

The Flag Desecration Amendment
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This fall expect the Senate to debate fiercely the “Flag Desecration Amendment” to the U.S. Constitution. S.J. Res. 12. What is said on the subject reflects a deep division within our society about the meaning of the flag. The division does not fall along the usual fault lines. For example, Senator Feinstein is a sponsor of S.J. Res. 12 whereas Justice Scalia has joined the majority of the Supreme Court twice to strike down previous efforts to criminalize flag burning by protestors.

The stakes are high. The House has approved the proposed amendment, for the sixth time. H.J. Res. 10. The proposal has never attracted sufficient support in the Senate but the election of new Republican senators in 2004 puts the proposal very close to the 67 votes needed for adoption. All fifty states have passed resolutions supporting a flag protection amendment.

Proponents of the amendment assert that it will reduce acts of desecration, engender greater respect for our nation and its institutions, and restore balance to First Amendment law. While their passion for the flag is laudable, they overstate the benefits of an amendment.

First, the language of the proposed amendment, on its face, is limited. It simply states, “The Congress shall have power to prohibit the physical desecration of the flag of the United States.” Congress will have to define the key terms, “physical desecration” and “flag.” The courts will then decide whether the definitions, as applied to a host of fact patterns, pass constitutional muster. Until we have definitive rulings from the Supreme Court, we run the risk of selective enforcement of whatever law Congress enacts. Years of litigation and the threat of litigation will not foster respect for the law.

Second, a new law will become a lightning rod for political protest. In the short term burnings and similar acts of desecration will increase, not decrease. Such was the case after Congress passed the Flag Protection Act in 1989.

Third, in terms of First Amendment law, the proposed amendment may not change much. Twice the Supreme Court has invalidated laws making criminal flag desecration as applied to protestors. Texas v. Johnson, 491 U.S. 397 (1989); U.S. v. Eichman, 496 U.S. 310 (1990). Both cases involved persons who burned flags at rallies called to protest federal government policies. The first rally occurred in Dallas during the 1984 Republican National Convention. The second rally occurred on the steps of the Capitol in 1989.

The majority held that the burnings were a form of symbolic speech, no different from the waving of a red flag in support of anarchism, Stromberg v. California, 283 U.S. 359 (1931), or the wearing of black armbands in school to protest the Vietnam War, Tinker v. Des Moines Independent Community School District, 393 U.S. 505 (1969). It then restated the First Amendment norm that government “may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” Texas v. Johnson, supra at 414. The laws in question failed this norm, because they imposed a particular view of the flag on all persons in all situations.

The majority rejected the argument of the dissent that the “special history” of the flag enabled the government to adopt measures to preserve its integrity, which measures might otherwise burden free expression.

The two decisions served as the catalyst for the current drive to amend the Constitution.

Yet, the proposed amendment appears to steer clear of the principles of the First Amendment, some of the proponents' talk notwithstanding. To save any legislation implementing the proposed amendment from constitutional challenge, the courts will probably construe the legislation narrowly, to be consistent with the two decisions. Should the courts do so, most forms of desecration that proponents decry will continue.

The last time we amended the Constitution to restrict freedoms resulted in Prohibition. That Amendment did not engender greater respect for our nation and its institutions. Nothing about the text of the Flag Desecration Amendment or the circumstances surrounding its possible adoption suggest that the proposal will achieve a better outcome.

Much of our reverence for the Constitution derives from its few changes over time. Why tamper with success?