

DESECRATING THE CONSTITUTION

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At the same time we are forcefully reminding the Chinese government of their need to safeguard civil liberties in Hong Kong, we are on the verge of modifying our own Bill of Rights to limit freedom of expression in the United States for the first time in our history.

By adopting H.J. Res. 54,¹ an amendment to the Constitution allowing Congress to prohibit flag desecration, the United States will be joining ranks with countries such as China, Iran, Haiti, the regimes of the former Soviet Union and the former South Africa in limiting one of the most cherished principles of a free and democratic society: freedom of expression.² Demonstrators who cut the communist symbols from the center of the East German and Romanian flags prior to the fall of the Iron Curtain committed crimes against their country's laws, yet freedom-loving Americans justifiably applauded these brave actions as outward expressions of what this country views to be an inherent and inalienable right of free speech. If we are to continue to maintain our moral stature in matters of human rights, it is essential that we remain fully open to unpopular dissent, regardless of the form it takes—even disparaging the United States flag.³

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¹H.J. Res. 54 was passed by the House of Representatives on June 12, 1997 by a 310-114 vote.

²See Roman Rollnick, *Flag Amendment Would Put U.S. With Iran, China*, UPI, July 1, 1989, (noting that Iran, China and other countries ban flag burning); C. PEN art. 3 (Les Editions Fardin Port-au-Prince 1988) (Haiti) (subjecting persons who desecrate the flag to lifetime forced labor); The proposed U.S. Constitutional amendment provides, “*the Congress shall have power to prohibit the physical desecration of the flag of the United States*,” H.J. Res. 54, 105th Cong., 2d Sess. (1997).

³See, e.g., *A Joint Resolution Proposing an Amendment to the Constitution of the United States Authorizing the Congress to Prohibit the Physical Desecration of the Flag of the United States: Hearings on H.J. Res. 54 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong., 2d Sess. (Apr. 30, 1997) [hereinafter *1997 House Judiciary Hearings*] (statement of PEN American Center, Feb. 5, 1997) (“To allow for the prosecution of [flag burners] would be to dilute what has hitherto been prized by

The flag desecration amendment responds to a perceived problem—flag burning—that is all but nonexistent in American life today. Studies indicate that in all of American history from the adoption of the United States flag in 1777 through the *Texas v. Johnson*⁴ decision in 1989 there were only 45 reported incidents of flag burning.⁵ Moreover, most incidents of flag burning can be successfully prosecuted today under laws relating to breach of peace or inciting violence—all fully within current constitutional constraints.⁶

Ironically, the flag desecration amendment will not even achieve the sponsors' stated purpose—protecting the American flag and honoring American's veterans. History has taught us that restrictive legislation merely encourages more flag burning in an effort to protest the law itself,⁷ and a vaguely worded constitutional amendment will surely cause such efforts to increase many times over. Rather than protecting the flag, the constitutional amendment will merely serve to dishonor the Constitution and compromise the very ideals our nation was founded on.

Although the majority of Americans initially indicate support for a flag

Americans everywhere as a cornerstone of our democracy. The right to free speech enjoys more protection in our country than perhaps any other country in the world") *Id.*

⁴491 U.S. 397 (1989). In the 5-4 decision authored by Justice Brennan, the Court found that Texas flag desecration law was unconstitutional as applied in that it was a "content-based" restriction. *Id.* Subsequent to *Johnson*, Congress enacted the Flag Protection Act in an effort to craft a more content neutral law. In *United States v. Eichman*, 496 U.S. 310 (1990), the Court overturned several flag burning convictions brought under the new law, finding that the federal law continued to be principally aimed at limiting symbolic speech.

⁵See Robert J. Goldstein, *Two Centuries of Flagburning in the United States*, 163 FLAG BULL. 65 (1995).

⁶See e.g., *Proposing an Amendment to the Constitution of the United States: Hearings on H. J. Res. 79 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 104th Cong., 1st Sess. (May 24, 1995) [hereinafter, *1995 House Judiciary Hearings*] (statement of Bruce Fein at 1) ("While I believe the *Johnson* and *Eichman* decisions were misguided, I do not believe a constitutional amendment would be a proper response. Flag desecrations when employed as 'fighting words' or when intended and likely to incite a violation of law remain criminally punishable under the Supreme Court precedents in *Chaplin-sky v. New Hampshire* (315 U.S. 568 (1942)) and *Brandenburg v. Ohio* (395 U.S. 444 (1969))").

