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104TH CONGRESS, 1st Session | HOUSE OF REPRESENTATIVES | REPORT 104–151

FLAG DESECRATION

JUNE 22, 1995.—Referred to the House Calendar and ordered to be printed

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

REPORT

together with

DISSENTING VIEWS

[To accompany H.J. Res. 79]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the joint resolution (H.J. Res. 79) proposing an amendment to the Constitution of the United States authorizing the Congress and the State to prohibit the physical desecration of the flag of the United States, having considered the same, report favorably thereon without amendment and recommend that the joint resolution do pass.

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99–008

PURPOSE AND SUMMARY

H.J. Res. 79 proposes to amend the Constitution to allow Congress and the States to prohibit the physical desecration of the flag of the United States.

The proposed amendment reads simply: "The Congress and the States shall have power to prohibit the physical desecration of the flag of the United States." The amendment itself does not prohibit flag desecration. It merely empowers Congress and the States to enact legislation to prohibit the physical desecration of the flag and establishes boundaries within which they may legislate. Prior to the Supreme Court decision in *Texas* v. *Johnson*, 109 S.Ct. 2533 (1989), forty-eight states and the Federal Government had laws on the books prohibiting desecration of the flag. The purpose of the proposed constitutional amendment is to restore the power to protect the flag to the States and to Congress.

BACKGROUND AND NEED FOR THE RESOLUTION

In June of 1989, the United States Supreme Court in *Texas* v. *Johnson*, 109 S.Ct. 2533, held that the burning of an American flag as part of a political demonstration was expressive conduct protected by the First Amendment to the U.S. Constitution. After publicly burning a stolen American Flag in a protest outside of the 1984 Republican National Convention in Dallas, Texas, Gregory Johnson was convicted of desecrating a flag in violation of Texas law. The Texas law prohibited the intentional desecration of a national flag in a manner in which "the actor knows will seriously offend one or more persons likely to observe or discover his action." [1] His conviction was upheld by the Court of Appeals for the Fifth District of Texas at Dallas, but reversed by the Texas Court of Criminal Appeals. The 5–4 U.S. Supreme Court opinion affirmed the decision of the Court of Criminal Appeals: Johnson's conviction was inconsistent with the First Amendment because his actions constituted "symbolic free expression."

Justice Rehnquist filed a dissenting opinion in which Justices O'Connor and White joined.[2] Justice Rehnquist noted the unique history of the American Flag:

> The American Flag, then, throughout more than 200 years of our history, has come to be the visible symbol embodying our Nation. It does not represent the views of any particular political party, and it does not represent any particular political philosophy. The flag is not simply another "idea" or "point of view" competing for recognition in the marketplace of ideas. Millions and millions of Americans regard it with an almost mystical reverence regardless of what sort of social, political, or philosophical beliefs

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[1] Tex. Penal Code Ann. Section 42.09(a)(3), Desecration of a Venerated Object, provides as follows: (a) A person commits an offense if he intentionally or knowingly desecrates:
(1) a public monument;
(2) a place of worship or burial; or
(3) a state or national flag.
(b) For purposes of this section, "desecrate" means 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.
(c) An offense under this section is a Class A misdemeanor.

[2] Justice Stevens filed a separate dissenting opinion.

> they may have. I cannot agree that the First Amendment invalidates the Act of Congress, and the laws of 48 of the 50 States, which make criminal the public burning of the flag. *Texas* v. *Johnson,* 109 S. Ct. at 2552.

Justice Rehnquist also pointed out that Chief Justice Earl Warren, and Justices Black and Fortas all expressed the view that the States and the Federal Government had the power to protect the American Flag from desecration and disgrace.

In response to the *Johnson* decision, in September of 1989, Congress passed the "Flag Protection Act of 1989" under Suspension of the Rules by a vote of a 380 to 38. The Act amended the Federal Flag Statute (18 U.S.C. 700) attempting to the make it "content-neutral" so that it would pass constitutional muster. As stated in the House Judiciary Committee report, "the amended statute focuses exclusively on the conduct of the actor, irrespective of any expressive message he or she might be intending to convey."[3]

On June 11, 1990, in *United States* v. *Eichman,* 496 U.S. 311, the Supreme Court in another 5–4 decision struck down the newly-enacted "Flag Protection Act of 1989", ruling that it infringed on expressive conduct protected by the First Amendment. Although the Government conceded that flag burning constituted expressive conduct, it claimed that flag burning, like obscenity or "fighting words" was not fully protected by the First Amendment. The Government also argued the "Flag Protection Act" was constitutional because, unlike the Texas statute struck down in *Texas* v. *Johnson,* the Act was "content-neutral" and simply sought to protect the physical integrity of the flag rather than to suppress disagreeable communication.

Justice Brennan, writing for the majority, rejected the Government's argument, noting that:

> 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,'" 491 U.S., at 410, 109 S.Ct., at 2543, and concerned with the content of such expression. [T]he 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. *U.S.* v. *Eichman,* 110 S. Ct. 2404 (1990).

Justice Stevens wrote a dissenting opinion in which Chief Justice Rehnquist, Justice White and Justice O'Connor joined. He expressed unanimous agreement with the proposition expressed by the majority that "the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." He went on, however, to note that methods of expression may be prohibited under a number of circumstances and set forth the following standard:

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[3] "Flag Protection Act of 1989", H. Rep. No. 101–231, 101st Cong., 1st Sess. 2 (1989). The Act became law without the President's signature on October 28, 1989 (Pub. L. 101–131).

> If (a) the prohibition is supported by a legitimate societal interest that is unrelated to suppression of the ideas the speaker desires to express; (b) the prohibition does not entail any interference with the speaker's freedom to express those ideas by other means; and (c) the interest in allowing the speaker complete freedom of choice among alternative methods of expression is less important than the societal interest supporting the prohibition. *Eichman,* 496 U.S., at 319.

Justice Stevens felt that the statute satisfied each of these concerns and thus should have withstood constitutional scrutiny.

Once the Supreme Court ruled a second time that flag burning was expressive speech protected by the First Amendment, it became apparent that no statute could adequately protect the U.S. Flag from desecration—a constitutional amendment was necessary. On June 21, 1990, the house considered H.J. Res. 350, an identical amendment to H.J. Res. 79. The amendment was rejected by a vote of 254 to 177.

