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REFLECTION ON THE BICENTENNIAL OF THE BILL OF RIGHTS

THE FLAG BURNING CONTROVERSY: A CHRONOLOGY

DANIEL H. POLLITT*

December 15, 1991 marked the bicentennial of America's great testament to individual freedom, the Bill of Rights. In celebration of this epoch in the history of democracy, Professor Daniel H. Pollitt reflects on two events that illuminate the country's commitment to freedom of expression: the debates that led to the ratification of the Constitution and the adoption of the Bill of Rights and the controversy over flag burning that culminated in Congress's decision not to amend the Constitution two centuries later.

The proverbial "dog days of August" came a little bit early in 1989.¹ On June 21, 1989, the Supreme Court agreed with the Texas Court of Appeals that flag burning was "symbolic speech" protected by the First Amendment.² The decision unleashed a patriotic fervor unmatched since the summer of 1988 when presidential candidate George Bush "outflagged" Massachusetts Governor Michael Dukakis by leading delegates at the Republican National Convention in the Pledge of Allegiance.³

TEXAS V. JOHNSON

The *Texas v. Johnson* chronicle began at the 1984 Republican Convention in Dallas when Gregory Lee Johnson burned an American flag. He and other members of the Revolutionary Communist Youth Brigade protested the Reagan Administration by parading from one corporate headquarters to another while chanting various slogans. The group snatched an American flag along the way. When they reached the Dallas

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1. As the "Dog Star" becomes visible between early July and early September it brings hot, sultry weather to the Northern Hemisphere, seemingly causing Congress to enact madcap laws.

2. *Texas v. Johnson*, 491 U.S. 397, 397 (1989).

3. Judy Mann, *Summertime Patriots*, WASH. POST, July 14, 1989, at C1.

City Hall, Johnson set it afire while others chanted "America, the red, white, and blue, we spit on you."⁴

Johnson was charged under Texas law for the crime of "desecration to a venerated object."⁵ This law made it illegal for a person to "knowingly desecrate[]" (i.e., to "physically mistreat") a "public monument; . . . a place of worship or burial; or . . . a state or national flag . . . in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action."⁶

Johnson was convicted, sentenced to one year in prison, and fined \$2,000. The Texas Court of Appeals affirmed Johnson's conviction,⁷ but the Texas Court of Criminal Appeals reversed, holding that the State could not, consistent with the First Amendment, punish Johnson for burning the flag in these circumstances.⁸ On October 17, 1988, the Supreme Court of the United States agreed to review the case.⁹ The case was argued on March 21, 1989, and decided on June 21, 1989.

The Supreme Court agreed with the Texas court that Johnson's conduct was symbolic speech protected by the First Amendment.¹⁰ Justice Brennan, writing for the majority, first noted that "nothing in our opinion should be taken to suggest that one is free to steal a flag so long as one later uses it to communicate an idea."¹¹ He emphasized in a footnote that Johnson was prosecuted "*only* for flag desecration—not for trespass, disorderly conduct, or arson,"¹² suggesting that the Texas court could have tried Johnson for these offenses. But the conviction for desecration of a venerated object could not stand because of the "bedrock principle underlying the First Amendment."¹³ This principle holds that government may not prohibit the expression of an idea because society feels that the idea, or the mode chosen to express it, is offensive.¹⁴

4. Tamar Jacoby et al., *A Fight for Old Glory*, NEWSWEEK, July 3, 1989, at 19.

5. *Johnson*, 491 U.S. at 400.

6. TEX. PENAL CODE ANN. § 42.09 (West 1989).

7. *Johnson v. State*, 706 S.W.2d 120, 125 (Tex. Ct. App. 1986), *rev'd*, 755 S.W.2d 92 (Tex. Crim. App. 1988) (en banc), *aff'd sub nom. Texas v. Johnson*, 491 U.S. 397 (1989).

8. *Johnson v. State*, 755 S.W.2d 92, 98 (Tex. Crim. App. 1988) (en banc), *aff'd sub nom. Texas v. Johnson*, 491 U.S. 397 (1989).

9. *Texas v. Johnson*, 488 U.S. 907 (1988).

10. *Texas v. Johnson*, 491 U.S. 397, 420 (1989).

11. *Id.* at 413 n.8.

12. *Id.*

13. *Id.* at 414.

14. *Id.* In support of this proposition Justice Brennan cited a large number of cases, including *Hustler Magazine v. Falwell*, 485 U.S. 46, 55-56 (1988); *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65, 72 (1983); *Carey v. Brown*, 447 U.S. 455, 462-63 (1980); and *FCC v. Pacifica Found.*, 438 U.S. 726, 745-46 (1978).

Justice Brennan did not believe that the acquittal of Johnson would “endanger the special role played by our flag or the feelings it inspires.”¹⁵ To the contrary, he wrote that “the flag’s deservedly cherished place in our community will be strengthened, not weakened” because “[o]ur decision is a reaffirmation of the principles of freedom and inclusiveness that the flag best reflects, and of the conviction that our toleration of criticism such as Johnson’s is a sign and source of our strength.”¹⁶ He concluded the opinion on this high note:

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. . . . We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents.¹⁷

Justices Marshall, Blackmun, Scalia, and Kennedy joined in Justice Brennan’s opinion. Justice Kennedy also wrote a brief concurring opinion emphasizing that

the flag is constant in expressing beliefs Americans share, beliefs in law and peace and that freedom which sustains the human spirit. The case here today forces recognition of the costs to which those beliefs commit us. It is poignant but fundamental that the flag protects those who hold it in contempt.¹⁸

Chief Justice Rehnquist wrote the principal dissent. He observed that “‘the First Amendment does not guarantee the right to employ every conceivable method of communication at all times and in all places,’ ”¹⁹ and that “[t]he Texas statute deprived Johnson of only one rather inarticulate symbolic form of protest—a form of protest that was profoundly offensive to many—and left him with a full panoply of other symbols and every conceivable form of verbal expression to express his deep disapproval of national policy.”²⁰ The Chief Justice concluded that there would be “‘little question about the power of Congress to forbid the mutilation of the Lincoln Memorial. . . . The flag is itself a monument, subject to similar protection.’ ”²¹ Justices White and O’Connor joined in this dissent.²²

15. *Johnson*, 491 U.S. at 418.

16. *Id.* at 419.

17. *Id.* at 420.

18. *Id.* at 421 (Kennedy, J., concurring).

19. *Id.* at 432 (Rehnquist, C.J., dissenting) (quoting *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 812 (1984)).

20. *Id.* (Rehnquist, C.J., dissenting).

21. *Id.* at 434 (Rehnquist, C.J., dissenting) (quoting *Smith v. Goguen*, 415 U.S. 566, 587 (1974) (White, J., concurring in judgment)).

22. *Id.* at 421. (Rehnquist, C.J., dissenting).

Justice Stevens penned his own dissenting opinion, arguing that "tarnish[ing the flag] is not justified by the trivial burden on free expression occasioned by requiring [Johnson to use] an available, alternative mode of expression."²³ He added that had Johnson

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.²⁴

THE RESULTING UPROAR

President Bush led a parade of "Chicken Littles" who saw the sky falling as a result of the Supreme Court's holding in *Johnson*. In symbolic speech of his own, he went to the nearby statue of the Marines hoisting the flag at Mt. Suribachi during the 1944 invasion of Iwo Jima²⁵ and asked Congress to reverse the Supreme Court's decision with a constitutional amendment providing that "[t]he Congress and the states shall have the power to prohibit the physical desecration of the flag of the United States."²⁶ *The New York Times* reported that there was a "political calculation in this decision" and quoted a White House official as saying that Chief of Staff John Sununu believed that "'this train was pulling out of the station fast, and the President might as well lead the parade.'"²⁷

The press was almost solidly hostile to the proposed amendment. *The New York Times*, for example, decried the sorry "spectacle of Democrats and Republicans vying for cheap advantage, exalting the fabric of

23. *Id.* at 437 (Stevens, J., dissenting).

24. *Id.* at 438-39 (Stevens, J., dissenting).

25. Chief Justice Rehnquist emphasized in an earlier case that

[n]o one who lived through the Second World War in this country can forget the impact of the photographs of the members of the United States Marine Corps raising the United States flag on the top of Mount Suribachi on the Island of Iwo Jima, which is now commemorated in a statue at the Iwo Jima Memorial adjoining Arlington National Cemetery.

Smith v. Goguen, 415 U.S. 566, 601 (1974) (Rehnquist, J., dissenting).

Marines who fought there might well consider Bush's political exploitation of those who died on the beaches a desecration of a venerated object.

26. Mann, *supra* note 3, at C1.

27. Bernard Weintraub, *White House*, N.Y. TIMES, July, 7, 1989, at B4 (quoting unidentified White House official).

the flag over the fabric of freedom.”²⁸ *The Washington Post* followed suit with an editorial lamenting that “[i]t is not the first time Mr. Bush has wrapped himself in patriotic bunting. He did it with the Pledge of Allegiance in last year’s campaign. . . . The tragedy is that George Bush knows better.”²⁹ The following well-known commentators also opposed tampering with the Constitution: Haynes Johnson, James Kilpatrick, Anthony Lewis, Judy Mann, Mary McGrory, William Safire, Tom Wicker, and George Will. Even Miss Manners wrote that “[t]he punishments of etiquette—public disapproval and political condemnation—are not only psychologically harsh but more fitting than fines or jail for dealing with transgressions involving symbolism.”³⁰

Nevertheless, President Bush rode the crest of the popular outrage: polls showed that more than seventy percent of Americans would support a constitutional amendment making flag burning illegal.³¹

THE PRIOR FLAG DESECRATION CASES

The outburst of emotion in response to the Supreme Court’s decision is puzzling. Flag desecration is not new in this country, and the Supreme Court has decided in favor of free speech on three prior occasions in the past twenty years.

*Street v. New York*³²

The *Street* case, now twenty years old, was the first to raise the flag-burning issue. During the afternoon of June 6, 1966, Mr. Street, a resident of Brooklyn, heard the news reports that a sniper in Mississippi had shot James Meredith, the first African-American to enroll at the University of Mississippi.³³ Street, also an African-American, took his United States flag from a drawer, went to the street corner, and set the flag on fire. He told a police officer, “We don’t need no damn flag. . . . If they let that happen to Meredith we don’t need an American flag.”³⁴ Street was convicted³⁵ under a New York law making it a misdemeanor to “publicly mutilate, deface, defile, or defy, trample upon, or cast contempt

28. *The Fabric of the Flag*, N.Y. TIMES, July 2, 1989, at E1 (editorial).

29. *The Flag War*, WASH. POST, June 29, 1989, at A24 (editorial).

30. Judith Martin, *A Banner Day for Etiquette*, WASH. POST, July 16, 1989, at F1, F6.

31. Michael D. Hinds, *Flag Day Brings a Day of Debate*, N.Y. TIMES, June 15, 1990, at A12 (citing American Legion spokesman John Minnick).

32. 394 U.S. 576 (1969).

33. *Id.* at 578.

34. *Id.* at 579.

35. *People v. Street*, 20 N.Y.2d 231, 234, 229 N.E.2d 187, 189, 282 N.Y.S.2d 491, 493 (1967), *rev’d sub nom. Street v. New York*, 394 U.S. 576 (1969).

upon *either by words or act*" any flag of the United States.³⁶

The Supreme Court, in an opinion by Justice Harlan, reversed Street's conviction, holding the New York statute unconstitutional because it permitted punishment "merely for speaking defiant or contemptuous words about the American flag."³⁷ Thus, in a sense, *Street* is a "speech" case, not a pure flag-burning case. *Street* is particularly significant, however, because the Court held that none of the four different governmental interests that New York asserted could justify the statute:

(1) an interest in deterring appellant from vocally inciting others to commit unlawful acts; (2) an interest in preventing appellant from uttering words so inflammatory that they would provoke others to retaliate physically against him, thereby causing a breach of the peace; (3) an interest in protecting the sensibilities of passers-by who might be shocked by appellant's words about the American flag; and (4) an interest in assuring that appellant, regardless of the impact of his words upon others, showed proper respect for our national emblem.³⁸

Chief Justice Warren, Justice Black, Justice White, and Justice Fortas wrote separate dissenting opinions. They did not agree with the majority that Street's conviction could have been based in whole or in part on his comments regarding James Meredith. To each of the dissenters the sole issue was the act of flag burning, not spoken words. Since each dissenter believed that the majority had not met this issue head-on, the dissenters wrote only brief conclusory comments. Thus, Chief Justice Warren wrote: "I believe that the States and the Federal Government do have the power to protect the flag from acts of desecration and disgrace. But because the Court has not met the issue, it would serve no purpose to delineate my reasons for this view."³⁹ Similarly, Justice Black limited himself to the following comments:

It passes my belief that anything in the Federal Constitution bars a State from making the deliberate burning of the American flag an offense. It is immaterial to me that words are spoken in connection with the burning. It is the *burning* of the flag that the State has set its face against.⁴⁰

Justice White was equally terse:

The Court is obviously wrong in reversing the judgment below

36. N.Y. PENAL LAW § 369-b (McKinney 1967) (current version at N.Y. GEN. BUS. LAW § 136 (McKinney 1989)).

37. *Street*, 394 U.S. at 581.

38. *Id.* at 591.

39. *Id.* at 605 (Warren, C.J., dissenting).

40. *Id.* at 610 (Black, J., dissenting).

because it believes that Street was unconstitutionally convicted for speaking. Reversal can follow only if the Court reaches the conviction for flag burning and finds that conviction, as well as the assumed conviction for speech, to be violative of the First Amendment. For myself, without the benefit of the majority's thinking if it were to find flag burning protected by the First Amendment, I would sustain such a conviction.⁴¹

Justice Fortas was the only dissenter to elaborate the rationale for his dissent:

If a state statute provided that it is a misdemeanor to burn one's shirt or trousers or shoes on the public thoroughfare, it could hardly be asserted that the citizen's constitutional right is violated. If the arsonist asserted that he was burning his shirt or trousers or shoes as a protest against the Government's fiscal policies, for example, it is hardly possible that his claim to First Amendment shelter would prevail against the State's claim of a right to avert danger to the public and to avoid obstruction to traffic as a result of the fire. This is because action, even if clearly for serious protest purposes, is not entitled to the pervasive protection that is given to speech alone. . . .

One may not justify burning a house, even if it is [one's] own, on the ground, however sincere, that [one] does so as a protest. One may not justify breaking the windows of a government building on that basis. Protest does not exonerate lawlessness. And the prohibition against flag burning on the public thoroughfare being valid, the misdemeanor is not excused merely because it is an act of flamboyant protest.⁴²

*Smith v. Goguen*⁴³

Smith was the second "flag case" to reach the Supreme Court. Goguen had a small United States flag sewn to the seat of his trousers. He was convicted under a Massachusetts law that made it illegal to "publicly . . . treat[] [the flag] contemptuously."⁴⁴ The Supreme Court upheld a writ of habeas corpus⁴⁵ ordering Goguen's release. Justice Powell wrote for the majority: "The slender record in this case reveals little more than that Goguen wore a small cloth version of the United States

41. *Id.* at 615 (White, J., dissenting) (footnote omitted).

42. *Id.* at 616-17 (Fortas, J., dissenting).

43. 415 U.S. 566 (1974).

44. MASS. GEN. LAWS ANN. ch. 264, § 5 (West 1974).

45. *Goguen v. Smith*, 343 F. Supp. 161 (D. Mass.), *aff'd*, 471 F.2d 88 (1st Cir. 1972), *aff'd*, 415 U.S. 566 (1974).

flag sewn to the seat of his trousers."⁴⁶ He noted that it was commonplace to display flags "‘on hats, garments and vehicles,’"⁴⁷ and that "‘the flag has become ‘an object of youth fashion and high camp.’"⁴⁸ The Supreme Court invalidated the Massachusetts law "on the due process doctrine of vagueness"⁴⁹ that requires legislatures "to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent ‘arbitrary and discriminatory enforcement.’"⁵⁰ Justice Powell noted: "[I]t could hardly be the purpose of the Massachusetts Legislature to make criminal every informal use of the flag" in this time "of widely varying attitudes and tastes for displaying something as ubiquitous as the United States flag."⁵¹ And yet, wrote Justice Powell, the statutory language under which Goguen was charged

fail[ed] to draw reasonably clear lines between the kinds of nonceremonial treatments that are criminal and those that are not. . . . Statutory language of such a standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections. Legislatures may not so abdicate their responsibilities for setting the standards of the criminal law.⁵²

Justice White disagreed on the "vagueness" point⁵³ but concurred in the judgment because the statutory prohibition of treating the flag "contemptuously" embraced the concept of communicating ideas "unacceptable to the controlling majority in the legislature."⁵⁴ To Justice White it was "clear under our cases that disrespectful or contemptuous spoken or written words about the flag may not be punished consistently with the First Amendment."⁵⁵

Justice Blackmun dissented. He read the Massachusetts law as only protecting the "physical integrity of the flag," and wrote that Goguen was convicted not because of a "communicative element," but "for harming the physical integrity of the flag by wearing it affixed to the seat of his pants."⁵⁶ Justice Rehnquist dissented separately.⁵⁷ He agreed with Justice White that treating the flag "contemptuously" required the

46. *Smith*, 415 U.S. at 568.

47. *Id.* at 571 (quoting *Goguen*, 343 F. Supp. at 167).

48. *Id.* at 574 (quoting *Goguen*, 343 F. Supp. at 164).

49. *Id.* at 572.

50. *Id.* at 573 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)).

51. *Id.* at 574.

52. *Id.* at 574-75.

53. *Id.* at 584 (White, J., concurring in judgment).

54. *Id.* at 588 (White, J., concurring in judgment).

55. *Id.* at 589 (White, J., concurring in judgment).

56. *Id.* at 591 (Blackmun, J., dissenting).

