagstaff with "Old Glory"' nailed fast to the top. * * * Our company circled around the old flag and sang "The Star Spangled Banner." Then three rousing cheers and a tiger were given to "Old Glory * * *".

The diary excerpts reflect not only the use of the flag's nickname before the Civil War, but also the popularity of "The Star Spangled Banner" nearly four decades after its composition by Francis Scott Key.

Henry Ward Beecher gave an address entitled, "The National Flag," in May 1861. These are excerpts:

> A thoughtful mind, when it sees a nation's flag, sees not the flag, but the nation itself. And whatever may be its symbols, its insignia, he reads chiefly in the flag the government, the principles, the truths, the history, that belong to the nation that sets it forth * * * When the united crosses of St. Andrew and St. George, on a fiery ground, set forth the banner of old England, we see not the cloth merely; there rises up before the mind the idea of that great monarchy.

> "This nation has a banner, too, and * * * wherever it [has] streamed abroad men saw day break bursting on their eyes. For * * * the American flag has been a symbol of Liberty, and men rejoiced in it * * *
>
> * * * * *
>
> If one, then, asks me the meaning of our flag, I say to him, it means just what Concord and Lexington meant, what Bunker Hill meant; it means the whole glorious Revolutionary War, which was, in short, the rising up of a valiant young people against an old tyranny, to establish the most momentous doctrine that the world had ever known, or has since known,—the right of men to their own selves and to their liberties.
>
> In solemn conclave our fathers had issued to the world that glorious manifesto, the Declaration of Independence. A little later, that the fundamental principles of liberty might have the best organization, they gave to this land our imperishable Constitution. Our flag means, then, all that our fathers meant in the Revolutionary War; all that the Declaration of Independence meant; it means all that the Constitution of our people, organizing for justice, for liberty, and for happiness, meant. Our flag carries American ideas, American history and American feelings. Beginning with the colonies, and coming down to our time in its sacred heraldry, in its glorious insignia, it has gathered and stored chiefly this supreme idea: Divine right of liberty in man. Every color means liberty; every thread means liberty; every form of star and beam or stripe of light means liberty; not lawlessness, not license; but organized institutional liberty,—liberty through law, and laws for liberty!

Justice Oliver Wendell Holmes, in a book on John Marshall, wrote:

> The flag is but a bit of bunting to one who insists on prose. Yet, thanks to Marshall and the men of his generation—and for this above all we celebrate him and them—its red is our lifeblood, its stars our world, its blue our heaven. It owns our land. At will it throws away our lives.

(Holmes, John Marshall (1901), in Collected Legal Papers 266, 270–71 (1920).)

Henry Holcomb Bennett, born in Chillicothe, OH, in 1863, engaged in ornithology, book illustration, and writing short stories about Army life. In 1904, he published, "The Flag Goes By:"

> Hats off!
> Along the street there comes
> A blare of bugles, a ruffle of drums,
> A flash of color beneath the sky:
> Hats off!
> The flag is passing by!
>
> Blue and crimson and white it shines,
> Over the steel-tipped, ordered lines.
> Hats off!
> The colors before us fly;

But more than the flag is passing by.

Sea-fights and land-fights, grim and great,
Fought to make and to save the State:
Weary marches and sinking ships;
Cheers of victory on dying lips;

Days of plenty and years of peace;
March of a strong land's swift increase;
Equal justice, right, and law,
Stately honor and reverend awe;

Sign of a nation, great and strong
To ward her people from foreign wrong:
Pride and glory and honor,—all
Live in the colors to stand or fall.

Hats off!
Along the street there comes
A blare of bugles, a ruffle of drums;
And loyal hearts are beating high:
Hats off!
The flag is passing by!

In 1907, George M. Cohan introduced the song, "You're a Grand Old Flag," neatly summarizing the outlook of millions of Americans.

Elias Lieberman left czarist Russia when he was 8 years of age. Educated in New York City public schools and colleges, he became an English teacher, poet, and magazine editor. His poem, "I Am an American," appearing in "Everybody's Weekly" in July 1916, is a reminder of the fierce patriotism of millions of immigrants to our country, and the meaning of the flag to them:

I AM AN AMERICAN

I am an American.
My father belongs to the Sons of the Revolution;
My mother, to the Colonial Dames.
One of my ancestors pitched tea overboard in Boston Harbor;
Another stood his ground with Warren;
Another hungered with Washington at Valley Forge.
My forefathers were America in the making:
They spoke in her council halls;
They died on her battle-fields;
They commanded her ships;
They cleared her forests.
Dawns reddened and paled.
Staunch hearts of mine beat fast at each new star
In the nation's flag.
Keen eyes of mine foresaw her greater glory:
The sweep of her seas,
The plenty of her plains,
The man-hives in her billion-wired cities.
Every drop of blood in me holds a heritage of patriotism.
I am proud of my past.
I am an American.

I am an American.
My father was an atom of dust,
My mother a straw in the wind,
To His Serene Majesty.
One of my ancestors died in the mines of Siberia;
Another was crippled for life by twenty blows of the knout;
Another was killed defending his home during the massacres.
The history of my ancestors is a trail of blood
To the palace-gate of the Great White Czar.

But then the dream came—
The dream of America.
In the light of the Liberty torch
The atom of dust became a man
And the straw in the wind became a woman
For the first time.
"See," said my father, pointing to the flag that fluttered near,
"That flag of stars and stripes is yours;
It is the emblem of the promised land.
It means, my son, the hope of humanity.
Live for it * * * die for it!"
Under the open sky of my new country I swore to do so;
And every drop of blood in me will keep that vow.
I am proud of my future.
I am an American.

The identification of the flag with the Nation and its ideals is also reflected in a WWI era poem by Henry van Dyke:

AMERICA'S WELCOME HOME

Oh, gallantly they fared forth in khaki and in blue,
America's crusading host of warriors bold and true;
They battled for the right of men beside our brave Allies.
And now they're coming home to us with glory in their eyes.

Oh it's home again, America for me!
Our hearts are turning home again and there we long to be,
In our beautiful big country beyond the ocean bars,
Where the air is full of sunlight and the flag is full of stars.

They bore our country's great word across the rolling sea,
"America swears brotherhood with all the just and free."
They wrote that word victorious on fields of mortal strife,
And many a valiant lad was proud to seal it with his life.

Oh, welcome home in Heaven's peace, dear spirits of the dead!
And welcome home ye living sons America hath bred!
The lords of war are beaten down, your glorious task is done;
You fought to make the whole world free, and the victory is won.

Now it's home again, and home again, our hearts are turning west,
Of all the lands beneath the sun America is best.
We're going home to our own folks, beyond the ocean bars,
Where the air is full of sunlight and the flag is full of stars.

During World War II, American Marines engaged in fierce combat against Japanese forces on Iwo Jima. The Marines' ascent up Mount Suribachi cost nearly 6,000 American lives. One of the most famous scenes of the war, captured on film and memorialized at the Iwo Jima Memorial in Arlington, VA, occurred when Marines raised the American flag at the top of Mount Suribachi.

The 1989 *Texas* v. *Johnson* decision striking down flag desecration statutes triggered another outpouring of expression on the meaning of the flag, starting with the dissenters in that case:

> The ideas of liberty and equality have been an irresistible force in motivating leaders like Patrick Henry, Susan B. Anthony, and Abraham Lincoln, schoolteachers like Nathan Hale and Booker T. Washington, the Philippine Scouts who fought at Bataan, and the soldiers who scaled the bluff at Omaha Beach. If those ideas are worth fighting for—and our history demonstrates that they are—it cannot be true that the flag that uniquely symbolizes their

> power is not itself worthy of protection from unnecessary desecration.

Justice John Paul Stevens (*Texas* v. *Johnson*, 491 U.S. at 439 (1989) (dissent)).

"Millions and millions of Americans regard [the American Flag] with an almost mystical reverence regardless of what sort of social, political, or philosophical beliefs they may have." Chief Justice William H. Rehnquist (*Texas* v. *Johnson*, 491 U.S. at 429 (1989) (dissent)).

Following the *Texas* v. *Johnson* decision, Americans rallied in support of the protection of the flag. A number of witnesses testified at the Judiciary Committee hearings following the *Johnson* decision. As John F. Heilman, national legislative director of the Disabled American Veterans, said when he testified at the hearings:

> The American flag—"Old Glory"—is our national ensign, a proud and courageous symbol of our Nation's precious heritage. As such, it has been carried and defended in battle, revered and cherished by its citizens and viewed as a beacon of hope and freedom by people throughout the world.

(Written statement of John F. Heilman, Sept. 13, 1989, at 1.)

As R. Jack Powell, executive director of the Paralyzed Veterans of America, forcefully articulated:

> The twenty-eighth President of the United States, Woodrow Wilson, in an address on June 14, 1915 (Flag Day) said:
>
> * * * The flag is the embodiment not of sentiment but of history. It represents the experiences made by men and women * * * who * * * live under that flag.
>
> The members of Paralyzed Veterans of America, all of whom have incurred catastrophic spinal cord injury or dysfunction, have shared the ultimate experience of citizenship under the flag: serving in defense of our Nation. The flag, for us, embodies that service and that sacrifice as a symbol of all the freedoms we cherish, including the First Amendment right of free speech and expression. Curiously, the Supreme Court in rendering its decision could not clearly ascertain how to determine whether the flag was a "symbol" that was "sufficiently special to warrant * * * unique status." In our opinion and from our experience, there is no question as to the unique status and singular position the flag holds as the symbol of freedom, our Constitution and our Nation. As such it must be defended and provided special protection under the law.
>
> * * * * *
>
> I am concerned that there is some impression, at least in the media and by some others that are around, that the idea of supporting the flag is some idea just of right-wing conservatives, and I have heard some Senators say, "Those veteran organizations," and that kind of thing.
>
> In fact, the flag is the symbol of a constitution that allows Mr. Johnson to express his opinion. So, to destroy

> that symbol is again a step to destroy the idea that there is one nation on earth that allows their people to express their opinions, whether they happen to be socialist opinions or neo-Nazi opinions, or democratic opinions or republican opinions.
>
> Certainly, the idea of society is the banding together of individuals for the mutual protection of each individual. That includes, also, an idea that we have somehow lost in this country, and that is the reciprocal, willing giving up of unlimited individual freedom so that society can be cohesive and can work. It would seem that those who want most to talk about freedom ought to recognize the right of a society to say that there is a symbol, one symbol, which in standing for this great freedom for everyone of different opinions, different persuasions, different religions, and different backgrounds, society puts beyond the pale to trample with.

(Testimony of R. Jack Powell, Sept. 13, 1989, at 432–437.)

Walter G. Hogan, then commander in chief of the Veterans of Foreign Wars of the United States testified on September 13, 1989:

> Mr. Chairman, upon hearing of the Supreme Court decision [in *Texas* v. *Johnson*], our reaction went from one of disbelief to shock then to outrage.
>
> While our members served overseas, the American flag was the one single symbol that was a constant reminder and link to our Nation and to our home. For this reason, members of the Veterans of Foreign Wars today still hold a very special allegiance to the flag borne out of their service and sacrifice to this great Nation.

(Testimony of Walter G. Hogan, September 13, 1989, at 427.)

H.F. "Sparky" Gierke, a former national commander of the American Legion and Justice on the North Dakota Supreme Court, testified the same day:

> You don't have to be a veteran to understand what the American flag means, nor do you have to be a super patriot to understand that the symbols of our freedom deserve to be protected.
>
> Tens of thousands of brave, selfless American men and women have died to protect our flag from desecration at the hand of our enemy. We have a sacred obligation to ensure that their flag will not now be desecrated by those whom they died to protect.
>
> We stand on a slippery slope, indeed, if we as a nation are not sufficiently offended by the desecration of our flag to be moved to action * * *

(Testimony of H.F. Gierke, September 13, 1995, at 407.)

Gary Freeman, a Vietnam veteran, from Hutchinson, Kansas testified to his efforts to collect signatures on a petition calling for a constitutional amendment on the flag:

> As you know, I am not a constitutional scholar. I am not a legal expert. I am a husband and father, and someone

> who works hard every day to earn a living as a treatment plant operator in South Hutchinson. I am also a man who loves his country, a man who spent 2 years fighting for America in Vietnam, and an American who feels very deeply about our Nation's flag and about the principles that the flag has come to represent.
>
> * * * * *
>
> [M]y experience in Vietnam reaffirmed what I already knew, that we in America are indeed blessed, blessed with many material possessions, and blessed with a Constitution that safeguards our precious freedoms.
>
> That is why I, and so many other veterans, were outraged when the Supreme Court said that our flag can be burned, that it can be desecrated by anyone at any time, that it can be thrown away like some old washrag.
>
> With all due respect to the Court, I think I and millions of other Americans know better. I know that the flag has followed every American regiment, every American battalion, and every American platoon into battle. I know that the flag rests respectfully on the caskets of our dead soldiers. And I know that the flag is given to the spouses of our deceased veterans, many of whose names appear on the Vietnam Veterans Memorial right here in Washington. The names of some of my friends appear on that memorial.
>
> The flag, in other words, is far more than just a piece of cloth. The flag is the very symbol of our freedoms, our values, our aspirations as a nation. And it deserves constitutional protection.
>
> They say the colors of the flag do not run. But I know that the colors of the flag flow through the veins of every American fighting man and woman until their dying day.
>
> So, in my opinion, allowing people to desecrate the flag is a slap in the face to every man and woman who has ever fought for their country. To let the flag and the principles for which it stands be desecrated at will is like someone assaulting your wife or your daughter, and walking free to do it again. I know this is a pretty strong statement, but this is what I believe in my heart.

(Testimony of Gary Freeman, September 13, 1989, at 500.)

Following defeat of the constitutional amendment to empower Congress and the States to prohibit the physical desecration of the flag of the United States, in 1990, the American Legion and other veterans, patriotic, and civics groups, and individual Americans, initiated a grassroots effort to gain support for a constitutional amendment. Many of these groups and individuals formed the Citizens Flag Alliance.

The Citizens Flag Alliance consists of over 100 organizations, ranging from the American Legion; the Knights of Columbus; Grand Lodge, Fraternal Order of Police; and the National Grange to the Congressional Medal of Honor Society of the USA and the African-American Women's Clergy Association. Individual Americans from all walks of life have joined the effort. The Veterans of Foreign Wars actively supports the amendment.

Forty-nine State legislatures have called for a constitutional amendment on flag desecration. According to Prof. Stephen B. Presser of Northwestern University Law School, no other amendment in the Nation's history has had this kind of support in State legislatures.

The Citizens Flag Alliance approached Senators Heflin and Hatch last year, well before the November, 1994, elections and asked them to lead a bipartisan effort in the Senate.

Similarly, the Citizens Flag Alliance approached Congressmen Gerald Solomon and G.V. "Sonny" Montgomery to lead the bipartisan effort in the House.

At the June 6, 1995, hearing of the Senate Judiciary Committee's Subcommittee on the Constitution, Federalism, and Property Rights, Rose Lee, past national president of the Gold Star Wives of America, testified:

> The flag, my flag, our flag—it means something different to each and every American. But to the Gold Star Wives it has the most personal of meanings. Twenty-three years ago this American flag covered the casket of my husband, Chew-Mon Lee, United States Army. He was a decorated combat veteran wounded in the Korean War. For his service in Korea he received The Purple Heart with an Oak Leaf Cluster and the Army's second-highest award, the Distinguished Service Cross, for extraordinary heroism in military operations against an armed enemy. He also served as a staff officer in the Vietnam War. And like all of us in this room, he was a proud and patriotic American. He died on active duty while stationed in Taiwan and is buried at Arlington National Cemetery. Every Gold Star Wife has a flag like this one, folded neatly in a triangle and kept in a special place. It's not fair and it's not right that flags like this flag, handed to my by an Honor Guard 23 years ago, can be legally burned by someone in this country. My husband defended this flag during his life. When he died, it was an honor to have this flag cover his casket. But it's a dishonor to our husbands and an insult to their widows to allow this flag to be legally burned.
>
> In a certain sense, I'm here today to finish the uncompleted mission of Chew-Mon Lee, to defend in my own way the flag he defended so bravely throughout his military career.
>
> The flag is a symbol that stands for the freedoms we enjoy as Americans. My husband fought for those freedoms, including one we hear a lot about in this debate, freedom of speech. The Gold Star Wives believe that free speech is one of our Nation's most important ideals. Our country is a marketplace of many voices and ideas; most of them useful, some of them hurtful. Under our Constitution you can say anything you want against the flag or against the United States. But burning the flag is not an expression of free speech. It's a terrible physical act. And it's a slap in the face of every widow who has a flag just like mine.

I'd like to speak briefly about what this flag symbolizes to me. My parents arrived in this country from China in the early 1920's. My mother was pregnant at the time with their first child, a son, one of six sons she would have. And all six would eventually serve in the armed forces of the United States. Like many people who come from other countries, coming to the United States was a big step for my parents. But they were proud to become Americans, proud of the opportunities this great country offered. My mother expressed that pride by displaying an American flag in our home each and every day. In a land that welcomes diverse people, the flag in our home represented that wonderful diversity.

The flag means something different to each of us. We each look at the flag and see something personal reflected in it. To some it stands for strength. To others it stands for justice. To my parents it meant diversity and opportunity. To me the flag has come to mean freedom and courage, the freedom we enjoy as Americans and the courage of the men and women who defend those freedoms. I have tried to honor those ideals by flying the flag outside my home on national holidays, especially Memorial Day, Flag Day and Veterans Day. And each day for the past 23 years I have kept this flag, the flag from my husband's casket, close at hand.

Although I grew up in California, I live in this area now and often drive past the powerful Iwo Jima Marine Memorial. It depicts our servicemen so valiantly and proudly raising the flag in a turning point of the war against tyranny and aggression. What a shame it is to permit the desecration of that flag. What an important and meaningful step it would be to make protection of that flag part of our Constitution.

The Gold Star Wives would welcome the day when organizations like ours would no longer be needed—no more wars, no more military widows. But until that day arrives, the Gold Star Wives will be here, each with her own flag, defended with courage, presented with gratitude, accepted with pride.

I urge you to give this flag the protection it so richly deserves.

(Written testimony of Rose Lee, June 6, 1995.)

At the same hearing, Joseph R. Pinon also testified:

I am here today as public servant, community leader, Vietnam veteran, naturalized citizen and family man. I have spent my entire adult life in public service. Currently, I am the assistant city manager of Miami Beach where I have oversight responsibility for numerous public works departments and programs serving the community's diverse, multicultural population. I have worked for the city in several management capacities since 1989. Prior to this, I was a police officer for 13 years serving in virtually

every capacity of law enforcement. I was honored to receive several commendations during my tenure.

Regarding my community service, I am president of the South Florida chapter of LULAC, the League of United Latin American Citizens, the largest Hispanic organization in the country, representing 350,000 members nationwide. I am president and chairman of the Stanley Myers Community Health Center, which offers medical services to more than 2,000, mostly poor, clients per year. I am also president of ASPIRA of Florida, an organization that provides opportunities and alternatives to students throughout Dade County. I am currently serving as the commander of Veterans of Foreign Wars Post 10212 in Miami Beach and I am a proud member of the American Legion.

So you see, I believe I have a good pulse on my community. And while there is a significant immigrant presence in Miami, in many ways, my community is not much different from others across the country. The families in Miami represent a mix of cultures and geographic origins. But despite all of our differences, we live, work and prosper together—united by a great Constitution and a flag that represents us all. In my community and others across the country, there is widespread public support for a constitutional amendment to protect the United States flag from physical desecration. We believe, as do most Americans, that purposeful destruction of the flag is wrong. It is simply unacceptable behavior and our laws ought to reflect this basic value. Common sense will tell you that *actions* such as flag desecration are *not* speech.