Since that time, forty-nine states have passed resolutions calling on Congress to pass an amendment to protect the flag of the United States from physical desecration and send it back to the States for ratification.[4]

HEARINGS

The Committee's Subcommittee on the Constitution held one day of hearings on the need for an amendment to the Constitution of the United States authorizing the Congress and the States to prohibit the physical desecration of the flag of the United States on May 24, 1995. Testimony was received from nine witnesses: Representative Gerald B.H. Solomon; Representative G.V. "Sonny" Montgomery; Stephen B. Presser, Raoul Berger Professor of Legal History, Northwestern University School of Law; Clint Bolick, Vice President and Director of Litigation, Institute for Justice; Rose E. Lee, Washington Representative, Gold Star Wives of America; Commander William Detweiler, National Commander, The American Legion; Adrian Cronauer, Senior Associate, Maloney & Burch; Bruce Fein, Attorney and Columnist; Robert Nagel, Ira Rothgerber Professor of Constitutional Law, University of Colorado; with additional material submitted by three organizations: The American Legion, the Emergency Committee to Defend the First Amendment and the American Bar Association.

COMMITTEE CONSIDERATION

On May 25, 1995, the Subcommittee on the Constitution met in open session and ordered reported the resolution H.J. Res. 79, by a rollcall vote of 7 to 5, a quorum being present. On June 7, 1995, the Committee on the Judiciary met in open session and ordered reported the resolution H.J. Res. 79 by a rollcall vote of 18–12, a quorum being present.

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[4] Vermont has passed the resolution in both Houses, but in separate sessions.

VOTES OF THE COMMITTEE

The Committee then considered the following with recorded votes:

1. Mr. Reed offered an amendment to substitute physical desecration of the flag of the United States with a prohibition on burning, trampling, or rending of the flag of the United States as well as the requirement that Congress determine by law what constitutes the flag of the United States. The Reed amendment was defeated by a rollcall vote of 6–22.

AYES	NAYS
Mrs. Schroeder	Mr. Hyde
Mr. Frank	Mr. Moorhead
Mr. Bryant (TX)	Mr. Sensenbrenner
Mr. Reed	Mr. McCollum
Mr. Scott	Mr. Coble
Mr. Jackson Lee	Mr. Schiff
	Mr. Canady
	Mr. Inglis
	Mr. Goodlatte
	Mr. Hoke
	Mr. Bono
	Mr. Heineman
	Mr. Bryant (TN)
	Mr. Chabot
	Mr. Flanagan
	Mr. Barr
	Mr. Conyers
	Mr. Berman
	Mr. Boucher
	Mr. Nadler
	Mr. Watt
	Mr. Becerra

2. A motion to favorably report H.J. Res. 79 was agreed to by a rollcall vote of 18–12.

AYES	NAYS
Mr. Hyde	Mr. Conyers
Mr. Moorhead	Mrs. Schroeder
Mr. Sensenbrenner	Mr. Frank
Mr. McCollum	Mr. Berman
Mr. Gekas	Mr. Boucher
Mr. Coble	Mr. Bryant (TX)
Mr. Schiff	Mr. Reed
Mr. Canady	Mr. Nadler
Mr. Inglis	Mr. Scott
Mr. Goodlatte	Mr. Watt
Mr. Buyer	Mr. Becerra

Mr. Hoke
Mr. Bono
Mr. Heineman
Mr. Bryant (TN)
Mr. Chabot
Mr. Flanagan
Mr. Barr

Ms. Jackson Lee

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 2(l)(3)(A) of rule XI of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT FINDINGS

No findings or recommendations of the Committee on Government Reform and Oversight were received as referred to in clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 2(l)(3)(B) of House Rule XI is inapplicable because this legislation does not provide new budgetary authority or increase tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 2(l)(3)(C) of rule XI of the Rules of the House of Representatives, the Committee sets forth, with respect to the resolution, H.J. Res. 79, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, June 13, 1995.

Hon. HENRY J. HYDE,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed H.J. Res. 79, a joint resolution proposing an amendment to the Constitution of the United States authorizing the Congress and the states to prohibit the physical desecration of the flag of the United States, as ordered reported by the House Committee on the Judiciary on June 7, 1995. We expect the 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 H.J. Res. 79 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.

Sincerely,

JUNE E. O'NEILL, *Director*.

INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2(l)(4) of rule XI of the Rules of the House of Representatives, the Committee estimates that H.J. Res. 79 will have no significant inflationary impact on prices and costs in the national economy.

CONSTITUTIONAL AMENDMENT PROCEDURES

Article V of the United States Constitution provides that the Congress has the authority to propose amendments to the Constitution. Such proposed amendments must be approved by a two-thirds vote of both Houses. Congress must also specify whether the ratification process is to be done through State legislatures or by State conventions. In either case, a proposed amendment must be ratified by three-fourths of the State legislatures or State conventions. H.J. Res. 79 calls for ratification by State legislatures.

SECTION-BY-SECTION ANALYSIS AND DISCUSSION

H.J. Res. 79 simply states "[t]he Congress and the States shall have power to prohibit the physical desecration of the flag of the United States."

This proposed constitutional amendment sets the parameters for future action by the State legislatures and the Congress on this issue. After the amendment is ratified, the elected representatives of the people will once again have the power and can decide whether to enact legislation to prohibit the physical desecration of the flag.

There are two key issues that will need to be resolved by state legislatures and the Congress if they decide to enact legislation to protect the flag from physical desecration.

First, they may specify the scope of conduct that will constitute "physical desecration." The amendment itself requires physical contact with the flag. The legislature could not punish mere words or gestures directed at the flag, regardless of how offensive they were. Webster's Ninth New Collegiate Dictionary defines "desecrate" as follows: "1. to violate the sanctity of: PROFANE 2: to treat irreverently or contemptuously often in a way that provokes outrage on the part of others." "Desecrate" is defined in Black's Law Dictionary as "to violate sanctity of, to profane, or to put to unworthy use." The legislatures could clearly prohibit burning, shredding and similar defilement of the flag. In addition, the term "desecrate" clearly implies that the physical act must demonstrate contempt for the flag.