57. *Id.* (Rehnquist, J., dissenting).

expression of an idea, "at least marginal elements of symbolic speech."⁵⁸ But he believed on balance that the governmental interest in protecting the physical integrity of the flag was more important than the communicative element in Goguen's conduct.⁵⁹ Chief Justice Burger concurred with the dissents of both Justice Blackmun and Justice Rehnquist.⁶⁰

*Spence v. Washington*⁶¹

Spence is the last of the three early "flag cases." On May 10, 1970, Spence, a college student in Seattle, Washington, hung his United States flag from the window of his apartment.⁶² He hung it upside down and attached a peace symbol as a protest against the invasion of Cambodia and the killings at Kent State University, events that occurred a few days before his arrest.⁶³ He was arrested and convicted under Washington's "improper use" statute,⁶⁴ which made it illegal to place any figure, mark, picture, or design upon any flag of the United States.⁶⁵ The Supreme Court, in a per curiam opinion, reversed.⁶⁶ It held that Spence had engaged in a form of communication, stating "[a]n intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it."⁶⁷ The Court weighed interests advanced by the State against the interest of free speech, and ruled in favor of free speech.⁶⁸

First, the State argued that the inhibition of Spence's freedom of expression was "minuscule and trifling because there are thousands of

58. *Id.* at 593 (Rehnquist, J., dissenting).

59. *Id.* at 599 (Rehnquist, J., dissenting).

60. *Id.* at 590 (Blackmun, J., dissenting); *id.* at 591 (Rehnquist, J., dissenting).

61. 418 U.S. 405 (1974) (per curiam).

62. *Id.* at 406.

63. *Id.* at 408. According to the Supreme Court opinion,

Appellant's activity occurred at a time of national turmoil over the introduction of United States forces into Cambodia and the deaths at Kent State University. It is difficult now, more than four years later, to recall vividly the depth of emotion that pervaded most colleges and universities at the time, and that was widely shared by young Americans everywhere. A spontaneous outpouring of feeling resulted in widespread action, not all of it rational when viewed in retrospect. This included the closing down of some schools, as well as other disruptions of many centers of education. It was against this highly inflamed background that appellant chose to express his own views in a manner that can fairly be described as gentle and restrained as compared to the actions undertaken by a number of his peers.

Id. at 414 n.10.

64. See WASH. REV. CODE ANN. § 9.86.020 (West 1988) (current version).

65. *Spence*, 418 U.S. at 407.

66. *Id.* at 415.

67. *Id.* at 410-11.

68. *Id.* at 415.

other means available to [him] for the dissemination of his personal views.'"⁶⁹ This contention was "rejected summarily" because "'one is not to have the exercise of [one's] liberty . . . in appropriate places abridged on the plea . . . it may be exercised in some other place.'"⁷⁰ Second, there was no support in the records that the arrest was necessary to prevent a "breach of peace."⁷¹ Third, the judgment below could not be supported to protect the sensibilities of passersby.⁷² The Court noted: "'It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are offensive to some of their hearers.'"⁷³ Fourth, the Court assumed that the state had an interest in "preserving the national flag as [a] . . . symbol of our country,"⁷⁴ but held that "[g]iven the protected character of his expression and in light of the fact that no interest that the State may have in preserving the physical integrity of a privately owned flag was significantly impaired on these facts, the conviction must be invalidated."⁷⁵

Justice Blackmun concurred in the result without opinion.⁷⁶ Justice Douglas also concurred.⁷⁷ He argued that Spence's symbolic speech could not be stifled because someone

"might be so intemperate as to disrupt the peace because of this display. But if absolute assurance of tranquility is required, we may as well forget about free speech. Under such a requirement, the only 'free' speech would consist of platitudes. That kind of speech does not need constitutional protection."⁷⁸

Chief Justice Burger dissented because "it should be left to each State and ultimately the common sense of its people to decide how the flag, as a symbol of national unity, should be protected."⁷⁹ Justice Rehnquist, with whom the Chief Justice and Justice White joined, dissented because Spence's "form of expression" was subject to limitation "when important countervailing interests [were] involved."⁸⁰ Such an interest

69. *Id.* at 411 n.4 (quoting *State v. Spence*, 81 Wash. 2d 788, 799, 506 P.2d 293, 301 (1973), *rev'd sub nom.* *Spence v. Washington*, 418 U.S. 405 (1974)).

70. *Id.* (quoting *Schneider v. State*, 308 U.S. 147, 163 (1939)).

71. *Id.* at 412.

72. *Id.*

73. *Id.* (quoting *Street v. New York*, 394 U.S. 576, 592 (1969)).

74. *Id.*

75. *Id.* at 415.

76. *Id.* (Blackmun, J., concurring).

77. *Id.* (Douglas, J., concurring).

78. *Id.* at 416 (Douglas, J., concurring) (quoting *State v. Kool*, 212 N.W.2d 518, 521 (Iowa 1973)).

79. *Id.* (Burger, C.J., dissenting).

80. *Id.* at 417 (Rehnquist, C.J., dissenting).

was at stake here: the "valid interest in preserving the integrity of the flag."⁸¹

EARLIER CONTROVERSIES OVER THE FLAG SALUTE AND THE DISPLAY OF THE RED FLAG

Controversy has surrounded the flag in other contexts as well. During the days of World War II, the Jehovah's Witnesses refused to salute the flag (to "bow down to a graven idol"),⁸² and their lack of "patriotism" resulted in a controversy exceeding that which now exists over flag burning.⁸³ In Kennebunkport, Maine, close to President Bush's summer home, a mob of some 2,500 persons raided a Kingdom Hall (the sanctuary of the Jehovah's Witnesses) and burned it to the ground.⁸⁴ Elsewhere, "patriotic" groups forced Jehovah's Witnesses to salute the flag by the forced intake of castor oil.⁸⁵

The Flag Salute Cases

*Minersville School District v. Gobitis*⁸⁶

In the late 1930s, Lillian Gobitis, aged twelve, and her brother William, aged ten, were expelled from the public schools in Minersville, Pennsylvania, for refusing to salute the national flag as part of a daily school exercise.⁸⁷ The Court noted that the Gobitis family was "affiliated with 'Jehovah's Witnesses,' for whom the Bible as the word of God is the supreme authority. The children had been brought up conscientiously to believe that such a gesture of respect for the flag was forbidden by command of Scripture."⁸⁸ The Supreme Court, in an opinion by Justice Frankfurter, sustained the flag-salute requirement because "[c]onscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs."⁸⁹

81. *Id.* at 418 (Rehnquist, C.J., dissenting).

82. The Witnesses' religious beliefs include a literal version of *Exodus* 20:4-5, which says: "Thou shalt not make unto thee any graven image. . . . Thou shalt not bow down thyself to them, nor serve them"

83. See *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 629 (1943).

84. *Kennebunkport Mob of 2,500 Burns Cult Headquarters*, PORTLAND PRESS HERALD, June 10, 1940, at 1; *Maine Mob Burns Jehovah Sect Home*, N.Y. TIMES, June 10, 1940, at 19.

85. Jon C. Blue, *One Nation, Divisible, with Liberty for None*, N.Y. TIMES, Sept. 2, 1988, at A27.

86. 310 U.S. 586 (1940).

87. *Id.* at 591.

88. *Id.* at 591-92.

89. *Id.* at 594.

Only Justice Stone dissented.⁹⁰

*West Virginia Board of Education v. Barnette*⁹¹

Following the *Gobitis* decision, the West Virginia legislature required all schools to conduct certain courses for the purpose of "fostering and perpetuating the ideals, principles and spirit of Americanism."⁹² Accordingly, the Board of Education ordered that the flag salute become "a regular part of the program of activities in the public schools."⁹³ The resolution provided that refusal to salute the flag shall be regarded "as an act of insubordination, and shall be dealt with accordingly," that is, with expulsion.⁹⁴ The expelled child could be proceeded against as a delinquent; the parents also were liable to prosecution.⁹⁵

The Barnette family and other Jehovah's Witnesses filed suit to enjoin the flag salute law, and won.⁹⁶ Justice Jackson wrote for the Court:

The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own. Nevertheless, we 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. . . . [F]reedom to differ is not limited to things that do not matter much. . . . 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 or force citizens to confess by word or act their faith therein. If there are any circumstances which permit exception, they do not now occur to us.⁹⁷

When one remembers the Jehovah's Witness school children who stood up for their religious faith by sitting down during the compulsory flag salute, one thinks back much further to Daniel and his friends Shadrach, Meshach, and Abednego, who refused Nebuchadnezzar's com-

90. *Id.* at 601 (Stone, J., dissenting).

91. 319 U.S. 624 (1943).

92. W. VA. CODE § 1734 (Supp. 1941) (current version at W. VA. CODE § 18-2-9(a) (1988)).

93. *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 626 (1943) (quoting Board of Education resolution dated Jan. 9, 1942).

94. *Id.*

95. *Id.* at 629.

96. *Id.* at 642.

97. *Id.* at 641-42. This opinion is included in many anthologies and quoted with reverence on legal ceremonial occasions.

mand to bow down before the image of gold, and consequently were thrown into the fiery furnace.⁹⁸

*The Red Flag Case, Stromberg v. California*⁹⁹

Following World War I and the Bolshevik Revolution in Russia, there was a "Red Scare" in America. The Espionage Act of 1917, among other things, made it illegal to "obstruct the recruiting and enlistment service of the United States."¹⁰⁰ A 1918 amendment made it a crime to "utter, print, write, and publish . . . [any] disloyal, scurrilous, and abusive language about the form of government of the United States."¹⁰¹ There were some 2,000 prosecutions under these laws¹⁰² including prosecutions against the entire leadership of a radical labor movement known as the Industrial Workers of the World.¹⁰³

These prosecutions sat well with the American people. Theodore Roosevelt, speaking of pacifist ministers indicted under the laws, said that "[t]he clergyman who does not put the flag above the church had better close his church, and keep it closed."¹⁰⁴ *The Washington Post* in like vein lectured that "[t]here is no time to waste on hairsplitting over infringement of liberty."¹⁰⁵

One of the most hysterical activities of the "Red Scare" was the "Palmer Raids." Woodrow Wilson's Attorney General, A. Mitchell Palmer, worried about the newly formed Communist Labor Party. He ordered predawn raids on the nights of January 2 and 6, 1920, and the arrest of aliens suspected of illegally entering the United States.¹⁰⁶ Some

98. *Daniel* 3:1-22. Is President Bush a modern-day Nebuchadnezzar? When he seeks to outlaw flag burning is he seeking to prescribe "what shall be orthodox in politics." The analogy is not without some force.

99. 283 U.S. 359 (1931).

100. *See* *Schenck v. United States*, 249 U.S. 47, 49 (1919) (citing Espionage Act of 1917, Ch. 30, § 3, 40 Stat. 217, 219).

101. *See* *Abrams v. United States*, 250 U.S. 616, 617 (1919) (quoting counts against defendants charged in indictment) (citing Act of May 16, 1918, Ch. 75, 40 Stat. 553).

102. NAT HENTOFF, *THE FIRST FREEDOM: THE TUMULTUOUS HISTORY OF FREE SPEECH IN AMERICA* 111 (1980).

103. *Id.* at 109.

104. *Id.* at 110.

105. *Id.* at 118 (quoting *The Washington Post*). Hentoff tells of a pacifist minister and his friend who were dragged with ropes around their necks to the public square. The layman was released when he signed a check for a \$1,000 Liberty Bond. The minister was released on the intervention of his wife. *The Sacramento Bee* headlined its report of the event, "Near Lynchings Give Pro-Germans Needed Lesson." *Id.* at 111.

106. *Id.* at 115. Following the assassination of President McKinley in 1901, Congress enacted an immigration law that forbade entry into the United States by immigrants who advocated the assassination of public officials or who believed in the overthrow of the government

10,000 were fished up in these dragnet raids. Ultimately, a few hundred were deported. Most of those arrested were harmless.¹⁰⁷

State legislatures shared the panic. In 1920 the New York Legislature expelled five members of the Socialist Party.¹⁰⁸ Earlier, after the 1901 assassination of President McKinley in Buffalo, New York, the state had enacted a "criminal anarchy" law.¹⁰⁹ It prohibited advocating or teaching the duty, necessity, or propriety of overthrowing the government by force or violence, or by assassination of the executive head of government.¹¹⁰ In the wake of World War I and the Russian Revolution, identical or similar laws were adopted by twenty states and two territories.¹¹¹ The Supreme Court originally sustained the laws in appeals from California and New York.¹¹² But on sober reflection the Court held the Ohio law (and all other such laws) unconstitutional in *Brandenburg v. Ohio*.¹¹³

In addition to the anarchy/sedition laws, some twenty-eight states enacted "red flag" laws, making it a felony to "display[] a red flag . . . in a public place . . . as a sign, symbol or emblem of opposition to organized government."¹¹⁴ The Supreme Court invalidated these laws in *Stromberg v. California*.¹¹⁵

Yette Stromberg, nineteen years old, was a member of the Young Communist League and a counselor at a summer camp for children. She led a daily ceremony in which the children raised a red flag, saluted it,

by force or violence. *Id.* at 101-02. Palmer said that those arrested suffered from the "disease of evil thinking." *Id.* at 112.

107. THOMAS H. JOHNSON, *THE OXFORD COMPANION TO AMERICAN HISTORY* 610 (1966).

108. HENTOFF, *supra* note 102, at 114. "The Socialist Party, a legal organization, did not advocate violence, but its name alone inspired fear." *Id.*

109. N.Y. PENAL LAW §§ 160, 161 (1909) (current version at N.Y. PENAL LAW § 240.15 (McKinney 1989)).

110. *Id.*

111. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (citing ELDRIDGE F. DOWELL, *A HISTORY OF CRIMINAL SYNDICALISM LEGISLATION IN THE UNITED STATES* 21 (1939)).

112. *Whitney v. California*, 274 U.S. 357, 372 (1927); *Gitlow v. New York*, 268 U.S. 652, 672 (1925). In *Gitlow* Justice Sanford wrote for the Court that "[a] single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration. . . . [A state] may, in the exercise of its judgment, suppress the threatened danger in its incipience." *Gitlow*, 268 U.S. at 669.

113. 395 U.S. 444 (1969). In a per curiam opinion the Court held that a state may not "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.* at 447.

114. *E.g.*, CAL. PENAL CODE § 403a (1919) (current version at CAL. MIL. & VET. CODE § 616 (West 1988)).

115. 283 U.S. 359, 369-70 (1931).

and recited a pledge of allegiance "to the worker's red flag and to the cause for which it stands; one aim throughout our lives, freedom for the working class."¹¹⁶

Stromberg may well be the first "symbolic expression" case decided by the Supreme Court. *Stromberg* was tried and convicted in a local court, and her conviction was affirmed on appeal to the California District Court of Appeal.¹¹⁷ A petition for a hearing was denied by the Supreme Court of California, and the United States Supreme Court agreed to hear the case. In an opinion by Chief Justice Hughes, the Court reversed. Chief Justice Hughes noted first that "the conception of liberty under the due process clause of the Fourteenth Amendment embraces the right of free speech"¹¹⁸ and then held:

The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people . . . is a fundamental principle of our constitutional system. A statute which . . . permit[s] the punishment of the fair use of this opportunity is repugnant to the guarantee of liberty contained in the Fourteenth Amendment.¹¹⁹

These flag decisions do not stand alone. The reports are replete with decisions upholding free speech even for those we dislike. That, of course, is what the First Amendment is all about.¹²⁰

The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. Words, acts, and symbols precious to the cause of some are anathema to and deeply offend the sensibilities of others. But history teaches that permissiveness is the price of freedom. Offensive words and emotive symbols must hold sway lest the power of the Bill of Rights be diminished. This lesson is repeated over and over again.

For example, many citizens of Alabama feel deep resentment when their legislators fly the Confederate flag over the state capitol. Yet fly it must, until the reality of the present overtakes the traditions of the past. The survivors of the Holocaust felt passionate anger when American Nazis marched through their home in Skokie, Illinois, brandishing the dreaded swastika. Yet parade the Nazis can, unless we want government to decide for us what we may see and hear.¹²¹

116. *Id.* at 362.

117. *People v. Mintz*, 290 P. 93, 102 (Cal. Dist. Ct. App.), *rev'd sub nom.* *Stromberg v. California*, 283 U.S. 359 (1931).

118. *Stromberg*, 283 U.S. at 368.

119. *Id.* at 369.

120. The cases that follow demonstrate this full well.

121. *Collin v. Smith*, 578 F.2d 1197, 1206-07 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978).

Georgia legislators were incensed when Julian Bond announced sympathy for draft resisters who burned their draft cards. As a result of Bond's statement, the legislature refused to seat him in his elected post in the House of Representatives.¹²² But the Supreme Court insisted that Bond be seated because he was protected by the First Amendment for "statements criticizing public policy and the implementation of it."¹²³

After activists in Boston burned their draft cards to protest the Vietnam War, they were beaten by a mob and Congress passed a law making draft card burning illegal. The Supreme Court upheld this law, but only because it furthered the important governmental interest that those of draft age carry their draft cards, and because this governmental interest was "unrelated to the suppression of free speech."¹²⁴

Members of the Ku Klux Klan were jailed in Ohio for wearing hooded robes, burning crosses, and threatening what they called "revenge."¹²⁵ The Court held that even speech advocating illegal action is protected, unless it is designed to incite immediate action and is likely to do so.¹²⁶

Young African-Americans throughout the South provoked violence and were jailed for "sitting in" at segregated dime store lunch counters.¹²⁷ The Supreme Court held that even in a public library, free speech "is not confined to verbal expression" but embraces the right to "protest by silent and reproachful presence . . . the unconstitutional segregation of public facilities."¹²⁸

In California a young man was arrested when he entered a court room wearing the statement "fuck the draft" on his jacket. The Supreme Court held that a state may not, as a "guardian[] of public morality," excise "one particular scurrilous epithet from public discourse"¹²⁹ because "words are often chosen as much for their emotive as their cognitive force," and the emotive function "may often be the more important element of the overall message sought to be communicated."¹³⁰

Hustler Magazine, to the dismay of most Americans (whether or not

122. Bond v. Floyd, 385 U.S. 116, 123 (1966).

123. *Id.* at 136.