⁷In his extensive survey of the history of American flag desecration law, Robert Goldstein writes, that "[a]lthough the purpose of the [Flag Protection Act adopted by Congress in 1968] was to supposedly end flag burnings, its immediate impact was to spur perhaps the largest single wave of such incidents in American history." ROBERT J. GOLDSTEIN, *SAVING "OLD GLORY": THE HISTORY OF THE AMERICAN FLAG DESECRATION CONTROVERSY* 215 (1995).

protection amendment, they oppose it once they understand its impact on the Bill of Rights. In a 1995 Peter Hart poll, 64 percent of registered voters surveyed said they were in favor of such an amendment; but when asked their position if they knew it would be the first constitutional amendment to restrict freedom of speech and freedom of political protest, support plummeted to 38 percent.⁸

IMPORTANCE OF FREEDOM OF EXPRESSION

Freedom of expression is one of the preeminent human rights and is central to fostering all other forms of freedom. In his pathbreaking article on the First Amendment, *Toward a General Theory of the First Amendment*, Professor Thomas I. Emerson noted that as early as the Renaissance, free and open expression has been considered to be an essential element of human fulfillment.⁹ In particular, Professor Emerson stated that “The theory [of free expression] grew out of an age that was awakened and invigorated by the idea of a new society, in which man’s mind was free, his fate determined by his own powers of reason, and his prospects of creating a rational and enlightened civilization virtually unlimited.”¹⁰

Freedom of expression also provides an important safety valve for society. Professor Greenwalt has written that “those who are resentful because their interests are not accorded fair weight, and who may be doubly resentful because they have not even had a chance to present those interests, may seek to attain by radical changes in existing institutions what they have failed to get from the institutions themselves. Thus liberty of expression, though often productive of divisiveness, may contribute to social stability.”¹¹

Freedom of expression also serves as an important tool in checking the abuse of powers by public officials. Professor Vincent Blasi has noted that this “checking function” should be accorded a level of protection higher than that given any other type of communication because “the particular evil of official

⁸See *Flag Burning Poll Results Show Americans Opposed to Amending the Constitution*, American Bar Association News Release (ABA News Center, Chicago, Ill.), Aug. 4, 1995.

⁹See Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 *YALE L.J.*, 877, 886 (1963).

¹⁰*Id.*

¹¹Kent Greenawalt, *Speech and Crime*, *AM. B. FOUND. RES. J.* 645, 672-3 (1980). See also RONALD D. ROTUNDA, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* §20.6, at 18 (2d ed. 1992).

misconduct is of a special order.”¹²

Perhaps the most important function served by a system of free expression is that it allows for free and open exchange of thoughts—referred to by Justice Holmes as the “marketplace of ideas.”¹³ In a 1644 speech before the English Parliament criticizing censorship laws, John Milton articulated the notion that free expression helps to prevent human error through ignorance:

[T]hough all the winds of doctrine were let loose to play upon the earth, so truth be in the field, we do injuriously, by licensing and prohibiting, to misdoubt her strength. Let her and falsehood grapple, whoever knew truth put to the worse in a free and open encounter?¹⁴

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

First, if any opinion is compelled to silence, that opinion for aught we can certainly know, be true Secondly, though this silenced opinion be in error, it may, and very commonly does, contain a portion of the truth Thirdly, even if the received opinion be not only true but the whole truth; unless it is suffered to be and actually is, vigorously and earnestly contested, it will by most of those who receive it, be held in the manner of a prejudice.¹⁵

The American system of government is itself premised on freedom of expression. Professor Emerson has noted: “Once one accepts the premise of the Declaration of Independence—that governments derive ‘their just powers from the consent of the governed’—it follows that the governed must, in order to exercise their right of consent, have full freedom of expression both in forming

¹²Vincent Blasi, *The Checking Valve in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 526.

¹³Justice Holmes articulated his “marketplace of ideas” theory of free speech in his dissent in *Abrams v. United States*, 250 U.S. 616, 630 (1919): “[T]he ultimate good desired is better reached by free trade in ideas . . . the best test of truth is the power of the thought to get it accepted in the competition in the market.” *Id.*

¹⁴John Milton, *Areopagitica, A Speech for the Liberty of Unlicensed Printing to the Parliament of England* (1644).