During the Full Committee markup, Representative Jack Reed (D–RI) proposed to replace "physical desecration" with language that would allow statutes prohibiting "burning, trampling, or rending" of the flag of the United States. The Reed language would have prevented States and the Congress from prohibiting acts such as throwing garbage or other forms of waste on the flag. More importantly, it would have allowed Congress and the States to criminalize conduct, such as burning a worn or soiled flag—a proper method of disposal—where the action was taken out of respect for the flag rather than with the intent to "desecrate" or defile it.

Second, legislatures may specify what representations of the flag of the United States are to be protected. Of course, the resolution in no way changes the fact that the authority to determine what constitutes the official design of the flag of the United States rests with the United States Congress. It is currently defined at 4 U.S.C. 1. States and the Congress will be able to decide, however, which representations of the flag are to be protected from physical desecration as they seek to enact statutes on this issue. They may protect the flag of the United States in cloth form, or other material readily capable of being waved or flown, with the characteristics of the official flag of the United States as described in 4 U.S.C. 1 or a "flag" could be any representation that a reasonable person would perceive to be a flag of the United States even if it were not precisely identical to the flag as defined by 4 U.S.C. 1. This would allow states and the Congress to prevent a situation whereby a representation of a United States flag with forty-nine stars or twelve red and white stripes were burned in order to circumvent the statutory prohibition.

AGENCY VIEWS

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGAL COUNSEL,
Washington, DC, June 14, 1995.

Hon. CHARLES T. CANADY,
Chairman, Subcommittee on the Constitution, Committee on the Judiciary, House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: As you are aware, in 1989 the Supreme Court held in *Texas* v. *Johnson*, 491 U.S. 397, that a state could not, consistent with the First Amendment, enforce a statute criminalizing flag desecration against a demonstrator who burned an American flag. In 1990, in *United States* v. *Eichman*, 496 U.S. 310, the Court held that the First Amendment prohibited the conviction of demonstrators for flag burning under a federal statute that criminalized mutilating, defacing, or physically defiling an American flag.

For five years, then, the flag has been left without any statutory protection against symbolic desecration. For five years, one thing, and only one thing, has stood between the flag and its routine desecration: the fact that the flag, as a potent symbol of all that is best about our country, is justly cherished and revered by nearly all Americans. Senator Hatch has eloquently described the flag's status among the American people:

> 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. 141 Cong. Rec. S4275 (daily ed. Mar. 21, 1995).

It is precisely because of the meaning the flag has for virtually all Americans that the last five years have witnessed no outbreak of flag burning, but only a few isolated instances, immediately and roundly condemned. If proof were needed, we have it now: with or without the threat of criminal penalties, the flag is amply protected by its unique stature as an embodiment of national unity and ideals.

It is against this background that one must assess the need for a proposed constitutional amendment (S.J. Res. 31) that would permit the criminal punishment of those who "physically desecrate" the American flag. The amendment, if adopted, would for the first time in our history alter the Bill of Rights adopted over two centuries ago. 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 ab-

sence of any meaningful evidence that the flag is in danger of losing its symbolic value.

The unprecedented amendment before you would create legislative power of uncertain dimension to override the First Amendment and other constitutional guarantees. More fundamentally, it would run counter to our traditional resistance, dating back to the time of the Founders, to resorting to the amendment process. For these reasons, the proposed amendment—and any other proposal to amend the Constitution in order to punish a few isolated acts of flag burning—should be rejected by this Congress.

At the outset, and in an excess of caution, I would like to note that our disagreement about the wisdom of the proposed amendment does not in any way reflect disagreement about the proper place of the flag in our national community. The President always has and always will condemn in the strongest of terms those who would show disrespect to the symbol of our country's highest ideals.

The President's record reflects his long-standing commitment to protection of the American flag, and his profound abhorrence of flag burning and other forms of flag desecration. In 1989, after the Supreme Court invalidated the Texas statute at issue in *Johnson*, then-Governor Clinton responded promptly by recommending enactment of a new State law prohibiting all intentional destruction of a flag. The President worked hard to craft legislation that would survive Supreme Court review, and his view was that the statute was consistent with the First Amendment. As you know, however, the Supreme Court's subsequent decision in *Eichman*, invalidating the Federal Flag Protection Act, appears to foreclose legislative efforts to prohibit flag burning. In the wake of *Johnson*, then-Governor Clinton also instituted a state-wide "flag respect" program to teach school children proper appreciation for the flag. Working with veterans groups in Arkansas, Governor Clinton created a program that went on to win awards from the Veterans of Foreign Wars and the Vietnam Veterans of America.

The text of the proposed amendment is short enough to quote in full: "The Congress and the States shall have power to prohibit the physical desecration of the flag of the United States." The scope of the amendment, however, is anything but clear. Because the proposed amendment fails to state explicitly the degree to which it overrides other constitutional guarantees, it is entirely unclear how much of the Bill of Rights it would trump.

By its terms, the proposed amendment does no more than confer affirmative power upon Congress and the States to legislate with respect to the flag. Its wording is similar to the power-conferring clauses found in Article I, Section 8 of the Constitution: "Congress shall have power to lay and collect taxes," for instance, or "Congress shall have power * * * to regulate commerce * * * among the several States." Like those powers, and all powers granted government by the Constitution, the authority given by the proposed amendment would seem to be limited by the Bill of Rights and the Fourteenth Amendment.

The text of the proposed amendment does not purport to exempt the exercise of the power conferred from the constraints of the First Amendment or any other constitutional guarantee of individual rights. Read literally, the amendment would not alter the result of

the decisions in *Eichman* or *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. Rather, by its literal text, it would simply and unnecessarily make explicit the governmental power to legislate in this area that always has been assumed to exist.

To give the amendment meaning, then, we must read into it, consistent with its sponsors' intent, at least some restriction on the First Amendment freedoms identified in the Supreme Court's flag decisions. What is difficult, and profoundly so, is identifying just how much of the First Amendment and the rest of the Bill of Rights is superseded by the amendment. Once we have departed, by necessity, from the amendment's text, we are in uncharted territory, and faced with genuine uncertainty as to the extent to which the amendment will displace the protections enshrined in the Bill of Rights.