124. United States v. O'Brien, 391 U.S. 367, 377 (1968).

125. Brandenburg v. Ohio, 395 U.S. 444, 446 (1969) (per curiam).

126. *Id.* at 447.

127. Daniel H. Pollitt, *Dime Store Demonstrations: Events and Legal Problems of the First Sixty Days*, 1960 DUKE L.J. 315, 319.

128. Brown v. Louisiana, 383 U.S. 131, 142 (1966) (citing Wright v. Georgia, 373 U.S. 284, 291-93 (1963)).

129. Cohen v. California, 403 U.S. 15, 22 (1971).

130. *Id.* at 26.

members of the Moral Majority), was allowed to print an ugly parody portraying imagined sexual scenes involving the Reverend Jerry Falwell and his mother in an outhouse. The Supreme Court concluded that it is a bedrock principle of the First Amendment that the government may not punish the expression of an idea because society deems the idea offensive.¹³¹

The litany of words and symbolic action that might easily result in physical outrage goes on and on.

The Constitution says we must risk a breach of the peace when schoolchildren wear black armbands to protest the Vietnam War.¹³² "Any word spoken . . . that deviates from the views of another person may start an argument or cause a disturbance," wrote the Supreme Court, but "our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society."¹³³

Much earlier, Justice Holmes wrote that even Communist revolutionary speech must be protected because the "theory of our Constitution" is that "the ultimate good desired is better reached by free trade in ideas."¹³⁴

Justice Douglas enunciated this constitutional principle in his opinion upholding the right of a defrocked Catholic priest to preach the worst kind of anti-Semitism in a public forum. "[A] function of free speech," he wrote, "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."¹³⁵

Who can challenge this wisdom? Who can doubt that the *Johnson* decision recognizing flag burning as a form of protected speech transformed the Fourth of July from a day of mindless rest and relaxation into an occasion for the exchange of opinion and an opportunity to reconsider the meaning of Old Glory and the values for which it stands?

1989: THE UPROAR IN CONGRESS

The popular clamor against flag burners drowned out the Supreme Court opinions cautioning against slicing into the First Amendment. In Congress, the tide of outraged patriotism swept reason away. House Re-

131. *Hustler Magazine v. Falwell*, 485 U.S. 46, 55-56 (1988).

132. *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 514 (1969).

133. *Id.* at 508-09.

134. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

135. *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

publican Whip Newt Gingrich observed that "it would be 'hard to explain' a vote against a constitutional amendment to ban flag burning."¹³⁶ Few legislators made the effort. To the contrary, within a week a total of 172 House members and forty-three senators had signed thirty-nine separate resolutions for a constitutional amendment outlawing desecration of the flag.¹³⁷ In addition to the proposed constitutional amendments, legislators introduced fifty-two different bills on the issue.¹³⁸

House Speaker Tom Foley sought to stem the amendment stampede and insisted that "we ought to hear from constitutional scholars, from various witnesses. It is a deeply felt matter and it also touches upon the First Amendment."¹³⁹ Foley had the full support of Representative Jack Brooks of Texas, chairman of the Judiciary Committee, and Representative Don Edwards of California, chairman of the subcommittee with jurisdiction over constitutional amendments. Edwards was distressed that "a nincompoop in Dallas . . . could . . . trigger this reaction" and thought "James Madison and Thomas Jefferson would turn over in their graves if the Bill of Rights were amended [to restrict freedoms]."¹⁴⁰ Brooks, a Marine veteran of World War II, was a little rougher with his comment that "if anyone wants a test of patriotism, they should look at draft deferments."¹⁴¹ This barb was obviously aimed at Newt Gingrich, the Republican Whip, who sat out the Vietnam War with college deferments.¹⁴²

The Democratic strategy was to propose palatable resolutions and statutes, thereby avoiding the necessity of amending the Constitution. The party, however, was not unanimous on this maneuver. The influential congressman from Texas, Charles Wilson, stated that it was "silly to give the Republicans the flag."¹⁴³ But the Democratic leadership prevailed. On June 22, 1989, Senator Joseph Biden, chairman of the Senate Judiciary Committee, introduced an amendment to a pending child-care bill expressing "profound disappointment" with the Supreme Court decision in *Johnson v. Texas*. It passed by a landslide vote of ninety-three to three. Liberal Democrats Edward Kennedy of Massachusetts and How-

136. Joan Biskupic, *Flag-Burning Ruling Sparks Cries for Action on Hill*, 47 CONG. Q. 1622, 1622 (1989) (statement of Rep. Newt Gingrich, R-Ga.).

137. *Id.* at 1623.

138. Susan B. Glasser, *52 Anti-Flag-Burning Bills Introduced*, ROLL CALL, July 13, 1989, at 1.

139. Gerald F. Seib, *Bush to Seek Constitutional Amendment Outlawing the Burning of the U.S. Flag*, WALL ST. J., June 28, 1989, at A16.

140. Don Phillips & Tom Kenworthy, *Democrats Brace for Real Battle over Symbolism*, WASH. POST, June 28, 1989, at A5 (statement of Rep. Don Edwards, D-Cal.).

141. *Id.* (statement of Rep. Jack Brooks, D-Tex.).

142. *Id.*

143. *Id.*

ard Metzenbaum of Ohio were surprised to be joined by conservative Republican Gordon Humphrey of New Hampshire in opposition to Biden's amendment. Humphrey explained that

[n]o one likes desecration, but this seems to me an exercise in silliness and even a little bit of hypocrisy. I am going to vote against it knowing full well that all kinds of things will rain on my head. But, frankly, it strikes me as intellectually dishonest, and I just cannot live with it.¹⁴⁴

On June 27, the House, with only five dissenters, adopted a resolution introduced by Judiciary Committee Chairman Jack Brooks. The resolution (1) expressed a "profound concern over the Supreme Court's decision in *Texas v. Johnson*," (2) pledged a "continued commitment to preserve the honor and integrity of the flag," (3) "condemned all actions intended to desecrate the flag," and (4) urged "the American people to continue to display proudly the flag of the United States as a symbol of our Nation and the values for which it stands." Representative Edwards scheduled a series of hearings and a parade of witnesses to begin testifying after the traditional Fourth of July recess.

The President and Republican leaders in both the Senate and the House continued to press for a constitutional amendment. Senate Minority Leader Robert Dole, with fifty-three cosponsors, introduced an amendment that authorized the states and the federal government to protect the flag against desecration.¹⁴⁵

Senator Terry Sanford of North Carolina was one of the few who openly opposed such efforts. In a stirring speech on the floor of the Senate, Sanford recounted the following tale:

My wife and I celebrated our 47th wedding anniversary on July 4 of this year. We talked of many memories, including the decision we made when we were newly married and I had a challenging and prestigious job as a special agent of the FBI. World War II was underway. Several of our good friends had been killed at Pearl Harbor. My brother was there. He escaped being hit, and managed to get his ship underway and in pursuit of the enemy. Fortunately, he did not catch them right then, but in time he and the rest of the U.S. Navy did catch them. My friends from home and college were going into the Air Force, the Marines, the Navy, and the Army. As an FBI agent, I did not have to go.

That was our first big decision: I did have to go. We knew

144. *Lame Duck Hero*, ROLL CALL, June 29, 1989, at 4 (editorial).

145. Don Phillips & Helen Dewar, *Amendment on Flag Introduced*, WASH. POST, July 19, 1989, at A1.

that I had to be where my generation was, that I could not escape risking my life as my friends were risking their lives. President Franklin Roosevelt had reminded us that our generation had "a rendezvous with destiny." Our destiny was to defend freedom as the American patriots had defended it in the 18th Century.

I could not shirk that duty. I was rejected as a commissioned officer in the Marines, the Navy, and the Air Force because of 20/30 vision. The last laugh is that I still do not need glasses.

Very well, I would go as a private, but I was going for the purpose of combat. So we studied the recruiting pamphlet and decided I would volunteer as a paratrooper. They promised no KP duty, steak every day, and \$50 a month extra pay. They only delivered on the pay.

We reminisced about this and many other pleasant experiences we had shared for half a century, and talked about the Supreme Court and the burning of the flag. That was the big issue as we had left Washington.

I had fought under the flag. I had seen the flag cut down by enemy fire. We knew what the flag meant. My fellow soldiers and I had worn it on our shoulders into combat. Even when our uniforms were camouflaged, our flags were not.

We also knew why we were fighting. We did not need any slogans. We were fighting against tyranny, against dictatorships, and for freedom of the world. I doubt if we had many conversations about freedom, or the Bill of Rights, or the Flag. We had more urgent, and sometimes more trivial, things to talk about. I never had any second thoughts about where I was or what I was doing.

On our anniversary my wife and I talked about those days, and we talked about President Bush's demand that we amend the Bill of Rights because some fool had burned a flag at Mr. Reagan's nomination.

Wait a minute, Mr. President, we said. We defend the flag, we honor the flag, we salute the flag. It is not the President's to wrap himself in. It is ours.

Those who insult the flag, those who set fire to it, earn the wrath and condemnation they get from the rest of us, but the flag flies on—splendidly and easily prevailing over insult and injury.

The flag is the symbol of freedom, and it glorifies the Bill of Rights, the full text of freedom. We do not mutilate the flag.

Misguided people do. We must not mutilate the Bill of Rights. That would violate the very soul of liberty.

The President has said we must amend the Bill of Rights. The flag, he says, is in danger. We must do something the people of this nation have been unwilling to do for more than 200 years. These are the times that try men's souls, says the President. We must alter that great document of freedom, those bold words of freedom in which most of the rest of the people of the world invest their deepest hopes: America's Bill of Rights.

No, Mr. President, you can come out from behind the Stars and Stripes. That is where the Bill of Rights belongs. The flag is flying high and proud because it represents the Bill of Rights. We cannot protect the flag by diminishing the Bill of Rights. That would diminish the flag.

But the warnings come from all around: to vote against the President's flag amendment is to commit political suicide.

....

"Well," my wife and I decided, on that 1989 July 4 anniversary earlier this month almost a half a century after we helped put Adolf Hitler to rest: "Well, the risk of political suicide is not too big a price to pay to defend America's Bill of Rights." We have risked our lives before for the Bill of Rights.

I will not vote—not ever—to alter the Bill of Rights.¹⁴⁶

The Edwards Subcommittee on Civil and Constitutional Rights began hearings on July 13, 1989. The practical issue was whether to promote a constitutional amendment, the favored technique of Minority Leader Robert Michel, or a bill, the desired approach of Speaker Foley.

146. 135 CONG. REC. S9056-57 (daily ed. July 31, 1989) (statement of Sen. Terry Sanford, D-N.C.). *Washington Post* columnist Richard Cohen addressed the issue with biting satire:

Democrats ought to go Bush one better. Instead of merely supporting his proposed amendment, the party should revive every crackpot, cheap-shot, demagogic constitutional amendment proposed over the past 20 years. This Super Amendment would . . . ensure that the Democratic Party is once again identified with red-blooded Americanism.

The Super Amendment would, in a stroke, permit prayer in the schools, forbid busing for the purposes of integration, outlaw abortion in all 50 states (except where pregnancy results from rape by a furloughed prisoner), prohibit pornography and dial-a-porn services, mandate a balanced budget, weaken the Fifth Amendment's prohibition against self-incrimination to permit the drug testing of anyone, any place, any time and (whew!) update the Second Amendment's quaint language to leave no doubt that a citizen has an inalienable right to pack a rod. Such an amendment, if passed, would deprive the Republican Party of anything to say until way into the 21st century.

Richard Cohen, *A Super Amendment for Democrats*, WASH. POST, June 29, 1989, at A25.

Representative Ted Weiss of New York was one of the few members who thought it best to leave well enough alone. He wanted neither a bill nor an amendment.¹⁴⁷

A number of witnesses before the Subcommittee supported Weiss. Charles Fried, the former Reagan Administration Solicitor General, said that he refrained from intervening the government in the *Johnson* case because the Texas law "was not defensible."¹⁴⁸ The best course for Congress, he told the Subcommittee, was to "bravely do nothing."¹⁴⁹ Edwards replied: "Your point of view is the right point of view, but it's such a loser."¹⁵⁰ Representative Patricia Schroeder of Colorado pointed out to Fried that the Subcommittee was "not talking about a purist world: we're talking about a very political world."¹⁵¹ Fried, unfazed, replied: "There are times . . . when you earn your rather inadequate salary just by doing the right thing."¹⁵² Columnist Tom Wicker said "Amen to that," and quoted Benjamin Franklin: "'Those who would give up essential liberty to purchase a little temporary safety deserve neither liberty nor safety.'"¹⁵³

The Subcommittee elected to promote a bill, and the full Judiciary Committee agreed "to quell the flag-burning [controversy] with a bill, not a constitutional amendment."¹⁵⁴ Similar to the bill proposed by Senator Joe Biden on the Senate side, it stated: "Whoever knowingly mutilates, defaces, burns 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."¹⁵⁵ The bill also provided for an "expedited review" by the Supreme Court: if a constitutional argument was raised in the trial of any flag desecrater, the trial court was to certify that question immediately to the Supreme Court.¹⁵⁶ With time on their side, the Democrats postponed the debate and vote on the bill until after the August recess.

147. Don Phillips, *Constitutional Flag-Burning Ban Vexes Lawmakers*, WASH. POST, July 13, 1989, at A4.

148. Don Phillips, *House Panel Gets Conflicting Advice on Dealing with Flag Desecration*, WASH. POST, July 20, 1989, at A17 (statement of Charles Fried).

149. Tom Wicker, *Bravely Do Nothing*, N.Y. TIMES, July 21, 1989, at A29 (statement of Charles Fried).

150. Phillips, *supra* note 148, at A17 (statement of Rep. Don Edwards, D-Cal.).

151. Wicker, *supra* note 149, at A29 (statement of Rep. Patricia Schroeder, D-Colo.).

152. *Id.* (statement of Charles Fried).

153. *Id.* (quoting Benjamin Franklin).

154. Joan Biskupic, *House Committee OKs Measure to Outlaw Flag Desecration*, 47 CONG. Q. 1963, 1963 (1989).

155. H.R. 2978, 101st Cong., 1st Sess. § 2(a) (1989).

156. *Id.* § 3.

The *Washington Post*, in a front page story on July 25, 1989, reported that

[i]n the first few days after the Supreme Court threw out the Texas law prohibiting flag burning, Sen. Nancy Kassebaum (R-Kan.) received 224 pages of petitions from Kansas calling for a constitutional amendment to reverse the court ruling.

But now 60 percent of her mail is running against amending the Constitution, and Kassebaum, who supports a flag amendment, is taking heat for her stand. Much of the pressure is coming from young people, including her four children.¹⁵⁷

On September 12, 1989, the House enacted the proposed bill by a vote of 380 yeas and 38 nays, with 12 not voting.¹⁵⁸ On October 5, the Senate followed suit by a vote of 91-9.¹⁵⁹ Then, on October 19, the Senate took up the proposed amendment. It failed to command the required two-thirds majority.¹⁶⁰ Columnist James Kilpatrick concluded that after all the fuss and fury we are left with a worthless law, because

[n]o one is going to mutilate, deface, defile, burn or trample upon a flag except as an act of political protest. When some punk artist in Chicago spread the flag upon the floor and called it sculpture, the jerk was trying to say something offensive about the land he lives in. This is his clear constitutional right. If the First Amendment doesn't protect offensive expression, it protects nothing at all.¹⁶¹

What caused the defeat of the constitutional amendment? Certainly many in Congress agreed with Democratic Representative William D. Ford of Michigan, when he said: "To me, the Ten Commandments and the ten amendments of the Bill of Rights are the most sacred documents ever written. I would not tamper with either of them. And I wouldn't trust the Congress or any group of modern politicians to improve them either."¹⁶²

A look at history amply supports Representative Ford's position.

157. Helen Dewar & Tom Kenworthy, *Support Lags for Amendment to Prohibit Flag Burning*, WASH. POST, July 25, 1989, at A1.

158. 135 CONG. REC. H5562 (daily ed. Sept. 12, 1989).

159. *Id.* at D1131 (daily ed. Oct. 5, 1989).

160. *Id.* at D1203 (daily ed. Oct. 19, 1989) (51 yeas to 48 nays).

161. James Kilpatrick, *Flag Flap Ends with a Worthless Law*, CHAPEL HILL NEWSPAPER, Oct. 29, 1989, at A4.

162. 135 CONG. REC. H5511 (daily ed. Sept. 12, 1989) (statement of Rep. William Ford, D-Mich.).

THE HISTORICAL SIGNIFICANCE OF THE BILL OF RIGHTS

Those like President Bush, who press for a flag-burning amendment even if it erodes the Bill of Rights, forget our history. They forget that we would have neither nation nor flag without the First Amendment. Our Constitution was ratified with the understanding that the First Congress would give us a bill of rights, would guarantee free speech, a free press, a free pulpit, and other blessings of liberty. We should hesitate to invade this historical inheritance.

The Call for State Conventions to Ratify the Constitution

The framers of our Constitution met in Philadelphia for four months in the summer and early fall of 1787. Their work completed, they resolved on September 17th that the Constitution be "laid before the United States in [the Continental] Congress assembled" and thereafter be submitted in each state "to a Convention of Delegates, chosen by the People thereof" for their "Assent and Ratification." As soon as nine states "shall have ratified the Constitution," the Continental Congress was to set the "Time and Place for commencing proceedings under this Constitution."