Seven days a week I meet and talk to common folks who believe in this country and the ideals and values represented in the flag. These people, mostly immigrants, want the flag of their adopted country, my country and yours, to be protected against offensive, repugnant acts such as flag burning.

I am one of these immigrants. My family went to great lengths to flee Fidel Castro's regime, and to be embraced by this country and its promise of freedom. In 1961 my mother placed me at the age of 12, along with my 10-year-old brother, on the Pedro Pan flight for unaccompanied children. We were in limbo until we were reunited with my mother and younger brother when they arrived a year later. To my family and millions of others around the world, the U.S. flag is an enduring symbol of individual freedom and opportunity. I remember as if it were yesterday, even though it was more than 20 years ago, the tears of joy shed by my mother and brother during citizenship ceremonies as they pledged allegiance to the flag of the United States.

As a young man I served my adopted country as a Marine in Vietnam. Military service was a pivotal point in my life. I lost many good friends in the war while others returned in pieces. The war taught me that life is precious and despite the controversy of our involvement, I felt par-

ticularly fortunate to return to a society of opportunity and freedom. My experience instilled in me a sense of obligation to give something back to my community and my country.

One experience I remember vividly was defending Hill 695, just outside of Khe Sanh, in Vietnam. My Marine reconnaissance unit was sent in advance of a larger offensive. Shortly after marking our base with an American flag, we faced overwhelming forces and had to withdraw. Despite grave danger, my unit would not leave until the U.S. flag was removed to safety. Twenty-five years ago we were willing to risk our lives to make sure the American flag did not fall into enemy hands. No one ordered us to do it. It was simply the way we felt about our Nation and our flag. How sad it is now to have to wage a political battle to preserve our flag here at home.

Protecting the flag with a constitutional amendment is as important to me today as defending the American flag on Hill 695 outside of Khe Sanh, Vietnam. I am not a constitutional scholar. But I *can* speak from what I know. Throughout my career in public service, participation in numerous citizenship ceremonies and involvement in community service, I am reminded each day that we are a diverse nation, representing many different ethnic groups, cultures and religions. Yet our flag has been a unique and unifying symbol. It stands for individual freedom and democracy and opportunity for all. It extends to the world a beacon of peace and goodwill.

(Written testimony, Joseph R. Pinon, June 6, 1995.)

William Detweiler, national commander of the American Legion testified:

We are a nation born of immigrants, many of whom came to America with only scant knowledge of our heritage and our history. Whether they docked at Ellis Island eighty years ago or landed in Miami yesterday, one of the first sights they beheld was Old Glory waving proudly in the air. It was the embodiment of all of their hopes for a better tomorrow. Although it was not the flag of their fathers, they knew it would be the flag of their children, and of their children's children.

They knew it was the flag of a nation that might not be perfect, but it was the banner of a good nation that then, and now strives for equal justice and opportunity for all. It is their flag—not the battle colors of a king or the banner of a dictator—it is the flag of the people.

* * * * *

The flag stands with honor in our houses of worship because it is a symbol of our religious freedom. It waves over our schools as a testament to our heritage and freedom of opportunity. The flag flies over our state houses and Federal buildings as testimony to our representative form of government. It is planted in the Sea of Tranquillity as a

> monument to our leadership and perseverance as a united people. And it flies from the front porch of our homes as a reminder that we are free today because of those who paid a dear price throughout all of our yesterdays. Those values, and so much more, are the essence of the flag. Those values and what they represent are what we now have the opportunity to pass on to our children, our children's children and [a] thousand generations to come through this amendment.

(Written testimony, William Detweiler, June 6, 1995.)

James N. Magill, director, National Legislative Service of the Veterans of Foreign Wars of the United States, wrote to Chairman Hatch:

> Because our members have always proudly followed the flag in time of hostility and taken their oaths of allegiance to the Constitution and the flag very seriously we passed VFW Resolution 101, "U.S. Flag Desecration" at our last national convention. The thrust of our resolution is to ask Congress to propose to the States an amendment to the Constitution prohibiting the physical desecration of the flag.

(Letter from James N. Magill to Senator Orrin G. Hatch, July 18, 1995.)

Perhaps Paul Greenberg, editorial page editor of the Arkansas Democrat Gazette, summarized it best in a July 6, 1995 column:

> But didn't our intelligentsia explain to us yokels again and again that burning the flag of the United States isn't an action, but speech, and therefore a constitutionally protected right? That's what the Supreme Court decided, too, if only in one of its confused and confusing 5-to-4 splits. But the people don't seem to have caught on. They still insist that burning the flag is burning the flag, not making a speech. Stubborn lot, the people. Powerful thing, public opinion * * *
>
> It isn't the idea of desecrating the flag that the American people propose to ban. Any street-corner orator who takes a notion to should be able to stand on a soapbox and badmouth the American flag all day long—and apple pie and motherhood, too, if that's the way the speaker feels, It's a free country.
>
> It's actually burning Old Glory, it's defacing the Stars and Stripes, it's the physical desecration of the flag of the United States that oughta be against the law. And the people of the United States just can't seem to be talked our of that notion—or orated out of it, or lectured out of it, or condescended and patronized out of it.
>
> Maybe it's because the people can't shut their eyes to homely truths as easily as our Advanced Thinkers. How many legs does a dog have, Mr. Lincoln once asked, if you call its tail a leg? And he answered: still four. Calling a tail a leg doesn't make it one. Not even a symbolic leg. The people have this stubborn notion that calling something a

constitutional right doesn't make it one, despite the best our theorists and pettifoggers can do.

The people keep being told that their flag is just a symbol.

Just a symbol.

"We live by symbols," said a Justice of the U.S. Supreme Court (Felix Frankfurter) * * * And if a nation lives by its symbols, it also dies with them.

To turn aside when the American flag is defaced, with all that the flag means—yes, all that it symbolizes—is to ask too much of Americans. There are symbols and there are Symbols. There are some so rooted in history and custom, and in the heroic imagination of a nation, that they transcend the merely symbolic; they become presences. * * *

C. NEED FOR AN AMENDMENT

Only a constitutional amendment can restore power to the people enabling them to undertake the legal protection of the flag. The Supreme Court has given the American people and their elected representatives no choice.

In *Texas* v. *Johnson,* Gregory Lee Johnson participated in a political demonstration at the 1984 Republican National Convention, protesting policies of the Reagan administration and certain Dallas-based corporations.

Johnson was given an American flag from a fellow protestor, who had taken it from a flagpole. At Dallas City Hall, Johnson unfurled the American flag, poured kerosene on it, and burned it. While the flag burned, protestors chanted: "America, the red, white, and blue, we spit on you."

Johnson was convicted of desecration of a venerated object in violation of section 42.09(a)(3) of the Texas Penal Code which, inter alia, made illegal the intentional or knowing desecration of a national flag.

By a 5-to-4 vote, the Court held that Johnson's conviction was inconsistent with the first amendment. The 1st amendment has been held to be applicable to State action by virtue of the 14th amendment's due process clause.

The Supreme Court acknowledged that "Johnson was convicted of flag desecration for burning the flag, rather than for uttering insulting words." 491 U.S. at 402 (footnote omitted).

The *Johnson* majority concluded that "Johnson's burning of the flag was conduct 'sufficiently imbued with elements of communication' to implicate the First Amendment." Id. at 406 (citation omitted).

If expressive conduct is being regulated by government for reasons unrelated to the suppression of expression, the Government need meet a less stringent standard and thus has a freer hand than if the Government is seeking to regulate expression itself. Id. at 406, 407.

The Court concluded that a State's "interest in preserving the flag as a symbol of nationhood and national unity * * * is related to expression in the case of Johnson's burning of the flag." Thus, the more stringent test—"the most exacting scrutiny"—must be applied to Texas' conviction of Johnson. Id. at 410 (citation omitted).

"Texas argues that its interest in preserving the flag as a symbol of nationhood and national unity survives this close analysis." Id. at 413. The *Johnson* majority disagreed:

> [N]othing in our precedents suggests that a state may foster its own view of the flag by prohibiting expressive conduct relating to it * * * If we were to hold that a state may forbid flag burning wherever it is likely to endanger the flag's symbolic role, but allow it whenever burning a flag promotes that role—as where, for example, a person ceremoniously burns a dirty flag—we would be saying that when it comes to impairing the flag's physical integrity the flag itself may be used as a symbol—as a substitute for the written or spoken word or a "short cut from mind to mind"—only in one direction * * *
>
> We never before have held that the Government may ensure that a symbol be used to express only one view of that symbol or its referents * * *
>
> There is, moreover, no indication—either in the text of the Constitution or in our cases interpreting it—that a separate juridical category exists for the American flag alone * * *

Id. at 415–417.

In dissent, Justice Stevens noted that the question whether a State or the Federal Government "has the power to prohibit the public desecration of the American flag * * * is unique." Id. at 436 (Stevens, J., dissenting). Justice Stevens continued:

> * * * In my judgment rules that apply to a host of other symbols, such as state flags, armbands, or various privately promoted emblems of political or commercial identity, are not necessarily controlling. Even if flag burning could be considered just another species of symbolic speech under the logical application of the rules that the Court has developed in its interpretation of the First Amendment in other contexts, this case has an intangible dimension that makes those rules inapplicable.
>
> A country's flag is a symbol of more than "nationhood and national unity." It also signifies the ideas that characterize the society that has chosen that emblem as well as the special history that has animated the growth and power of those ideas. The fleurs-de-lis and the tricolor both symbolized "nationhood and national unity," but they had vastly different meanings. The message conveyed by some flags—the swastika, for example—may survive long after it has outlived its usefulness as a symbol of regimented unity in a particular nation.
>
> So it is with the American Flag. It is more than a proud symbol of the courage, the determination, and the gifts of nature that transformed 13 fledgling Colonies into a world power. It is a symbol of freedom, of equal opportunity, of religious tolerance, and of good will for other peoples who share our aspirations. The symbol carries its message to dissidents both at home and abroad who may have no interest at all in our national unity or survival.

> The value of the flag as a symbol cannot be measured. Even so, I have no doubt that the interest in preserving that value for the future is both significant and legitimate. Conceivably that value will be enhanced by the Court's conclusion that our national commitment to free expression is so strong that even the United States as ultimate guarantor of that freedom is without power to prohibit the desecration of its unique symbol. But I am unpersuaded. The creation of a Federal right to post bulletin boards and graffiti on the Washington Monument might enlarge the market for free expression, but at a cost I would not pay. Similarly, 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, see *Street* v. *New York*, 394 U.S. 576 (1969)—be employed.
>
> It is appropriate to emphasize certain propositions that are not implicated by this case. The statutory prohibition of flag desecration does not "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein," *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624, 642 (1943). The statute does not compel any conduct or any profession of respect for any idea or any symbol.
>
> * * * * *
>
> The Court is * * * quite wrong in blandly asserting that respondent "was prosecuted for his expression of dissatisfaction with the policies of this country, expression situated at the core of our First Amendment values." Respondent was prosecuted because of the method he chose to express his dissatisfaction with those policies. Had he chosen to spray-paint—or perhaps convey with a motion picture projector—his message of dissatisfaction on the facade of the Lincoln Memorial, there would be no question about the power of the Government to prohibit his means of expression. The prohibition would be supported by the legitimate interest in preserving the quality of an important national asset. Though the asset at stake in this case is intangible, given its unique value, the same interest supports a prohibition on the desecration of the American flag.

Id. at 436–39.

The majority opinion, in contrast, was unable to understand the uniqueness of the flag:

> To conclude that the government may permit designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernible

> or defensible boundaries. Could the government on this theory prohibit the burning of state flags? Of copies of the Presidential seal? Of the Constitution? In evaluating these choices under the First Amendment, how would we decide which symbols were sufficiently special to warrant this unique status? To do so, we would be forced to consult our own political preferences, and, impose them on the citizenry, in the very way that the First Amendment forbids us to do.

Id. at 417.

The American flag as mere "designated symbol?" The American flag as indistinguishable from a State flag, a copy of the Presidential seal, or a copy of the Constitution?

The Court could have recognized the obvious uniqueness of the American flag, as all four dissenters did. The law need not be utterly divorced form common sense and understanding on this point. The proposed amendment does no more than return us to this common understanding and common sense point of view, as most recently expressed by 49 State legislatures.

As Chief Justice Rehnquist, for himself and Justices O'Connor and White, stated in dissent:

> For more than 200 years, the American flag has occupied a unique position as the symbol of our Nation, a uniqueness that justifies a governmental prohibition against flag burning in the way respondent Johnson did here.

Id. at 422.

Rebuking the *Johnson* majority, he continued later in his dissent:

> The uniquely deep awe and respect for our flag felt by virtually all of us are bundled off under the rubric of "designated symbols," that the First Amendment prohibits the government from "establishing." But the government has not "established" this feeling; 200 years of history have done that. The government is simply recognizing as a fact the profound regard for the American flag created by that history when it enacts statutes prohibiting the disrespectful public burning of the flag.

Id. at 434.

In an earlier case, Justice White wrote:

> One need not explain fully a phenomenon to recognize its existence and in this case to concede that the flag is an important symbol of nationhood and unity, created by the Nation and endowed with certain attributes * * *

Smith v. *Goguen*, 415 U.S. 566 at 587 (White, J., concurring).

Following the Supreme Court's decision in *Texas* v. *Johnson*, there was a thoughtful debate over whether a so-called facially "content neutral" flag protection statute would survive the Supreme Court's scrutiny. Legal scholars and many commentators were divided over this question. A number of Members of Congress did not believe any such statute could survive the majority's analy-

sis in *Johnson*, even aside from whether a facially content neutral flag protection statute is desirable as a matter of sound public policy. The *Johnson* majority declared that the Government's asserted interest in preserving the flag as a national symbol was insufficient to overcome the majority's newly minted "right" to burn or otherwise physically mistreat the flag as part of expressive conduct. Nevertheless, it cannot be denied that the principal, if not the only purpose, in enacting a facially content neutral statute is to protect the symbolic value of the flag. Indeed, one underlying purpose of any statutory effort to respond to *Johnson* would be to prohibit "expressive" conduct that physically desecrates the flag. Further, a facially neutral statute which did not permit an exception for disposal of a worn or soiled American flag by burning—which is the preferred way of doing so—would lead to highly undesirable results. Yet such an exception necessarily undermines the purported neutrality of such a statute—indeed, the Court said so in *Johnson*.

Congress did enact a facially neutral statute in 1989 with an exception for disposal of worn or soiled flags, as a response to the *Johnson* decision. The Supreme Court promptly struck it down, 5 to 4:

> Although the Flag Protection Act contains no explicit content-based limitation on the scope of prohibited conduct, it is nevertheless clear that the government's asserted *interest* is "related to the suppression of free expression," and concerned with the content of such expression. The Government's interest in protecting the "physical integrity" of a privately owned flag rests upon a perceived need to preserve the flag's status as a symbol of our Nation and certain national ideas * * *

United States v. *Eichman*, 496 U.S. 310, at 315, 316 (citations omitted; emphasis in original).

A statutory response to the *Johnson* and *Eichman* decisions is thus clearly not a viable option. A narrow 5-to-4 majority of the Supreme Court erred in *Texas* v. *Johnson* and repeated its error in *United States* v. *Eichman*. President Clinton agrees *Texas* v. *Johnson* was wrongly decided, even though he opposes any constitutional amendment on flag protection. (Testimony of Assistant Attorney General for Legal Counsel Walter Dellinger, June 6, 1995, Tr. at 54, 66.)

We live in a time where standards have eroded. Civility and mutual respect are in decline. Nothing is immune from being reduced to the commonplace. Absolutes are distrusted. Values are considered relative. Rights are cherished and constantly expanded, but responsibilities are shirked or scorned.

We seek to instill in our children a pride in their country that will serve as a basis for good citizenship and a devotion to improving the country and adhering to its best interests as they can see them. We hope they will feel connected to the diverse people who are their fellow citizens. We ask our school children to pledge allegiance to the flag, but *Johnson* and *Eichman* dictate that we must tell them the same flag is unworthy of legal protection when it is treated in the most vile, disrespectful, and contemptuous manner.

At the same time, our country grows more and more diverse. Many of our people revel in their particular cultures and diverse national origins, and properly so. Others are alienated from their fellow citizens and from government altogether.

We have no monarchy, no "state" religion, no elite class—hereditary or otherwise—"representing" the Nation. We have the flag.

The American flag is the one symbol that unites a very diverse people in a way nothing else can, in peace and war. Despite our differences of party, politics, philosophy, religion, ethnic background, economic status, social status, or geographic region, the American flag forms a unique, common bond among us. Failure to protect the flag inevitably loosens this bond, no matter how much some may claim to the contrary.

The flag stands above all of our differences. The American people's desire for the legal protection of their beloved flag draws support across all of the lines that otherwise divide us.

It is not possible to express fully all of the reasons the flag deserves such protection. As then Justice Rehnquist wrote in 1974: "The significance of the flag, and the deep emotional feelings it arouses in a large part of our citizenry, cannot be fully expressed in the two dimensions of a lawyer's brief or of a judicial opinion." *Smith* v. *Goguen*, 415 U.S. 566 at 602 (1974) (Rehnquist, J., dissenting). The same is true of a congressional committee report.

Senate Joint Resolution 31 empowers Congress and the States to protect only the American flag—and only from acts of physical desecration.

The current movement for this amendment originates with the American people. It is right and proper that their elected representatives respond affirmatively.

D. SENATE JOINT RESOLUTION 31 IS A SUITABLE AMENDMENT TO THE CONSTITUTION

1. *Senate Joint Resolution 31 will effectively restore power to Congress and the States denied them in* Texas *v.* Johnson *and* U.S. *v.* Eichman; *S.J. Res. 31 does not "trump" the first amendment or any other constitutional provision*

The Clinton administration, as part of the false choice between restricting the first amendment or protecting the flag it poses to the American people, makes two contradictory initial arguments. On the one hand, it argues that,

> Read literally, the amendment would not alter the result of the decisions in *Eichman* and *Johnson*, holding that the exercise of congressional and state power to protect the symbol of the flag is subject to First and Fourteenth Amendment limits.

(Written statement of Assistant Attorney General for Legal Counsel Walter Dellinger, June 6, 1995, at page 4.)

On the other hand, on the preceding page, the administration argues, "it is entirely unclear how much of the Bill of Rights it would trump." (Id. at page 3.)

The short answers, are, of course, first, the amendment *does* overturn the two Supreme Court decisions and empowers Congress

and the States to prohibit physical desecration of the flag. Second, the amendment does *not* trump any part of the Constitution.

a. *Senate Joint Resolution 31 will effectively empower Congress and the States to enact statutes prohibiting the physical desecration of the American flag*

Some critics of S.J. Res. 31 suggest that it may merely be redundant of "governmental power to legislate in this area that always has been assumed to exist." (Id at 4.) The suggestion is ironic since the flag amendment will simply *restore* power to Congress and the States it was assumed they always possessed. The committee shares the reaction of one of Mr. Dellinger's predecessors, former Assistant Attorney General for Legal Counsel Charles J. Cooper:

> * * * I am perplexed by the claim that the states and Congress currently possess, notwithstanding *Johnson* and *Eichman*, the legislative power that the Supreme Court so decisively and permanently prevented them from exercising in *Johnson* and *Eichman*.

(Written testimony of Charles J. Cooper, June 6, 1995, at 9.)