We do not know, for instance, whether the proposed amendment is intended, or would be interpreted to authorize enactments that otherwise would violate the due process "void for vagueness" doctrine. In *Smith* v. *Goguen*, 415 U.S. 566 (1974), the Court reversed the conviction of a defendant who had sewn a small flag on the seat of his jeans, holding that a state statute making it a crime to "treat contemptuously" on the flag was unconstitutionally vague. We cannot be certain that the vagueness doctrine applied in *Smith* would limit as well prosecutions brought under laws enacted pursuant to the proposed amendment.

Nor is this a matter of purely hypothetical interest, unlikely to have much practical import. The amendment, after all, authorizes laws that prohibit "physical desecration" of the flag, and "desecration" is not a term that readily admits of objective definition. On the contrary, "desecrate" is defined to include such inherently subjective meanings as "profane" and even "treat contemptuously" itself. Thus, a statute tracking the language of the amendment and making it a crime to "physically desecrate" an American flag would suffer from the same defect as the statute at issue in *Smith*: it would "fail to draw reasonably clear lines between the kinds of nonceremonial treatment that are criminal and those that are not." 415 U.S. at 574.

The term "flag of the United States" is similarly "unbounded," id. at 575, 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. Indeed, testifying in favor of a similar amendment in 1989, 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". "Hearings on S. 1338, H.R. 2978, and S.J. Res. 180 Before the Senate Comm. on the Judiciary," 101st Cong., 1st Sess. 82–85 (1989) ["1989 Hearings"]. And while a statute enacted pursuant to the amendment could attempt a limiting definition, it need not do so; the amendment would authorize as well a statute that simply prohibited desecration of "any flag of the United States." Again, such

a statute would implicate the vagueness doctrine applied in *Smith*, and raise in any enforcement action the question whether the empowering amendment overrides due process guarantees.

Even if we are prepared to assume that the proposed amendment would operate on the First Amendment alone, important questions about the amendment's scope remain. Specifically, we still face the question whether the powers to be exercised under the amendment would be freed from all, or only some, First Amendment constraints, and, if the latter, how we will know which constraints remain applicable.

An example may help to illuminate the significance of this issue. In *R.A.V.* v. *City of St. Paul*, 112 S. Ct. 2538, decided in 1992, the Supreme Court held that even when the First Amendment permits regulation of an entire category of speech or expressive conduct, it does not necessarily permit the government to regulate a subcategory of the otherwise proscribable speech on the basis of its particular message. A government acting pursuant to the proposed amendment would be able to prohibit all flag desecration, but, if *R.A.V.* retains its force in this context, a government could not prohibit only those instances of flag desecration that communicated a particularly disfavored view; statutes making it a crime—or an enhanced penalty offense—to "physically desecrate a flag of the United States in opposition to United States military actions," for instance, would presumably remain impermissible.

This result obtains, of course, if and only if the proposed amendment is understood to confer powers that are limited by the *R.A.V.* principle. If, on the other hand, the proposed amendment overrides the whole of the First Amendment, or overrides some select though unidentified class of principles within which *R.A.V.* falls, then there remains no constitutional objection to the hypothetical statute posited above. This is a distinction that makes a difference, as I hope this example shows, and it should be immensely troubling to anyone considering the amendment that its text leaves us with no way of knowing whether the rule of *R.A.V.*—or any other First Amendment principle—would limit governmental action if the amendment became part of the Constitution.

I will make only one last point with respect to the uncertain scope of the proposed amendment. It is possible that conferral of an undelineated power to cut into the Bill of Rights might be lesser concern if Congress alone were so empowered. But it must be remembered that the amendment at issue here also grants the same power to fifty different states and an uncertain number of local governments. That raises, of course, the interpretive question of whether state legislatures acting under the amendment would remain bound by state constitutional free speech guarantees, or whether the proposed amendment would superseds state as well as federal constitutional provisions. On a more practical level, it increases, by at least fifty times, the risk that unduly restrictive or arbitrary legislation may be enacted at some point in the near or distant future, and it virtually guarantees a patchwork of very different state responses. Under these circumstances, Congress has a special obligation to make clear the dimensions of the power the amendment would confer.

I have real doubts about whether these interpretive concerns could be resolved fully by even the most artful of drafting. In my view, any effort to constitutionalize an "exception" to the Bill of Rights necessarily will produce significant interpretive difficulties and uncertainty, as the courts attempt to reconcile a specific exception with the general principles that remain. But even assuming, for the moment, that all of the interpretive difficulties of this amendment could be cured, it would remain an ill-advised departure from a constitutional history marked by a deep reluctance to amend our most fundamental law.

The Bill of Rights was ratified in 1792. Since that time, over two hundred years ago, the Bill of Rights has never once been amended. And this is no historical accident, nor a product only of the difficulty of the amendment process itself. Rather, our historic unwillingness to tamper with the Bill of Rights reflects a reverence for the Constitution that is both entirely appropriate and fundamentally at odds with turning that document into a forum for divisive political battles.

The Framers themselves understood that resort to the amendment process was to be sparing and reserved for "great and extraordinary occasions." The Federalist No. 49, at 314 (James Madison) (Clinton Rossiter ed., 1961). James Madison warned against using the amendment process as a device for correcting every perceived constitutional defect—a practice that could not help but undermine the role of the Supreme Court See id. at 314. Of particular interest here, Madison objected especially to amendment on issues that inflamed public passion, fearing that such actions might threaten "the constitutional equilibrium of the government." Id. at 315–17. See also "1989 Hearings" at 720–23 (statement of Professor Henry Paul Monaghan, Columbia University School of Law).

The proposed amendment cannot be reconciled with this fundamental and historic understanding of the integrity of the Constitution. I think perhaps Charles Fried, who served with distinction as Solicitor General under President Reagan, made the point best when he testified against a similar proposed amendment in 1990:

> The flag, as all in this debate agree, symbolizes our nation, its history, its values. We love the flag because it symbolizes the United States; but we must love the Constitution even more, because the Constitution is not a symbol. It is the thing itself. "Hearing Before the Senate Comm. on the Judiciary," 101st Cong., 2d Sess. 110 (1990).