The framers had met behind closed doors, and there was a great deal of curiosity concerning what the most distinguished men of America had prepared. A crowd gathered around Convention Hall when the work was done and asked Benjamin Franklin as he emerged, "What have you given us?" His reply was, "A republic, if you can keep it." But when the Constitution was published in Philadelphia papers on September 19, 1787, many who read it were not satisfied, for lack of a bill of rights, that the framers had created a republic.

George Mason of Virginia and Elbridge Gerry of Massachusetts had moved, in the closing days of the convention, that a committee be appointed to prepare a bill of rights. The motion was defeated by a unanimous vote of the states.¹⁶³ James Wilson, the principal spokesman for ratification at the Pennsylvania convention, explained that the framers had contemplated a limited government of "enumerated powers." In other words, if the powers were not enumerated expressly, they did not exist. Therefore, there was no need for a bill of rights. Indeed, a bill of rights would be redundant and might even boomerang because it was impossible to "undertake a perfect enumeration of the civil rights of mankind," said Wilson, and because the rights not enumerated would be

163. 1 JONATHAN ELLIOT, ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 306 (2d ed. Philadelphia, J.B. Lippincott 1845).

“thrown into the hands of the government.”¹⁶⁴ But the absence of a bill of rights was a prime concern, increasingly so as the ratification debate waged on state by state.

On September 27, Richard Henry Lee of Virginia proposed that the Continental Congress add a bill of rights.¹⁶⁵ The Congress rejected his proposal, and the proposed Constitution was sent to the states without alteration or approval “in conformity to the resolves of the Convention.”¹⁶⁶

The Ratification Debates

The Delaware convention was the first to ratify the Constitution. The delegates had read the reports in the Philadelphia papers and had listened to the debates pro and con. Satisfied that its interests were protected by equal representation in the Senate, the delegates unanimously ratified and adopted the Constitution on December 7, 1787.¹⁶⁷

The Pennsylvania convention was then in session and received this news with gratification. But the decision to ratify was not unanimous. The delegates from the counties west of the Susquehanna objected to the Constitution for its lack of a bill of rights. They failed, however, to bring forward specific propositions or to enumerate those rights they deemed basic, as was done in subsequent state conventions.¹⁶⁸ It was difficult to vote in favor of the abstract, and the final vote in Pennsylvania was forty-six aye, twenty-three nay.¹⁶⁹

Some of the Pennsylvania delegates expressed reservations about the slave trade. James Wilson, the chief spokesman for the Constitution, responded:

Under the present Confederation, the states may admit the importation of slaves as long as they please; but by this article [Art. 1, sec. 9], after the year 1808, Congress will have the power to prohibit such importation, notwithstanding the disposition of any state to the contrary. I consider this as laying the foundation for banishing slavery out of this country . . . and in the mean time, the *new* states which are to be formed will be under *the control* of Congress in this particular, and slaves will

164. 2 GEORGE T. CURTIS, HISTORY OF THE ORIGIN, FORMATION AND ADOPTION OF THE CONSTITUTION OF THE UNITED STATES 522 (New York, Harper and Bros. 1858).

165. *Id.* at 500-01.

166. *Id.*

167. *Id.* at 518-19; 1 ELLIOT, *supra* note 163, at 319.

168. 2 CURTIS, *supra* note 164, at 521-23.

169. *Id.* at 524.

never be introduced amongst them.¹⁷⁰

After the convention, a conference of leading citizens met in Harrisburg on September 3, 1788, and adopted a resolution urging amendments once the Constitution was ratified by the requisite number of states. Eleven amendments were specified, including several relating to the "war powers." One provided that "no standing army of regular troops shall be raised or kept up in time of peace, without the consent of two-thirds of both houses in Congress." Another provided that the militia of any state would not "be continued in active service longer than two months, under any call of Congress, without the consent of the legislature of such state."¹⁷¹

The ratification debate then moved to New Jersey. Lying between the great commercial states of New York and Pennsylvania (each with tariff barriers and revenue systems to protect its own goals), New Jersey had insisted at the Constitutional Convention that the regulation of commerce ought to be vested in the general government. In addition, along with the other smaller states, New Jersey had insisted upon the compromise that the House of Representatives be based on population, but that each state have equal representation in the Senate. Content with this security, the New Jersey delegates unanimously ratified the Constitution on December 18, six days after Pennsylvania's ratification.¹⁷²

A few days later, on January 2, 1788, Georgia unanimously ratified the Constitution. Georgia's delegates to the National Convention had resisted loss of her control over the slave trade, but then agreed to the compromise that Congress would not prohibit it "prior to the year one thousand eight hundred and eight."¹⁷³ With a "large, powerful, and cruel tribe of Indians" pressing upon her western settlements and looking south to the "unfriendly territory of a Spanish colony" in Florida, Georgia "felt the want of a general government able to resist, with a stronger hand than that of the Confederation, the evils which pressed upon [her]."¹⁷⁴

The Connecticut convention met on January 4, 1788. Only fragments of the debates are preserved and these indicate that the chief arguments against the Constitution were the general power of taxation and the particular power of laying imposts. Oliver Ellsworth (a delegate to the National Convention) allayed these concerns, and a large majority of

170. 2 ELLIOT, *supra* note 163, at 452.

171. *Id.* at 542-46.

172. 2 CURTIS, *supra* note 164, at 525-26; 1 ELLIOT, *supra* note 163, at 320-21.

173. U.S. CONST. art. 1, § 9, cl. 1.

174. 2 CURTIS, *supra* note 164, at 526-27.

the Connecticut delegates ratified the Constitution on January 9, 1788.¹⁷⁵

Alexander Wolcott, a leading Federalist, assured the delegates that there were sufficient safeguards in the Constitution without a bill of rights because

“[i]t is founded upon the election of the people. . . . [I]f it is to be altered hereafter, it must be with the consent of the people. This is all the security in favor of liberty that can be expected. Mankind may become corrupt, and give up the cause of freedom; but I believe that love of liberty which prevails among the people of this country will prevent such a direful calamity.”¹⁷⁶

Wolcott also had to defend the provision in Article IV prohibiting any religious test as a qualification for office:

“I do not believe that the United States would ever be disposed to establish one religious sect, and lay all others under legal disabilities. But as we know not what may take place hereafter, and any such test would be exceedingly injurious to the rights of free citizens, I cannot think it altogether superfluous to have added a clause, which secures us from the possibility of such oppression.”¹⁷⁷

Five of the nine states that were required to establish the new government had ratified the Constitution within a matter of several months. But then trouble mounted. The critical states of Massachusetts, New York, and Virginia were still to meet in convention, and formidable opposition to the Constitution was known to be forthcoming, as elected officials had been instructed to vote “nay.” If all three adopted the Constitution, the required ninth state had to be found in either New Hampshire, Maryland, North Carolina, or South Carolina.¹⁷⁸ Few expected Rhode Island to vote for ratification.

The Constitution was well received in Massachusetts on its first publication, and Mr. Gerry was a “good deal censured” for his refusal to sign.¹⁷⁹ But in a short time three parties emerged. Those who lived in the district of Maine would vote either way, depending on how their vote would facilitate their wish for statehood.¹⁸⁰ This group numbered two sevenths of the elected delegates. The rest of the delegates were divided

175. *Id.* at 527-29; 1 ELLIOT, *supra* note 163, at 322.

176. 2 ELLIOT, *supra* note 163, at 202 (quoting Alexander Wolcott).

177. *Id.* (quoting Alexander Wolcott).

178. 2 CURTIS, *supra* note 164, at 529-30.

179. *Id.* at 501 (delegate from Mass.).

180. *Id.* Maine gained statehood in 1820 as part of the Missouri Compromise: Maine was to be a free state, Missouri was to be a slave state, and the rest of the Louisiana Purchase north of latitude 36° 30' was to be free soil forever. JOHNSON, *supra* note 107, at 536.

into two groups: the merchants and the bankers, favoring the Constitution, and the farmers, who opposed it.¹⁸¹ This division resulted from what is known as Shays' Rebellion.¹⁸²

The bankers, merchants, and business interests favored the proposed Constitution because of the provisions that barred the states from making "any Thing but gold and silver Coin a Tender in Payment of Debts," and from enacting any law "impairing the Obligation of Contracts."¹⁸³ The farmers opposed the Constitution because of these same provisions.¹⁸⁴

The others who joined Shays' farmers in opposing the Constitution were those who felt the need for a bill of rights. In no state was the spirit of liberty more jealous and exacting than in Massachusetts. The Massachusetts Constitution, adopted at the outset of the Revolution, was filled with provisions designed to stand as bulwarks between the power of the few and the rights of the many.¹⁸⁵

The Massachusetts convention opened on January 9, 1788 with Samuel Adams leading the opposition, which consisted of about twenty farmers who had marched with Shays' army, the delegates from the district of Maine, and those who insisted upon a bill of rights. They composed the original majority. Obviously, the "federalists" had to compromise if the Constitution was to be adopted.¹⁸⁶

The debate was fast and furious; the comments by one Major Lusk offer some of its flavor. The records state that he,

in the most pathetic and feeling manner, described the miseries of the poor natives of Africa, who are kidnapped and sold for slaves. With the brightest colors he painted their happiness and ease on the native shores, and contrasted them with their

181. 2 CURTIS, *supra* note 164, at 501-02.

182. JOHNSON, *supra* note 107, at 719; see Daniel H. Pollitt, *Presidential Use of Troops to Execute the Laws: A Brief History*, 36 N.C. L. REV. 117, 118-20 (1958).

In the immediate post-Revolutionary war years there was a depression in Massachusetts. Many incoming and outgoing ships had been sunk or captured by the British, and many farms had gone untended while the farmers were fighting in the war. At the war's end, the banks attempted to collect overdue mortgage payments, and the farmers resisted by turning away the judges who attempted to hold court. The confrontation escalated into an armed rebellion by the farmers under the leadership of Daniel Shays. The militia from the eastern counties won the shooting war (about twenty casualties), but the farmers won control of the legislature and enacted mortgage moratorium laws, which provided that mortgages could be paid off with "paper money" or, in some cases, with fresh farm produce. The so-called "Shays' Rebellion" had ramifications in the adjacent states. *Id.*

183. U.S. CONST. art. 1, § 10, cl. 1.

184. 2 CURTIS, *supra* note 164, at 501-02.

185. *Id.* at 531-32.

186. *Id.* at 538.

wretched, miserable, and unhappy condition, in the state of slavery. From this subject he passed to the article dispensing with the qualification of a religious test, and concluded by saying, that he shuddered at the idea that Roman Catholics, Papists, and Pagans might be introduced into office, and that Popery and the Inquisition may be established in America.¹⁸⁷

After some weeks of debate, on January 30, Governor John Hancock (who opposed the Constitution as presented) proposed that the convention ratify the Constitution on the condition that the Congress immediately proceed to consider specific amendments.¹⁸⁸ The convention agreed to Hancock's compromise and ratified the Constitution on February 7 by a majority of nineteen votes: 187 "yeas" to 168 "nays."¹⁸⁹ This result established a pattern for the remaining states to follow.

The convention in New Hampshire opened as the Massachusetts convention was completing its tasks. The population was chiefly rural, and generally sympathized with the western Massachusetts farmers during Shays' Rebellion. They had elected a majority of delegates who were opposed to the Constitution.¹⁹⁰ The minority that favored the Constitution, borrowing a leaf from the tree that the Massachusetts delegation had planted, decided to move for ratification with the understanding that amendments would be forthcoming.¹⁹¹ The convention then adjourned so that the delegates could have an opportunity to present this information to their constituents, who had instructed them to oppose ratification. The delegation reconvened in mid-June and adopted both the Constitution and the proposed amendments.¹⁹²

Only a few fragments of the New Hampshire convention were preserved, and they deal exclusively with the evils of the slave trade, described as "manstealing."¹⁹³ The Honorable Joshua Atherton spoke with feeling on this subject, saying:

"Let us figure to ourselves a company of these manstealers, well equipped for the enterprise, arriving on our coast. They seize and carry off the whole or a part of the inhabitants of the town of Exeter. . . . [S]tripped of every comfort of life, like beasts of prey—they are hurried on a loathsome and distressing voyage to the coast of Africa A parent is sold to one, a son to another, and a daughter to a third! . . . Broken with every dis-

187. 2 ELLIOT, *supra* note 163, at 148.

188. *Id.* at 122-23.

189. 2 CURTIS, *supra* note 164, at 537-38.

190. *Id.* at 514.

191. *Id.* at 541.

192. *Id.* at 542; 1 ELLIOT, *supra* note 163, at 325-27.

193. 2 ELLIOT, *supra* note 163, at 204.

tress that human nature can feel, and bedewed with tears of anguish, they are dragged into the last stage of depression and slavery, never, never to behold the faces of one another again! The scene is too affecting. I have not fortitude to pursue the subject!"¹⁹⁴

The legislature of Maryland met in December of 1787 and directed the Maryland delegates to the Constitutional Convention to explain the proposed Constitution. Luther Martin laid before the legislature a detailed account of the Constitutional Convention proceedings and argued against ratification. He cautioned that substituting a House of Representatives based on population for the existing federal league of states, characterized by equal representation, would destroy the power of state governments. But to most of the legislators, it was clear that the old confederation had failed and something more was needed. Accordingly, the legislature ordered a convention to meet on April 21, 1788,¹⁹⁵ and the majority of the elected delegates were instructed by their constituents to ratify the Constitution as speedily as possible, and "to do no other act." The convention ratified the Constitution on April 28 by a vote of sixty-three yeas and eleven nays.¹⁹⁶ The majority refused to entertain a motion for amendments.¹⁹⁷

Among the proposed amendments were several relating to war powers:

That the militia . . . shall not be marched beyond the limits of an adjoining state, without the consent of their legislature or executive;

That no standing army shall be kept up in time of peace, unless with the consent of two thirds of the members present of each branch of Congress;

That no person conscientiously scrupulous of bearing arms, in any case, shall be compelled personally to serve as a soldier.¹⁹⁸

The issue then moved to the state of South Carolina. The state legislature debated for three days on whether to call a state convention. Representatives were concerned over the slave trade, the federal regulation of commerce, and the lack of a bill of rights.¹⁹⁹ Opponents were concerned over the power given to Congress to end the slave trade in 1808. Propo-

194. *Id.* (quoting Joshua Atherton).

195. 2 CURTIS, *supra* note 164, at 514.

196. 2 ELLIOT, *supra* note 163, at 549.

197. *Id.* at 548; 2 CURTIS, *supra* note 164, at 543.

198. 2 ELLIOT, *supra* note 163, at 552-53.

199. 2 CURTIS, *supra* note 164, at 510-11.

nents replied that it should be possible within twenty years to acquire all the slave labor the state would need, and emphasized that the Constitution secured a right that did not previously exist—the right to recover a slave that might escape into other states.²⁰⁰ South Carolina was then a great exporting state and feared that the Commerce Clause might be used by Congress to restrict American shipping to “American bottoms.” Proponents replied that there was no need to rely upon foreign vessels, as there was more than enough New England shipping available.²⁰¹

On May 23, 1788, South Carolina ratified the Constitution by a vote of 149 to 73, but not until it was agreed that the state would present to Congress the same amendments proposed by Massachusetts.²⁰² The delegates undoubtedly were swayed by speeches such as that given by Patrick Dollard. He pointed out that “in the late bloody contest,” the people he had had the honor to represent “fought, bled, and conquered, in defense of their civil rights and privileges, which they expected to transmit untainted to their posterity.” He remarked that

“[t]hey are nearly all, to a man, opposed to this new Constitution, because, they say, they have omitted to insert a bill of rights therein, ascertaining and fundamentally establishing, the unalienable rights of man, without a full, free, and secure enjoyment of which there can be no liberty.”²⁰³

With South Carolina’s vote, eight states had ratified the Constitution.

The Virginia debate involved a battle of the titans. Thomas Jefferson, from his diplomatic post abroad, opposed the Constitution because of his belief that no government should be organized without express and positive restraints to guard the liberties of the people, even if those liberties should periodically break into licentiousness.²⁰⁴ His original suggestion was that nine states should adopt the Constitution unconditionally, and that the four remaining states should accept on the previous condition that certain amendments be made. But when Jefferson saw the results of the Massachusetts convention, he authorized his friends to say that he favored unconditional acceptance by each state with subsequent amendments as permitted by the Constitution.²⁰⁵

Meanwhile, the Anti-Federalist forces at home in Virginia were led by Patrick Henry, with able assistance from George Mason, Richard Henry Lee, and Benjamin Harrison. Leading the advocates were James

200. See U.S. CONST. art. IV, § 2, cl. 3.

201. 2 CURTIS, *supra* note 164, at 545-47.

202. *Id.* at 548.

203. 4 ELLIOT, *supra* note 163, at 337 (quoting Patrick Dollard).

204. 2 CURTIS, *supra* note 164, at 506-07.

205. *Id.* at 508.

Madison and John Marshall. Governor Edmund Randolph occupied a middle position, but finally supported ratification.²⁰⁶

George Washington, upon his return to Mount Vernon from the National Convention, sent copies of the Constitution to Henry, Mason, and others whose opposition he anticipated, urging that the Virginia legislature call a popular convention to consider and ratify the Constitution.²⁰⁷

When the Virginia Legislature assembled in October of 1787, Patrick Henry requested that this be done, and the election of delegates to a popular convention was ordered to be held in March and April of the following spring. When the convention assembled on June 2, 1788, the Federalists appeared to have a majority.²⁰⁸ They were led by James Madison and John Marshall, with the prestige of George Washington looming in the background. Patrick Henry began the debate with the proposition that a bill of rights is "essential in every republican government that is clothed with powers of direct legislation."²⁰⁹ Governor Edmund Randolph, who had refused initially to sign the Constitution,²¹⁰ now favored its adoption if a bill of rights also would be adopted.²¹¹ Ultimately, the contest was between those who favored ratification followed by amendments (the Randolph-Madison view) and those who, with Patrick Henry, favored postponing ratification until Virginia sent its proposed amendments to the other states for consideration.²¹² On June 25, the Henry resolution was defeated by eight votes and the Constitution was then ratified by a vote of eighty-nine ayes, seventy-nine nays. Virginia then adopted a bill of rights for presentation to Congress.²¹³ This was shortly after the New York convention opened in Poughkeepsie.²¹⁴

In New York, the city and the southern counties favored the Constitution. It was in trouble everywhere else. Governor George Clinton opposed it, and indicated as much when the legislature met in January. Resolutions calling for a state convention passed by bare majorities of three in the Senate and two in the House. When New York elected delegates in April, it appeared that Anti-Federalists had won two-thirds of

206. *Id.* at 505-06.