The Supreme Court in *Texas* v. *Johnson* stated, "There is * * * no indication—either in the text of the Constitution or in our cases interpreting it—that a separate juridical category exists for the American flag alone." (491 U.S. at 417). Simply put, this amendment creates that "separate juridical category" for the flag in the Constitution's text, and grants the power to prohibit physical desecration of the flag the Supreme Court took away in 1989. Indeed, any other interpretation of the amendment renders it meaningless. As Mr. Cooper testified, in coming to the same conclusion: "Suffice it to say that there is no reasonable possibility that the Supreme Court, in some future *Johnson* or *Eichman* case, would interpret the Flag Protection Amendment as being utterly meaningless." Bruce Fein, a former Department of Justice lawyer who testified against the amendment, agreed.

b. *Senate Joint Resolution 31 does not amend the first amendment or "trump" any other constitutional provision*

This amendment, granting Congress and the States 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 two o'clock in the morning in a residential neighborhood and claim first amendment protection. Fighting words which provoke violence or breaches of the peace are not protected under the first amendment.

The view that the first amendment does not disable Congress and the States from prohibiting physical desecration of the flag has been shared by ardent supporters of the first amendment and freedom of expression.

In *Street* v. *New York*, 394 U.S. 576 (1969), the defendant burned a flag while uttering a political protest. The Court overturned his conviction since the defendant might have been convicted solely be-

cause of his words. The Court reserved judgment on whether a conviction for flag burning itself could withstand constitutional scrutiny. Id. at 581. Chief Justice Warren dissented, and in so doing, asserted: "I believe that the States and the Federal Government do have the power to protect the flag from acts of desecration and disgrace * * *" Id. at 605 (Warren, C.J., dissenting).

Justice Black—generally regarded as a first amendment "absolutist"—also dissented and stated: "It passes my belief that anything in the Federal Constitution bars a State from making the deliberate burning of the American Flag an offense." Id. at 610 (Black, J., dissenting).

Justice Fortas agreed with Chief Justice Warren and Justice Black:

> [T]he states and the Federal Government have the power to protect the flag from acts of desecration committed in public. * * * [T]he flag is a special kind of personality. Its use is traditionally and universally subject to special rules and regulation. * * * A person may "own" a flag, but ownership is subject to special burdens and responsibilities. A flag may be property, in a sense; but it is property burdened with peculiar obligations and restrictions. Certainly * * * these special conditions are not per se arbitrary or beyond governmental power under our Constitution.

Id. at 615–617 (Fortas, J., dissenting).

Professor Stephen B. Presser testified:

> The Flag Amendment would not in any way infringe the First Amendment. * * * The Flag Protection Amendment does not forbid the expression of ideas, nor does it foreclose dissent.

(Written testimony of Professor Stephen B. Presser, June 6, 1995, at p. 11.)

Richard Parker, professor of Law at Harvard Law School, testified:

> The proposal would *not* "amend the First Amendment." Rather, each amendment would be interpreted in light of the other—much as in the case with the guaranties 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 "desecration" and "flag of the United States" in light of general values of free speech. They would simply restore one narrow democratic authority. Experience justifies this much confidence in our judicial system.
>
> But, we're asked, is "harmonization" possible? If the *Johnson* and *Eichman* decisions protecting flag desecration were rooted in established strains of free speech law—as

> they were—how could an amendment countering those decisions coexist with the First Amendment?
>
> First, it's important to keep in mind that free speech law has within it multiple, often competing strains. The dissenting opinions *Johnson* and *Eichman* were also rooted in established arguments about the meaning of freedom of speech. Second, even if the general principles invoked by the five Justices in the majority are admirable in general—as I believe they are—that doesn't mean that the proposed amendment would tend to undermine them, so long as it is confined, as it is intended, to mandating a unique exception for a unique symbol of nationhood. Indeed, carving out the exception in a new amendment—rather than through interpretation of the First Amendment itself—best ensures that it will be so confined. Even opponents of the new amendment agree on this point. Third, it's vital to recognize that the proposed amendment is not in *general* tension with the free speech principle forbidding discrimination against specific "messages" in regulation of speech content. 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. In fact, they may be burning the flag to protest the behavior of *non*-governmental, "patriotic" groups and to support efforts of the government to squash those groups. Laws enacted under the proposed amendment would have to apply to all such activity, whatever the specific "point of view." One, and only one, generalized message could be regulated: "desecration" of the flag itself. And regulation could extend no farther than a ban on one, and only one, mode of doing it: "physical" desecration. Finally, and perhaps most importantly, we mustn't lose sight of the fundamental purpose of the proposed amendment. That purpose is to restore democratic authority to protect the unique symbol of our aspiration to national unity, an aspiration that, I've said, nurtures—rather than undermines—freedom of speech that is "robust and wide-open."

(Written testimony, Prof. Richard D. Parker, June 6, 1995, pages 6–8, footnotes omitted.)

There is no basis for the assertion that the amendment "trumps" or supersedes other parts of the Constitution. Such an assertion is a scare tactic. Nothing in the text of the amendment provides a basis for that fear. The 4th and 8th amendments, and the due process clause of the 5th and 14th amendments, for example, all apply to legislation enacted under S.J. Res. 31 and will avert abuses that some of the amendment's opponents fear. As Mr. Cooper testified regarding the possibility of contrary results: "There are simply no plausible arguments supporting an interpretation of the proposed Flag Protection Amendment that yield these results." As Professor Parker testified, the flag amendment will be read in harmony with the rest of the Constitution, including the first amendment.

The Clinton administration particularly cites two cases in raising its concerns in this regard. The first is *Smith* v. *Goguen,* 415 U.S. 566 (1974), a case involving the void for vagueness doctrine of the due process clause of the 14th amendment. But there is no basis at all to suggest S.J. Res. 31 trumps the due process clause of the 5th or 14th amendments. Nothing in the amendment suggests that result. Nor does this case suggest that flag statutes enacted pursuant to S.J. Res. 31 would not be subject to, or unable to withstand, due process scrutiny.

In *Smith* v. *Goguen,* the Court found a portion of a Massachusetts law void because it was unconstitutionally vague. The Court did not reach first amendment issues.

The Massachusetts statute made illegal publicly mutilating, trampling upon, defacing, *or treating contemptuously* the flag of the United States. The phrase "treats contemptuously" was the offending, unconstitutionally vague phrase.

Yet, in the very same opinion, the Court noted:

> Certainly nothing prevents a legislature from defining with substantial specificity what constitutes forbidden treatment of United States flags. The Federal flag desecration statute * * * reflects a congressional purpose to do just that * * * [That statute reaches] only acts that physically damage the flag.

415 U.S. at 582.

The Court then quoted the Federal statute, as a flag statute surviving a due process, void-for-vagueness claim: "Whoever knowingly casts contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it."

In other words, legislation under the flag amendment is subject to the void-for-vagueness doctrine. But that doctrine allows Congress and the States to prohibit contemptuous or disrespectful treatment of the flag so long as there is substantial specificity in spelling out what that treatment is—be it by burning, mutilating, defiling, defacing, trampling, and so on.

This amendment authorizes the very same language the Court cited from the Federal statute. *Smith* v. *Goguen* is not affected by this amendment, and a statute prohibiting the casting of contempt on the flag by specified physical acts survives a due process vagueness challenge under that decision.

Next, the administration raises concern about the Supreme Court's decision in *R.A.V.* v. *St. Paul,* 112 S.Ct. 2538 (1992). Mr. Dellinger notes that when the first amendment permits regulation of a whole category of speech or expressive conduct, "it does not necessarily permit the government to regulate a subcategory of the otherwise prescribable speech on the basis of its particular message." (Written statement, page 6.)

The committee finds concern about S.J. Res. 31 in light of *R.A.V.* to be misplaced. Congress and the States are not authorized by the flag protection amendment to enact statutes banning physical flag desecration *only* by advocates of particular points of view. That is, for example, a legislature could not ban burning the flag by those who condemn an increase in military spending, but not ban such desecration by those who seek to protest what they believe to be

inadequate military spending. See *R.A.V.* v. *City of St. Paul* [112 S.Ct. 2538 (1992)].

The committee notes as well, that the Clinton administration's suggestion, in footnote 10 of its testimony, is incorrect. There, Mr. Dellinger says that "[e]ven a statute that prohibited all flag desecration would be in tension with the principle of *R.A.V.*" because, for example, respectful burning of the flag, say, to dispose of a worn flag, would remain legal. In fact, there will be no such tension between a flag statute prohibiting all flag desecration and *R.A.V.*

The judiciary has determined that the first amendment does not protect libel. *R.A.V.* says: "* * * the government may proscribe libel; but it may not make the further content discrimination of proscribing only libel critical of the government." [112 S.Ct. at 2543.] Similarly, S.J. Res. 31, if ratified, will establish that the Constitution does not protect physical desecration of the flag. Congress and the States, having created power in the Government to proscribe flag desecration, *R.A.V.* then only requires that the government not discriminate among flag desecrators based on the points of view they seek to dramatize by their particular physical desecration. Similarly, governments could not ban physical desecration of the flags by members of one race but not ban it when committed by members of other races, per the 5th and 14th amendments.

As further indication of the lack of merit to the administration's criticism that the flag amendment might supersede other parts of the Bill of Rights, consider the 16th amendment. It too is one sentence: "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."

This language, ratified in 1913, is remarkably similar to the flag amendment in that it says, without more, that a legislative body, "shall have power" to do something. Do the critics of S.J. Res. 31 doubt the applicability of the fourth and eighth amendments to legislation enacted under the income tax amendment? The committee assumes not. Why, then, invoke these scare tactics against the flag amendment?

2. *The terms "physical desecration" and "flag of the United States" are precise enough for inclusion in the Constitution*

The Senate in the 104th Congress should not subject S.J. Res. 31, authorizing legislation protecting the American flag, to a higher standard than the Framers subjected the terms of the Constitution and the Bill of Rights in the Philadelphia Convention and in the First Congress. The terms of the flag protection amendment are at least as precise, if not more so, than such terms as "unreasonable searches and seizures;" "probable cause;" "speedy * * * trial;" "excessive bail;" "excessive fines;" "cruel and unusual punishment;" "due process of law;" "just compensation"—all terms from the Bill of Rights. Similarly, the 39th Congress was not deterred from the inclusion of the term "equal protection of the laws" in the 14th amendment by concerns of alleged vagueness. None of these terms are self-executing. All have been eventually explicated by the judiciary. Similarly, as Senator Heflin noted at both the June 6 sub-

committee hearing and the July 20 executive business meeting, we should not lose sight of the fact that all the flag protection amendment does is authorize Congress and the States to enact implementing legislation. Legislative bodies will implement the flag protection amendment with the specificity of statutory language which itself, as mentioned earlier, will be subject to constitutional requirements.

Second, the committee does not consider ambiguous the word "desecrate," which in turn is modified by the word "physically." Desecrate means to treat with contempt, to treat with disrespect, to violate the sanctity of something; profane. The committee does not believe these terms are too difficult for our legislatures and courts to handle. Congress had no difficulty in utilizing its constitutional power to legislate sensibly on this subject in 1968. Legislative bodies will define what treatment they believe constitutes desecration. Accidental acts are not reachable. As Professor Parker testified:

> 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" [Constitution of the Commonwealth of Massachusetts, part I, article 15], 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 purpose—that the courts resolve year in and year out under other constitutional provisions. Thus, there is nothing radical or extreme about the flag amendment—unless it is the rhetoric igniting and fueling all kinds of fears purveyed by some of its opponents.

The flag protection amendment does not authorize legislation which prohibits displaying or carrying the flag at meetings or marches of any group—be they Nazis, Marxists, or anyone else. The amendment does not authorize legislation prohibiting derogatory comments about the flag or cursing the flag, nor does it authorize a prohibition on shaking one's fist at the flag or making obscene gestures at the flag, whether or not such gestures are accompanied by words. The amendment does not authorize legislation penalizing carrying or displaying the flag upside down as a signal of distress or flying it at half mast on days not officially designated for such display.

The flag protection amendment does not disturb Congress' power alone to determine the design of the flag of the United States. It has already done so in 4 U.S.C. 1 and 2. If Congress sends this amendment to the States, and if they ratify it, it would be with this design as the backdrop. Congress might later change the design of the flag, which is extremely unlikely, but no State now or in the future will be able to determine the design of the American flag.

Having said that, under this amendment, there is some flexibility in the legislative bodies in defining the term "flag of the United States."

While the committee does not believe that congressional consideration of a constitutional amendment empowering Congress and the States to protect the flag is the appropriate time to discuss the details of implementing legislation, the committee notes two of the possibilities available to legislative bodies.

For example, the term "flag of the United States" could be defined at the narrowest as just a cloth or other substance or material readily able to be flown, waved, or displayed with the characteristics as set out in the U.S. Code sections mentioned earlier. The flag, of such characteristics and material, could also be defined to be of any size or dimensions. That would be up to legislative bodies to determine.

Another possible definition available to legislative bodies would be to include in the definition of the flag something a reasonable person would perceive to be a flag of the United States meeting the design set forth in the U.S. Code, and capable of being waved, flown, or displayed, regardless of whether it is precisely identical to that design. Thus, under such a definition, for example, physically desecrating a flag with 48 stars, or 12 or 14 stripes, could be covered. Congress or States may wish to use such a definition because the reasons we would ban burning, defacing, defiling, trampling, or mutilating an American flag obtain when the flag being so treated has 48 stars, for example, and people cannot readily tell the difference between it and a 50 star flag. They look indistinguishable from even close up. For all we know, for example, the people burning the flags giving rise to the *Johnson* and *Eichman* cases may have burned flags with less than 50 stars or 13 stripes.

The choice of what to cover under the term "flag of the United States" should be left up to the sensible judgment of the American people, as it had been for 200 years before the *Johnson* decision.

As to the parade of horribles opponents invoke in opposition to the amendment, there is a straightforward answer. For many years, 48 States and the Federal Government had flag protection statutes on the books. Were there insuperable problems of administration, enforcement, and adjudication under those statutes? No.

Testing the hypotheticals posed by opponents of this amendment about things such as bathing suits, paper cups, and napkins with a picture of the flag, against the history of enforcement of flag desecration statutes, renders these hypotheticals no basis for opposing the amendment. This is especially true in light of a string of judicial decisions since these statutes were first enacted: extending the first amendment's free speech protection against the actions of the States; requiring substantial specificity in what is made illegal; and effectively prohibiting discrimination between desecrators based on viewpoint. It is also especially true in light of the universal understanding that words alone casting contempt on the flag cannot be actionable under the flag protection amendment.

The committee believes, moreover, that states and Congress will legislate with care, and with the specificity required by the Constitution. There is certainly a greater awareness of the concerns raised by opponents of legal protection of the flag from physical

desecration—however exaggerated many of the hypotheticals are—than existed at the time most of the 49 pre-1989 statutes were enacted.

Reliance on the parade of horribles to oppose the amendment would reflect the Senate's fundamental mistrust of the people, acting through their elected officials, to enact reasonable flag protection statutes.

As then Assistant Attorney General for Legal Counsel William Barr, for example, testified before the Judiciary Committee on August 1, 1989:

> I would simply urge the committee not to lose sight of the ultimate objective of protecting the flag by becoming mired in countless hypotheticals that can be posed to test at the margins choice of the term "desecration." One can always construct hypotheticals that push the limits of any word in the language. This is as true of statutory language as it is of constitutional language. In the end, those who are responsible for the ultimate choice of language, must simply choose terms that most clearly reach the conduct they wish to reach, and only that conduct. At the margins, one has no choice but to rely upon the individual legislatures in the first instance, and ultimately on the courts, to prevent application of the language in a manner that would do injustice to the drafter's intent.

(Written testimony of William Barr, August 1, 1989, at 18.)

The committee is mindful that it is the Constitution we are proposing to amend, not a code of statutes. Drafting the language of a flag protection amendment too narrowly runs a serious risk of thwarting the American people's ability to legislate protection of their flag from the range of acts or conduct which might physically misuse, or cast contempt physically on, the flag. No supporter of protecting the American flag from physical desecration wishes to amend the Constitution *twice* to achieve that purpose.

3. *The flag protection amendment is no precedent whatsoever for any other constitutional amendment or statute*

There is no "slippery slope" here. The flag protection amendment is limited to authorizing states and the Federal Government to prohibit physical desecration of only the American flag. It serves as no precedent for any other legislation or constitutional amendment on any other subject or mode of conduct, precisely because the flag is unique. Moreover, the difficulty in amending the Constitution serves as a powerful check on any effort to reach other conduct, let alone speech, which the Supreme Court has determined is protected by the first amendment.

It is not the "thought we hate" which this amendment would allow Congress and the States to prohibit, but rather, one narrow method of dramatizing a viewpoint—one form of conduct. No speech, and no conduct other than physical desecration of the American flag, can be regulated under legislation authorized by the amendment.

As Mr. Cooper testified:

> * * * if prohibiting flag desecration would place us on [a slippery slope of restrictions on constitutional protection of expression "for the thought we hate,"] we have been on it for a long time. The sole purpose of the Flag Protection Amendment is to restore the constitutional *status quo ante Johnson*, a time when 48 States, the Congress, and four Justices of the Supreme Court believed that the legislation prohibiting flag desecration was entirely consistent with the First Amendment. And that widespread constitutional judgment was not of recent origin, it stretched back about 100 years in some States. During that long period before *Johnson*, when flag desecration was universally criminalized, we did not descend on this purported slippery slope into governmental suppression of unpopular speech. The constitutional calm that preceded the *Johnson* case would not have been interrupted, I submit, if a single vote in the majority had been cast the other way, and flag desecration statutes had been upheld. Nor will it be interrupted, in my view, if the Flag Protection Amendment is passed and ratified.

(Testimony of Charles J. Cooper, June 6, 1995, at 12, 13).[2]

---

[2] Some critics of the flag protection amendment suggest that, for example, protection of the American flag from physical desecration ineluctably will lead to curtailment or prohibition of the right of Nazis to march in Skokie, IL, a community of survivors of the Nazi Holocaust. At a minimum, say these critics, the flag protection amendment renders "cynical" the denial to Holocaust survivors of the right to prevent such a march.

The flag protection amendment provides no basis for curtailing anyone's right to march anywhere, regardless of the marchers message, as explained more fully elsewhere in this report. The uniqueness of the flag itself, and the obvious distinction between physically desecrating it and other forms of "expression" such as marches, rallies, and picketing, render this concern completely unjustified.

Professor Parker answered the concern about the Skokie case in response to written questions from Senator Hatch. He replied, in part:

> The [flag protection amendment is] premised on a belief that permitting physical desecration of the flag tends to erode the underpinning of our country and our liberties *as a whole*—whether or not a specific group, in a specific place, is offended * * * I would say to the camp survivors—and to other groups sometimes painfully offended by free expression—that the aspiration to national unity, which is symbolized by the flag is unique. More than that, it is foundational. It is the basis of all laws and legal protections. It is thus the basis of the security of all groups. It underlies the freedom of speech that enables us to condemn prejudice and hatred. What is at stake, here, is the bond that holds us together, despite all our differences, in democracy—and that ought, surely, to come first.

(Letter from Prof. Richard D. Parker to Senator Orrin G. Hatch, June 13, 1995.)