We come to this discussion at a time when peace among ourselves seems threatened, and national unity an elusive goal. The unity we seek, however, should be of the kind that is freely chosen, because that is the only kind that matters and the only kind that will endure. Americans are free today to display the flag respectfully, to ignore it entirely, or to use it as an expression of protest or reproach. By overwhelming numbers, Americans have chosen the first option, and display the flag proudly. And what gives this gesture its unique symbolic meaning is the fact that the choice is freely made, uncoerced by the government. Were it otherwise—were, for instance, respectful treatment of the flag the only choice

constitutionally available—then the respect paid the flag by millions of Americans would mean something different and perhaps something less.

Sincerely,

WALTER DELLINGER.

DISSENTING VIEWS

We strongly oppose H.J. Res. 79, which would—for the first time in our Nation's history—modify the Bill of Rights to limit our freedom of expression. Although the motives of the proposition's supporters are well-intentioned, we believe that adopting H.J. Res. 79 is wrong as a matter of principle, wrong as a matter of precedent, and wrong as a matter of practice.

H.J. Res. 79 responds to a perceived problem—flag burning—that is fortunately a rare occurrence in American life today.[1] Moreover, most incidents of flag burning can be successfully prosecuted today under laws relating to breach of peace, thefts, vandalism and trespassing—all fully within current constitutional constraints. (Indeed, constitutional scholars agree that legislation employing the "fighting words" exception to the first amendment could criminalize the objectionable conduct and withstand constitutional challenge.[2])

By embedding a principle prohibiting flag desecration into the Constitution, we will have elevated the flag over other cherished symbols, including not only national symbols such as the Declaration of Independence and Statue of Liberty, but religious symbols such as crosses and Bibles. Clinton Bolick, testifying on behalf of the Institute for Justice, asks, "[b]y what perverse principle will we have a society in which burning a flag is forbidden, but in which burning a cross is permitted?"[3]

Ironically, H.J. Res. 79 will not even achieve the sponsors' stated purposes—protecting the American flag and honoring America's veterans. History has taught us that restrictive legislation will sadly result in more flag burning in an effort to protest the law itself,[4] and a vaguely worded constitutional amendment such as H.J.

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[1] Studies indicate that in all of American history from the adoption of the United States flag in 1777 through *Texas* v. *Johnson,* 491 U.S. 397 (1989), there have only been 45 reported incidents of flag burning. See Robert J. Goldstein, "Two Centuries of Flagburning in the United States," 163 Flag Bull. 65 (1995). *Johnson* upheld the Texas Court of Criminal Appeals finding that the Texas flag desecration law was unconstitutional as applied in that it was a "content-based" restriction. Subsequent to *Johnson,* Congress enacted the Flag Protection Act in an effort to craft a more content-neutral law. In *United States* v. *Eichman,* 496 U.S. 310 (1990), the Court overturned several flag burning convictions brought under the new law, finding that the federal law continued to be principally aimed at limiting symbolic speech.

[2] See "Hearing on H.J. Res. 79, Proposing an Amendment to the Constitution of the United States before the Subcom. on Constitution of the House Comm. on the Judiciary," 104th Cong., 1st Sess. (May 24, 1995) (forthcoming) [hereinafter, "1995 House Judiciary Hearings"] (statement of Bruce Fein at 1) ("Flag desecrations when employed as "fighting words" or when intended and likely to incite a violation of law remain criminally punishable under the Supreme Court precedents in *Chaplinsky* v. *New Hampshire* (1942) and *Brandenburg* v. *Ohio* (1969)"); "Hearings on Statutory and Constitutional Responses to the Supreme Court Decision in *Texas* v. *Johnson,* 101st Cong., 1st Sess. (July 13, 18, 19 and 20, 1989) (Serial No. 24) (statement of Laurence Tribe at 112 and 113 ("when flag desecration is * * * an incitement [to violence] it may be prosecuted as such * * * Every State already has authority to enact a criminal statute directed specifically against those assaults upon the flag that are likely to cause an immediate and serious physical disturbance among onlookers.")

[3] Id. (statement of Clinton Bolick at 3).

[4] In his extensive survey of the history of American flag desecration law, Robert Goldstein writes that "[a]lthough the purpose of the [Flag Protection Act adopted by Congress in 1968]

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Res. 79 may cause such efforts to increase many times over. If we truly want to honor our veterans, it would be far more constructive for Congress to reconsider eliminating cost-of-living increases and health care benefits previously promised to veterans.[5] Thus, while we condemn those who would dishonor our Nation's flag, we believe that rather than protecting the flag, H.J. Res. 79 will merely serve to weaken the Constitutional protection of free expression.

IMPORTANCE OF FREEDOM OF EXPRESSION

Freedom of expression is one of the preeminent human rights and is central to fostering all other forms of freedom. Professor Emerson notes that since as early as the Renaissance, free and open expression has been considered to be an essential element of human fulfillment: "They theory [of free expression] grew out of an age that was awakened and invigorated by the idea of a new society, in which man's mind was free, his fate determined by his own powers of reason, and his prospects of creating a rational and enlighten civilization virtually unlimited."[6]

Freedom of expression also provides an important safety valve for society. Professor Greenwalt writes that "those who are resentful because their interests are not accorded fair weight, and who may be doubly resentful because they have not even had a chance to present those interests, may seek to attain by radical changes in existing institutions what they have failed to get from the institutions themselves. Thus liberty of expression, though often productive of divisiveness, may contribute to social stability."[7]

Freedom of expression also serves as an important tool in checking the abuse of powers by public officials. Professor Blasi has noted that this "checking function" should be accorded a level of protection higher than that given any other type of communication because "the particular evil of official misconduct is of a special order."[8]

Perhaps the most important function served by a system of free expression is that it allows for free and open exchange of thoughts—referred to by Justice Holmes as the "marketplace of ideas."[9] In a 1644 speech before the English Parliament critizing censorship laws, Milton articulated the notion that free expression helps to prevent human error through ignorance:

> [T]hough all the winds of doctrine were let loose to play upon the earth, so truth be in the field, we do injuriously, by licensing and prohibiting, to misdoubt her strength. Let

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was to supposedly end flag burnings, its immediate impact was to spur perhaps the largest single wave of such incidents in American history." Robert J. Goldstein, "Saving 'Old Glory'": The History of the American Flag Desecration Controversy" 215 (1995).