207. *Id.* at 509.

208. *Id.* at 510.

209. *Id.* at 554.

210. *Id.* at 555. Randolph, George Mason, and Elbridge Gerry were the three delegates who refused to sign the Constitution. ARTHUR T. PRESCOTT, *DRAFTING THE FEDERAL CONSTITUTION* 157-58 (1968).

211. 2 CURTIS, *supra* note 164, at 556.

212. *Id.* at 580.

213. *Id.* at 581.

214. *Id.* at 504.

the seats.²¹⁵ Their strategy was to meet at the appointed time in June, and then adjourn for a year. If nine states ratified the Constitution, New York would have an opportunity to witness the government in action, and act accordingly. The Anti-Federalists rejected an outright turn-down of the Constitution, for fear that the southern counties might secede and form a new state.²¹⁶ Alexander Hamilton, James Madison, and John Jay sought to turn the tide with a series of essays on the Constitution, which became known as the *Federalist Papers*.²¹⁷

While the delegates debated in Poughkeepsie, news came on the twenty-fourth of June that New Hampshire, the required ninth state, had ratified the Constitution on the twenty-first. The old Confederation was now dissolved.²¹⁸ Would New York join the new Union, or stand alone?

Then came the news that Virginia, the so-called "tenth pillar of the temple of liberty," had ratified the Constitution on June 25.²¹⁹ The New York Anti-Federalists stood firm, but they became divided in their form of opposition. Some favored the adoption of a bill of rights by a convention of the states as a condition precedent to ratifying the Constitution.²²⁰ Others favored immediate ratification, but on condition that New York retain the right to secede from the Union within five or six years if certain amendments were not adopted.²²¹

The debate continued. On July 16, 1787, the Federalist motion for unconditional ratification was defeated.²²² The convention then rejected the Anti-Federalist motion that the Constitution be adopted "on condition" that a bill of rights be enacted. A compromise resolution proposed that the Constitution be adopted "in full confidence" that Congress would not abuse its powers until the proposed amendments were adopted.²²³ This was carried by a vote of thirty-one ayes to twenty-seven nays. The Constitution, with a proposed bill of rights attached, was adopted on July 26 by a vote of thirty ayes, twenty-six nays.²²⁴

The North Carolina legislature met in December of 1787 and ordered a convention to meet in Hillsborough on July 21, 1788. Anti-Federalists dominated the convention. They knew that New Hampshire and

215. *Id.* at 502-03.

216. *Id.* at 504.

217. *Id.* at 503.

218. *Id.* at 573-74.

219. *Id.* at 582.

220. *Id.* at 584.

221. *Id.* at 587.

222. *Id.* at 588.

223. *Id.*

224. *Id.* at 588-89.

Virginia had ratified the Constitution (news of New York's ratification did not come until later), and they knew that five of the states had proposed amendments for the consideration of the first Congress simultaneous with ratification.

The Federalists urged strenuously that North Carolina do the same, but the majority was not convinced. The convention decided to wait it out, and adopted a resolution declaring that a bill of rights be laid before Congress and adopted as a condition of North Carolina's ratification of the Constitution. This resolution was passed on August 2, 1788, by a vote of one hundred eighty-four ayes, eighty-four nays.

But North Carolina was careful to leave its door to the new nation wide open. On the assumption that the new Congress would lay imposts on goods imported into the states of the new nation, the convention recommended that the North Carolina legislature lay a similar impost on goods imported into the state, and appropriate the proceeds to the use of Congress.²²⁵

Rhode Island, founded by Roger Williams and others fleeing religious persecution in Massachusetts and other New England states, enjoyed a long tradition of religious and civil freedom and possessed a high spirit of individual and public independence.²²⁶ Further, there was a dominant "paper-money party" of farmers, united against the merchants and bankers of Providence and Newport.²²⁷ When the Rhode Island General Assembly received the Constitution in October of 1787, it directed that it be published and circulated among all of the citizens of the state.²²⁸ In February 1788, instead of calling a statewide convention of elected delegates, the adoption of the Constitution was referred to the freemen in their several town meetings.²²⁹ It was rejected by a vote of 2,703 to 232.²³⁰ The Federalists in Providence and Newport then petitioned the General Assembly to call a state convention at which opposing views could be heard and discussed, and amendments agreed upon if this was deemed desirable. The applications were denied, and the state of Rhode Island was not represented in New York when the Continental Congress met in July 1788 to organize the new government.²³¹

The rest of the story is familiar. The First Congress in its first session appointed James Madison to head a committee to sift through the

225. 4 ELLIOT, *supra* note 163, at 250-51.

226. 2 CURTIS, *supra* note 164, at 598.

227. *Id.* at 599-600.

228. *Id.* at 602.

229. *Id.*

230. *Id.* at 602 n.1.

231. *Id.* at 602-03.

various petitions and propose amendments to the Constitution. This he did, and the result is our Bill of Rights, ratified by the states on December 15, 1791. The very first provision of our Bill of Rights provides that the Congress shall make no law "abridging the freedom of speech."

It was this history—not a flag burning by youthful fanatics seeking a symbol for their discontent—that persuaded Representative Ford and others in Congress that they would not amend the First Amendment, as requested by President Bush.

1990: THE *EICHMAN* DECISION

The Flag Protection Act became law on October 28, 1989. From that moment protesters began to burn flags against what they described as "enforced patriotism." At 12:01 a.m. on October 28, Gregory Johnson (earlier catapulted into the headlines by his Dallas flag-burning episode) with companions Shawn Eichman, David Blalock, and Scott Tyler, burned a flag in New York.²³² Nothing happened. On October 30, they burned a flag on the Capitol steps in Washington, D.C. This time they provoked arrest, although the United States Attorney refused to bring charges against Johnson.²³³ Meanwhile in Seattle, four young people protested the Act's passage with a flag-burning ceremony. They too were arrested.

The defendants in Seattle and Washington, D.C. were acquitted when the respective federal trial judges ruled that the Flag Protection Act was unconstitutional under the First Amendment.²³⁴ Judge Barbara Rothstein in Seattle wrote that "for the flag to endure as a symbol of freedom in this nation, we must protect with equal vigor the right to wave it and the right to destroy it."²³⁵ In the District of Columbia, Judge June Green noted that "the right to dissent is sometimes an albatross which burdens society with its offensive sounds. Yet, political dissent lies at the heart of the First Amendment's protection."²³⁶ She added that the First Amendment would not be needed "if the persons who exercise their right of free expression by words and action were all pleasing, loveable persons with whom the rest of [us] agreed."²³⁷

232. David Cole, *Flagging Issue for Mr. Bush*, NAT'L L.J., Nov. 20, 1989, at 13.

233. *Id.*

234. Jack Germond & Jules Witcover, *Flag-Burning Folly Flies Again*, RALEIGH NEWS & OBSERVER, Mar. 8, 1990, at 19A.

235. *United States v. Haggerty*, 731 F. Supp. 415, 422 (W.D. Wash.), *aff'd*, 110 S. Ct. 2404 (1990).

236. *United States v. Eichman*, 731 F. Supp. 1123, 1131 (D.D.C.), *aff'd*, 110 S. Ct. 2404 (1990).

237. *Id.*

These decisions put the new flag law on the fast track. Under the expedited appeal process the cases went directly to the Supreme Court. On June 11, 1990, the Supreme Court ruled in *United States v. Eichman* that the Flag Protection Act, like the Texas desecration law before it, violated the First Amendment.²³⁸

As in *Johnson*, Justice Brennan wrote the majority opinion. He was joined by Justices Marshall, Blackmun, Scalia, and Kennedy. In a brief, eight-page treatment harking back to his earlier opinion in *Johnson*, Justice Brennan wrote that the Flag Protection Act, like the earlier Texas law, was aimed at the "communicative impact of flag destruction."²³⁹ The criminalization of any act which "mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag"²⁴⁰ "unmistakably connotes disrespectful treatment of the flag and suggests a focus on those acts likely to damage the flag's symbolic value."²⁴¹ Brennan again relied upon the "bedrock principle underlying the First Amendment," that "the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."²⁴² He declined to reassess this conclusion because of a purported "national consensus" favoring a prohibition on flag burning, because "any suggestion that the Government's interest in suppressing speech becomes more weighty as popular opposition to that speech grows is foreign to the First Amendment."²⁴³ He concluded with the thought that "punishing desecration of the flag dilutes the very freedom that makes this emblem so revered, and worth revering."²⁴⁴

Justice Stevens's brief dissent²⁴⁵ argued that the "Government's legitimate interest in preserving the symbolic value of the flag" outweighs the flag burner's right to communicate. The flag burner, he explained, "may express his or her idea by other means," and while they may be less effective in drawing attention, "that is not itself a sufficient reason for immunizing flag burning."²⁴⁶ Justice Stevens then observed, in words later repeated time and again in congressional debate by those favoring the amendment, that "[p]resumably a gigantic fireworks display or a parade of nude models in a public park might draw even more attention

238. *United States v. Eichman*, 110 S. Ct. 2404, 2410 (1990).

239. *Id.* at 2405.

240. 18 U.S.C.A. § 700 (West Supp. 1990).

241. *Eichman*, 110 S. Ct. at 2405.

242. *Id.* at 2410.

243. *Id.* at 2405.

244. *Id.* at 2410.

245. *Id.* at 2411 (Stevens, J., dissenting). Chief Justice Rehnquist, Justice White, and Justice O'Connor joined this dissent.

246. *Id.* (Stevens, J., dissenting).

to a controversial message, but such methods of expression are nevertheless subject to regulation."²⁴⁷

In closing, Justice Stevens lamented, again in words oft repeated in subsequent congressional debate by those opposing a constitutional amendment, that the symbolic value of the flag "is not the same today as it was yesterday" because it "has been compromised by those leaders who seem to . . . manipulate the symbol of national purpose into a pretext for partisan disputes about meaner ends."²⁴⁸

THE ENSUING DEBATE ON A PROPOSED CONSTITUTIONAL AMENDMENT

The ink had hardly dried on the *Eichman* opinion before President Bush announced he would "continue to press" for a constitutional amendment²⁴⁹ because the decision "endangers the fabric of our country."²⁵⁰ At a Rose Garden ceremony he said that the flag burners must be punished, and called for an amendment by July 4.²⁵¹ When a reporter asked if it was necessary to tamper with the Bill of Rights, the President replied that he was for "free speech. But I am for protecting the flag against desecration. . . . [T]he law books are full of restrictions on free speech. And we ought to have this be one of them."²⁵²

On Flag Day, June 14, President Bush made a sunrise visit to the Vietnam Veterans' Memorial and stood at attention as one flag was lowered and a new flag, earlier flown over the White House, was run up the flag pole. By 7:00 a.m. he was back at the White House. "The networks had their presidential images for the morning shows and the evening newscasts."²⁵³

When asked after all this whether the President intended to "demagogue" the flag issue, a White House spokesman said no, "[t]hat's what

247. *Id.* (Stevens, J., dissenting).

248. *Id.* at 2412 (Stevens, J., dissenting).

249. Ruth Marcus, *Justices Overturn Federal Flag Law*, WASH. POST, June 12, 1990, at A1 (statement of President Bush).

250. Joan Biskupic, *Congress Snaps to Attention over New Flag Proposal*, 48 CONG. Q. 1877, 1877 (1990) (statement of President Bush).

251. Chris Harvey, *GOP Set to Make Flag Burning Decision Campaign Issue*, WASH. TIMES, June 13, 1990, at A3. Barbara Bush, usually silent on political matters, told reporters, "I'm with the President on that." Steven A. Holmes, *House Flag-Burning Amendment Advances on Subcommittee Vote*, N.Y. TIMES, June 14, 1990, at B10 (statement of Barbara Bush).

252. Dan Balz & Tom Kenworthy, *Bush Again Calls for Flag Amendment*, WASH. POST, June 13, 1990, at A9 (statement of President Bush).

253. Dan Balz, *The President and Politics of the Flag*, WASH. POST, June 17, 1990, at A12.

he's got Dole for."²⁵⁴

Senate Minority Leader Robert Dole seemed to relish his role as designated demagogue. He and Robert Michel, his counterpart in the House, introduced identical proposed amendments to the Constitution: "The Congress and the States shall have power to prohibit the physical desecration of the Flag of the United States."²⁵⁵ Then, wearing a small flag, Dole urged a floor vote on Flag Day, because the issue would "make a good 30-second spot."²⁵⁶ When asked if an opponent could defend his stand, Dole replied, "I think he could at a bar association meeting, but not before real people."²⁵⁷ House Minority Leader Michel predicted quick adoption of the proposed amendment, asking, "Who wants to be against the flag, mother and apple pie?"²⁵⁸

Ed Rollins, cochair of the Republican House Campaign Committee, also was delighted at the prospects of a floor vote. "Democrats are definitely not going to get a free ride on this,"²⁵⁹ he said, because it was "a defining issue, like Bush using the ACLU issue against Dukakis."²⁶⁰

Republican expectations seemed justified. Gallup polls showed that seventy-one percent of the American people supported a constitutional amendment.²⁶¹ Both Joseph Biden, Democratic chairman of the Senate Judiciary Committee, and Jack Brooks, his House counterpart, announced support for an amendment.²⁶² Beyond the Beltway, Virginia's governor, Douglas Wilder, announced support "because his combat tour in Korea made him 'emotional' about the flag."²⁶³

Comments that "Florida would support a constitutional amendment in a flash" were echoed by legislators in Pennsylvania, Maryland, Louisiana, Indiana, Tennessee, and Vermont.²⁶⁴ In fact, the Maryland legislature overwhelmingly enacted a law prohibiting the desecration of the flag

254. Balz & Kenworthy, *supra* note 252, at A9 (statement of unidentified White House official).

255. David Shribman & Stephen Wermiel, *Justices Strike Down Flag-Burning Law, Reviving a Push to Amend Constitution*, WALL ST. J., June 12, 1990, at A22 (quoting proposed amendment).

256. *Id.* (statement of Sen. Robert Dole, R-Kan.).

257. *Id.* (statement of Sen. Robert Dole, R-Kan.).

258. *Leave the First Amendment Alone*, WASH. POST, June 12, 1990, at A22 (editorial) (statement of Rep. Robert H. Michel, R-Ill.).

259. Tom Kenworthy & Helen Dewar, *Ruling Rekindles Amendment Debate*, WASH. POST, June 12, 1990, at A7 (statement of Edward J. Rollins).

260. Marcus, *supra* note 249, at A1, A7 (statement of Edward J. Rollins).

261. Hinds, *supra* note 31, at A12.

262. Harvey, *supra* note 251, at A3.

263. *Id.* (statement of Virginia Governor Douglas Wilder).

264. Hinds, *supra* note 31, at A12 (statement of Florida state congressman Stephen R. Wise).

under circumstances that could cause a breach of peace.²⁶⁵ In Louisiana, state representative and former Ku Klux Klan Grand Wizard David Duke introduced a bill to declare open season on anyone who desecrated the flag. His bill substituted a slap on the wrist as punishment for those who assaulted flag desecraters by cutting back the punishment for battery from a six-month jail term and a \$500 fine to no more than a \$25 fine and no jail time if the victim of the assault had desecrated the flag. It was adopted by the Louisiana State House by a vote of fifty-three to thirty-nine and quickly moved on for Senate approval.²⁶⁶ The village trustees of Romeoville, Illinois did Louisiana one better: they reduced the penalty for assault of a flag-burner to \$1.²⁶⁷

But the current did not all run one way. The Flag Amendment hit a sensitive chord, and the response from both sides reflected anger, bitterness, and pain.²⁶⁸

Journalistic opinion strongly opposed the amendment. *The Washington Post*²⁶⁹ and *The New York Times*²⁷⁰ wrote lead editorials against it. They were joined by columnists from the right, such as William Safire

265. See MD. ANN. CODE art. 27, §§ 83, 85 (Supp. 1990).

266. *Beating Flag Burner to Cost \$25 Under Louisiana Bill*, WASH. POST, June 13, 1990, at A9 (editorial).

267. Letter from Ira Glasser, Director of the ACLU, to Mr. and Mrs. Daniel H. Pollitt (June 25, 1990) (on file with author).

268. An Associated Press dispatch of June 11, 1990 reported that

Michigan's congressional delegation is sharply divided over amending the Constitution to outlaw desecrating the American flag, a proposal suggested in the wake of the latest Supreme Court ruling.

"I would rather amend the Ten Commandments than the Bill of Rights," said Rep. William Ford, D-Taylor. "I don't see any reason to rewrite our Constitution because some crazy kooks want to burn our flag to upset the rest of us."

"It seems that nothing in American [sic] is sacred any more," said Rep. William Broomfield, R-Birmingham. "But some g[oo]d may come out of this decision. It will strengthen the determination of many of us in the Congress to force the issue with a constitutional amendment."

Joining Broomfield in support of an amendment were Reps. Bill Schuette, R-Sanford, and Bob Davis, R-Gaylord, and Sen. Carl Levin, D-Detroit.