Mr. Cooper also responded in writing to the argument that this amendment will be the basis for exceptions to the first amendment's protection of hateful political speech, such as racist speech of the Ku Klux Klan or anti-Semitic speech of Nazis and that prohibiting flag desecration would undermine the moral legitimacy of constitutional protection of all other hateful or offensive expressions. He wrote to Senator Hatch on June 27, 1995:

> I believe that this argument proceeds from two false premises. First * * * ratification of the Flag Protection Amendment would in no way compromise, or even threaten to compromise, the First Amendment's protection "for the thought we hate." Nor would the proposed amendment in any way curtail, censor, abridge, or otherwise affect in the slightest any *speech* communicating "the thought we hate." The protestor who burned an American flag in the *Johnson* case led his comrades in chanting "America the red, white, and blue, we spit on you," as they watched the flames consume our flag. Their anti-American speech expressed, albeit sophomorically, hateful thoughts, and their continued freedom to do so would not be affected in the slightest by ratification of the Flag Protection Amendment. It would simply deny to such people the freedom to dramatize their anti-American speech by physically desecrating an American flag.
>
> The slippery slope argument against the Flag Protection Amendment is also premised on the false notion that a constitutional amendment authorizing legislative restriction on physical desecration of the American flag would constitute an abrupt departure from our Nation's traditional commitment to freedom of speech. In truth, however, it was the Supreme Court's decision in *Texas* v. *Johnson* that departed abruptly from the tradi-

Some critics of the amendment ask, is our flag so fragile as to require legal protection? The committee has explained why it believes our national symbol should be legally protected. The better question is—is our freedom of expression so fragile in this country as to be unable to withstand the withdrawal of the flag from physical desecration? Of course not.

Unpopular ideas have many avenues of expression, including the use of marches, rallies, picketing, leaflets, placards, bullhorns, and so very much more.

Even one of the opponents of the amendment testifying at the subcommittee hearing, Bruce Fein, described the amendment as "a submicroscopic encroachment on free expression * * *" in response to written questions.

Other witnesses testifying against the amendment implicitly acknowledged that much of the criticism of the amendment is overblown. Gene Nichol, Dean of the University of Colorado Law School testified, "* * * we have, no doubt, long recognized limited exceptions to a regime of free expression; at least some of which present no greater problems of slipperiness than would a flag desecration law." (Written testimony of Gene Nichol, June 6, 1995, at 1.)

Professor Cass M. Sunstein of the University of Chicago Law School, a vigorous opponent of the amendment, conceded,

> There are reasons to think that as the basic symbol of nationhood the flag is *sui generis* and legitimately stands alone. Moreover, constitutional protection of the flag would prohibit only one, relatively unusual form of protest. Multiple other forms would remain available.

(Written testimony of Cass M. Sunstein, June 6, 1995, at 5.)

Assistant Attorney General Dellinger agreed with these remarks of Professor Sunstein, in response to written questions. Indeed, the committee believes Professor Sunstein understated his first point—there is no doubt the flag stands alone as a national symbol.

---

tional and widely held view that statutory prohibitions against flag desecration are entirely consistent with the First Amendment. * * *

* * * * * * *

Ratification of S.J. Res. 31 * * * will not require changing in the slightest what Holocaust victims living in Skokie, IL, were told in 1977 when neo-Nazis actually did march through their community. See *Natl. Socialist Party of America* v. *Skokie,* 432 U.S. 43 (1977). Again, at the time of that infamous march in Skokie, flag burning was criminalized both by Congress and by the State of Illinois, and there was no doubt that if the Nazis dramatized their hateful message by burning an American flag, they would be prosecuted and punished for their crime. And yet the residents of Skokie were nonetheless told that they must endure the pain of the Nazis' despicable message and must tolerate the spectacle of the Nazis' presence in their community to communicate that message. They were told that our First Amendment protects the freedom of the Nazis to express their hateful message in Skokie no less than it protects the freedom of Holocaust survivors to protest Hitler's despicable thoughts and acts in any community dominated by neo-Nazis (if there is such a community). But neither group, nor anyone else, was at that time constitutionally free to physically desecrate an American flag. Why was this so? Senator Hatch answered this question, to my satisfaction at least, not long ago:

The American flag represents in a way nothing else can, the common bond shared by a very diverse people. Yet whatever our differences of party, politics, philosophy, race, religion, ethnic background, economic status, social status, or geographic region, we are united as Americans. That unity is symbolized by a unique emblem, the American flag.

(Congressional Record, March 21, 1995.)

Even if one agreed that the *Johnson* and *Eichman* cases were correctly decided under prior precedents, one could still support this amendment—if one believes protection of the flag from physical desecration is an important enough value to override, in the words of Justice Stevens, the trivial burden on expression such protection would entail.

4. *The American flag deserves legal protection regardless of the number of flag desecrations in recent years*

The administration testified that, in light of what it refers to as "* * * only a few isolated instances [of flag burning], the flag is amply protected by its unique stature as an embodiment of national unity and ideals." (Testimony of Mr. Dellinger, June 6, 1995, at p. 1.) The committee finds that comment wrong. In the words of Chairman Hatch:

> First, aside from the number of flag desecrations, our very refusal to take action to protect the American flag clearly devalues it. Our acquiescence in the Supreme Court's decisions reduce its symbolic value. As a practical matter, *the effect, however unintended,* of our acquiescence equates the flag with a piece of common cloth, certainly as a matter of law, no matter what we feel in our hearts. Anyone in this room can buy a piece of cloth and the American flag and burn them both to dramatize a viewpoint. The law currently treats the two acts as the same. How one can say that this legal state of affairs does not devalue the flag is beyond me.
>
> This concern is shared by others. Justice John Paul Stevens said in his *Johnson* dissent: "* * * in my considered judgment, sanctioning the public desecration of the flag will tarnish its value * * * 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. [436 U.S. at 437.]
>
> Professor Richard Parker of Harvard Law School testified after Mr. Dellinger, and in my view, effectively rebutted his argument.
>
> If it is *permissible* not just to heap verbal contempt on the flag, but to burn it, rip it and smear it with excrement—if such behavior is not only permitted in practice, but *protected* in law by the Supreme Court—then the flag is already decaying as the symbol of our aspiration to the unity underlying our freedom. The flag we fly in response is no longer the same thing. We are told * * * 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."
>
> Second, as a simple matter of law and reality, the flag is *not* protected from those who would burn, deface, trample, defile or otherwise physically desecrate it.

> Third, whether the 45 plus flags whose publicly reported desecrations between 1990 and 1994 of which we are currently aware represent too small a problem does not turn on the sheer number of these desecrations alone. When a flag desecration is reported in local print, radio, and television media, potentially millions, and if reported in the national media, tens upon tens of millions of people, see or read or learn of them. How do my colleagues think Rose Lee, for example, feels when she sees a flag desecration in California reported in the media? The impact is far greater than the number of flag desecrations.

(Statement of Senator Orrin G. Hatch, July 20, 1995.)

The committee does not believe there is some threshold of flag desecrations during a specified time period necessary before triggering congressional action. Certainly, critics of the amendment cite no such threshold. If it is right to empower the American people to protect the American flag, it is right regardless of the number of such desecrations. And no one can predict the number of such desecrations which may be attempted or performed in the future.

Senator Heflin also responds to the criticism that there are too few flag desecrations to justify an amendment by adding:

> In my judgment, this is the time, in a cool, deliberate, calm manner, and in an atmosphere that is not emotionally charged to evaluate values. I think that is something that makes it appropriate to do it now. I [believe] that there have to be in this nation some things that are sacred.

(Statement of Senator Howell Heflin, July 20, 1995.)

5. *A so-called "content neutral" constitutional amendment is wholly inappropriate*

A few critics of S.J. Res 31 believe that *all* physical impairments of the integrity of the flag, such as by burning or mutilating, must be made illegal or no such misuse of the flag should be illegal. This "all or nothing" approach flies in the face of nearly a century of legislative protection of the flag. It is also wholly impractical.

In order to be truly "content neutral," such an amendment must have no exceptions, *even for the disposal of a worn or soiled flag.* Once such an exception is allowed, the veneer of content neutrality is stripped away.[3] If such an exception is not permitted, however, and burning a worn or soiled flag for disposal purposes is made illegal, the American people would be subjected to the unacceptable choice of letting worn or soiled flags literally accumulate, or breaking the law by disposing of them in a manner already designated by Congress in the flag code: "The flag, when it is in such condition

[3] The *Texas* v. *Johnson* majority itself pointedly noted: "If we were to hold that a state may forbid flag burning wherever it is likely to enlarge the flag's symbolic role, but allows it whenever burning a flag promotes that role—as where, for example, a person ceremoniously burns a dirty flag—we would be saying that when it comes to impairing the flag's physical integrity, the flag itself may be used as a symbol * * * only in one direction * * *" (491 U.S. at 416–417). Of course, if Congress proposes and the States ratify a constitutional amendment with such an exception, the Supreme Court would have to uphold the exception. But the amendment would not be content neutral.

that it is no longer fitting emblem shown for display, should be destroyed in a dignified way, preferably by burning." 36 U.S.C. 176(k). While the flag code is legally unenforceable, the flag code represents a traditional and commonly held view of proper disposal of flags no longer fit for display[4]—one followed by the National Park Service, for example (The Sun, July 4, 1995.)

As former Assistant Attorney General for Legal Counsel Charles J. Cooper testified:

> The threshold question that must be answered by proponents of this suggestion is whether anyone *really* wants a "neutral" flag protection statute. Does anyone *really* want to protect the physical integrity of all American flags, regardless of the circumstances surrounding the prohibited conduct? Certainly the constitutional scholars suggesting a 'neutral' flag protection amendment do not, for they advance the idea only as a lesser evil than the Flag Protection Amendment. Nor are supporters of the proposed Flag Protection Amendment likely to be persuaded that a "neutral" alternative would be preferable. The problem is that a genuinely "neutral" flag protection measure simply doesn't make sense.
>
> The act of burning an American flag is not inherently evil. Indeed, the Boy Scouts of America have long held that an American flag, "when worn beyond repair" should be destroyed "in a dignified way by burning." Boy Scout Handbook at 422 (9th ed.). Similarly, Congress has prescribed [such disposal for flags no longer fit for display]. Nor is the respectful disposition of an old or worn flag the only occasion on which burning a flag might be entirely proper. The old soldier whose last wish is to be cremated with a prized American flag fast against his breast would be deserving of respect and admiration, rather than condemnation.
>
> In contrast, Gregory Lee Johnson's conduct was offensive—indeed, reprehensible—not simply because he burned an American flag, but because of the manner in which he burned it. Yet, a truly neutral flag protection statute would require us to be blind to the distinction between the conduct of Gregory Lee Johnson and his comrades and the conduct of a Boy Scout troop reverently burning an old and worn American flag. It would also reach other forms of conduct that honor, rather than desecrate, the flag. If, rather than burning an American flag, Gregory Lee Johnson and his colleagues had heaped dirt upon it in some sort of anti–American burial ritual, their conduct would undoubtedly have violated not only the Texas flag desecration statute, but a "neutral" flag protection statute as well. A "neutral" flag protection statute, however, would also have reached and punished the conduct of the unidentified

[4] The suggestion that a worn or soiled flag is no longer a flag, in an effort to escape the logical inconsistency of a so-called content neutral amendment which would permit an exception for disposal of such a flag, is unavailing. Obviously, a worn or soiled American flag is still a flag, recognizable as such, even if no longer fit for display.

> patriot who gathered up Johnson's charred flag and buried it in his back yard.
>
> Moreover, not only would a "neutral" flag protection statute prohibit conduct that should be praised rather than punished, it would fail to prohibit an infinite variety of public conduct that casts contempt upon the flag. Such a statute would prohibit only conduct that compromises the physical integrity of the flag. Conduct that is not physically destructive of the flag, no matter how openly offensive and disrespectful it may be would presumably not be reached. Thus, affixing an American flag to the seat of one's pants or simulating vulgar acts with a flag would not come within such a prohibition.
>
> Thus, a "neutral" flag protection statute is at once too broad, since it would prohibit conduct that no one wants to prohibit, and too narrow, since it would permit conduct that few people want to permit. The proposal therefore simply does not mesh with the public sentiment that animated the passage of 48 state flag desecration statutes and a similar measure by the Federal Government, that led to the prosecution of Gregory lee Johnson under the Texas flag desecration law, that provoked the extraordinary public outcry at the Supreme Court's reversal of Johnson's conviction, and that inspired this hearing. I submit that public sentiment is not 'neutral'; it is not indifferent to the circumstances surrounding conduct relating to the flag. If such conduct is dignified and respectful, I daresay that the American people and their elected representatives do not want to prohibit it; if such conduct is disrespectful and contemptuous of the flag, I believe that they do.

(Testimony, Charles J. Cooper, June 6, 1995.)

A content-neutral amendment would forbid an American combat veteran from taking an American flag flown in battle and having printed on it the name of his unit and location of specific battles, in honor of his unit, the service his fellow soldiers, and the memory of the lost.

Then Assistant Attorney General for Legal Counsel William S. Barr testified before the Senate Judiciary Committee August 1, 1989, and brought a certain American flag with him:

> Now let me give you an example of * * * the kind of result that we get under the [content-neutral approach]. This is the actual flag carried in San Juan Hill. It was carried by the lead unit, the 13th Regiment U.S. Infantry, and they proudly emblazon their name right across the flag, as you see; 1,078 Americans died following this flag up San Juan Hill.
>
> * * * Under [a content-neutral approach], you can't have regiments put their name on the flag, that's defacement * * *

(Testimony, Assistant Attorney General William P. Barr, August 1, 1989, at 68.)

The committee does wish to empower Congress and the States to prohibit the contemptuous or disrespectful physical treatment of the flag. The committee does *not* wish to compel Congress and the States to penalize respectful treatment of the flag. A constitutional amendment which would treat the placing of the name of a military unit on a flag as the equivalent of placing the words "Down with the fascist Federal Government" or racist remarks on the flag is *not* what the popular movement for protecting the flag is all about. The committee respectfully submits that such an approach ignores distinctions well understood by tens of millions of Americans. Moreover, a constitutional amendment equating the ceremonial, reverential disposal of a worn American flag by burning, with the contemptuous burning of the flag to dramatize this or that viewpoint is as impractical as it is overbroad.

Moreover, never in the 204 years of the first amendment has the free speech clause been construed as totally "content neutral." Professor Parker, who believes in "robust and wide-open" freedom of speech and that it ought to be more robust than the Supreme Court currently allows in some respects, noted as much in the context of making a larger point:

> 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—in our democracy, that means ordinary 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 adherence to 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. Practically everyone accepts some explicitly "substantive" parameters of speech content as well. Indeed, despite talk of "content-neutrality," the following principle of constitutional law is very clear: Government sometimes may sanction you for speaking because of the way the *content* of what you say affects other people.
>
> What is less clear is the shape of this principle. There are few bright lines to define it. The Supreme Court understands the principle to rule out speech that threatens to cause imminent tangible harm: face-to-face fighting words, incitement to violation of law, shouting "fire" in a crowded theater. And it does not stop there. It understands the principle, also, to rule out speech that threatens certain intangible, even diffuse, harms. It has, for instance, described obscenity as pollution of the moral "environment." But what about "political" 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, for instance, that statements criticizing official conduct of a public official may be sanctioned if they are known to be false and damage the reputation of the official. There has been no outcry against this rule. It was set forth by the Warren Court—in an opinion by Justice Brennan, the very opinion that established freedom of speech as "robust and wide-open." [*New York Times* v. *Sullivan,* 376 U.S. 254 (1964).] It has been reaffirmed ever since.

Professor Parker also noted:

> The bonds that hold us together—and so make it possible, as in a healthy family, for us to engage in "robust" disagreement with on another—appear to be disintegrating * * *

(Written testimony, Prof. Richard D. Parker, June 6, 1995, pp. 1–3.)

6. *Granting States, as well as Congress, power to protect the flag reflects the constitutional principle of federalism and returns us to the status quo ante 1989*

The States, as well as Congress, are authorized to legislate protection of the flag from physical desecration under S.J. Res. 31. Some critics of the amendment believe that *only* Congress should be able to legislate protection of the flag, because it is a national symbol. Concern has been expressed that a "patchwork" of different statutes will develop.

The committee notes, as mentioned earlier, that only Congress can set the design of the flag. While States cannot define the design of the flag, the flag belongs to the people of the several States as well as to the American people as a whole.

If Utahns, for example, want to ban only burning and trampling on the flag as a means of casting contempt on it, and New Yorkers or Congress or both wish to also ban defacing and mutilating the flag as a means of physical desecration, the committee believes New Yorkers and the American people as a whole should have the right to do so.

This is precisely the situation obtaining prior to 1989. Congress and 48 States had flag desecration statutes until 1989. Their lack of uniformity presented no threat to the fabric of our liberties.

Indeed, in restoring power to the States they had held for 200 years, the flag protection amendment reflects the basic constitutional principle of federalism.

Today, some States make unlawful what other States permit, across a vast range of human activity. There is nothing new or startling about this.

Some States legislate the protection of monuments, tombstones, and historical sites differently than other States. States regulate the sale and use of alcohol differently from each other. And on and on.

There is nothing unusual in letting States legislate protection of the American flag, and there was nothing unusual about it when 48 States did so before 1989.

The committee further notes that in the area of obscenity, the Constitution already permits greater local variation in the definitions of protected and unprotected *speech* than the variety of prohibitions against the *conduct* of physical flag desecration which would occur under S.J. Res. 31. In order to decide what materials are obscene, and thus unprotected by the first amendment, juries are required to determine a) "whether the 'average person, *applying contemporary community standards*' would find that the work, taken as a whole, appeals to the prurient interest;" b) "whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law;" and c) "whether the work, taken as a whole lacks serious literary, artistic, political, or scientific value." *Miller* v. *California*, 413 U.S. 15, 24 (1973) (emphasis added). The Court explicitly has recognized that this standard may produce different standards of "obscenity" not just at the state level, but at the local level as well. See *Jenkins* v. *Georgia*, 418 U.S. 153 (1974).[5]

Thus, under the *Miller* test, there may be definitions of obscenity that vary not only by State, but also by locality. And these variations pertain to actual *speech*, not mere conduct, as is involved in prohibiting physical desecration of the American flag. Thus, a streetcorner speech or book protected by the first amendment in New York City may not be protected in Wilmington, DE; Green Bay, WI; or Provo, UT. Yet, the committee is unaware of any congressional effort, including by opponents of the flag protection amendment, to address this diverse state of affairs.

IV. Vote of the Committee

On July 20, 1995, with a quorum present, by roll call vote, the committee on the Judiciary voted on a motion to report favorably S.J. Res. 31. The motion was adopted by a vote of 12 yeas and 6 nays, as follows:

Yeas	Nays
Thurmond	Biden
Simpson—proxy	Kennedy—proxy
Grassley	Leahy—proxy
Specter—proxy	Simon—proxy
Brown—proxy	Kohl
Thompson	Feingold
Kyl	
DeWine—proxy	
Abraham	
Heflin	

[5] Under the *Miller* test, States are free to adopt communitywide, statewide, or even nationwide standards of prurience and patent offensiveness. Naturally, the Court subjects these standards to review to ensure that they do not go too far. See *Jenkins* v. *Georgia*, 418 U.S. 153 (1974) (no jury could find film Carnal Knowledge to be obscene); *Brockett* v. *Spokane Arcades*, 472 U.S. 491 (1985) (States cannot classify as "obscene" materials which provoke only "normal and healthy sexual desires"). But neither expert testimony on community standards nor jury instructions on the definition of "community" or "contemporary standards" are constitutionally required. *Hamling* v. *United States*, 418 U.S. 87, 125–27 (1974); *Jenkins*, 418 U.S. at 157. *Miller's* holding that juries may decide for themselves what is "prurient" or what violates "contemporary community standards" —subject to a rather light standard of review by the Court—means that a large amount of diversity in the definition of obscenity is inevitable.