[5] See H. Con. Res. 67, 104th Cong., 1st Sess.

[6] Thomas I. Emerson, "Toward a General Theory of the First Amendment," 72 Yale L.J., 877, 886 (1963).

[7] Greenwalt, Speech and Crime, A.B.F. Res.J 645, 672–3 (1980). See also Rotunda, "Treatise on Constitutional Law: Substance and Procedure" § 20.6 at 18 (2d ed. 1992).

[8] See Redish, "The Value of Free Speech," 130 U. Penn. L.Rev., 591, 611 (1982).

[9] Justice Holmes articulated his "marketplace of ideas" theory of free speech in his dissent in *Abrams* v. *United States*, 250 U.S. 616, 630 (1919): "[T]he ultimate good desired is better reached by free trade in ideas * * * the best test of truth is the power of thought to get it accepted in the competition in the market."

> her and falsehood grapple, whoever knew truth put to the worse in a free and open encounter?[10]

In his 1859 essay "On Liberty," John Stuart Mill further expanded upon this vision when he recognized the public good and enlightenment which results from the free exchange of ideas:

> First, if any opinion is compelled to silence, that opinion for aught we can certainly know, be true * * * Secondly, though his silenced opinion be in error, it may, and very commonly does, contain a portion of the truth * * * Thirdly, even if the received opinion be not only true but the whole truth; unless it is suffered to be and actually is, vigorously and earnestly contested, it will by most of those who receive it, be held in the manner of a prejudice.[11]

The American system of government is itself premised on freedom of expression. Professor Emerson notes: "Once one accepts the premise of the Declaration of Independence—that governments derive 'their just powers from the consent of the governed'—it follows that the governed must, in order to exercise their right of consent, have full freedom of expression both in forming individual judgments and in forming the common judgments."[12]

The founding fathers recognized the difficulties in maintaining a system of free expression against the "tyranny of the majority." In the Federalist Papers James Madison expressed concern as to the unfettered power of the majority: "By a faction I understand a number of citizens, whether amounting to a majority or a minority of the whole who are * * * adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."[13] It is for these reasons that the Constitution not only explicitly protected freedom of expression,[14] but created a judiciary possessing the power of review over all legislative and executive action. These twin safeguards—a written constitution and an independent judiciary—have served to foster in this country the freest society in human history.

H.J. RES. 79 IS WRONG AS A MATTER OF PRINCIPLE

Unfortunately, H.J. Res. 79 detracts from our system of unfettered political expression. The true test of any nation's commitment to freedom of expression lies in its ability to protect unpopular expression, such as flag desecration. In 1929 Justice Holmes wrote that it was the most imperative principle of our constitution that it protects not just freedom for the thought and expression we

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[10] J. Milton, "Areopagitica, A Speech for the Liberty of Unlicensed Printing to the Parliament of England" (1644).

[11] J.S. Mill, "On Liberty" Ch. II. (1859).

[12] Thomas I. Emerson, "Toward a General Theory of the First Amendment," supra note 6 at 883.

[13] The Federalist No. 10 (J. Madison) at 57 (J. Cooke ed. 1961).

[14] Indeed the framers chose to include freedom of speech in the first amendment of the Bill of Rights, and wrote its protection in absolute terms: "Congress shall make no law * * * abridging freedom of speech * * *". The strictness of the language is in contrast with the fourth amendment, for example which prohibits only "unreasonable searches and seizures."

agree with, but "freedom for the thought we hate."[15] As Justice Jackson so eloquently wrote in 1943:

> 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. 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.[16]

And there can be no doubt that "symbolic speech" relating to the flag falls squarely within the ambit of traditionally protected speech. Our nation was born in the dramatic symbolic speech of the Boston Tea Party, and our courts have long recognized that expressive speech associated with the flag is protected speech under the first amendment.

Beginning in 1931 with *Stromberg* v. *California*[17] (state statute prohibiting the display of a "red flag" overturned) and continuing through the mid-1970's with *Smith* v. *Goguen*[18] and *Spence* v. *Washington*[19] (overturning convictions involving wearing a flag patch and attaching a peace sign to a flag), the Supreme Court has consistently recognized that flag-related expression is entitled to constitutional protection. Indeed, by the time Gregory Johnson was prosecuted for burning a U.S. flag outside of the Republican Convention in Dallas, the State of Texas readily acknowledged that Johnson's conduct constituted "symbolic speech" subject to protection under the first amendment.[20] Those who seek to justify H.J. Res. 79 on the grounds that flag desecration does not constitute "speech" are therefore denying decades of well-understood court decisions.[21]

While we deplore the burning of an American flag in hatred, we recognize that it is our allowing of this conduct that reinforces the strength of the Constitution. As one federal court wrote in a 1974 flag burning case, "the flag and that which it symbolizes is dear to us, but not so cherished as those high moral, legal, and ethical precepts which our Constitution teaches."[22] The genius of the Constitution lies in its indifference to a particular individual's cause. The fact that flag burners are able to take refuge in the first amendment means that every citizen can be assured that the Bill of Rights will be available to protect his or her rights and liberties should the need arise.

H.J. Res. 79 will also open the door to selective prosecution based purely on political beliefs. When Peter Zenger was charged with

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[15] *United States* v. *Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting).

[16] *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624, 642 (1943).

[17] 283 U.S. 359 (1931). Absent this decision, a State could theoretically have prevented its citizens from displaying the U.S. flag.

[18] 415 U.S. 94 (1972).

[19] 418 U.S. 405 (1974).

[20] Texas v. Johnson, supra note 1.