Reps. John Dingell, D-Trenton, Paul Henry, R-Grand Rapids, and David Bonior, D-Mount Clemens, said they opposed amending the Constitution. Other lawmakers didn't return phone calls

"I cherish the flag and have served it in peace and in war," Dingell said. "But I'm not sure it's wise or necessary to choose the flag over the Bill of Rights."

The flag issue is delicate for members of Congress, many of whom don't want to tinker with the Constitution but fear that opposing an amendment could be political suicide.

John Flesher, *State Delegation Divided on Flag Desecration Amendment*, ASSOCIATED PRESS, June 11, 1990.

269. *Leave the First Amendment Alone*, *supra* note 258, at A22.

270. *We the People and Our Flag*, N.Y. TIMES, June 14, 1990, at A26.

and Bruce Fein; columnists from the left, such as Nat.Hentoff; and columnists from the center, such as Edwin M. Yoder and Charles Krauthammer.²⁷¹ The notable exception was George Will.²⁷² James J. Kilpatrick wrote:

Perhaps "scoundrel" is too strong a word for those who know in their hearts that a flag amendment is unneeded but will vote for it anyway. Maybe "weakling" is better. The pity is to see decent men and women playing politics with the issue. In their ostensible concern for the flag as a symbol, they forget what it symbolizes.²⁷³

Hodding Carter was much harsher. He described "the vast majority backing the amendment" as "cynical partisans, cowards, summer soldiers or time-servers without a conviction more meaningful than the need for self-protection."²⁷⁴

Flag Day, June 14, 1990, was a day of debate. It began at dawn when President Bush stood at attention while the flag was raised over the Vietnam Memorial. At the Betsy Ross house in Philadelphia, a fife and drum corp played "Yankee Doodle" and a descendant of Ross opined that the flag "is a political symbol[,] . . . fair game as a means of expression."²⁷⁵

At the Capitol in Washington, before an eight-by-ten foot flag, Bob Dole said he was there to "give the flag the protection that it deserves," not to be a demagogue.²⁷⁶ The House Republican Whip, Newt Gingrich, was more candid. He said the flag protection amendment was "a definitional question," and predicted that "Democrats who represent a kind of Hollywood-New York liberalism . . . will vote against it."²⁷⁷

The Democrats were out in force. Senator Bob Kerrey of Nebraska, who won the Medal of Honor and lost a foot in Vietnam, denounced Bush and Dole for their attempt to "politicize the issue and use it to

271. Bruce Fein, *Drop the Flag Issue*, N.Y. TIMES, June 15, 1990, at A29; Nat Hentoff, *30-Second Patriots*, WASH. POST, June 13, 1990, at A23; Charles Krauthammer, *Scoundrel's Refuge*, WASH. POST, June 15, 1990, at A25; William Safire, *Why the Flag-Waving?*, N.Y. TIMES, June 15, 1990, at A29; Edwin M. Yoder, Jr., . . . *With Old Glory*, WASH. POST, June 14, 1990, at A23.

272. George F. Will, *Obnoxious Acts Are Not Protected "Speech,"* WASH. POST, June 14, 1990, at A23.

273. James J. Kilpatrick, *Playing Politics . . .*, WASH. POST, June 14, 1990, at A23.

274. Hodding Carter III, *They Love Old Glory Now—They Reviled It Back Then*, WALL ST. J., June 21, 1990, at A15.

275. Hinds, *supra* note 31, at A12 (statement of Greg Scott).

276. Tom Kenworthy & Sandra Torrey, *Desecration Debate Marks Flag Day*, WASH. POST, June 15, 1990, at A6, A7 (statement of Sen. Robert Dole, R-Kan.).

277. *Id.* (statement of Rep. Newt Gingrich, R-Ga.).

'divide the nation.'²⁷⁸ Senator Terry Sanford of North Carolina recalled that in World War II he had "jumped into combat with the flag sewed on my left shoulder" and wondered if Thomas Jefferson and James Madison "could have possibly imagined that the United States would have . . . a president so frightened about the outcome of the next election that he wants to weaken the Bill of Rights."²⁷⁹ Sanford ridiculed the pro-amendment claims that a flag-burning ban would only limit free speech "a little bit." "That's like saying 'I'm going to take a tiny sliver out of your heart. . . . Not much, just a little tiny sliver.'"²⁸⁰

At a news conference on June 14, the American Bar Association argued that the patriotic thing is to let people burn the flag to show that America permits free speech: "This is the time that true lovers of the flag and what it symbolizes need to stand up for it. . . . We don't want to desecrate our Bill of Rights in order to permit the prosecution of a handful of peaceful protesters."²⁸¹

The Debate in the House of Representatives

Long before the *Eichman* opinion came down, House Speaker Tom Foley had promised a vote on a flag amendment within thirty days. In the Senate, Joe Biden immediately announced that his Judiciary Committee would convene hearings "to determine how to best fashion an amendment that doesn't do violence to the Constitution's First Amendment."²⁸² The lawmakers put the legislative process into action in hope of getting a vote before the July 4 recess. Foley said he personally opposed the amendment, but that there would be no party position; "'members would be urged to follow their conscience.'"²⁸³

The Edwards Subcommittee Recommends Rejection but Moves the Bill to the Full Committee

The legislation for a constitutional amendment began making its way through the House on Wednesday, June 13, in the Subcommittee on Civil and Constitutional Rights, chaired by Representative Don Edwards of California. This was the first step in the legislative process. Because

278. *Id.* at A6 (statement of Sen. Robert Kerrey, D-Neb.).

279. *Id.* at A7 (statement of Sen. Terry Sanford, D-N.C.).

280. Chris Harvey, *Flag Issue Heats Tongues of Flame*, WASH. TIMES, June 15, 1990, at A3 (statement of Sen. Terry Sanford, D-N.C.).

281. Hinds, *supra* note 31, at A12 (statement of Randolph W. Thrower, spokesman for the American Bar Association).

282. Marcus, *supra* note 249, at A1 (statement of Sen. Joseph Biden, D-Del.).

283. Robin Toner, *Patriotism and Politics Mix in Reaction to Flag Burning*, N.Y. TIMES, June 12, 1990, at B6 (statement of Rep. Thomas Foley, D-Wash.).

Speaker Foley had promised a vote on the issue, the Edwards Subcommittee moved it on to the full Judiciary Committee, the second step in the legislative process.²⁸⁴ The Subcommittee, by a party-line vote of five to three, urged that the amendment be rejected by the full Committee, and attached a substitute nonbinding resolution that both condemned flag burning and restated Congress's support for the Bill of Rights. Ranking Republican James Sensenbrenner of Wisconsin called this "political flim-flam" and "a political fig leaf."²⁸⁵ Representative John Conyers of Michigan retorted that it was the Republicans who were engaged "in a cynical political ploy." He added that "the Amendment is not about flag burning but about the politics of reelection . . . the politics of hypocrisy and manipulation."²⁸⁶

Edwards accused the Republicans of "taking the low road" in suggesting that he was less patriotic than those who supported the amendment, and said:

I am a veteran. I served in World War II. It was a bloody war. . . . So I share the outrage of Americans at seeing the flag burned. But at the same time . . . I took an oath . . . to support and defend not the flag, but the Constitution. . . . That is what I intend to do today—defend the Constitution.²⁸⁷

The Judiciary Committee Moves the Proposal to the House with No Recommendation

On Wednesday, June 19, a sharply divided Judiciary Committee, chaired by Representative Jack Brooks of Texas, cleared the way for the full House to vote on the proposed amendment. It voted nineteen to seventeen to send the proposed amendment to the House without a recommendation. Attempts to move it to the floor with either a favorable or unfavorable recommendation were narrowly defeated.²⁸⁸ The votes generally fell along party lines. Five Democrats joined the fourteen Republicans in the final vote of no recommendation; seventeen Democrats wanted an unfavorable recommendation.²⁸⁹

The brushfire at the grass roots level never ignited. The congres-

284. Holmes, *supra* note 251, at B10.

285. Tom Kenworthy, *Panel Reluctantly Clears Flag Amendment*, WASH. POST, June 14, 1990, at A4 (statement of Rep. F. James Sensenbrenner, Jr., R-Wis.).

286. *Id.* (statement of Rep. John Conyers, Jr., D-Mich.).

287. Chris Harvey, *Panel Moves Flag Amendment up to Judiciary After Rejecting It*, WASH. TIMES, June 14, 1990, at A3 (statement of Rep. Don Edwards, D-Cal.).

288. Tom Kenworthy, *Flag Amendment Sent to House Floor*, WASH. POST, June 20, 1990, at A14.

289. *Id.*

sional phones did not ring; the letters did not pour in. Seemingly, flag burning was an issue whose time had come and gone. The Republicans played for time; the Democrats moved in for a quick, clean kill. Yet some Democrats worried that a vote against flag burning might be a "political AIDS virus that you will always carry and won't know when it will be activated."²⁹⁰

The Rules Committee²⁹¹ denied a Republican request to postpone a floor vote and calendared the issue for floor action on Thursday, June 22, one year to the day after the Supreme Court's *Johnson* decision. In addition to debate and a vote on the constitutional amendment, the Rules Committee authorized debate and a vote on a bill making it a crime to destroy or damage a flag "when it is likely to provoke violence."²⁹² Finally, the Rules Committee "waived" the requirement that three days

290. Tom Kenworthy & Paul Taylor, *Opponents of Flag Amendment Seeking Quick Kill on House Floor*, WASH. POST, June 19, 1990, at A8 (statement of Rep. Robert Wise, Jr., D-W. Va.).

"[W]avering Democrats who provided the critical votes to block the constitutional amendment . . . said their decisions [were] based . . . on nagging personal concerns over tampering with the First Amendment," despite the political risk. "[B]y the time the vote came, they simply could not acquiesce to altering the Constitution." Susan F. Rasky, *For Flag Vote, History Won over Political Risk*, N.Y. TIMES, June 23, 1990, at L6.

Representative Peter Hoagland of Nebraska, who faced a serious Republican challenge, said "I don't know what the political damage will be," but "[w]hen you vote for something like this, it goes away and nobody pays attention. When you vote against it, you have to spend a lot of time and energy explaining why." *Id.* (statement of Rep. Peter Hoagland, D-Neb.). He eventually voted against the amendment. See *infra* text accompanying notes 354-56.

Representative Tim Valentine of North Carolina originally supported the amendment because of the "political reality in his conservative district," all the while "hoping in my heart that it would not pass." *Id.* (statement of Rep. Tim Valentine, D-N.C.). But at the last minute he decided to go against the amendment because "his constituents were not exercised enough over the flag issue to justify his tampering with the First Amendment." *Id.* (statement of Rep. Valentine).

Democrat Richard Durbin of Illinois also debated whether to reject the amendment. Although Durbin feared his office would be bombarded with mail after his hometown newspaper printed an article saying the congressman was leaning against the amendment, he "got a total of [only] 32 letters and phone calls on this subject." *Id.* (statement of Rep. Richard Durbin, D-Ill.). According to the *New York Times*, "Durbin credited Speaker Tom Foley with refocusing the flag debate on the constitutional question and not making the vote a test of party loyalty." *Id.*

291. The Rules Committee is the "traffic cop" in the House of Representatives. It decides whether a bill will go to the floor for a vote, when it will get there, the amount of time allocated for debate, whether amendments can be offered, and so on. There is a bifurcated procedure. The members first vote on whether to adopt the rule proposed by the Rules Committee; if the vote is affirmative, the members then debate and vote on the proposed bill.

292. This bill presumably was introduced for the benefit of members who wanted to vote against the proposed constitutional amendment but also wanted to tell their constituents at home that they had voted to punish flag desecrators.

must elapse between the time the Rules Committee reports its recommendation and action on the floor.

Republicans, who wanted more time to mobilize grass roots support for the amendment, were furious with the proposal to waive the three-day delay requirement. Representative Gerald Solomon of New York accused the Speaker and the Rules Committee of "kowtowing" to communists:

What you are doing is gagging 10 million veterans throughout this nation from being able to mobilize and contact members of this House individually . . . I swear I just cannot understand why you cannot be receptive to the veterans of this nation when you are kowtowing to ilk like the Communist Youth Brigade and allow them to trample and desecrate our American Flag.²⁹³

As scheduled debate on the Rule began that Thursday at 10:00 a.m., Republican James Sensenbrenner of Wisconsin asked, "What is the rush?" and described the proposed rule as a "railroad job that tramples the right of individual Members of the House of Representatives."²⁹⁴ Gerald Solomon of New York thundered:

Thirty-seven veterans organizations . . . were counting on that 3-day notice, . . . counting on Congress to abide by its own rules, so that they could mobilize their troops, . . . to contact . . . support for the amendment. Democrats knew this and deliberately rewrote the rules . . . to rush the amendment to the floor with no notice.²⁹⁵

Jack Brooks of Texas, who supported the constitutional amendment throughout, nonetheless spoke for the Rule because "with 5 hours of general debate, the issue can be properly cast and all Members will have had the benefit of hearing all sides."²⁹⁶

Debate on the Rule included debate on the merits of the proposed amendment. The following comments give some of the flavor of the debate:

Representative David Bonior, founder of the Vietnam Veterans of Congress, said he would "oppose any amendment that would weaken our Bill of Rights. In 200 years of our Nation, these basic freedoms have never been amended. If we start now, who knows what freedom will be

293. Tom Kenworthy, *House Democrats Bar Delay in Key Flag Amendment Vote*, WASH. POST, June 21, 1990, at A1 (statement of Rep. Gerald Solomon, R-N.Y.).

294. 136 CONG. REC. H4002 (daily ed. June 21, 1990) (statement of Rep. F. James Sensenbrenner, Jr., R-Wis.).

295. *Id.* at H3999 (statement of Rep. Gerald Solomon, R-N.Y.).

296. *Id.* at H4002 (statement of Rep. Jack Brooks, D-Tex.).

next?"²⁹⁷

Representative Robin Tallon of South Carolina said:

A few idiots burning a flag isn't going to tear us apart, nor is it an indication of a widespread problem.

Our flag will wave and the Constitution will endure long after these flag burning crazies are a forgotten footnote. But, if this amendment passes, their perversion will forever stain the most enlightened document ever created for the government of mankind.

Are we going to use a sledgehammer to kill a gnat?²⁹⁸

Representative Joseph Brennan of Maine asked, "Is flag burning really some kind of threat to America? Is an amendment to the Bill of Rights really what America needs today?" He then answered his own question: "[W]hat America really needs today is the courage of Congress to deal with the serious problems of our country: homelessness, health care, quality education, drug and alcohol abuse that is truly an epidemic, and the monumental fiscal mess of the United States Government which grows worse daily."²⁹⁹

Representative Lynn Martin of Illinois spoke for the proposed amendment: "It is, indeed, a burning issue. It is not just about flag burning, but about a flag that burns in the hearts of the American people as an enduring symbol of all this country stands for."³⁰⁰ Representative Henry Hyde of Illinois also spoke on behalf of the amendment. He denied that flag burning was speech at all, categorizing it as "a grunt designed to antagonize." He added that unlike the Cross or the Star of David, "[t]he flag is our national symbol of unity and our symbol of community, and it is unique in all of America. That symbol is transcendent."³⁰¹

Representative Frank McCloskey of Indiana denied that the proposed amendment was in any way motivated by concern for the flag. "Rather," he said, "the driving engines have been a partisan political agenda. Highly placed operatives have talked repeatedly about the potential for devastating 30 second attack ads."³⁰² Representative Hyde admitted that the issue "has been exploited shamelessly for political reasons. I regret that." But he urged opponents not to "collectivize the

297. *Id.* at H3997 (statement of Rep. David Bonior, D-Mich.).

298. *Id.* at H4001 (statement of Rep. Robin Tallon, D-S.C.).

299. *Id.* (statement of Rep. Joseph Brennan, D-Me.).

300. *Id.* at H4000 (statement of Rep. Lynn Martin, R-Ill.).

301. *Id.* at H4004 (statement of Rep. Henry Hyde, R-Ill.).

302. *Id.* at H4003 (statement of Rep. Frank McCloskey, D-Ind.).

guilt and blame on all for the sins of a few."³⁰³

With that, the House voted 232 to 191 to adopt the Rule and move on to consideration of the Flag Amendment. Any amendment to the Constitution requires two-thirds majorities in both houses of Congress, as well as ratification by three-fourths (thirty-eight) of the states.³⁰⁴ For the House that meant 288 votes; 145 votes against the proposal would kill it.

Preparation for the Debate

The effort to defeat the Flag Amendment began long before the issue hit the floor. It began even before the Supreme Court *Eichman* decision.

Speaker Tom Foley anticipated that the Supreme Court would follow the previous year's *Johnson* decision, and that President Bush once again would press for a constitutional amendment. So in early April, three months before the *Eichman* decision, he created a "flag task force" led by Representative Don Edwards and Chief Deputy Majority Whip David E. Bonior of Michigan.³⁰⁵

The task force's strategy was to shift the focus from the sanctity of the flag to the sanctity of the Bill of Rights. They reasoned that "[n]o one wants the flag burned, but neither does anyone want their First Amendment rights trampled."³⁰⁶ Speaker Foley repeatedly remarked that "every country has a flag. We are one of the few countries that has a Bill of Rights."³⁰⁷

Representative Edwards remembered that when he first brought up the issue with fellow Democrats, they would "just shudder and run."³⁰⁸ But the task force kept at it, contacting newspaper editors and meeting with grass roots groups, including the influential group People for the American Way. This anti-censorship organization broadcast television advertisements in major cities, lauding the inviolability of the Bill of Rights. It also supplied radio and television scripts for Democratic members in close fall elections.³⁰⁹ The task force arranged for the veterans in Congress to campaign for Democrats in difficult districts. It kept the Democrats supplied with national polling data and editorial commentary showing that support for a constitutional amendment was by no

303. *Id.* at H4005-06 (statement of Rep. Henry Hyde, R-Ill.).