¹⁵JOHN STUART MILL, *ON LIBERTY* ch. II. (1859).

individual judgments and in forming the common judgments.”¹⁶

The founding fathers recognized the difficulties in maintaining a system of free expression against the “tyranny of the majority.” In *The Federalist Papers* James Madison expressed concern as to the unfettered power of the majority when he stated that, “By a faction I understand a number of citizens, whether amounting to a majority or a minority of the whole who are . . . adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.”¹⁷ It is for these reasons that the Constitution not only explicitly protected freedom of expression,¹⁸ but created a judiciary possessing the power of review over all legislative and executive action. These twin safeguards—a written constitution and an independent judiciary—have served to foster in this country the freest society in human history.

H.J. RES. 54 IS WRONG AS A MATTER OF PRINCIPLE

Unfortunately the flag desecration amendment belies our system of unfettered political expression. In so doing, it not only undermines our commitment to freedom of expression and opens the door to selective prosecution based on political belief, but diminishes our nation’s international standing.

The true test of any nation’s commitment to freedom of expression lies in its ability to protect unpopular expression, such as flag desecration. In 1929 Justice Holmes wrote that it was the most imperative principle of our constitution to protect not just freedom for the thought and expression we agree with, but “freedom for the thought we hate.”¹⁹ Justice Robert Jackson explained it eloquently fourteen years later in *West Virginia Board of Education v. Barnette*:

Freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order. If there is any fixed star in our constitutional constellation, it is that no of-

¹⁶Emerson, *supra* note 9, at 883.

¹⁷THE FEDERALIST No. 10, at 57 (James Madison) (J. Cooke ed., 1961).

¹⁸Indeed the framers chose to include freedom of speech in the first amendment of the Bill of Rights, and wrote its protection in absolute terms: “Congress shall make no law . . . abridging freedom of speech” U.S. CONST. amend. I. The strictness of the language is in contrast with the fourth amendment, for example which prohibits only “unreasonable searches and seizures.” U.S. CONST. amend. IV.

¹⁹United States v. Schwimmer, 254 U.S. 644, 655 (1929) (Holmes, J., dissenting).

ficial, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion.²⁰

Jim Warner, a Vietnam veteran and prisoner of the North Vietnamese from October 1967 to March 1973, reiterated this principle when he wrote to the House Judiciary Committee:

[Flag burning] intended merely as an insult is not worthy of our fallen comrades. It is the sort of thing our enemies did to us, but we are not them, and we must conform to a different standard Now, when the justice of our principles is everywhere vindicated, the cause of human liberty demands that this amendment be rejected. Rejecting this amendment would not mean that we agree with those who burned our flag, or even that they have been forgiven. It would, instead, tell the world that freedom of expression means freedom, even for those expressions we find repugnant.²¹

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

Beginning in 1931 with *Stromberg v. California*²² (state statute prohibiting the display of a “red flag” overturned) and continuing through the mid-1970’s with *Smith v. Goguen*²³ and *Spence v. Washington*²⁴ (overturning convictions involving wearing a flag patch and attaching a peace sign to a flag), the Su-

²⁰West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

²¹See 1997 House Judiciary Hearings, *supra* note 3 (statement of Jim Warner). These thoughts are echoed by Terry Anderson, a former U.S. Marine Staff Sergeant and Vietnam veteran, who was held hostage in Lebanon, who writes that “[H.J. Res. 54] is an extremely unwise restriction of every American’s Constitutional rights. The Supreme Court has repeatedly held that the First Amendment protects symbolic acts under its guarantee of free speech. Burning or otherwise damaging a flag is offensive to many (including me), but it harms no one and is so obviously an act of political speech that I’m amazed anyone could disagree with the Court.” *Id.* (statement of Terry Anderson).

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

²³415 U.S. 94 (1972).

²⁴418 U.S. 405 (1974).

preme Court has consistently recognized that flag-related expression is entitled to constitutional protection. Indeed, by 1984 when Gregory Johnson was prosecuted in *Texas v. Johnson*²⁵ for burning a U.S. flag outside of the Republican Convention in Dallas, the State of Texas readily acknowledged that Johnson's conduct constituted "symbolic speech" subject to protection under the first amendment. Those who seek to justify H.J. Res. 54 on the grounds that flag desecration does not constitute "speech" are therefore denying decades of well understood court decisions.²⁶

While most Americans deplore the burning of an American flag in hatred, we must recognize that it is our allowance of this conduct that reinforces the strength of the Constitution. As one federal judge wrote in a 1974 flag burning case, "the flag and that which it symbolizes is dear to us, but not so cherished as those high moral, legal, and ethical precepts which our Constitution teaches."²⁷ The genius of the Constitution lies in its indifference to a particular individual's cause. The fact that flag burners are able to take refuge in the first amendment means that every citizen can be assured that the Bill of Rights will be available to protect his or her rights and liberties should the need arise.