[21] See also, Note, "The Supreme Court—Leading Cases, 103 Harv. L.Rev. 137, 152 (1989) ("the majority opinion [in Johnson] is a relatively straightforward application of traditional first amendment jurisprudence"); Sheldon H. Nahmod," The Sacred Flag and the First Amendment, 66 Ind. L.J. 511, 547 (1991) ("Johnson is an easy case if well-established first amendment principles are applied to it").

[22] U.S. ex rel *Radich* v. *Criminal Court of N.Y.*, 385 F.Supp. 165, 184 (1974).

"seditious libel" in the very first case involving freedom of speech on American soil, his lawyer, James Alexander warned:

> The abuses of freedom of speech are the excrescences of Liberty. They ought to be suppressed; but whom dare we commit the care of doing it? An evil Magistrate, entrusted with power to punish Words, is armed with a Weapon the most destructive and terrible. Under the pretense of pruning the exuberant branches, he frequently destroys the tree.[23]

The history of the prosecution of flag desecration in this country bears out these very warnings. The overwhelming majority of flag desecration cases have been brought against political dissenters, while commercial and other forms of flag desecration has been almost completely ignored. An article in "Art in America" points out that during the Vietnam War period, those arrested for flag desecration were "invariably critics of national policy, while 'patriots' who tamper with the flag are overlooked."[24] Whitney Smith, director of the Flag Research Center, has further observed that commercial misuse of the flag was "more extensive than its misuse by leftists or students, but this is overlooked because the business interests are part of the establishment."[25]

Almost as significant as the damage H.J. Res. 79 would do to our own Constitution, is the harm it will inflict on our international standing in the area of human rights. Demonstrators who cut the communist symbols from the center of the East German and Romanian flags prior to the fall of the Iron Curtain committed crimes against their country's laws, yet freedom-loving Americans justifiably applauded these brave actions. If we are to maximize our moral stature in matters of human rights, it is therefore, essential that we remain fully open to unpopular dissent, regardless of the form it takes.[26]

H.J. RES. 79 IS WRONG AS A MATTER OF PRECEDENT

Adoption of H.J. Res. 79 will also create a number of dangerous precedents in our legal system. The Resolution will encourage further departures from the first amendment and diminish respect for our Constitution.

If we approve H.J. Res. 79, it is unlikely to be the last time Congress acts to restrict our first amendment liberties. As President Reagan's Solicitor General Charles Fried testified:

> Principles are not things you can safely violate "just this once." Can we not just this once do an injustice, just this once betray the spirit of liberty, just this once break faith with the traditions of free expression that have been the glory of this nation? Not safely; not without endangering our immortal soul as a nation. The man who says you can

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[23] Philadelphia Gazette, Nov. 17, 1737, quoted in Levy, "Legacy of Suppression" 135 (1960).

[24] See Robert J. Goldstein, "Saving Old Glory: The History of the American Flag Desecration Controversy," supra note 4 at 154.

[25] Id.

[26] To illustrate, when the former Soviet Union adopted legislation in 1989 making it a criminal offense to "discredit" a public official, Communist officials sought to defend the legislation by relying on, among other things, the United States flag desecration statute. See Rotunda, "Treatise on Constitutional Law: Substance and Procedure," supra note 7, § 20.49 at 352.

> make an exception to a principle, does not know what a principle is; just as the man who says that only this once let's make 2+2=5 does not know what it is to count.[27]

Adoption of H.J. Res. 79 will also trivialize our Constitution.[28] If we begin to second guess the courts' authority concerning matters of free speech, we will not only be carving an awkward exception into a document designed to last for the ages, but will be undermining the very structure created under the Constitution to protect our rights. This is why Madison warned against using the amendment process to correct every perceived constitutional defect, particularly concerning issues which inflame public passion.[29] Conservative legal scholar Bruce Fein emphasized this concern when he testified:

> While I believe the *Johnson* and *Eichman* decisions were misguided, I do not believe a Constitutional amendment would be a proper response * * * to enshrine authority to punish flag desecrations in the Constitution would not only tend to trivialize the Nation's Charter, but encourage such juvenile temper tantrums in the hopes of receiving free speech martyrdom by an easily beguiled media * * * it will lose that reverence and accessibility to the ordinary citizen if it becomes cluttered with amendments overturning every wrongheaded Supreme Court decision.[30]

H.J. RES. 79 IS WRONG AS A MATTER OF PRACTICE

As a practical matter, H.J. Res. 79 is too loosely drafted and may well open up a "Pandora's Box" of litigation. The terms of the resolution are so open-ended that they give us no guidance as to its intended Constitutional scope or parameter. While the amendment's supporters claim they are merely drawing a line between legal and illegal behavior, in actuality, they are granting the state and federal governments open-ended authority to prosecute dissenters who use the flag in a manner deemed inappropriate.

The Committee debate highlights the fact that there is little understanding or consensus concerning the meaning of such crucial terms as "desecration" and "flag of the United States." Depending on the state law adopted, "desecration" could apply to cancelling flag postage stamps or use of the flag by Olympic athletes. The term "flag of the United States" could include underwear from the

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[27] "Measures to Protect the American Flag, Hearing before the Senate Comm. on the Judiciary," 101st Cong., 2d Sess. (June 21, 1990) (Serial No. J–101–77) (statement of Charles Fried at 113).

[28] Inserting the term "desecration" into the Constitution would in and of itself seem highly inappropriate. Webster's New World Dictionary defines "desecrate" as "to violate the sacredness of," and in turn defines "sacred" as "consecrated to a god or God; holy; or having to do with religion." The introduction of these terms could create a significant tension within our constitutional structure, in particular with the religion clause of the first amendment.

[29] Legal philosopher Lon Fuller also highlighted this very problem over four decades ago:

> We should resist the temptation to clutter up [the constitution] with amendments relating to substantive matters. [In that way we avoid] * * * the obvious unwisdom of trying to solve tomorrow's problems today. But [we also escape the] more insidious danger [of] the weakening effect [such amendments] have on the moral force of the Constitution itself.

L. Fuller, "American Legal Philosophy at Mid-Century," 6 J.L. Ed. 457, 465 (1954), cited in "Hearings on Proposed Flag Desecration Amendment before the Subcomm. on Constitution of the Senate Comm. on the Judiciary," 104th Cong., 1st Sess. (June 6, 1995) (forthcoming) [hereinafter, "1995 Senate Judiciary Hearings"] (statement of Gene R. Nichol).