Feinstein
Hatch

V. TEXT OF SENATE JOINT RESOLUTION 31

JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States to grant Congress and the States the power to prohibit the physical desecration of the flag of the United States.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

ARTICLE —

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

VI. COST ESTIMATE

In accordance with paragraph 11(a), rule XXVI, of the Standing Rules of the Senate, the committee offers the report of the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, July 24, 1995.

Hon. ORRIN G. HATCH,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S.J. Res. 31, a joint resolution proposing an amendment to the Constitution of the United States to grant Congress and the States the power to prohibit the physical desecration of the flag of the United States, as ordered reported by the Senate Committee on the Judiciaiy on July 20, 1995. We expect that enactment of this resolution would result in no significant cost or savings to the federal government, and no cost to state and local governments. Because enactment of S.J. Res. 31 would not affect direct spending or receipts, pay-as-you-go procedures would not apply to the bill.

The joint resolution would propose amending the Constitution to prohibit the physical desecration of the U.S flag. Enacting this resolution could impose additional costs on U.S. law enforcement and the court system to the extent that cases involving desecration of the flag are pursued and prosecuted. However, CBO does not expect any resulting costs to be significant. To become effective, two-thirds of the members of both houses would have to vote to approve the resolution, and three-fourths of the states would have to ratify the proposed amendment within seven years.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Susanne S. Mehlman, who can be reached at 226–2860.

Sincerely,

JUNE E. O'NEILL,
Director.

VII. REGULATORY IMPACT STATEMENT

Pursuant to paragraph 11(b), rule XXVI of the Standing Rules of the Senate, the committee, after due consideration, concludes that Senate Joint Resolution 31 will not have direct regulatory impact.

VIII. ADDITIONAL VIEWS OF MR. HATCH

The Committee Report sets forth the case for a constitutional amendment granting Congress and the States power to prohibit physical desecration of the flag of the United States. It fully responds to the principal criticisms of the amendment. I wish to respond to some of the other criticisms of the amendment.

THE CONSTITUTION IS AMENDABLE FOR A PROPER CAUSE

A few critics claim the flag protection amendment elevates the American flag above the Constitution itself and to some god-like religious status. The amendment does not elevate the flag above the Constitution or to religious-like status any more than erecting monuments to Washington and Lincoln, and legally prohibiting the desecration of those monuments, elevates Washington and Lincoln—or their monuments—to such status. The amendment simply restores to Congress and the states power they had prior to the Supreme Court's misinterpretation of the First Amendment in 1989. Chief Justice Earl Warren, and Justices Hugo Black and Abe Fortas, for example, all believed that Congress and the states had such power.

The irony of this criticism is that it is *opponents* of the flag protection amendment who are treating the Constitution as sacrosanct. Not even its Framers did that. They knew that the people may have to amend it and provided for such a possibility in Article V.

Indeed, many of these same Framers amended it ten times in 1791, and twice more shortly thereafter. Yet, listening to the Clinton Administration's testimony, presented by Assistant Attorney General Dellinger on June 6, one would think there is a time-lock on the document, permitting the people to amend it only at specified intervals, rather than upon a pressing need:

> After the adoption [of the first 12 amendments], we went half a century before we had the first amendment to the Constitution. We had the three Civil War amendments and we went another half century before we amended it again * * *

(Written Testimony of Assistant Attorney General Walter Dellinger, June 6, 1995.)

It is difficult to believe that the Clinton Administration and its allies opposing the flag protection amendment would have opposed a constitutional amendment banning slavery in 1796 on the grounds that the document had been amended ten times just five years before, and that it was too fragile to amend again so soon. Could the opponents of this amendment argue that if the 19th amendment, granting women the right to vote, had been brought to Congress 50 years earlier, in 1870, they would have opposed it because we had just ratified the three great Civil War Amendments? Of course not.

This notion that there is some kind of arbitrary limit on when the people can amend their fundamental charter does not hold up.

So what is the real, underlying position of some of the opponents of this amendment, certainly, at least, of the Clinton Administra-

tion? It is that protecting the American flag from physical desecration is not important enough to amend the Constitution—the Clinton Administration acknowledged as much in its testimony.

Mr. Dellinger testified, "But even assuming, for the moment, that all of the interpretive difficulties of this amendment could be cured"—difficulties that, in this Senator's view, are almost entirely in the Administration's imagination—"it would remain an ill-advised departure from a constitutional history marked by a deep reluctance to amend our most fundamental law." A flag amendment is simply not one of those "great and extraordinary occasions" for which we should "resort to the amendment process." (*Id.* at 8, 9).

Some of the academics, lawyers, and editorial writers who are among the most vociferous opponents of the amendment make the same basic comment. I respect that opinion, but I profoundly disagree with it.

And here, in my view, is one of the fundamental mistakes in accepting their hidebound conclusion: the Constitution, like the flag, belongs to the *entire* American people, not just law professors, not just lawyers, and not just editorial writers.

Thus, exquisitely analyzing and categorizing the basic kinds of amendments that have been ratified in the past, and presenting to us rules, theories, and guidance as to what kinds of amendments are appropriate today, are the type of thing lawyers and law professors tend to do. Their work is important, but it is not dispositive.

Many of these same lawyers and academics think it is fine when they press upon the federal judiciary new and expansive legal and constitutional theories divorced from the text and original meaning of our statutes and Constitution. Many think it is even better when these unelected federal judges accept their theories.

But let the American people, having been told by lawyers and law professors that flag burners should keep their newfound constitutional right, resort to *their* constitutional right to press for an amendment to the Constitution to protect their beloved, unique national symbol, and suddenly they get a series of condescending civics lectures.

DIVISIVENESS?

This Administration scorns the sincere beliefs and values of tens of millions of Americans when it effectively describes the grassroots effort that has brought us here as "turning [the Constitution] into a forum for divisive political battles." If it has become such a battle, who is responsible for that? This measure had over 300 Congressional cosponsors before hardly anyone else inside the Capitol Beltway noticed it. This has been a bipartisan movement from the start.

Further, criticizing an effort to amend the Constitution because it "turns the document into a forum for divisive political battles" cannot be intended as a serious argument against this amendment. Under that theory, we might still be functioning under the Articles of Confederation. A number of amendments to the Constitution resulted only after a certain amount of divisiveness, the Civil War for example. I think the body politic can absorb disagreement over this amendment. The difficulty of the amendment process, the difficulty in obtaining the highly motivated popular support necessary to see

that process through to ratification, serves as a powerful check on undue resort to the amendment process.

THIS ISSUE TRANSCENDS MERE LEGAL ANALYSIS

What is disappointing to me is that President Clinton apparently relied so heavily on a narrow legal analysis to come to a position on a matter which, to most other Americans, transcends mere legal analysis. Of course, a constitutional amendment must be carefully drawn and the lawyers must be consulted. But the desirability of the amendment is hardly a matter for the lawyers alone.

Another irony is: Mr. Dellinger twice stated that President Clinton believes *Texas* v. *Johnson* is wrongly decided and that Justice Black was right when he said that states have the right to protect the flag. How, then, can the President, in the next breath, claim, through Mr. Dellinger, that an amendment overturning *Johnson*—even an ideally drafted amendment from the Administration's point of view—is "tampering with the Bill of Rights?"

If, after 200 plus years of a contrary understanding, the Court today decides, 5 to 4, that obscenity is protected by the First Amendment, would President Clinton oppose an amendment authorizing the prohibition of its sale and distribution? And if the President felt that the 5-to-4 decision was wrong, would he view the amendment as tampering with the Bill of Rights, or just overturning a mistaken judicial interpretation of it? Would his Administration and its allies be demanding on the floor of Congress that supporters of the amendment determine in advance whether this or that hypothetical picture, photograph, or writing would qualify as "obscene" under the amendment?

Moreover, if the President believes Justice Black was correct, why is his Administration now criticizing the flag protection amendment on the grounds that it authorizes states, not just Congress, to protect the flag?

The Clinton Administration cannot have it both ways.

Finally, the Clinton Administration gives us yet another misguided civics lecture. Noting that many Americans choose to display the flag proudly, Mr. Dellinger says: "what gives this gesture its unique symbolic meaning is the fact that choice is freely made, uncoerced by the government." Nothing in the flag amendment or any legislation authorized thereunder will coerce anyone into displaying the flag in any way, respectfully or otherwise. The meaning of voluntary respectful display of the flag will be no less under this amendment.

The Clinton Administration apparently forgets that before 1989, these respectful displays occurred under 48 state statutes and one federal statute protecting the flag. Is the Clinton Administration seriously suggesting that respect for the flag in recent decades was lessened by laws banning its desecration before 1989? Incredibly, the answer is yes. Mr. Dellinger concluded his testimony with the amazing remark that if "respectful treatment of the flag is the only choice constitutionally available—then the respect paid the flag by millions of Americans would mean something different and perhaps something less." Really? Did the respect shown the flag mean something less before 1989? Perhaps in a modern day constitutional law classroom, but not among tens of millions of Americans,

including most opponents of the amendment, as well. And I daresay that none of the opponents of the amendment in this Congress would agree that their respectful treatment of the flag meant something less at 9:59 a.m. June 21, 1989, than it did one minute later when the Court announced its *Johnson* decision.

I urge my colleagues to support S.J. Res. 31.

IX. ADDITIONAL VIEWS OF MR. THURMOND

I wish to stress three specific aspects of the flag protection amendment.

First, the American people do not want a so-called "content-neutral" flag protection amendment. The American people are not neutral about their flag. It is perfectly appropriate for the American people to advocate legislative protection of their flag from contemptuous or disrespectful treatment or use of the flag. It should not be necessary to require that, in order to protect the flag from such physical desecration, the American people must be barred as well from reverentially, ceremonially disposing of the flag by burning it, as the Flag Code suggests.

Some combat units emblazon the name of their unit on a flag they carried into battle. Congress should not equate this respectful treatment of a flag with writing racist slogans on it. Yet, a "neutral" flag amendment would treat both the conduct of the respectful veteran and the racist as the same—defacing the flag. Americans know better than this—and they expect more from their elected officials than to equate both actions.

Second, we must be careful to assure that the language we send to the States, if ratified, will allow the American people to prohibit all—not just some—of the contemptuous or disrespectful treatment they find offensive, if they choose to do so. Immediately after the *Texas* v. *Johnson* decision, I introduced along with 43 cosponsors a proposed constitutional amendment to protect the American flag. Our initial proposal contained language to allow protection from defiling, desecrating, burning and defacing the flag. Later, we determined that a better proposal would be to avoid content neutral language such as burning and defacing. Moreover, because it is the Constitution we are amending, we should not risk ratifying an amendment too narrowly drawn. An amendment which authorizes Congress and the States to enact legislation to prohibit the act of knowingly defacing or burning the flag is too narrow. For example, it does not cover trampling or walking on the flag. It does not cover mutilating the flag. It does not cover the disrespectful *use* of the flag. Indeed, such an amendment is also content-neutral—any knowing "defacing" of the flag outlawed under legislation enacted thereunder would have unintended consequences. For example, a respectful and ceremonial disposition of the flag would technically be against the law under a content-neutral statute.

We should trust the people of our States and their elected State and Federal officials to legislate with the specificity and care necessary to protect the flag without unduly tying their hands in the Constitution itself. That is why we must not succumb to the temptation to be overly specific in this amendment. The term "physical desecration" strikes the right balance: it is general in that it authorizes legislation against the range of contemptuous or disrespectful treatment or use of the flag, yet it is specific in that it is precisely and only contemptuous or disrespectful treatment or use of the flag which can be outlawed.

Moreover, any legislation enacted under S.J. Res. 31 as adopted by the committee must pass muster under the due process clauses of the 5th and 14th amendments. This requirement includes that

the conduct outlawed by substantially specified. This is a strong safeguard against unwise legislation.

Third, while only Congress can establish the design of our flag, the flag belongs to the people of our States as much as to our people as a whole. Accordingly, we must be careful not to deny the people of their right to protect the flag through legislation enacted in their States. The people had this right until the Supreme Court took it from them in 1989. Forty-eight States had flag protection statutes on the books, many for a long time before the enactment of the general Federal flag desecration statute.

I urge my colleagues to show some faith in the American people by trusting them to protect Old Glory under the amendment as it passed the Judiciary Committee.

X. SUPPLEMENTAL VIEWS OF MRS. FEINSTEIN

There seems to be a mind set among some, that if you support a constitutional amendment to protect the American flag you are either a) opposed to free speech, b) undermining the most fundamental tenets of a free society, or c) singing like a political windchime to the popular tune of the day.

In my view, it is exactly this kind of straight-jacketed thinking that has caused an increasing number of people to move away from both major political parties.

The fact is, there are intelligent arguments on both sides of the flag amendment debate. To be sure, just as one who opposes amending the Constitution to protect the flag should not be accused of being less than wholly American, one who supports it should not automatically be accused of engaging in pseudo-patriotic posturing. For those of us on either side of this debate, the patriotism and love of country are equally as strong.

I, for one, support a constitutional amendment to restore protection to our national flag, and I do so not in deference to political expediency, but because I believe it is the right thing to do and have for a long time.

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.

It wasn't until the flag was fired upon at Fort Sumter—in an overt act of war—that Americans came to look upon the flag as more than just a symbol of their government. Those shots fired changed the American spirit from pilgrim to patriot, and it changed the stars and stripes from a piece of cloth to the embodiment of what we stand for as a people.

I will never forget the emotion I felt as a child when I saw that famous photograph by photographer Joe Rosenthal, of the soldiers raising the American flag at Iwo Jima—capturing in one moment in time the strength and determination of the entire nation.

Our history books are replete with the stories of soldiers, beginning with the Civil War, who were charged with the responsibility of leading their units into battle by carrying the flag. To them it was more than a task—it was an honor worth dying for, and many did. When one soldier would fall, another would take his place, raise the flag, and press forward. They would not fail. Their mission was too important; the honor too great; flag and country too respected to give anything short of their lives to succeed.

The unique status of the national flag has been supported by constitutional scholars as diverse as Chief Justices William Rehnquist and Earl Warren, and Justices John Paul Stevens and Hugo Black.

Our flag is recognized as unique not only in the hearts and minds of Americans but in our laws and customs as well. No other emblem or symbol in our Nation carries with it such a specific code

of conduct and protocol in its display and handling. Listed below are just a few sections of the relevant Federal law:

- The U.S. flag should never be displayed with the union down except as a signal of dire distress or in instances of extreme danger to life or property.
- The U.S. flag should never touch anything beneath it—ground, floor, water or merchandise.
- The U.S. flag should never be dipped to any person or thing.
- The U.S. flag should never be carried horizontally, but it should always be carried aloft and free.[1]

It is my belief that restoring legal protection to our Nation's flag would not infringe upon our long-standing tradition of free speech under the First Amendment. Until the Supreme Court's *Texas* v. *Johnson*[2] decision in 1989, 48 of 50 states had laws preventing the burning or defacing of our Nation's flag.[3] I do not believe one can credibly claim that, over the course of those years, these laws prevented anyone from speaking out, even against the United States itself, in the strongest possible terms.

I do not take amending the Constitution lightly. However, the Supreme Court's 1989 *Johnson* decision, and its decision in *United States* v. *Eichman*[4] in 1990, forced those of us who want to protect the flag to choose this path. This amendment is the only way to return the nation's flag to the protected status I believe it deserves.

In voting for this legislation, however, I extend a cautionary note. This amendment should not be viewed as a precedent for a host of new constitutional amendments on a limitless variety of subjects. The Constitution was designed to endure through the ages, and for that reason it should not be amended to accommodate the myriad of issues of the day. My support of a constitutional amendment to protect the flag reflects the gravity of my belief in this unique purpose.

FROM A FIRST AMENDMENT PERSPECTIVE, A CONSTITUTIONAL AMENDMENT ON FLAG BURNING MAY BE PREFERABLE TO A STATUTE

From a First Amendment perspective, a specific constitutional amendment relating to flag burning may be preferable to a statute. Harvard Law Professor Frank Michelman made this point in a 1990 article, "Saving Old Glory: On Constitutional Iconography."[5] Although not himself an advocate of flag-protective prohibitions, Professor Michelman argued that a well-drafted constitutional amendment related to flag burning would be preferable to a statute because Supreme Court review is not required for constitutional amendments.

---

[1] 36 U.S.C. 176 (1994).

[2] 491 U.S. 397 (1989) (regarding the constitutionality of the application of a state statute prohibiting flag burning).

[3] For example, section 614 of California's Military and Veterans Code states: "A person is guilty of a misdemeanor who knowingly casts contempt upon any flag of the United States or of this state by publicly mutilating, defacing, defiling, burning, or trampling upon it." Military and Veterans Code, Division 3, Ch. 1, sec. 614. This statute would likely be held unconstitutional under current law.

[4] 496 U.S. 310 (1009) (regarding the constitutionality of the application of a Federal statute prohibiting flag burning).

[5] 42 "Stanford Law Review" 1337 (1990).

By contrast, a statute, if challenged, could only survive if the Supreme Court ultimately determined it to be constitutional. In other words, the Supreme Court would need to determine that the statute comported with existing freedom-of-expression doctrine. In so doing, the Court arguably would need to develop a rationale that could, in the long term, serve to justify prohibitions on other kinds of symbolic expression.

In Professor Michelman's words,

> [t]he Supreme Court could not sustain the Flag Protection Act on the ground that it serves a legitimate and substantial governmental interest without loosening the category of justifying governmental interests in a way or ways fraught with danger to the future constitutional-legal protection of constitutional freedoms.[6]

LANGUAGE OF SENATE JOINT RESOLUTION 31

I realize that, in order to avoid unduly infringing on legitimate forms of expression, the language of this amendment should not be vague or overinclusive. Currently, S.J. Res. 31 reads:

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

I am concerned that the wording of S.J. Res. 31 is unduly vague. Because the language is subject to varying interpretations, I believe that it fails to delineate clearly the boundaries between permissible and impermissible behavior. Any vagueness problem will be heightened if criminal penalties are involved.

The two most troublesome words are "desecration" and "flag." Depending on the state law adopted, "desecration" could apply to the use of the flag by Olympic athletes, or to the cutting of flag-patterned cloth by a seamstress. The term "flag of the United States" could include various articles of red, white, and blue clothing. Adding to the potential confusion, S.J. Res. 31 would allow for 50 separate State definitions of the word, "flag." This is unnecessary, as the goal is to protect the flag of our Nation as a whole.

This is why, when the Judiciary Committee held its mark-up of S.J. Res. 31 on July 20, I offered, and will continue to recommend, language that is, in my view, more specific and better defined.

SPECIFICITY OF MY PROPOSED SUBSTITUTE AMENDMENT

My proposed amendment protects against what it is supposed to protect against—the burning or defacing of the American flag. The amendment reads:

> The Congress and the States shall have the power to prohibit the act of knowingly defacing or burning the flag of the United States.[7]

---

[6] *Id.*, at 1351.

[7] Future Federal or state legislation could include language exempting practices associated with flag disposal. For example: "This law does not prohibit any conduct consisting of the disposal of a flag when has become worn or soiled."

> For the purpose of this article of amendment, the Congress shall determine by law what constitutes the flag of the United States.

I believe that this language represents a fair compromise which allows for protection of our national symbol without jeopardizing our fundamental principles of free speech.

The amendment is limited to very specific actions—flag defacing or burning. I purposefully omitted vague words like "mutilate," "desecrate," "defile," "soil," and "trample." I believe that these words are overinclusive—they could serve to punish more behavior than intended.