The flag desecration amendment will also open the door to selective prosecution based purely on political beliefs. When Peter Zenger was charged with "seditious libel" in the very first case involving freedom of speech on American soil, his lawyer, Andrew Hamilton warned:

The abuses of freedom of speech are the excrescences of Liberty. They ought to be suppressed; but whom dare we commit the care of doing it? An evil Magistrate, entrusted with power to punish Words, is armed with a Weapon the most destructive and terrible. Under the pretense of pruning the exuberant branches, he frequently destroys the tree.²⁸

The history of the prosecution of flag desecration in this country bears out

²⁵491 U.S. 397 (1989). See *supra* note 4.

²⁶See also, Note, *The Supreme Court—Leading Cases*, 103 HARV. L. REV. 137, 152 (1989) ("the majority opinion [in *Johnson*] is a relatively straightforward application of traditional first amendment jurisprudence."); Sheldon H. Nahmod, *The Sacred Flag and the First Amendment*, 66 IND. L.J. 511, 547 (1991) ("Johnson is an easy case if well-established first amendment principles are applied to it."). But see David Yassky, *Eras of the First Amendment*, 91 COLUM. L. REV. 1699 (1991).

²⁷U.S. *ex rel* Radich v. Criminal Ct. of N.Y., 385 F. Supp. 165, 184 (1974).

²⁸LEONARD W. LEVY, *LEGACY OF SUPPRESSION* 135 (1960) (quoting Mr. Hamilton from a *Philadelphia Gazette* article of Nov. 17, 1737.)

these very warnings. The overwhelming majority of flag desecration cases have been brought against political dissenters, while commercial and other forms of flag desecration have been almost completely ignored. A 1971 article in *Art in America* points out that during the Vietnam War period, those arrested for flag desecration were "invariably critics of national policy, while 'patriots' who tamper with the flag are overlooked."²⁹ Whitney Smith, director of the Flag Research Center has further observed that commercial misuse of the flag was "more extensive than its misuse by leftists or students, but this is overlooked because the business interests are part of the establishment."³⁰

H.J. RES. 54 IS WRONG AS A MATTER OF PRECEDENT

If Congress ultimately passes H.J. Res. 54, it is unlikely to be the last time Congress acts to restrict our First Amendment liberties. As President Reagan's Solicitor General Charles Fried testified in 1990:

Principles are not things you can safely violate "just this once." Can we not just this once do an injustice, just this once betray the spirit of liberty, just this once break faith with the traditions of free expression that have been the glory of this nation? Not safely; not without endangering our immortal soul as a nation. The man who says you can make an exception to a principle, does not know what a principle is; just as the man who says that only this once let's make $2+2=5$ does not know what it is to count.³¹

Adoption of the flag desecration amendment will also diminish and trivialize our Constitution. If Congress begins to second guess the courts' authority concerning matters of free speech, we will not only be carving an awkward exception into a document designed to last for the ages, but will be undermining the very structure created under the Constitution to protect our rights. This is why Madison warned against using the amendment process to correct every perceived constitutional defect, particularly concerning issues which inflame public passion.³² Conservative legal scholar Bruce Fein emphasized this con-

²⁹GOLDSTEIN, *supra* note 7, at 154.

³⁰*Id.* at 154.

³¹*Measures to Protect the American Flag: Hearing Before the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. (June 21, 1990) [hereinafter *1990 Senate Judiciary Hearings*] (statement of Charles Fried at 113).