304. U.S. CONST. art. V.

305. Joan Biskupic, *For Critics of Flag Measure, Advance Work Pays Off*, 48 CONG. Q. 1962, 1962 (1990).

306. Biskupic, *supra* note 250, at 1877 (statement of Rep. Thomas Foley, D-Wash.).

307. *Id.* (statement of Rep. Foley).

308. *Id.* (statement of Rep. Don Edwards, D-Cal.).

309. Rasky, *supra* note 290, at L6.

means complete. By the time of the *Eichman* decision, Representative Edwards could claim: "This year you could hardly find a hometown paper that was editorializing for the Amendment."³¹⁰

Speaker Foley was active throughout; he declared early and forcefully that he would oppose the amendment.³¹¹ A straight appeal to party loyalty got him nowhere, so he combined political theory with nuts-and-bolts organizing. On the "theoretical side" he argued that "the Bill of Rights . . . is too delicate . . . [to survive] alteration over a passing political tempest," and warned that once the process of changing the First Amendment began, "we would be looking at more than just this vote. What about burning the Bible or the Constitution?"³¹² On the practical side he spent hours on the phone persuading wavering Democrats that they could vote against the amendment and still survive an election challenge—that sober second thought had "take[n] much of the venom out of the issue."³¹³

President Bush began calling "friendly" Democrats after Flag Day, but often it was too late. They had been contacted by the Speaker and his flag task force, and they no longer were in the "favorable" or "undecided" column.³¹⁴ Those opposed to the amendment were hopeful when the vote drew nigh, but when the amendment reached the floor the outcome was still uncertain.

Debate on the Floor

Almost 200 House members participated in the five hours of debate. Much was repetitive; more was exciting.

Early on, House Minority Leader Robert Michel set a pattern followed by many who favored the amendment. He began by paying his respects to Representative Sonny Montgomery, cosponsor with him of the proposed amendment, and the 169 colleagues "from both sides of the aisle who have joined us."³¹⁵

Then he denied that the proposed amendment "would be some radical new departure from two hundred years of first amendment rights," and pointed out that no one had protested the lack of free speech under the federal and state flag-burning laws until the decision in *Texas v. John-*

310. Biskupic, *supra* note 305, at 1963 (statement of Rep. Don Edwards, D-Cal.).

311. Susan F. Rasky, *Foley Vindicated by Vote on Flag*, N.Y. TIMES, June 22, 1990, at A14.

312. *Id.* (statement of Rep. Thomas Foley, D-Wash.).

313. *Id.*

314. Biskupic, *supra* note 305, at 1963.

315. 136 CONG. REC. H4007 (daily ed. June 21, 1990) (statement of Rep. Robert Michel, R-Ill.).

son.³¹⁶ He denied that enactment of the amendment would open the door to further inroads on the First Amendment and argued that the "creeping censorship argument" is "rooted in fear" that if the American people "constitutionally protect our flag on one day, they will call upon the Government to start burning books . . . next."³¹⁷ This argument, he asserted, was "profoundly antidemocratic in its implications."³¹⁸ The argument that "we don't need an amendment because . . . not that many flags are desecrated" was "curious," he claimed, because "even one desecration of the flag is too many."³¹⁹

Then he turned to the "fear of federalism" argument that "it will be bad if 50 states have different laws on flag desecration."³²⁰ He asked, "Why shouldn't the people of California and Illinois and Arkansas and all the rest of the States be free to decide what they feel is the appropriate way to handle flag desecration?"³²¹

The minority leader ended his opening salvo with emotion:

Mr. Speaker, there is our flag. In this great Chamber, it hangs between the portraits of George Washington and the great Frenchman who helped our revolutionary cause, the Marquis de Lafayette.

In Lafayette's day, our flag had 13 stars.

Over a century later, another Frenchman came to these shores. He was my father, an immigrant. When he first saw our flag, as he arrived in New York Harbor in 1914, it had 48 stars. Today our flag has 50 stars. But it is the same flag Lafayette and Washington saw two centuries ago. It symbolizes the same virtues, the same love of freedom.

It is the same Old Glory, its radiance undiminished and its honor undefiled. The only difference is that today it is an open target for physical desecration.³²²

He closed by saying that "everything comes down to one question . . . : Do I want to protect our flag . . . ?" If your answer is yes, he told his colleagues, "Join Sonny Montgomery and me and our 169 bipartisan cosponsors in protecting Old Glory, not despite the Constitution, but through the Constitution, not against the first amendment, but because of the first amendment, which guarantees the right of the people to express

316. *Id.* at H4008 (statement of Rep. Michel).

317. *Id.* (statement of Rep. Michel).

318. *Id.* (statement of Rep. Michel).

319. *Id.* (statement of Rep. Michel).

320. *Id.* (statement of Rep. Michel).

321. *Id.* (statement of Rep. Michel).

322. *Id.* at H4008-09 (statement of Rep. Michel).

themselves as we are on this issue."³²³

Representative Hyde was designated to close debate for Republican supporters of the amendment, and he too spoke with passion. The flag, he said,

is a unique symbol, and too many people have paid for it with their blood. Too many have marched behind it, too many have slept in a box under it, too many kids and parents and widows have accepted this triangle as the last remembrance of their most precious son, father and husband. Too many to have this ever demeaned.

. . . .

. . . [T]he flag is falling. I ask Members to catch the falling flag and raise it up. In my judgment that does not demean the Constitution. It elevates us all to being worthy of the great country we live in.³²⁴

There was applause from both sides of the aisle.

The prose was not as purple, but those opposing the amendment spoke with sincerity, and sometimes pain.

Representative Mary Rose Oakar of Ohio gave a "very personal perspective to this debate."³²⁵ When she was growing up in Cleveland, "the 4th of July was a very big holiday to my family. . . . We would put the flag up on our front porch, plan a picnic, watch the parade, standing proudly at attention as the numerous flags passed by . . ." Her father, an immigrant, was born on the Fourth of July and "kidded us kids by saying he thought the Nation was celebrating his birthday with him."³²⁶ Representative Oakar said her father was "a patriot, through and through. . . . Even though he had five kids at home, my dad volunteered for the service in World War II. Why . . . ? . . . [B]ecause of the freedoms he found in this, his adopted country."³²⁷ She doubted that anyone in the House would think it right to burn or mutilate our flag.³²⁸ "I don't think it is right."³²⁹ But she added that does not mean either that it is right to "scorch the Bill of Rights."³³⁰ Her decision came the night before the vote on Thursday. She had intended to vote for the amendment because of what she had learned from her father, "a flag waver . . .

323. *Id.* at H4009 (statement of Rep. Michel).

324. *Id.* at H4086 (statement of Rep. Henry Hyde, R-Ill.).

325. *Id.* at H4058 (statement of Rep. Mary Rose Oakar, D-Ohio).

326. *Id.* (statement of Rep. Oakar).

327. *Id.* (statement of Rep. Oakar).

328. *Id.* (statement of Rep. Oakar).

329. *Id.* (statement of Rep. Oakar).

330. *Id.* (statement of Rep. Oakar).

who taught us how to fold it and display it," and because of constituents who "go psycho" when they "see some guy on television burning the flag."³³¹ When Speaker Foley called her on Wednesday night, she told him to leave her alone while she read the Bill of Rights and a biography of Patrick Henry, and she slowly changed her mind.³³²

Representative Barbara Boxer, another first-generation American, told the House that "[h]ad my parents not come to this country—had they remained in Europe—the chances are we would have perished."³³³ To her, "the flag not only means freedom; it means life itself."³³⁴ But she could not vote to amend the Bill of Rights, "the centerpiece of freedom," which, "eloquent in its brevity[,] . . . successful . . . [in] its . . . broad, sweeping rights . . . has seen us through wars, depression, recession, the best of times, the worst of times."³³⁵

It was a difficult decision, as well, for Representative Tim Valentine, a conservative Democrat from a conservative district in North Carolina. Representative Valentine originally had signed on to cosponsor the proposed amendment. "But after much soul searching and reflection, [he] . . . concluded that we should not depart from two centuries of constitutional history We have always tolerated dissent, even when the actions of individual dissenters seemed intolerable. And our Nation is stronger for having done so."³³⁶ He went on to assert that "[t]he Constitution is the fabric of our Nation," and urged that we not "tear that national fabric asunder by surrendering our Constitution to flag burners."³³⁷ He asked for unanimous consent "to have my name stricken as a cosponsor," and explained that "[o]ver the rhetoric of the past few days I have finally heard the voice of my own conscience."³³⁸

Fellow North Carolinians Charles Rose, Steve Neal, and David Price joined Tim Valentine in opposing the proposed amendment. Each referred to his state's refusal to join the Union until Congress proposed a bill of rights.

Representative Rose explained at some length that when the first Congress assembled in New York in March of 1789, two states remained outside the Union. Neither Rhode Island nor North Carolina had rati-

331. Rasky, *supra* note 290, at L6 (statement of Rep. Oakar).

332. *Id.* (statement of Rep. Oakar).

333. 136 CONG. REC. H4020 (daily ed. June 21, 1990) (statement of Rep. Barbara Boxer, D-Cal.).

334. *Id.* (statement of Rep. Boxer).

335. *Id.* (statement of Rep. Boxer).

336. *Id.* at H4016 (statement of Rep. Tim Valentine, D-N.C.).

337. *Id.* (statement of Rep. Valentine).

338. *Id.* (statement of Rep. Valentine).

fied the Constitution.³³⁹ Earlier, on July 21, 1788, the North Carolina ratification convention had assembled at St. Matthew's Church in Hillsborough.³⁴⁰ After "10 days of spirited debate," the delegates voted against joining the Union.³⁴¹ They believed that a "Bill of Rights was absolutely necessary to prevent Federal infringement on individual freedoms."³⁴²

When the First Congress adopted the Bill of Rights, North Carolinians assembled a second time, on November 2, 1789, in Fayetteville.³⁴³ After four days of debate, the delegates voted to ratify the Constitution. North Carolina became the twelfth state to enter the Union, and the third (after Maryland and New Jersey) to approve the Bill of Rights.³⁴⁴

Representative Rose concluded that "we, as a nation, cannot let reckless individuals who garner attention by abusing the flag to dictate the course our Nation takes, especially in regards to issues as important and dear as freedom, liberty, the Constitution, and the Bill of Rights."³⁴⁵

Representative Stephen Neal echoed these sentiments:

My State of North Carolina . . . refused to ratify the Constitution until Congress approved a Bill of Rights.

. . . [T]o those early North Carolinians freedom was not an abstract principle. They had lived under repressive governors in the Old World and under harsh Colonial governments in North Carolina. They knew how precious the freedoms in the Bill of Rights were. . . . They did not just want these rights; they demanded them.

. . . I would be untrue to my heritage if I voted to tamper with the Bill of Rights, Mr. Speaker, and I will not do it.³⁴⁶

Representative David Price of North Carolina's Fourth District added that "the history of my State and its traditions weighs heavily upon me. North Carolina refused to ratify the Constitution until it was certain that a Bill of Rights would be a fundamental component of our Constitution."³⁴⁷ Before election to Congress, Price had held a chair in the political science department at Duke University, and he told his House

339. See *supra* text accompanying note 225 (discussing North Carolina's refusal to join the Union until a bill of rights was included).

340. 136 CONG. REC. H4076 (daily ed. June 21, 1990) (statement of Rep. Charles Rose, D-N.C.).

341. *Id.* (statement of Rep. Rose).

342. *Id.* (statement of Rep. Rose).

343. *Id.* (statement of Rep. Rose).

344. *Id.* at H4076-77 (statement of Rep. Rose).

345. *Id.* at H4077 (statement of Rep. Rose).

346. *Id.* at H4075 (statement of Stephen Neal, D-N.C.).

347. *Id.* at H4054 (statement of Rep. David Price, D-N.C.).

colleagues that since being elected he had “talked to school children across my district about our Nation’s Bicentennial and the foundations of constitutional government. There is no way that I can now vote to punch a hole in the very Bill of Rights whose 200th anniversary we celebrate next year.”³⁴⁸

Like Tim Valentine, Glenn Poshard, a first-term representative from Illinois, wrestled with his conscience. Earlier, he too had signed on as a cosponsor of the amendment, but had “struggled with this decision ever since.”³⁴⁹ The weekend before the vote he went with his family to Philadelphia, to Independence Hall, and sat “where the Declaration of Independence and the Constitution had been written.”³⁵⁰ He then walked the battlefield at Gettysburg and later travelled to the Jefferson Memorial.³⁵¹ Poshard voted against the amendment because he believed “[i]t should be the purpose of the flag, as it is the Constitution, to invite respect and love but not to command it because . . . love and respect not freely given cannot be real.”³⁵²

Representative Charles Stenholm of Texas opposed the amendment, and to supply a reason he quoted Charles Fried, former Solicitor General under the Reagan Administration:

“Is any political advantage, is winning any election, really worth being known to your children and grandchildren and great grandchildren as one of the Congressmen who drew a moustache on the Mona Lisa of our liberties? What Eichman and Johnson do will be forgotten tomorrow, if you will let it; if you add your text to Madison’s and Jefferson’s sacred text, that is a piece of vandalism whose mark will be with us forever.”³⁵³

Peter Hoagland of Nebraska, another first-term representative, had supported the amendment after the *Johnson* decision, but after a year’s thought, voted against it the second time around. He said simply, “I didn’t want my tombstone inscription to be that I supported the amendment to weaken the Constitution.”³⁵⁴ He explained that a vote like this “is associated with self respect,” and that “[i]n the past there have been a few times that I have tilted more toward political considerations than I

348. *Id.* (statement of Rep. Price).

349. *Id.* at H4043 (statement of Rep. Glenn Poshard, D-Ill.).

350. *Id.* (statement of Rep. Poshard).

351. *Id.* at H4044 (statement of Rep. Poshard).

352. *Id.* (statement of Rep. Poshard).

353. *Id.* at H4050 (statement of Rep. Charles Stenholm, D-Tex.) (quoting Charles Fried).

354. Rasky, *supra* note 290, at L6 (statement of Rep. Peter Hoagland, D-Neb.).

should have, . . . and I lived to regret it.”³⁵⁵

This vote demanded a great deal of courage from a Democrat who had won in a traditional Republican district with only fifty-one percent of the vote. After casting his vote, Hoagland returned home to face the music when he presented a folded flag to the family of a constituent who, after many years, had officially been declared missing in action in the Korean War in 1953. The reception was chilly. His smiles were returned with hard stares, and some folded their arms rather than applaud his introduction. Yet, he was not without support. The daughter of the veteran being honored came forward and said her father had died for the freedom the flag represents, not the flag itself, and that “[w]e don’t need to change the Constitution. Outlawing flag burning, that’s what the Communists do.”³⁵⁶

There were other extemporaneous statements that stilled the halls of Congress. Craig Washington, a first-termer who is African-American, told his colleagues how the Grand Wizard of the Ku Klux Klan once came to his law office.³⁵⁷ The Grand Wizard had been fired from his job for distributing literature with despicable caricatures of black people. Washington agreed to represent him. When the Klansman tried to explain the literature, Washington told him, “You don’t have to explain to me. . . . It doesn’t matter what is on the literature. It matters that you were out there exercising your constitutional rights at the time you were fired from your job.”³⁵⁸ Washington added:

It does not matter what we think about Gregory Lee Johnson.
It matters what we think about our Constitution.

. . . .

. . . [I]f they can take away the right of Gregory Lee Johnson . . . to say whatever he wishes to say by whatever means he wishes, next they will come and they will tell us what religion we can engage in, and then they will come and tell us how we may assemble and who will assemble.

I will not be a part of that process, for 200 years from now I would not like to have my fingerprints on the desecration of the Constitution. And if this amendment passes, we are lowering the Constitution of the United States to half mast.³⁵⁹

355. Dirk Johnson, *Flag Vote: The People Back Home*, N.Y. TIMES, June 25, 1990, at A12 (statement of Rep. Hoagland).

356. *Id.* (statement of Rhonda McAuliffe).

357. 136 CONG. REC. H4078 (daily ed. June 21, 1990) (statement of Rep. Craig Washington, D-Tex.).

358. *Id.* (statement of Rep. Washington).

359. *Id.* at H4078-79 (statement of Rep. Washington).

Representative Bill Gray, the Majority Whip, matched Representative Washington's eloquence. He said that "when our forefathers gathered together in my home town of Philadelphia . . . , they tried to define their values within a document that would serve as a guide to a nation for all time. . . . Our Constitution serves as a guide to the world."³⁶⁰ He did not oppose constitutional amendments as such, but concluded that amendments must speak to expanding freedom, "because I remember the price Americans have paid for those freedoms."³⁶¹ He remembered that "the first American to fall in the Revolutionary War was Crispus Attucks[,] . . . an African-American who died for freedom a century before our Nation ended slavery."³⁶² He remembered that in the War of 1812, another African-American, John Johnson, fought gallantly for his country in the Battle of Lake Erie. As he lay wounded on the deck of a Navy schooner, he urged on his comrades with the cry, "[F]ire away boys, don't haul down the colors."³⁶³

Representative Gray then urged his fellow members, "'Don't haul down the colors.' What are the true colors? It is not the red, white, and blue colors of the fabric . . . but the Bill of Rights and the Constitution, which the fabric symbolizes. . . . Don't haul down the Bill of Rights. Don't haul down the Constitution."³⁶⁴

Speaker Foley closed the debate. He pointed out that above the flag hanging in the House Chamber lies an inscription of Daniel Webster's words, spoken during his commemoration of those who had died at Bunker Hill. It reads, in part: "'Let us develop the resources of our land, . . . build up its institutions, . . . and see whether we also in our day and generation may not perform something worthy to be remembered.'"³⁶⁵ The Speaker said the "greatest resource of our country," the greatest institution, is the Constitution, and he closed by saying, "Let us, by preserving and protecting that institution . . . show that we, too, in our day and generation may perform something worthy to be remembered."³⁶⁶ Although it is the custom of Speakers to vote only to break a tie, Speaker Foley then voted against the Flag Amendment. He was joined by 160 Democrats and 17 Republicans. Ninety-five Democrats joined 159 Republicans favoring the amendment. The vote, 254

360. *Id.* at H4075-76 (statement of Rep. William Gray III, D-Pa.).