At the same time, the words I chose are not underinclusive. They are sufficient to cover all of the undesired activities. For example, the word, "deface," would include such activities as trampling, defiling, or mutilating the flag. According to Websters Dictionary, "deface" means to "mar the appearance of, or impair the usefulness, value or influence of."

Another reason I omitted words like "defile" and "trample" is that I am concerned that they may encompass more than just physical acts. "Defile" and "trample" both have significant communicative components. In examining the constitutionality of the Federal Flag Protection Act in the *Eichman*[8] case, the Supreme Court cited definitions of these words in Webster's Third New International Dictionary. One meaning of "defile," for example, is "to rob of chastity."[9] And, according to another definition in Webster's New World Dictionary, a meaning of trample is to "to crush, destroy, hurt, violate, etc. by or as by treading upon."[10]

My proposed language also would promote uniformity, giving Congress the authority to establish a single definition for "flag," rather than allowing for 50 separate State definitions.

Finally, in contrast to S.J. Res. 31, my amendment is limited to "knowing" conduct. This helps protect against the prosecution of innocent parties, such as the seamstress or tailor cutting through flag-patterned cloth.

I believe that this proposal would give the American flag the protection it deserves, while at same time guarding the First Amendment principles we revere.

---

[8] 496 U.S. 310 (1990).
[9] *Id.*, at 317, n. 7.
[10] "Webster's New World Dictionary: Third College Edition" (1989).

XI. MINORITY VIEWS OF MR. BIDEN

I. THE FLAG DESERVES PROTECTION

Nothing symbolizes what we might call our "national spirit" like the flag. In times of crisis, it inspires us to do more. In times of tranquility, it moves us to do better. At all times, it unifies us in the face of our diversity and our differences.

After the Supreme Court handed down its decision in *Texas* v. *Johnson*, 491 U.S. 397 (1989), invalidating the conviction of flag burner Gregory Johnson, I joined the overwhelming majority of my colleagues in a call to action. Notwithstanding my instinctive First Amendment passions, I felt then—as I do now—that the flag is special and uniquely deserving of legal protection. I believe that we should protect the flag as the singular and unifying symbol of a diverse people in need—in urgent need, sometimes—of common ground. Like many Americans, I can see in my mind's eye the picture painted by American Legion National Commander William Detweiler:

> We are a nation born of immigrants, many of whom came to America with only scant knowledge of our heritage and our history. Whether they docked at Ellis Island eighty years ago or landed in Miami yesterday, one of the first sights they beheld was Old Glory waving proudly in the air. It was the embodiment of all of their hopes for a better tomorrow. Although it was not the flag of their fathers, they knew it would be the flag of their children, and of their children's children.

(Written statement of William Detweiler, June 6, 1995, at 5.)

The flag, as Justice Stevens wrote in his *Texas* v. *Johnson* dissent, symbolizes more than nationhood and national unity.

> It also signifies the ideas that characterize the society that has chosen [it] as well as the special history that has animated the growth and power of those ideas. * * * [The flag] is a symbol of freedom, of equal opportunity, of religious tolerance, and of good will for other peoples who share our aspirations.

491 U.S. at 396–97 (Stevens, J., dissenting).

All of the views expressed in this Report—majority and minority—evidence respect and love for the flag. But this shared sentiment does not end the debate over a constitutional amendment; it marks only where it begins. For this is not a debate between those who love the flag and those who don't, or between patriots and rogues. It's a debate about the proper balance to be struck between our respect for the flag and our commitment to the Constitution's bedrock values.

In seeking to protect the flag, we must not trample on the very rights that give meaning to the concept of freedom Americans treasure. As we contemplate adding a 28th amendment to the Constitution, we must not lose sight of the First Amendment and its guiding principles. I believe that we can protect the flag while not doing damage to core free speech values—by prohibiting all abuse of the flag without regard to the message intended by the abuser.

Unfortunately, S.J. Res. 31 does not take this approach. Instead, as outlined in detail below, the amendment seeks to protect the flag by impinging on First Amendment rights in a way never before permitted in our nation. Thus, I cannot support this constitutional amendment—even as I add my voice to the many voices on the pages of the majority report—all of us trying to put to words the shiver we get when we see the flag—our flag—flying high and proud.

When the full Senate considers this issue, I will offer an amendment that protects the flag regardless of the intent or message of the actor—and which thus protects our cherished First Amendment rights as well.

II. Any Effort To Protect the Flag Should be Viewpoint Neutral

At the heart of the First Amendment lies a very basic notion: the government cannot muzzle a speaker because it dislikes what he has to say, or discriminate between your speech and mine because it agrees with me but not with you. That sort of viewpoint discrimination is most importantly what the First Amendment forbids. As the Supreme Court has said:

> [A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. * * * The essence of * * * forbidden censorship is content control.

Police Dept. of Chicago v. *Mosley*, 408 U.S. 92, 95–96 (1972); *see also FCC* v. *Pacifica Foundation*, 438 U.S. 726, 745 (1978) ("[I]t is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas").

Just last term, the Supreme Court forcefully reiterated its intolerance for viewpoint discrimination in *Rosenberger* v. *University of Virginia*, No. 94–329, slip op. at 7 (U.S. June 29, 1995):

> In the realm of private speech or expression, government regulation may not favor one speaker over another. * * * When the government targets not subject matter but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.

It was in this spirit—to protect the flag while not doing violence to the core First Amendment principle of viewpoint neutrality—that I wrote The Flag Protection Act in 1989. The Act aimed to safeguard the physical integrity of the flag across the board—by making it a federal crime (without regard to the actor's motive) to mutilate, deface, physically defile, burn, maintain on the floor or ground or trample on an American flag. An exception was carved out for disposing of the flag when it became worn or soiled.[1] The

[1] The majority report would have us believe that viewpoint neutrality is sacrificed by a law which excepts disposal of a worn or soiled flag. Not so. The governmental interest at stake here is in the flag as we all know it—intact and worthy of display. When a flag has come to the end of its life, our interest is no longer in its preservation—and so allowing for its customary disposal in no way detracts from the viewpoint neutrality that we should impose upon its destruction during its life. At the end of its days, a flag is no longer The Flag that we aim to protect.

statute focused solely and exclusively on the conduct of the actor—regardless of any idea she might have been trying to convey, regardless of whether she meant to cast contempt on the flag, and regardless of whether anyone was offended by her actions.

The statute was written that way because, in my view, the government's interest in preserving the flag is the same regardless of the particular idea that may have motivated any given act of burning or mutilation. Our interest in the flag is in the flag itself—as the symbol of our identity as Americans. The flag's unique place in our national life means that we should preserve it against *all* manner of destruction. It matters not whether the flag burner means to protest a war, praise a war—or start a barbecue. It is the flag as treasured symbol—not as vehicle for disagreeable speech—that should be protected.

As Professor Tribe testified in support of the Act:

> The sentiment reflected in a law designed to protect a physical symbol may often be a sentiment of *sympathy* for what the symbol embodies and represents, not a sentiment of *censorship* of what the symbol-destroyer expresses.

(Written statement of Laurence H. Tribe, August 1, 1989, at 5.)

Regrettably, in my view, the Supreme Court, by a 5-to-4 vote, struck down The Flag Protection Act in 1990. *U.S.* v. *Eichmann*, 496 U.S. 310 (1990). Which brings us to where we are today: face to face with the prospect of adding a 28th amendment to the Constitution. And though I here part company with many of my liberal friends—believing as I do that the flag is worthy of constitutional protection—I nevertheless must oppose S.J. Res. 31. I oppose this constitutional amendment because, in my view, it puts the flag on a collision course with the Bill of Rights.

III. Senate Joint Resolution 31 is Fundamentally Flawed

A. The Amendment is Not Viewpoint Neutral

The proposed amendment gives Congress and the 50 states the power to prohibit the physical "desecration" of the flag. Contrary to the suggestion of the majority, it is not the ambiguity of the word, but its generally accepted *meaning*, that I find so troublesome. Although the amendment itself does not hazard a definition, the majority report does: "[d]esecrate means to treat with contempt, to treat with disrespect, to violate the sanctity of something; profane." Report at 31. *See also Webster's New Collegiate Dictionary* ("to violate the sanctity of: PROFANE; to treat irreverently or contemptuously"); *Black's Law Dictionary* ("to violate sanctity of, to profane, or to put to unworthy use").

That word—desecration—is so value laden that it gives the government license to do what the First Amendment most fundamentally prohibits: to discriminate between speech it likes and speech it doesn't like. For to determine whether an action "desecrates," we must first make a value judgment about what message the actor is trying to communicate. Does he mean to profane the flag? Does her action treat the flag irreverently or contemptuously? Is the flag being put to an unworthy use? When we make those kinds of value

judgments, we are not making the act of flag burning the crime—we are making the *message* behind the act the crime.

That is the crux of my objection to this amendment—it makes not the act, but its message, the crime. And in so doing, it gives the Congress and the states nearly unbounded authority to criminalize expressive conduct that the government may find offensive, annoying or just plain wrong-headed. As Professor Michael E. Parrish noted:

> The proposed [amendment] flies squarely in the face of the libertarian-egalitarian tradition of constitutional amendments in this country. It does not secure or enhance individual freedom; it seeks to restrict it. It does not limit governmental authority; on the contrary, it unleashes it. It does not promote equality or justice; it invites Congress and the state legislatures to punish those forms of expression and conduct which offend the sentiments of the majority. This, the First Amendment forbids.

(Written statement of Prof. Michael E. Parrish, August 14, 1989, at 5.)

Professor Cass R. Sunstein put it simply:

> One of the problems with the word "desecration" is that it "conspicuously calls for criminalization of protest activity—of criticism of the government—rather than protecting the flag in a more neutral manner."

(Written statement of Prof. Cass R. Sunstein, June 6, 1995, at 6.)

In two rather striking passages, the majority report seems to suggest that the amendment would require viewpoint neutrality in both its implementation and enforcement. *See* Report at 30 (suggesting that amendment will be governed by *R.A.V.* v. *City of St. Paul,* 112 S.Ct. 2538 (1992), which (as report concedes) "requires that the government not discriminate among flag desecrators based on the points of view they seek to dramatize by their particular physical desecration"); *id.* at 32 (judicial decisions "effectively prohibit[] discrimination between desecrators based on viewpoint").

Would that it were so. Such a suggestion is belied, however, not only by the amendment's considerable legislative history, but by the majority report itself. Indeed, the chief proponents of the proposed amendment have been unapologetic on the point—arguing that neutrality is neither desirable nor sufficient, and pointing to the amendment's *lack* of neutrality as one of its most appealing features.

For example, when the Judiciary Committee held an extensive set of four-day hearings on the amendment in 1989, Assistant Attorney General William Barr testified that the measure "would permit the legislatures to focus on the kind of conduct that is *really offensive.*" (Testimony of William P. Barr, August 1, 1989, at 128) (emphasis added). Mr. Barr testified that the amendment would give the Congress and states "wide latitude to prohibit that conduct toward the flag that they believe deserved proscription" (written statement of William P. Barr, August 1, 1989, at 13); that there are "an infinite number of forms of desecration" (*id.* at 17); and that

states would have "substantial discretion" in fashioning flag laws (*id*. at 20).

When the Committee once again convened hearings in 1990, after the *Eichmann* decision, the Bush Administration was no less candid. At those hearings, Acting Assistant Attorney General Michael Luttig testified that the amendment would give the government the latitude to punish actions "only as intended to cast contempt upon the flag." (Testimony of Michael Luttig, June 21, 1990, at 25.) Indeed, I specifically asked Mr. Luttig whether it would be permissible under the amendment to pass laws discriminating between different types of expression. His response was nothing if not frank: "That is correct," he said. "You could punish that desecration which you thought was intended to be disrespectful toward the flag and not that [which] in your judgment does not." *Id*.

The majority report also underscores the point: viewpoint neutrality is neither a goal nor an attribute of the proposed amendment:

> The Committee does wish to empower Congress and the States to prohibit the contemptuous or disrespectful physical treatment of the flag. The Committee does *not* wish to compel Congress and the States to penalize respectful treatment of the flag.

(Report at 39.) (Emphasis in original.)

The report approvingly quotes at length the recent testimony of former assistant attorney general Charles J. Cooper, including the following:

> I submit that public sentiment is not "neutral;" it is not indifferent to the circumstances surrounding conduct relating to the flag. If such conduct is dignified and respectful, I daresay that the American people and their elected representatives do not want to prohibit it; if such conduct is disrespectful and contemptuous of the flag, I believe that they do.

(Report at 39.) (Quoting testimony of Charles J. Cooper, June 6, 1995.)

I do not challenge for a moment the factual accuracy of Mr. Cooper's testimony: all of us, instinctively, are probably more inclined to punish acts of flag desecration that we consider disrespectful than those we consider dignified. But that, I believe, misses the basic constitutional point—indeed, the genius of the First Amendment. Here in America, the majority by and large does not get to choose what can and cannot be said by the minority—or by anyone else, for that matter. And the government, more importantly, is constitutionally restrained from deciding what speech is "good" and what "bad."[2] But that is precisely what the proponents of the

[2] The majority rightly points out that the First Amendment's free speech guarantee is not absolute: obscenity, fighting words, libel, words that incite imminent lawlessness, and commercial speech are all circumscribed to varying degrees. But the point is this: those are entire categories of speech that the Court has accorded less than full protection—either because they are harmful in and of themselves, lacking entirely in scientific, literary, political or artistic value, or false. At no time has the Court given the green light to viewpoint discrimination within a given cat-

Continued

amendment say that it would—*should*—do. They would have a flag emblazoned with the slogan "government is great" treated differently than one that says "government is rotten." That, I believe, takes us down an unchartered and very perilous path.

As Professor Tribe stated:

> The proponents of [the] amendment work themselves into a posture where they are advocating what * * * not any of the conservative Justices of the Court have ever said we ought to be able to do: censoring the viewpoint being expressed through a particular act.

(Testimony of Laurence H. Tribe, August 1, 1989, at 160.)

Under this amendment, the states could send to jail the fringe artist displaying the flag on the floor of an art museum —while giving its blessing to the veteran who displays the flag on the ground at a war memorial. The state could arrest the widow who burns the flag to protest the war that took her husband's life—while smiling on the widow who burns the flag in loving memory of her fallen loved one.

I respectfully submit that the proposed amendment, which endorses—and indeed encourages—this type of viewpoint discrimination exacts too high a constitutional price for the protection of the flag. Again, Professor Tribe:

> [O]ne of the most profound principles for which our flag stands—a principle at the core of the First Amendment—is that government must never prohibit verbal or symbolic expression simply because society detests the particular idea or emotion expressed * * *

(Written statement of Laurence H. Tribe, August 1, 1989, at 2.)

Or as Justice Jackson so memorably put it in the flag salute case of 1943:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. * * * If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

Board of Education v. *Barnette,* 319 U.S. 624, 638, 642 (1943).

Justice Holmes said it this way:

> [I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate.

---

egory—and said, for instance, that pro-American fighting words are permissible where their anti-American counterparts are not, or that it's OK to libel Republicans but not Democrats.

U.S. v. *Schwimmer*, 279 U.S. 644, 654–5 (1929) (Holmes, J., dissenting).

What it boils down to is this: the amendment allows the government to pick and choose—to make flag burning illegal only in certain situations, involving only certain circumstances, and only if carried out by certain people. This discrimination is precisely—and most profoundly—what the First Amendment forbids. Any amendment that works such discrimination does not protect the flag. It censors speech.[3]

B. WHAT IS A "FLAG"?

That the amendment also fails to define the word "flag" adds yet another layer of difficulty in interpretation and application—and opens the door further to inconsistencies among the states. Again, each state would have considerable discretion to craft its own definition. And again, the possibilities are nearly endless. As Assistant Attorney General Barr testified, the legislatures would be able to criminalize conduct dealing not only with the flag as we know it, but with "depictions of the flag, such as posters, murals, pictures, buttons, and any other representation of the flag." (Barr written statement, August 1, 1989, at 16.) Indeed, Mr. Barr seemed to favor such a sweeping definition as "consistent with the Government's interest in preserving the flag's symbolic value because it recognizes that the desecration of representations of the Flag damage that interest as much as desecration of the flag itself." *Id.*

In testimony this year, Bruce Fein viewed this wide legislative berth a bit differently:

> Defining a "flag" within the protective ambit of the amendment * * * is problematic. Would it include a flag with 49 stars, or one with 12 stripes? Would a flag portrayal by a youth in a school art course qualify? What about a flag whose shape was square rather than rectangular? In sum, the phrase "flag of the United States" is riddled with ambiguity and wars with the due process norm that the law should warn before it strikes.

(Written statement of Bruce Fein, June 6, 1995, at 4.)

Assistant Attorney General Walter Dellinger agreed:

> The term "flag of the United States" is * * * unbounded, and by itself provides no guidance as to whether it reaches unofficial as well as official flags, or pictures or representations of flags created by artists as well as flags sold or distributed for traditional display.

(Written statement of Walter Dellinger, June 6, 1995, at 5.)

So, in Maine, it might be a crime to draw a flag being fed into a shredding machine. In California, it could be a crime to wear a sequined dress in the pattern of a flag, or a flag bikini or tee-shirt.

[3] The majority report contends that the amendment will simply restore to the states the power they had before the Supreme Court handed down *Texas* v. *Johnson* in 1989—and that the states will exercise their power appropriately. Both as a matter of law and perception, however, the states will have much more latitude under the amendment. Prior to *Johnson*, the states acted within what they believed were the First Amendment's boundaries. With this new amendment in hand, the states would not be thus constrained.

In Mississippi, the legislature might make it a crime to put a flag decal on the side of a hot dog machine.

While much is unknown about this amendment, this much is clear: it will beget a host of differing state laws whose reach will be limited only by the imagination of legislators and the political whims of the majority.

C. THE AMENDMENT FAILS TO TREAT THE FLAG AS A NATIONAL SYMBOL

This state-by-state approach to flag protection seems to trouble the majority not at all. Indeed, the majority report celebrates it:

> If Utahns, for example, want to ban only burning and trampling on the flag as a means of casting contempt on it, and New Yorkers or Congress or both wish to also ban defacing and mutilating the flag as a means of physical desecration, the Committee believes New Yorkers and the American people as a whole should have the right to do so.

(Report at 41.)

This sort of disparity between state laws—whether it be over the meaning of "desecration" or "flag"—is especially inappropriate where, as here, we're talking about a *national* symbol. The point of protecting the flag is to safeguard a distinctly American emblem, with its capacity to inspire and unify a disparate and sometimes discordant nation. The flag, I submit, is a symbol of the nation, not of the states. This amendment, fostering as it will a crazy quilt of laws all across the map, misses that most important point, and will be more divisive than unifying. Why is it any less reprehensible to burn a flag in Louisiana than in Montana? Why should you be able to wear a flag tee-shirt in Arkansas, but not in Florida?

Moreover, constitutional rights and principles should know no geographic boundaries. A Delawarean should not be accorded greater freedom of speech than his neighbor across the way in Pennsylvania. A Californian should not have more due process rights than her cousin up north in Washington. Yet that is what the proponents of S.J. Res. 31 unabashedly propose. And to compare, as they do, such disparity in the application of fundamental rights with examples of local prerogatives regarding monuments and tombstones belittles both the flag and the Constitution for which it stands.

If we want to protect the flag, we should have one, national standard. The Constitution, after all, stands for broad principles, not a patchwork of 50 different and idiosyncratic ideas.

III. CONCLUSION

I agree that we should honor the flag. We should hold it high in our hearts and in our laws. I believe that we should have a single, national standard which protects the flag against all manner of destruction and mutilation.