³²Legal philosopher Lon Fuller also highlighted this very problem over four decades ago:

cern when he testified at the 1995 House Judiciary hearings:

While I believe the *Johnson* and *Eichman* [overturning flag burning convictions] decisions were misguided, I do not believe a Constitutional amendment would be a proper response To enshrine authority to punish flag desecrations in the Constitution would not only tend to trivialize the Nation's Charter, but encourage such juvenile temper tantrums in the hopes of receiving free speech martyrdom by an easily be-guiled media It will lose that reverence and accessibility to the ordinary citizen if it becomes cluttered with amendments overturning every wrong-headed Supreme Court decision.³³

H.J. RES. 54 IS WRONG AS A MATTER OF PRACTICE

As a practical matter, H.J. Res. 54 is so poorly conceived there can be no doubt it will open up a "Pandora's Box" of litigation. Not only are its terms vague, but the Resolution gives us no guidance as to its intended Constitutional scope or parameter. While the amendment's supporters claim they are merely drawing a line between legal and illegal behavior, in actuality, they are drawing no line at all, but merely granting the federal government open-ended authority to prosecute dissenters who use the flag in a manner deemed politically inappropriate.

There is little understanding or consensus concerning the meaning of such crucial terms as "desecration" and "flag of the United States." Taken to an extreme and depending on the statute ultimately adopted under the Amendment's authority, "desecration" could apply to canceling flag postage stamps or use of the flag by Olympic athletes. The term "flag of the United States" could include underwear from the "Tommy Hilfiger" collection as well as a

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

Lon Fuller, *American Legal Philosophy at Mid-Century*, 6 J. LEGAL EDUC. 457, 465 (1954), as cited in *Hearings on Proposed Flag Desecration Amendment Before the Subcomm. on Constitution of the Senate Comm. on the Judiciary*, 104th Cong., 1st Sess. (June 6, 1995) (statement of Gene R. Nichol).

³³1995 House Judiciary Hearings, *supra* note 6 (statement of Bruce Fein at 1-2).

Puerto Rican flag including a likeness of the U.S. flag.³⁴

Moreover, since H.J. Res. 54 is drafted to modify the entire Constitution, rather than any portion of the First Amendment, it is unclear whether and to what extent it will supersede provisions in the Bill of Rights relating to "void for vagueness" (First and Fifth Amendment), overbreadth and least restrictive alternatives test (First Amendment), search and seizure (Fourth Amendment), due process and self-incrimination (Fifth Amendment) and cruel and unusual punishment (Eighth Amendment), as well as provisions in the Constitution relating to the Supremacy Clause (Article VI, Section 2) and the Speech and Debate Clause (Article I, Section 6).³⁵

It is insufficient to respond to these concerns by asserting that the courts can easily work out the meaning of the terms in the same way that they have given meaning to other terms in the Bill of Rights such as "due process" and "unreasonable search and seizures." Unlike the other open-ended provisions of the Bill of Rights which constrain the power of the state against the individual, the flag desecration amendment represents an unchartered invasion of our rights and liberties, rather than a back-up mechanism to prevent the government from usurping our individual rights and liberties.

CONCLUSION

We have come too far as a nation to risk jeopardizing our commitment to freedom in a fruitless endeavor to legislate patriotism. As Justice Jackson wrote in *West Virginia Board of Education v. Barnette*:

[The] ultimate futility of . . . attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the last failing efforts of our present totalitarian enemies.

³⁴See 1995 House Judiciary Hearings, *supra* note 5 (statement of Representative Jose Serrano); see also, ROTUNDA, *supra* note 10, §20.49 at §90 ("If we adopt laws outlawing flag desecration "there will be future problems defining what is a flag. Will it be a crime for someone to burn a flag? Or burning fireworks in the shape of an American flag? May a movie director (filming Francis Scott Key watching Fort McHenry) order that the American flag of 1812 be shot at and otherwise defaced? Will it be a crime for the post office to cancel (*i.e.*, deface) a stamp that has on it a copy of the American flag? If a flag design is on a birthday cake, will it be a federal crime to light the birthday candles on the cake? Will cutting the cake deface it? Is it defacing the flag to display it upside down?"). *Id.*

³⁵See *e.g.*, 1990 Senate Judiciary Hearings, *supra* note 30 (statement of Walter Delinger); William Van Alstyne, *Stars and Stripes and Silliness Forever*, LEGAL TIMES, Oct. 2, 1989, at 34.

Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.³⁶

H.J. Res. 54 denigrates the vision of Madison and Jefferson and glorifies the simple-mindedness of those who would disparage our flag, such as Johnson and Eichman. If we tamper with our Constitution, we will have turned the flag, an emblem of unity and freedom, into a symbol of intolerance, and do what no foreign power has been able to—limit the freedom of expression of the American people.

³⁶319 U.S. 624, 641 (1943).