361. *Id.* at H4076 (statement of Rep. Gray).

362. *Id.* (statement of Rep. Gray).

363. *Id.* (statement of Rep. Gray) (quoting John Johnson).

364. *Id.* (statement of Rep. Gray).

365. *Id.* at H4087 (statement of Rep. Thomas Foley, D-Wash.) (quoting Daniel Webster).

366. *Id.* (statement of Rep. Foley).

yeas to 177 nays,³⁶⁷ was 34 votes short of the two thirds needed to propose a constitutional amendment. But the day had not yet ended. There was more to come.

The Flag Protection Act of 1990

At the very last minute, Congressmen Jim Cooper of Tennessee, Rick Boucher of Virginia, and Ron Wyden of Oregon introduced the Flag Protection Act of 1990. Its key provision made it unlawful (subject to a fine of \$100,000 and a year in jail) for anyone to destroy or damage a flag of the United States "with intent to provoke imminent violence, and in circumstances reasonably likely to produce imminent violence."³⁶⁸ The Rules Committee scheduled it for debate immediately following the vote on the Flag Amendment.

There was instant and heated opposition to considering the bill. Minority Leader Robert Michel used strong words, calling it a "charade and sham," "flim-flam,"³⁶⁹ a "phantom statute conceived only in the waning hours of last evening, . . . designed to give Members cover so that they can vote against the constitutional amendment. And then we are back in the same old boat again."³⁷⁰ He urged defeat of the rule and offered an amendment to postpone debate and vote on the proposed bill.³⁷¹

Representative Cooper defended his bill, saying:

[W]ithout my statute there is nothing to protect the flag of the United States for the next 2- or 3-year period pending the ratification of a constitutional amendment. It is important that we protect the flag as soon as possible. Advocates of the amendment [to reject the Rule] seem to have forgotten that without a criminal statute in the meantime our flag is naked and defenseless against flag burners.³⁷²

The House voted for the Rule, and began debate on the bill immediately after it had defeated the proposed constitutional amendment. Naturally there was bitterness. Representative Sensenbrenner of Wisconsin resented that it "was introduced just last night . . . never was referred to a committee . . . [and] never was reviewed by the Committee on the Judiciary."³⁷³ He labelled it a "political copout" to "provide some people

367. *Id.*

368. *Id.* at H4088.

369. *Id.* at H4001 (statement of Rep. Robert Michel, R-Ill.).

370. *Id.* at H4000-01 (statement of Rep. Michel).

371. *Id.* at H4001.

372. *Id.* (statement of Rep. Jim Cooper, D-Tenn.).

373. *Id.* at H4089 (statement of Rep. F. James Sensenbrenner, Jr., R-Wis.).

political cover for having voted against the constitutional amendment."³⁷⁴

Representative Robert Walker of Pennsylvania used even stronger language:

Mr. Speaker, when you get to the end of a basketball game and the game has been either won or lost by one team or another, they throw the subs in and they play for a little while, and it is called garbage time. I think we have reached garbage time here.³⁷⁵

The bill was defeated 236 to 179.³⁷⁶ Speaker Foley proclaimed the issue dead for the remainder of the 101st Congress.³⁷⁷

Although constitutional amendments require two-thirds approval in both Houses of Congress, Senate Minority Leader Robert Dole said he would still press for a Senate vote, conceding that the "Democratic claims of being close to enough votes to defeat it in the Senate are probably accurate."³⁷⁸ This proved to be the case.

The Senate Debate

The House voted down the amendment on Thursday, June 21, 1990. The Senate opened debate on the identical amendment on Monday, June 25. Senator Joseph Biden, Chair of the Senate Judiciary Committee, opened on a sour note. He regretted that the Senate was "engaged in . . . [a] futile exercise," since the House vote assured that "there will be no amendment to the Constitution."³⁷⁹ Senator Biden called flag protection a "dead issue,"³⁸⁰ and accused others of committing the "sin of playing politics with this important symbol."³⁸¹ Arkansas Senator Dale Bumpers put it this way: "In my 15 1/2 years in the U.S. Senate, I have never seen us vote on something that we knew was absolutely dead, dead, dead."³⁸² The flag issue's time had come and gone, but this did not stop the senators from going through the motions, which they did extremely well.

374. *Id.* (statement of Rep. Sensenbrenner).

375. *Id.* at H4091 (statement of Rep. Robert Walker, R-Pa.).

376. *Id.* at H4094.

377. Steven A. Holmes, *Amendment to Bar Flag Desecration Fails in the House*, N.Y. TIMES, June 22, 1990, at A1, A14.

378. Tom Kenworthy, *Flag Amendment Fails in Decisive House Vote*, WASH. POST, June 22, 1990, at A1 (statement of Sen. Robert Dole, R-Kan.).

379. 136 CONG. REC. S8632 (daily ed. June 25, 1990) (statement of Sen. Joseph Biden, Jr., D-Del.).

380. *Id.* (statement of Sen. Biden).

381. *Id.* at S8634 (statement of Sen. Biden).

382. *Id.* at S8649 (statement of Sen. Dale Bumpers, D-Ark.).

Senator Biden, the first speaker, punctuated his comments with interesting historical anecdotes and constitutional contentions. The first flag desecrators, he said, were members of

the two major political parties in the decade of the 1870's. For in that era the two political parties had a custom, and the custom was to sew onto the face of the flag the pictures and/or names of their Presidential candidates.

. . . Oftentimes, rival operatives would seize these banners and then burn the American flag bearing the opposition ticket's picture at their political rallies.

. . . .

This destruction of the flag [by opponents of Grover Cleveland and James Blaine during the campaign of 1884] . . . is what gave rise to the first flag protection laws enacted in the late 19th century.³⁸³

Senator Biden objected strongly to the section of the "Bush/Dole Amendment" that authorized the fifty states to prohibit desecration of the flag.³⁸⁴ He said that his own state of Delaware once proposed to enact a law providing for the arrest of any person who, when a flag was raised at an athletic event, held up a clenched fist in what was known as the Black Power salute.³⁸⁵ Further, Delaware once prosecuted a person for displaying the United Nations flag in a position of honor at the right side of his house while at the same time flying the American flag in a subordinate position on the left side of his house.³⁸⁶ Biden "respectfully suggest[ed]" that such prosecutions might occur anywhere, because "my State has as many educated and well-motivated people as any State in the union."³⁸⁷

Biden then asked a series of questions about "desecration," indicating that the answer might well depend on when and where the question was asked:

Is it physical desecration for the hate-filled American Nazi Party to fly the American flag at the head of their parade when they goose-stepped through Skokie, Illinois, a community made up of a number of . . . survivors of the Nazi-camp . . . ?

Is it physical desecration to place the flag on a pair of boots similar to those the President gave to a leader of China?

383. *Id.* at S8633 (statement of Sen. Joseph Biden, Jr., D-Del.).

384. *Id.* at S8635 (statement of Sen. Biden).

385. *Id.* at S8636 (statement of Sen. Biden).

386. *Id.* (statement of Sen. Biden).

387. *Id.* (statement of Sen. Biden).

He gave boots, good old American cowboy boots . . . , a little American flag embroidered on the side.

Is it physical desecration for the Japanese Subaru car company to paint American flags on cars they drive up to the top of a mountain advertising the sponsorship of the American Olympic team . . . ? . . . Is commercial use of the flag all right?³⁸⁸

Then he quoted Duke Law School professor Walter Dellinger in support of his proposition that this particular amendment would “ ‘stimulate a generation of litigation.’ ”³⁸⁹ Biden closed by saying, “I want to prohibit burning the flag, if possible. But I . . . do not want to burn the Constitution in the process.”³⁹⁰

From then on, the Senate debate was largely a reprise of the arguments made familiar since the *Johnson* decision of a year before, with repeated flashes of eloquence.

The Senate debate was open to amendments and several were offered.

The Bumpers “Breach of Peace” Amendment

Senator Dale Bumpers of Arkansas offered an amendment similar to the bill offered in the House by Representatives Cooper, Boucher, and Wyden. It was, in his words, “a legislative remedy that simply says in two sentences: Anybody who knowingly and purposely desecrates the flag may be, upon conviction, fined or imprisoned for 1 year, or both. But then it defines desecration as an act calculated to create a breach of the peace. You cannot get simpler.”³⁹¹ Senator Bumpers said that “when you start talking about amending the Constitution, I belong to the ‘wait-just-a-minute club.’ ”³⁹² He could not vote for a constitutional amendment, so he offered this “very narrow legislative remedy” as a substitute to the pending constitutional amendment.³⁹³

Senator Charles Grassley of Iowa opposed the Bumpers proposal as a “figleaf to provide political cover,”³⁹⁴ and Senator Dole called it “yet another quick fix . . . to provide more cover for more people.”³⁹⁵

The Bumpers amendment was defeated when the Senate voted by a

388. *Id.* at S8638 (statement of Sen. Biden).

389. *Id.* at S8639 (statement of Sen. Biden) (quoting Walter Dellinger).

390. *Id.* (statement of Sen. Biden).

391. *Id.* at S8694 (daily ed. June 26, 1990) (statement of Sen. Dale Bumpers, D-Ark.).

392. *Id.* at S8695 (statement of Sen. Bumpers).

393. *Id.* (statement of Sen. Bumpers).

394. *Id.* at S8697 (statement of Sen. Charles Grassley, R-Iowa).

395. *Id.* at S8691 (statement of Sen. Robert Dole, R-Kan.).

razor-thin margin of fifty-one to forty-eight that it was unconstitutional and therefore “out of order.”³⁹⁶ Senator Jesse Helms of North Carolina voted “present,” because he did not think that “any Member of the Senate knows whether this amendment is constitutional or not.”³⁹⁷

The Helms “Court Stripping” Amendment

Senator Helms then offered an amendment of his own to strip the Supreme Court of jurisdiction to review state court decisions relating to the “public mutilation, defilement, incineration, or other physical abuse of any flag of the United States,” and to deprive the lower federal courts of jurisdiction over cases “which the Supreme Court does not have jurisdiction to review.”³⁹⁸ This would return to the states their power to outlaw flag desecration as they might see fit.

Senator Arlen Specter of Pennsylvania opposed the Helms amendment because “it is plain under our constitutional structure that the Congress cannot take away the jurisdiction of the Supreme Court of the United States to decide constitutional issues. . . . The issue was laid to rest in *Marbury versus Madison* in 1803,” and “[s]ince that time, it has been rockbed constitutional law in this country that the Supreme Court of the United States [is] the final arbiter on constitutional issues.”³⁹⁹ As further support, Senator Specter reminded Senator Helms that Chief Justice Rehnquist, in his confirmation hearings, supported the proposition that Congress “cannot take the jurisdiction from the Supreme Court to decide a constitutional issue, especially the First Amendment.”⁴⁰⁰

Over the years, Senator Helms has introduced and favored proposals to “strip” the federal courts of jurisdiction to hear cases involving school prayer, school busing, and so on. Senator Biden began his opposition commenting that “we have been through this exercise a number of times.”⁴⁰¹ To quote Yogi Berra, this was “*deja vu* all over again.”

Then, on a practical level, Senator Biden predicted that “there is no prospect of the Helms Amendment passing” because an affirmative vote would “eliminate the prospect of there being any vote on the President’s amendment.”⁴⁰² He was correct. The Helms proposal was defeated by a landslide vote of ninety to ten.⁴⁰³

396. *Id.* at S8699-8700.

397. *Id.* at S8700 (statement of Sen. Jesse Helms, R-N.C.).

398. *Id.* (statement of Sen. Helms).

399. *Id.* at S8701 (statement of Sen. Arlen Specter, R-Pa.).

400. *Id.* (statement of Sen. Specter).

401. *Id.* at S8702 (statement of Sen. Joseph Biden, Jr., D-Del.).

402. *Id.* at S8703 (statement of Sen. Biden).

403. *Id.* at S8704.

The Biden/Levin Amendment

Senator Biden and Senator Levin of Michigan introduced a last-minute constitutional amendment that would authorize Congress (but not the states) to make it unlawful "to burn, mutilate, or trample upon any flag of the United States."⁴⁰⁴ Senator Strom Thurmond of South Carolina opposed the amendment because it "denies the States the opportunity to legislate in this arena, which I think is bad."⁴⁰⁵ Senator Orrin Hatch of Utah labeled it a "stealth amendment" because "it has been available only for a matter of hours" and "has been subjected to no scrutiny."⁴⁰⁶ Like the Helms Amendment, the Biden/Levin Amendment, if adopted, would have precluded a vote on the Bush/Dole Amendment. It was defeated by a resounding vote of seven yeas, ninety-three nays.⁴⁰⁷

The Final Vote

No more amendments were offered, and the Senate moved to consider the Bush/Dole proposal to amend the Constitution. After the familiar arguments were presented at length,⁴⁰⁸ the Senate voted for the amendment fifty-eight yeas to forty-two nays, nine votes short of the two-thirds majority necessary to pass a constitutional amendment. Twenty Democrats joined thirty-eight Republicans in voting for the Bush/Dole amendment; seven Republicans joined thirty-five Democrats against it.⁴⁰⁹ Three days later *The Wall Street Journal* reported that the People's Republic of China had passed that nation's first flag desecration law punishing those who damage their national emblem.⁴¹⁰

CONCLUSION

These were times that tried people's souls. Most Americans were outraged when their flag was desecrated. They saw the sky falling in. They were encouraged in this when President Bush exploited, as the launching pads for his constitutional amendment to punish flag desecrators, the memorial to those who died at Iwo Jima⁴¹¹ and the me-

404. *Id.* at S8714.

405. *Id.* at S8716 (statement of Sen. Strom Thurmond, R-S.C.).

406. *Id.* (statement of Sen. Orrin Hatch, R-Utah).

407. *Id.* at S8719.

408. *See supra* text accompanying notes 379-90.

409. 136 CONG. REC. S8736 (daily ed. June 26, 1990).

410. *World Wire*, WALL ST. J., June 29, 1990, at A10.

411. *See supra* note 25 and accompanying text.

morial to those who died at Vietnam.⁴¹² More than seventy percent of Americans supported the President.⁴¹³ The "train was pulling out of the station fast."⁴¹⁴ The safe thing was to get on board. It would be "hard to explain" a vote against an amendment to ban flag burning.⁴¹⁵

There were those who dared. Representatives Bill Ford, John Dingell, and Paul Henry from Michigan immediately spoke out against any tampering with the Bill of Rights.⁴¹⁶ Speaker Tom Foley took up the cudgels, ably assisted by Representatives Don Edwards and David Bonior.⁴¹⁷ In the Senate, Senators Bob Kerrey of Nebraska⁴¹⁸ and Terry Sanford of North Carolina⁴¹⁹ were among the first to risk their political careers by opposing the popular amendment. Fellow Tarheel Representatives Charles Rose, Steve Neal, David Price, and Tim Valentine all spoke strongly against amending the Bill of Rights, the first such proposal in almost 200 years.⁴²⁰

Their defense of the Bill of Rights harkens back to North Carolina Governor Zeb Vance during the Civil War. As Albert Coates⁴²¹ tells the story, "[Confederate] General French moved into eastern North Carolina in the latter part of 1862 and . . . arrested forty citizens on the suspicion that they were disloyal,"⁴²² perhaps deserters. They were sent to a military prison for confinement—all without notice or a chance to be heard. Governor Vance advised President Jefferson Davis to go slowly in suspending the writ of habeas corpus, and warned that if necessary, "he would issue a proclamation recalling the North Carolina soldiers from Virginia" to uphold "the principles of Anglo-Saxon liberty—trial by jury, liberty of speech, freedom of the press," and the privilege of habeas

412. See *supra* text accompanying note 253.

413. See *supra* text accompanying note 31.

414. See *supra* text accompanying 27.

415. See *supra* text accompanying note 136 (statement of Rep. Newt Gingrich, R-Ga.).

416. See *supra* note 268.

417. See *supra* text accompanying notes 305-14.

418. See Helen Dewar & Tom Kenworthy, *Support Lags for Amendment to Prohibit Flag Burning*, WASH. POST, July 25, 1989, at A1, A8; Bob Kerrey, *The Flag Stands for the Freedom to Be Wrong*, WASH. POST, July 23, 1989, at D7 (op-ed); Robin Toner, *Amendment on the Flag Raises Fears in Congress*, N.Y. TIMES, June 13, 1990, at A22; *supra* text accompanying note 278.

419. See *supra* text accompanying notes 146, 279-80.

420. See *supra* text accompanying notes 336-48.

421. Albert Coates joined the law faculty at the University of North Carolina in 1923. His proud boast was that it was the only job he ever had.

422. Albert Coates, *Three North Carolinians Who Have Stood Up to Be Counted for the Bill of Rights*, Address before the Washington, D.C. chapter of the North Carolina Democratic Club 6-10 (Oct. 18, 1973) (transcript on file with author).

corpus.⁴²³ The forty were released. In later years Vance said that the “proudest boast” of his governorship was that “the laws were heard amidst the roar of cannon.”⁴²⁴

Zeb Vance stood up to be counted for the Bill of Rights in 1862 midst shot and shell. The Bill of Rights was ratified on December 15, 1791. What better way to celebrate its 200th birthday than to pay homage to those members of Congress who risked the “sound bite” and the negative “thirty-second spot” to ensure it passes on to the next generations without change, without blemish, totally intact.

423. *Id.*

424. *Id.* at 10.