But we should not, in our effort to honor the flag, dishonor the Constitution in the process. And that, I believe, is what this amendment asks us to do. By giving the states the power to criminalize the physical "desecration" of the flag, it gives them

each a license to discriminate between speech they like and speech they don't. For desecration—like beauty—is in the eyes of the beholder.

"A regulation of speech that is motivated by nothing more than a desire to curtail expression of a particular point of view," wrote the Supreme Court, "is the purest example" of a law abridging the freedom of speech. *Consolidated Edison C.* v. *Public Serv. Comm'n,* 447 U.S. 530, 546 (1980). Senate Joint Resolution 31 is a textbook example of the sort of provision the Court warned against. We should heed the warning and reject the amendment.

XII. ADDITIONAL MINORITY VIEWS OF MESSRS. KENNEDY, LEAHY, SIMON, AND FEINGOLD

I. INTRODUCTION

A. THE FLAG OF THE UNITED STATES IS A SOURCE OF PRIDE FOR AN ENTIRE NATION

Despite the fact that we strongly disagree with our colleagues who support S.J. Resolution 31 on the necessity of adopting this restriction on the Bill of Rights, there are many facts which are not in dispute.

Chief among them is that the flag of this nation holds a special place in the hearts and minds of nearly all Americans. In this year we celebrate the fiftieth anniversary of the sacrifices the men and women of this nation made in defending freedom and democracy in the Second World War. Each of us has been touched and inspired by the stories of the men and women who put their love of country above all else. Their dedication to our country and the flag is beyond reproach. Furthermore, we find the act of burning the United States Flag abhorrent and join our colleagues in condemning each such act. These matters are not in dispute.

B. A CONSTITUTIONAL AMENDMENT IS NOT NEEDED TO PRESERVE THE UNWAVERING RESPECT AMERICANS HOLD FOR THE UNITED STATES FLAG

However, the aforementioned factors, when weighed against the risks and uncertainty inherent in this proposed amendment, do not obviate the need to respect and preserve the Constitution of the United States and in particular, the First Amendment. While we all agree that the flag is unique and that the handful of people who burn the flag are worthy of our scorn, we must also acknowledge that our collective respect for the flag is not now diminished by the absence of a constitutional amendment, nor will it be enhanced by adoption of S.J. Res. 31.

As Senator Kennedy noted in hearings before the Senate Judiciary Subcommittee on the Constitution, Federalism, and Property Rights on June 6, 1995:

> The American flag will always be revered because of the nation it symbolizes and because of the extraordinary sacrifices made by the brave men and women to preserve the freedoms for which it stands. We do not need to amend the Constitution to honor the flag of those who have served it * * *

(Hearing transcript beginning at 7, June 6, 1995.)

The words of Congressional Medal of Honor recipient, Senator Robert Kerrey of Nebraska, speaking in opposition to S.J. Res. 31, are compelling and sum up the indisputable fact that Americans' respect for the flag is not predicated or conditioned on any factor other than their unique and individual love of country:

> * * * [T]he Constitutional amendment is not necessary either for the maintenance of democracy or for the preservation of respect for the flag * * * my opposition is based

> upon an inherent belief that the Government should not enact anything that the people themselves do not need, and we do not need the Constitution to be changed, nor indeed do we need legislation to convince Americans that burning a flag is wrong.

(Hearing transcript at page 4, June 6, 1995.)

Americans respect and love the flag for deeply individual reasons—not because the Constitution mandates our respect. The Majority report on this measure goes to great lengths to establish that which we readily acknowledge, i.e. Americans love and respect the United States Flag. However, a Constitutional amendment to "protect" a flag which is already protected by the unwavering respect of an entire nation is unwarranted, ill conceived and in our opinion, does unprecedented damage to the Constitution and the very principles the flag symbolizes.

II. There is No Evidence To Justify Amending the Bill of Rights for the First Time in our Nation's History

A. THE CONSTITUTION SHOULD BE AMENDED ONLY UNDER VERY LIMITED CIRCUMSTANCES

Despite a myriad of opportunities in the two hundred years since its adoption, efforts to amend the Constitution have been successful on only twenty-seven occasions.[1] Of the twenty-seven amendments to the Constitution, the first ten, the Bill of Rights, are the foundations for the freedoms enjoyed by all Americans. The remaining seventeen amendments have largely been adopted in response to a specific need—a compelling necessity, such as abolishing slavery and guaranteeing legal equality between the races, granting women the right to vote, or abolishing the poll tax.

Senate Joint Resolution 31 is offered in direct response to Supreme Court decisions in *Texas* v. *Johnson*, 109 S.Ct. 2533 (1989) and *United States* v. *Eichman*, 496 U.S. 310 (1990). On only four occasions in our history has a Constitutional Amendment been adopted in response to a Supreme Court ruling.[2] On at least two of these four occasions, the 14th and the 26th Amendments, the Amendment was in direct response to a Supreme Court ruling that

---

[1] On only thirty-three occasions has Congress approved potential Constitutional amendments and submitted them to the States for ratification. According to the Congressional Research Service, 114 Constitutional amendments have been introduced to date in the 104th Congress. S.J. Resolution 31, was the third Constitutional Amendment reported out of the Judiciary Committee in the first six months of this Congress alone. In addition to this resolution, S.J. Res. 1, The Balanced Budget Amendment, was reported to the Senate on January 24, 1995; S.J. Res. 19, Term Limits, was reported to the Senate on February 9, 1995. There have been 29 Constitutional Amendments referred to the Judiciary Committee as of September, 1995.

[2] In 1789, the Eleventh Amendment was adopted to overrule *Chisholm* v. *Georgia*, 2 Dall. 419 (1793). The amendment prevented suits in Federal court against States by citizens of other States or by citizens or subjects of foreign jurisdictions. In 1868, the Fourteenth Amendment was adopted in response to the Dred Scott Case, *Scott* v. *Sanford*, 19 How. 393 (1857). The amendment established that each person born or naturalized in the U.S. is a citizen and further established the "due process" clause and the "equal protection" language which have been paramount in guaranteeing the individual freedoms of all Americans. In 1913, the Sixteenth Amendment was adopted to overrule *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895) which declared the attempt of Congress to implement an income tax the previous year unconstitutional. The Amendment gave Congress the authority to impose an income tax. Finally, the Twenty-Sixth Amendment, adopted in 1971, lowered the national voting age to 18. The Amendment overruled *Oregon* v. *Mitchell*, 400 U.S. 112 (1970) which held that although Congress could lower the voting age in Federal elections, doing so in all other elections exceeded their authority.

limited or denied individual rights. Senate Joint Resolution 31 constitutes the first time in our history that the Constitution would be used to limit the freedoms enjoyed by Americans pursuant to the Bill of Rights—freedoms which form the cornerstone of our democracy, the First Amendment. This unprecedented use of the Constitution of the United States as a limitation on the liberties of all Americans defies the long established premise that the Constitution is a limitation on government and not on individuals:

> If our Constitution has a fundamental bias it is the bias of liberty, the presumption of freedom, the desire to limit the scope of government. This libertarian assumption informs virtually all of the great amendments adopted since 1790.

(S. Hrg. 101–355, statement of Michael E. Parrish at page 313, 1989.)

The University of Chicago's Llewellyn Distinguished Service Professor of Jurisprudence, Cass R. Sunstein, testified before the Constitution Subcommittee that Constitutional amendments have historically, and should remain, limited to two categories: "If there is a serious structural problem or omission in the document * * *" or if a "new moral or ethical" understanding calls for an amendment, "especially if those understandings involve an effort to include or protect groups excluded by previous constitutional arrangements." (Written testimony of Cass Sunstein at page 2.) The testimony of Bruce Fein, corroborated the historically narrow basis for amending the Constitution:

> Outside the Bill of Rights, amendments have customarily been reserved for matters of important moment related to the political template of the nation: federalism, the powers of government, political rules of the game, and participation in the electoral process * * * The ill-fated Prohibition Amendment deviated from this time-honored custom, and we should learn from that example.

(Written testimony of Bruce Fein, beginning at page 3.)

The need and responsibility to preserve the historic integrity of the Constitution was echoed by Senator Kennedy when he pointed out that the Constitution "should not be treated as a billboard on which to plaster the bumper sticker slogan of the moment. [E]very problem in our society cannot be solved by a constitutional amendment." (Hearing transcript at page 6, June 6, 1995.)

As is the case with any proposed amendment to the Constitution, we must, out of respect for historic precedent, as well as common sense, acknowledge that the Constitution should be amended only in circumstances where it is truly necessary. To abandon this premise is to ignore not only our past history of amendment, but also the guidance of the Framers who reserved amendment for great and extraordinary occasions. James Madison noted the importance of an amendment process which guards "equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults." (The Federalist Papers, No. 43, Rossiter, editor at 278 (1961).) The potential for each and every issue giving rise to

Constitutional amendment and the detrimental effect that would have on the republic was clearly of concern to the Framers:

> [A]s every appeal to the people would carry an implication of some defect in the government, frequent appeals would, in great measure, deprive the government of that veneration which time bestows on everything, and without which perhaps the wisest and freest governments would not posses the requisite stability.

(The Federalist Papers, No. 49, Rossiter, editor at 314 (1961).)

The proposed Amendment is a marked and unwise departure, not only from this nation's history of caution and restraint in amending the Constitution, but also from the noble and historic precedent that the United States Constitution protects freedoms instead of limiting them. Perhaps even more troubling is that this attempted departure occurs in the absence of any sustainable justification.

B. THE PROPONENTS HAVE FAILED TO PROVIDE ANY EVIDENCE THAT INCIDENTS OF FLAG BURNING JUSTIFY AN AMENDMENT TO THE CONSTITUTION

Incidents of flag burning cannot, by any measure, be deemed epidemic. Nor is there any evidence suggesting that such an epidemic is forthcoming. Analysis conducted by the Congressional Research Service indicates that since the Supreme Court handed down *Texas* v. *Johnson* in 1989, there have been relatively few incidents of flag burning. While each of these instances may be deserving of our collective condemnation, they are not a sufficient basis for amending the United States Constitution.

Not only have the proponents of this resolution failed to show a compelling need for this amendment, they have seemingly abandoned a showing of necessity as a prerequisite to amending the Constitution. In fact, written testimony submitted in support of the resolution argued that flag burning "* * * is a problem even if no one ever burns another American flag." (Written testimony of William Detwiller at page 2.)

The accompanying Majority views concur, stating that, "[t]he committee does not believe there is some threshold of flag desecrations during a specified time period necessary before triggering congressional action." (Report at 37.) We should not endeavor to amend the guiding document of this nation on the basis of speculation that something may or may not occur.

Never before has the Bill of Rights been altered by a Constitutional amendment. The consequences of being the first Congress in our history to override the Founding Fathers and amend the Bill of Rights, and to do so absent any necessity, should not be overlooked. As Walter Dellinger stated:

> Whether in the future some set of truly exigent circumstances might justify tampering with the Bill of Rights is a question we can put to one side here. For you are asked to assume the risk inherent in a first-time edit of the Bill of Rights in the absence of any meaningful evi-

> dence that the flag is in danger of losing its symbolic value.

(Written testimony of Walter Dellinger at page 2.)

The Dean of the University of Colorado School of Law, Gene R. Nichol concurred:

> Our Federal charter has rarely been amended to address temporary or symbolic problems. It has rarely been amended merely to make a statement, and if a statement is to be made, I think there would be a real reluctance to be the first American Congress to successfully amend the First Amendment.

(Hearing transcript at page 106, June 6, 1995.)

The instances in our history which have justified amending the Constitution have been few. If there is a consistent strain running throughout the history of this great document it is that for over two centuries it has served as the guiding framework of individual freedoms and that framework should be altered only in the face of a compelling necessity. As Bruce Fein stated, the burden of persuasion is on the proponents to justify this amendment, and:

> * * * to show a compelling need, which has not been done. Mollifying a swell of public opinion falls far short of that standard. Socrates, it should be remembered, was sacrificed at the alter of public opinion, and history has treated him more kindly than his persecutors.

(Written testimony of Bruce Fein at page 5.)

In the present case the burden of necessity has not been met to justify altering, for the first time ever, the First Amendment and the Bill of Rights.

III. Senate Joint Resolution 31 is an Unprecedented Restriction on the Bill of Rights

A. The First Amendment, as cornerstone of individual freedom in this nation, protects above all that expression with which society disagrees or finds objectionable

At the heart of this debate is the proper scope of the guarantee of free speech embodied in the First Amendment to the Constitution. While it is certainly true that all individual rights guaranteed by the Constitution are important aspects of our democratic way of life, the right to engage in speech without the fear of government intervention or censor, regardless of your particular political beliefs and regardless of how objectionable those views may be to the remainder of society, is one of the most important.

It is paramount in consideration of this amendment to have a clear understanding of the holding of *Texas* v. *Johnson,* 109 S.Ct. 2533 (1989), and the Constitutional underpinnings which led an ideologically diverse majority consisting of Justices Brennan, Scalia, Marshall, Blackmun and Kennedy to affirm the Texas Court of Criminal Appeals finding that the Texas statute was unconstitutional.

In 1988, Gregory Johnson was arrested and charged under the Texas statute which makes it a misdemeanor to intentionally or knowingly desecrate a venerated object, which includes a state or national flag (*Texas Penal Code Ann.* § 342.09 (1989).) The Constitutionality of the Texas statute ultimately turned upon the state's definition of "desecrate:"

> [to] * * * deface, damage, or otherwise physically mistreat in a way that the actor knows will *seriously offend* one or more persons likely to observe or discover his action.

Id., *emphasis added.*

The Supreme Court held that Johnson's actions constituted "expression" entitled to Constitutional protection. It did so consistent with a long established precedent that the First Amendment protects certain conduct provided it is imbued with sufficient communicative elements.[3] As it pertains to conduct regarding flags, the Supreme Court has historically had "little difficulty identifying an expressive element." 109 S.Ct. at 2539.[4] The Court has not, however, deemed all conduct relating to the flag to be expression, deferring instead to a case by case determination.

Gregory Johnson burned a flag at a political demonstration outside the Republican National Convention in opposition to the nuclear arms policies of the Reagan Administration. In the words of Justice Brennan, "[t]he expressive, overtly political nature of this conduct was both intentional and overwhelmingly apparent." Id., at 2540. In fact, the State of Texas conceded that Johnson's conduct was indeed expressive. Id.

With the issue of the expressive nature of the conduct settled, of critical importance was whether or not the Texas statute was related or unrelated to the suppression of that expression. This distinction is critical to First Amendment jurisprudence:

> A law is "related to the suppression of free expression" if it expressly restricts the communication of particular messages or if it restricts speech because of the reactions of others to the content of the message conveyed. A law is "unrelated to the suppression of free expression" if it applies wholly without regard to the content of the message conveyed.

(S. Hrg. 101–355, statement of Prof. Geoffrey R. Stone, at page 190, 1989.)

The Court found that the statute was in fact directed at suppressing expression because the statute did not sanction all actions which encroached upon the integrity of the flag. Relying on the Texas statute itself the Court held:

> The Texas law is thus not aimed at protecting the physical integrity of the flag in all circumstances, but is de-

---

[3] The threshold determination is whether "an intent to convey a particularized message was present and whether the likelihood was great that the message would be understood by those who viewed it," *Spence* v. *Washington,* 418 U.S. 405 at 410–411 (1974). *See also, Tinker* v. *Des Moines Independent Community School District,* 393 U.S. 503 (1969); *Brown* v. *Louisiana,* 383 U.S. 131 (1966); *Schacht* v. *United States,* 398 U.S. 58 (1970); *Food Employees* v. *Logan Valley Plaza, Inc.,* 391 U.S. 308 (1968).

[4] See also, *Stromberg* v. *California,* 283 U.S. 359, (1931); *Smith* v. *Goguen,* 415 U.S. 566 (1974); *West Virginia Board of Education* v. *Barnette,* 319 U.S. 624 (1943).

> signed instead to protect it only against impairments that would cause serious offense to others. Texas concedes as much: section 42.09(b) reaches only those severe acts of physical abuse of the flag carried out in a way likely to be offensive. The statute mandates intentional or knowing abuse, that is, the kind of mistreatment that is not innocent, but rather is intentionally designed to seriously offend other individuals.

109 S.Ct. 2543, footnote omitted.

Therefore, the statute was clearly related to free expression because, "[w]hether Johnson's treatment of the flag violated Texas law thus depended on the likely communicative impact of his expressive conduct." Id.[5]

In upholding the Texas Court of Criminal Appeals decision to strike down the Texas statute, Justice Brennan detailed the proud history of free expression which has marked this nation's history since its inception over two hundred years ago:

> If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit expression of an idea simply because society finds the idea itself offensive or disagreeable. We have not recognized an exception to this principle even where our flag has been involved.

Id., at 2544, citations omitted.[6]

Brennan continued:

> To conclude that the Government may permit designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernible or defensible boundaries. Could Government, on this theory, prohibit the burning of state flags? Of copies of the Presidential seal? Of the Constitution? * * * *There is moreover, no indication—either in the text of the Constitution or in our cases interpreting it—that a separate juridical category exists for the American flag alone.* Indeed, we would not be surprised to learn that the persons who framed our Constitution and wrote the Amendment that we now construe were not known for their reverence for the Union Jack. The First Amendment does not guarantee that other concepts virtually sacred to our Nation as a whole—such as the principle that discrimination on the basis of race is odious and destructive—will go unquestioned in the marketplace of ideas. We decline, therefore, to create for the flag an exception to the joust principles protected by the First Amendment.

Id., at 2546, *citations omitted, emphasis added.*

---

[5] Texas unsuccessfully argued its interest in preserving the peace and maintaining the integrity of the flag was sufficient to overcome the Constitutional barrier. 109 S.Ct. 2541.

[6] The suggestion that this point is novel or was crafted solely for the benefit of Gregory Johnson is dispelled by the fact that Justice Brennan cites no less than thirteen prior Supreme Court cases relying upon this principle.

Finally, the Court recognized that in the face of a flag burner, the strongest response is adherence to the Constitutional principles the flag represents and not retreat from those principles:

> We can imagine no more appropriate response to burning a flag than waving one's own, no better way to counter a flag-burner's message than by saluting the flag that burns, no surer means of preserving the dignity even of the flag that burned than by—as one witness here did—according to its remains a respectful burial. *We do not consecrate the flag by punishing its desecration, for in so doing we dilute the freedom that this cherished emblem represents.*

Id., at 2547, *emphasis added.*

Contrary to the impression some have created, the *Johnson* holding is premised upon constitutional principles settled long before Gregory Johnson burned the flag. While many may disagree with the outcome, as is their Constitutional right, *Johnson* was not a new or divergent interpretation of the First Amendment.

Following *Johnson*, the Flag Protection Act of 1989 was passed into law. (103 Stat. 777, 18 U.S.C. 700 (1990).) The Supreme Court, in *United States* v. *Eichman*, 496 U.S. 310 (1990) declined to reconsider *Johnson* in declaring the Flag Protection Act unconstitutional. The 1989 Act provided:

> (a)(1) Whoever knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or 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 section does not prohibit any conduct consisting of the disposal of a flag when it has become worn or soiled.

Id., at 314.