[30] "1995 House Judiciary Hearings" supra note 2 (statement of Bruce Fein at 1–2).

"Tommy Hilfiger" collection as well as a Puerto Rican municipal flag including a likeness of the U.S. flag.[31] And in our view it is insufficient to respond to these concerns by asserting that the courts can easily work out the meaning of the terms in the same way that they have given meaning to other terms in the Bill of Rights, such as "due process." Unlike the other provisions of the Bill of Rights, H.J. Res. 79 represents an unchartered restriction of our rights and liberties, rather than a back-up mechanism to prevent the government from usurping our rights.

The Resolution's sponsors also appear to have reached no consensus as to its Constitutional scope or breadth. Although Constitution Subcommittee Chairman Canady stated that the amendment would simply "restore the status quo before the Supreme Court ruled in 1989," he later asserted that the Resolution would allow the states to criminalize wearing clothing with the flag on it. Yet this latter assertion is in direct contravention of the Court's 1972 decision in *Smith* v. *Goguen*,[32] which held that Massachusetts could not prosecute a person for wearing a small cloth replica of the flag on the seat of his pants. The fact of the matter is that H.J. Res. 79 gives us no guidance whatsoever as to what if any provisions of the first amendment, the Bill of Rights, or the Constitution in general that it is designed to overrule.[33] A provision of such untested meaning and scope as H.J. Res. 79 will inevitably lead to confusing and inconsistent law enforcement and adjudication, and it will likely be decades before the court system could even begin to sort out the problems.

In an effort to cure many of the defects in the writing of H.J. Res. 79, at the Committee markup Representative Reed offered an amendment which would have specified that the Resolution would only authorize laws prohibiting the "burning, trampling, or rending" of the flag. The Reed amendment would have also allowed Congress—the traditional designator of our national symbols[34]—to adopt a single uniform definition of the term "U.S. flag", rather than leaving the definition to 50 different State legislatures and

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[31] Id. (transcript at 67, statement of Representative Serrano). See also, Rotunda, "Treatise on American Constitutional Law: Substance and Procedure," supra note 7, § 20.49 at § 90 (If we adopt laws outlawing flag desecration "there will be future problems defining what is a flag. Will it be a crime for someone to burn a flag? Or burning fireworks in the shape of an American flag? May a movie director (filming Francis Scott Key watching Fort McHenry) order that the American flag of 1812 be shot at and otherwise defaced? Will it be a crime for the post office to cancel (i.e., deface) a stamp that has on it a copy of the American flag? If a flag design is on a birthday cake, will it be a federal crime to light the birthday candles on the cake? Will cutting the cake deface it? Is it defacing the flag to display it upside down?").

[32] 415 U.S. 95 (1972) (Massachusetts statute held to be unconstitutionally "void for vagueness"). See also, *Spence* v. *Washington*, 418 U.S. 405 (1974) (overturning conviction for attaching removable tape in the form of a peace sign to a flag).

[33] Since H.J. Res. 79 is drafted to modify the entire Constitution, rather than any portion of the first amendment, it is unclear whether and to what extent it will supersede a number of Constitutional provisions. At a minimum, the Resolution raises very troubling questions regarding flag desecration laws which would otherwise be (i) "void for vagueness" in violation of the first and fifth amendment (see e.g., *Smith* v. *Goguen*); (ii) overbroad under the first amendment; or (iii) selectively prosecuted under the 14th amendment. In addition, the Resolution may also conflict with Constitutional provisions relating to the least restrictive alternatives test and religious protection (first amendment), search and seizure (fourth amendment), due process and self-incrimination (fifth amendment), cruel and unusual punishment (eighth amendment), the supremacy clause (Article VI, Section 2), and the speech and debate clause (Article I, Section 6). See e.g., "1995 Senate Judiciary Hearings," supra note 29 (statement of Walter Dellinger); William Van Alstyne, "Stars and Stripes and Silliness Forever," Legal Times at 34 (October 2, 1989).

[34] See 4 USC § 1 et seq.

permit significant overlap and confusion.[35] This amendment, which would have allowed the States and Congress to outlaw flag burning pursuant to a more narrow and constrained set of laws, was defeated.

CONCLUSION

Adoption of H.J. Res. 79 will diminish our commitment to untrammeled freedom of expression under our constitutional system. We believe we are too secure as a nation to need to risk our commitment to freedom by endeavoring to legislate patriotism. As the Court wrote in *West Virginia Board of Education* v. *Barnette*:

> [The] ultimate futility of * * * attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the last failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.[36]

If we tamper with our Constitution because of the antics of a handful of obnoxious and thoughtless people we will have reduced the role of the flag as an emblem of freedom, not enforced it. We will not go on record as supporting a proposal which will limit the freedom of expression of the American people no matter how great the provocation, or how noble the motives of its proponents.

JOHN CONYERS, Jr.
PAT SCHROEDER.
BARNEY FRANK.
HOWARD L. BERMAN.
RICK BOUCHER.
JACK REED.
JERROLD NADLER.
BOBBY SCOTT.
MELVIN L. WATT.
XAVIER BECERRA.
JOSÉ E. SERRANO.
ZOE LOFGREN.

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[35] In his testimony on behalf of the Administration, Assistant Attorney General Walter Dellinger stated:

> It is possible that conferral of an undelineated power to cut into the Bill of Rights might be of lesser concern if Congress alone were so empowered. But it must be remembered that the amendment at issue here also grants the same power to the fifty different states and an uncertain number of local governments. That raises, of course, the interpretive question of whether State legislatures acting under the amendment would remain bound by state constitutional free speech guarantees, or whether the proposed amendment would supersede state as well as constitutional provisions. On a more practical level, it increases, by at least 50 times, the risk that unduly or arbitrary legislation may be enacted at some point in the near or distant future, and it virtually guarantees a patchwork of very different state responses.

"1995 Senate Judiciary Committee Hearings," supra note 29 at 8–9.

[36] 319 U.S. 624, 641 (1943).