The Government contended that the 1989 Act was unlike the *Johnson* statute because it did not target expressive conduct premised upon the content of its message and therefore regulated expression in a neutral, constitutional manner. Id., at 315. Recall that the Texas statute prohibited only conduct which the actor knew would offend others. Just as they had done in *Johnson* however, the Government conceded that the conduct in question was expressive. Therefore, in the Court's view, the only question raised by *Eichman* was, "whether the Flag Protection Act is sufficiently distinct from the Texas statute that it may constitutionally be applied to * * *" expressive conduct. Id. The Court held it was not:

> Although the Flag Protection Act contains no explicit content-based limitation on the scope of prohibited conduct, it is nevertheless clear that the Government's asserted interest is "related to the suppression of free expression" and concerned with the content of such expression. The Government's interest in protecting the "physical integrity" of a privately owned flag rests upon a perceived need to preserve the flag's status as a symbol of our Nation and certain national ideals. But the mere destruction or disfigurement of a particular physical manifestation of

> the symbol, without more, does not diminish or otherwise affect the symbol itself in any way. For example, the secret destruction of a flag in one's own basement would not threaten the flag's recognized meaning. Rather, the Government's desire to preserve the flag as a symbol for certain national ideals is implicated "only when a person's treatment of the flag communicates [a] message" to others that is inconsistent with those ideals.

Id., citations and footnotes omitted.

The Court also noted that the statute's prohibited actions, with the possible exception of the term "burns," lead to the undeniable conclusion that the statute focused solely upon that conduct which would be deemed disrespectful. In sum, the Court held that the semantic distinction between the statutes was one without a difference:

> Although Congress cast the Flag Protection Act in somewhat broader terms than the Texas statute at issue in *Johnson*, the Act still suffers from the same fundamental flaw: it suppresses expression out of concern for its likely communicative impact.

Id., at 317.[7]

Eichman, therefore, reaffirmed the holding in *Johnson* that Government cannot suppress expression based upon the content of that expression. Despite the fact that the 1989 Act was cast in more neutral terms than the Texas statute, the Government's interest still suffered from the fatal flaw of suppressing expression based upon its message. Following these two decisions, there can be no doubt that the Constitution of the United States prohibits content-based restriction. This point reiterated by *Eichman*, the proponents now seek to change the Constitution.

B. SENATE JOINT RESOLUTION 31 RESTRICTS INDIVIDUAL RIGHTS CURRENTLY HELD PURSUANT TO THE FIRST AMENDMENT

Despite assertions to the contrary, if the proponents' intent is carried out, this amendment will undoubtedly restrict the First Amendment protections currently enjoyed by Americans. Arguments are repeatedly made that the amendment does not amend the First Amendment, yet in the accompanying views, the proponents of S.J. Res. 31 claim that their amendment creates "that separate juridical category" which the Supreme Court has explicitly held does not exist.[8] In the Committee's own words: "Simply put, this amendment creates that 'separate juridical category' for the flag in the Constitution's text * * *" (Report at 26.) Therefore, at the same time proponents argue that the First Amendment remains unchanged, they create an explicit *exception* to the First

---

[7] The Court noted that the wider scope of the Act did not obviate the need to "consider the content of the regulated speech" in determining if the State's restriction is justified. Id., citations omitted.

[8] Justice Brennan for the Court; "There * * * is no indication—either in the text of the Constitution or in our cases interpreting it—that a separate juridical category exists for the American flag alone." *Johnson* at 2546.

Amendment for expressive conduct involving the flag of the United States.

Equally futile is the argument that because S.J. Res. 31 will become a new and separate amendment, in effect, the Twenty-eighth Amendment, it is a "unique exception" to the First Amendment which does not undermine freedom of speech. (Written testimony of Richard D. Parker at page 7.) Regardless of where within the physical structure of the Constitution this amendment is placed, by the proponent's own words, it creates a separate "category" of First Amendment rights. How this amendment can be classified as an "exception" or a "separate juridical category" and not be deemed to change the scope of the First Amendment defies explanation under either of these theories.

As noted above, the fatal flaw in *Johnson* was that the Texas statute sought to punish only people whose conduct was determined to "cause serious offense to others." The Court found this to be a prohibited content-based suppression of free expression. Furthermore, the Federal Statute in *Eichman* was found to be directed at the content of the suppressed expression as well. In delineating the flaws in a possible content-neutral alternative to S.J. Res. 31, the Majority views explicitly state their intention to violate the constitutional principle against content-based restriction be it explicitly or otherwise:

> The Committee does wish to empower Congress and the States to prohibit the contemptuous or disrespectful physical treatment of the flag. The Committee does not wish to compel Congress and the States to penalize respectful treatment of the flag.

(Report at 39, emphasis included in original.)

The Constitutional principles utilized in *Johnson* and *Eichman*, to strike down content-based restrictions were not the product of judicial activism on the part of the majority. As Professor Sunstein noted:

> Indeed, offense at the content of ideas—even hateful ideas—is a classic case of prohibited basis for regulating speech under the Constitution. That is, I think, why Justice Scalia, no enthusiast for judicial activism or for free-wheeling use of the Constitution, joined the majority * * *

(Written testimony of Cass Sunstein at page 3.)[9]

The principles utilized by the *Johnson* and *Eichman* Courts are well established and have developed throughout our history. The notion that government should not suppress speech based upon content is a fundamental principle at the very core of our freedoms. The Committee's desire to sanction conduct based upon the relative offensiveness of that conduct goes far beyond overturning *Johnson* or *Eichman*—it stands the First Amendment as we know it, on its head.

Furthermore, to suggest that the Constitution of the United States should prohibit that speech which society finds contemp-

[9] The majorities in *Johnson* and *Eichman*, by any standard, cut across all ideological lines containing such diverse jurists as the late Justice Thurgood Marshall and Justice Antonin Scalia as well as Justices Brennan, Blackmun and Kennedy.

tuous or disrespectful is to ignore the inescapable fact that this nation was born of dissent. One need look no further than the Boston Tea Party for evidence that the founders were hardly engaging in conduct which could be termed respectful by the ruling British. The Supreme Court has long held that a Constitution that protects only that speech with which we all agree is a hollow charter at best:

> * * * [W]e apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization * * * *Freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.*

(*Street* v. *New York,* 394 U.S. 576, (1969) quoting *Board of Education* v. *Barnette,* 319 U.S. 624 (1943) *emphasis added.*) [10]

As a nation we have grown and prospered as a result of dissent. The Civil Rights movement or the Suffrage movement are but two compelling examples of this fact. If our system of government and our society is to continue to define freedom and democracy throughout the world, it must, as a threshold be a system open to free and diverse debate—that is what separates us from oppressive nations across the world.[11] The value of dissent in our democratic society was stated explicitly by the Supreme Court in 1949:

> * * * [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.

Justice Douglas, *Terminello* v. *Chicago,* 337 U.S. 1, (1949) [12]

As a free society we have endured dissent and opposing views, including flag burning, throughout our history. We have endured flag burning in times of war and in times of peace, in times of growth and in times of depression, in short, in good times and bad. Our Constitutional system provides for dissent and that should give us all comfort for in protecting dissent, it also provides for the preservation of our individual right to express ourselves freely. Professor Sunstein cautions:

> It is far easier to live with the First Amendment as a slogan or an abstraction than it is to accept it when we are confronted, concretely, with speech that seems genuinely despicable or offensive. When one sees, close up, the hate speech of the Ku Klux Klan, or Nazis marching in Skokie, or right-wing or left-wing militants * * * the commitment

---

[10] In *Street* v. *New York,* a defendant was convicted under a statute punishing desecration "by words or act" when he burned a flag and uttered contemptuous words. Without consideration of his burning the flag, the conviction was overturned because it may have been premised upon the words he spoke and the government could not provide a valid interest to sustain the conviction based upon verbal contempt for the flag. In *Barnette,* the Court held that requiring unwilling schoolchildren to salute the flag violated the right to free expression.

[11] The distinction was never more evident, nor more striking, than in the headlines of the New York Times the morning after the Court decided *Texas* v. *Johnson.* One headline read; "Justices, 5–4, back protestors right to burn the flag." In an adjacent column another headline read; "Chinese execute 3 in public display for protest role." (New York Times, June 22, 1989, page one.)

[12] Cited also in *Johnson,* 109 S.Ct. 2533 at 2541 (1989).

> to the speech "we hate" might seem a bit pale and abstract, and perhaps easily dispensed with in the particular case. But in this natural instinct lies a serious risk of danger; the erosion of our most fundamental liberty. For if flag-burning is to be prohibited, and if a Constitutional amendment is to be approved, it will not be easy to draw the line between that activity and other sorts of political expression that are also thought by many or most citizens to be harmful or offensive. In a pluralistic society, tolerance and open-mindedness are the watchwords of freedom.

(Written testimony of Cass Sunstein beginning at page 3.)

The proposed resolution is directed specifically at expression which might offend other people. In so doing, this resolution disregards the history of the First Amendment and the history of this nation—it is clearly a limitation on the freedoms currently held by all Americans.

C. EXISTING CONSTITUTIONAL LIMITATIONS ON FREEDOM OF EXPRESSION ARE APPLICABLE TO INSTANCES OF FLAG BURNING

It is important to note that the *Johnson* Court held that existing Constitutional limitations on freedom of expression would, given the presence of the necessary facts, be applicable to incidents of flag burning. Under particular circumstances freedom of expression can be, and has been, subject to limitation. It is well settled doctrine that expression which is directed to inciting or producing "imminent lawless action," may be limited. *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969). Furthermore, words classified as "fighting words" or those words likely to spur an average citizen to fight may be restricted. *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942).

These limitations, wholly appropriate responses to violence, both actual and potential, are applicable in cases of flag desecration just as they are in any other case involving expression. In fact, Supreme Court precedent is very clear that flag desecration which could be classified under either the *Brandenburg* or *Chaplinsky* tests, is not worthy of First Amendment protection. The facts in *Johnson* failed to provide any evidence that a breach of the peace was imminent or that Johnson's action was, "an invitation to fisticuffs." 109 S.Ct. at 2542. However, while the Court noted that every flag burning is not a per se potential breach of the peace:

> [t]he State need not worry that our holding will disable it from preserving the peace. We do not suggest that the First Amendment forbids a State to prevent "imminent lawless action."

Id.

Thus, just as *Johnson* was decided based upon long-standing First Amendment principles, so too does the State maintain certain rights pursuant to well defined constitutional doctrine. If warranted by the facts, flag burning or any form of expression for that matter, may be regulated to avert imminent lawless action or a breach of the peace. It cannot, however, be suppressed solely because the broader society finds it objectionable and remain consistent with the U.S. Constitution.

IV. Senate Joint Resolution 31 is Vague and its Effect on the Constitutional Rights of Americans is Uncertain

Beyond the fact that we should maintain this nation's historic reverence for the integrity of the Constitution, problems inherent in the drafting of the proposed amendment counsel caution. The proposed language will subject the fundamental rights of Americans to a myriad of unclear and divergent interpretations as to the limits of those rights. The language of S.J. Res. 31 is as follows:

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

While obviously attempting to "empower" Congress and the States to enact statutes prohibiting desecration of the flag, the resolution provides no guidance whatsoever as to the parameters of the power. The practical difficulties with this resolution are apparent from the outset. For example, how is the term "flag" to be defined? In the words of Bruce Fein:

> Defining a "flag" within the protective ambit of the amendment, however, is problematic. Would it include a flag with 49 stars, or one with 12 stripes? Would a flag portrayal by a youth in a school art course qualify? What about a flag whose shape was square rather than rectangular? In sum, the phrase, "flag of the United States" is riddled with ambiguity and wars with the due process norm that the law should warn before it strikes.

(Written testimony of Bruce Fein at page 4.)

We note that at the outset of their accompanying views, the proponents include a lengthy discussion of the many different flags which have flown proudly over this nation throughout our history. Ironically, it is unclear if this amendment will protect all of these flags from desecration—or none of them.

The parameters of what constitutes or potentially constitutes a flag for purposes of this amendment are limitless. Assistant Attorney General Walter Dellinger noted in his testimony that in 1989, then-Assistant Attorney General William Barr, testifying in support of the amendment, acknowledged that the flag could mean many different things:

> * * * then Assistant-Attorney General William Barr acknowledged that the word "flag" is so elastic that it can be stretched to cover everything from cloth banners with the characteristics of the official flag, as defined by statute, to "any picture or representation" of a flag, including "posters, murals, pictures, [and] buttons."

(Written testimony of Walter Dellinger beginning at page 5.)

Ironically, the Majority views on potential interpretations track closely the explanation given by Mr. Barr six years ago. However, proponents choose to downplay the seemingly endless range of potential definitions by simply acknowledging that, "* * * there is some flexibility in the legislative bodies in defining the term "flag of the United States." (Report at 31.)

Equally as troubling and potentially more dangerous is the lack of guidance as to what "desecration" entails. Mr. Fein properly asks:

> Its ordinary meaning is the divesting of the sacred or hallowed character of the flag. But would that include writing on the flag "This nation cherishes freedom of expression."? Would it include flying the flag over a brothel? Would it include writing "Benedict Arnold" across the stars?"

(Written testimony of Bruce Fein at page 5.)

The simple answer to Mr. Fein's question is that nobody knows. According to the Majority views the term is not ambiguous and means "* * * to treat with contempt, to treat with disrespect, to violate the sanctity of something; profane." (Report at 31.)

This response does little to eliminate the vagueness and ambiguity that pervade this proposed amendment. Notwithstanding the proponents' interpretation of desecration, value judgments remain necessary to determine what is and is not acceptable. Clearly, respect, contempt and sanctity are all subject to the eye of the beholder. For example, in *Spence* v. *Washington*, 418 U.S. 405 (1974), a Washington man was arrested and charged for attaching a "peace symbol" to his flag following the invasion of Cambodia and the incident at Kent State. When asked the basis for attaching the peace symbol to the flag the man replied:

> I felt there had been so much killing and that this was not what America stood for. I felt that the flag stood for America and I wanted people to know that I thought America stood for peace.

Id., at 408.

Under the proposed statute was his action contemptible, disrespectful, or in violation of the sanctity of the flag? Was he desecrating the flag or was he seeking to motivate his fellow Americans to a higher purpose?

It is obvious by the Majority's own admission that not every person who "desecrates" the flag is intended to be subject to prosecution. Ultimately, a decision must be made so that the Committee's desire "not to compel Congress and the States to penalize respectful treatment of the flag," can be carried out. (Report at 39.) However, as *Spence* illustrates the distinction is not so simple. No one can say, not even the proponents, what these terms will mean in application.

Furthermore, it is far from clear what effect this amendment will have on the remainder of the Constitution. For example, does the newly created "power" given to Congress and the States supersede just the First Amendment? Or are other protections in the Constitution, such as the Fourth and Fourteenth Amendments implicated? While the discussion above makes it clear the proposal attempts to limit the First Amendment, does the proposed resolution, absent a specific reference to the First Amendment, remain subject to the existing parameters of that Amendment? While the proponents are quick to characterize these legitimate inquiries as a "parade of horribles" we do not think it is too much for the Amer-

ican people to ask the elected officials who propose this amendment, exactly how they intend to limit their constitutional rights. (Report at 32.)

Beyond the clear definitional problems of S.J. Res. 31, this amendment will for the first time in our history apportion fundamental rights based upon geography. In response to concerns over the vagueness of the amendment, the proponents argue that states will make independent determinations of what conduct and expression is punishable pursuant to the United States Constitution. By the Committee's own admission:

> If Utahns, for example, want to ban only burning and trampling on the flag as a means of casting contempt on it, and New Yorkers * * * wish to also ban defacing and mutilating the flag as a means of physical desecration, the Committee believes New Yorkers * * * should have the right to do so.

(Report at 41.)

This will clearly, and apparently intentionally, subject the First Amendment to as many as fifty-one separate and distinct interpretations. The suggestion that a citizen of Utah may have greater First Amendment freedom than his counterpart in New York in fact understates the potential diversity of rights. One must assume that the States, pursuant to their new authority, could in turn "empower" local units of government to prohibit desecration of the flag. Therefore, a woman in Minneapolis may have substantially greater constitutional protection than her brother who lives in St. Paul. Additionally, the scope of individual protection could change with each election. Using the Committee example, could not a newly elected majority in the Utah legislature extend or eliminate the prohibitions established by their predecessor? Clearly, it would retain that right. We suggest that the fundamental rights of Americans are simply too important to be subject to the election cycle and should not be subject to change depending upon who may or may not hold political power. As Justice Jackson noted in *West Virginia* v. *Barnette,* 319 U.S. 624 (1943):[13]

> The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

Contrary to the proponents' arguments this geographic distribution of fundamental rights does not "reflect federalism." This is an unprecedented manner in which to apportion constitutional rights. Due Process does not mean one thing in Montana and another in New Mexico. Equal Protection is not defined one way in New York and completely differently in Utah. This theory, if applied equally to all of the Constitution, would make a mockery out of fundamen-

[13] Held unconstitutional State action making it compulsory for children in public schools to salute the flag.

tal liberties as we now know them. The proponents point out that states often have differing laws on the same subjects. "States regulate the sale of liquor and the use of alcohol differently from each other." (Report at 41.)

It is our sincere hope that the proponents of this amendment are not equating the importance of free speech, a fundamental liberty on which this nation was founded, with the regulation of liquor sales? To do so trivializes the very principles the flag symbolizes.

Finally, the proponents note, in an effort to identify a situation analogous to what they are proposing, that the standards for obscenity, which is not protected by the First Amendment, may differ from community to community.[14] While this is true, it is equally true that the differing community standards are not as unchecked or as limitless as the Committee is suggesting. The Supreme Court, subsequent to *Miller*, explicitly held that while community standards clearly contribute to determining what is and is not obscene:

> * * * it would be a serious misreading of *Miller* to conclude that juries have unbridled discretion in determining what is "patently offensive."

Jenkins v. *Georgia*, 418 U.S. 153 (1974).[15]

It should also be pointed out that the limited anomaly created in *Miller* is the result of judicial interpretation and not political fiat. As such, it remains possible that over time a uniform and consistent standard may evolve. Such a possibility is preferable to the present situation whereby we are legislatively creating a vague and uncertain standard and seeking to enshrine it forever in the United States Constitution.

V. CONCLUSION

Proponents of S.J. Res. 31 passionately argue that the flag, as America's most unique symbol, is at risk of being devalued if the Constitution is not changed to explicitly protect it. However, their position is contradicted by the litany of examples of personal devotion to the U.S. Flag contained at the outset of this report. Americans, since the dawn of this nation, have loved and respected the United States Flag—and they will continue to do so. A handful of dissidents each year cannot shake the devotion of the American people to the Flag.

We submit, however, that Americans also hold dear the principles the Flag symbolizes. Principles of equality, opportunity and freedom—principles embodied in the Bill of Rights. The flag, as a symbol of these principles cannot truly be protected if we must depart from these principles to do so. The proposed amendment asks us to do just that.

Senate Joint Resolution 31 is unprecedented, unjustified, unclear and perhaps most importantly, unnecessary. The greatest protection the Flag can obtain is the unwavering respect of the people

---

[14] *Miller* v. *California*, 413 U.S. 15 (1973).

[15] In *Jenkins*, the Supreme Court, in an opinion written by Justice Rehnquist, overturned a Georgia obscenity conviction of a man charged with showing an "obscene" movie. Despite the fact that the local Georgia jury found the movie to be "obscene" the Court held that the film was not obscene under the *Miller* standards and overturned the conviction.

over which it flies. The United States Flag already enjoys such protection.

Accordingly, we respectfully urge that S.J. Res. 31 not be approved by the Senate.

XIII. SUPPLEMENTAL MINORITY VIEWS OF MR. KOHL

Senator Kohl concurs in the views expressed by Senators Kennedy, Leahy, Simon, and Feingold, with the exception of section III.

○