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Letting the People Decide: The Constitutional Amendment Authorizing Congress to
Prohibit Physical Desecration Of the Flag of the United States Before the Committee on the
Judiciary United States Senate
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Whether Congress is empowered, if it chooses, to protect the American flag from physical desecration has been debated for well over a decade. The debate has evolved over time but, by now, a pattern in the argument is clear. Today, I would like to analyze that pattern.

Consistently, the overwhelming majority of Americans have supported flag protection. Consistently, lopsided majorities in Congress have supported it too. In 1989, the House of Representatives voted 371-43 and the Senate 91-9 in favor of legislation to protect the flag. Since that route was definitively blocked by a narrow vote on the Supreme Court in 1990, over two thirds of the House and nearly two-thirds of the Senate have supported a constitutional amendment to correct the Court's mistake and, so, permit the majority to rule on this specific question. Up to 80% of the American people have consistently supported the amendment.

In a democracy, the burden should normally be on those who would block majority rule -- in this case, a minority of the Congress, influential interest groups and most of the media, along with the five Justices who outvoted the other four -- to justify their opposition. They have not been reluctant to do so. Indeed, they have been stunningly aggressive. No less stunning has been their unresponsiveness to (and even their seeming disinterest in) the arguments of the popular and congressional majority. What I am going to do is focus on the pattern of their self-justification.

I am going to speak frankly, not just as a law professor, but as an active Democrat. For a disproportionate share of the congressional, interest group and media opposition has been aligned with the Democratic Party. What has pained me, in the course of my involvement with this issue, are attitudes toward our democracy revealed in the structure of the argument against the flag amendment by so many of my fellow Democrats -- attitudes that would have seemed odd years ago, when I worked for Senator Robert Kennedy, but that now seem to be taken for granted.

I. Arguments About (Supposed) Effects of the Constitutional Amendment: Trivialization and Exaggeration

The central focus of argument against the flag amendment involves the (supposedly) likely effects of its ratification. Typically, these effects are -- at one and the same time -- trivialized and exaggerated. Two general features of the argument stand out: its peculiar obtuseness and the puzzling disdain it exudes for the Congress and for the millions of proponents of the amendment.

A. Trivialization (1) The "What, Me Worry?" Argument. The first trivialization of the amendment's effects is the repeated claim that there is simply no problem for it to address. There are, it is said, few incidents of flag desecration nowadays; and those few involve marginal malcontents who may simply be ignored. The American people's love of the flag, the argument continues, cannot be disturbed by such events. It concludes that, in any event, the flag is "just a

symbol" and that the amendment's proponents had better apply their energy to -- and stop diverting the attention of Congress from -- other, "really important" matters.

What is striking about this argument is not just its condescension to the amendment's supporters and to the Congress which, it implies, cannot walk and chew gum at the same time. Even more striking is its smug refusal to recognize the point of the amendment. The point is not how often the flag has been burned or urinated on or who has been burning it and urinating on it. Rather, the point has to do with our response -- especially our official response -- to those events. In this case, the key response has been that of the Court and, since 1990, of the Congress. When we are told, officially, that the flag represents just "one point of view" on a par, and in competition, with that of flag desecrators and that flag desecration should not just be tolerated, but protected and even celebrated as free speech; when we get more and more used to acts of desecration; then, "love" of the flag, our unique symbol of national community, is bound gradually to wither -- along with other norms of community and responsibility whose withering in recent decades is well known.

To describe what is at stake as "just a symbol" is thus obtuse. The Court's 5-4 decision was not "just a symbol." It was an action of a powerful arm of government, and it had concrete effects. To be sure, its broader significance involved values that are themselves invisible. The issue it purported to resolve is, at bottom, an issue of principle. But would any of us talk of it as "just an issue of principle" and so trivialize it? Surely, the vast majority of members of Congress would hesitate to talk that way. They, after all, voted for a statute to protect the flag. Hence, I would have hoped that the "What, Me Worry?" argument is not one we would hear from them.

(2) The "Wacky Hypotheticals" Argument. The second familiar way of trivializing the amendment's effects is to imagine all sorts of bizarre applications of a law that (supposedly) might be enacted under the amendment. This line of argument purports to play with the terms "flag" and "physically desecrate." Often, the imagined application involves damage to an image (a photo or a depiction) of a flag, especially on clothing -- frequently, on a bikini or on underwear. And, often, it involves disrespectful words or gestures directed at an actual flag or the display of flags in certain commercial settings -- a favorite hypothetical setting is a used car lot. This line of argument is regularly offered with a snicker and sometimes gets a laugh.

Its obtuseness should be clear. The proposed amendment refers to a "flag" not an "image of a flag." And words or gestures or the flying of a flag can hardly amount to "physical desecration." In the Flag Protection Act of 1989, Congress explicitly defined a "flag" as taking a form "that is commonly displayed." And it applied only to one who "knowingly mutilates, defaces, physically defiles, burns, maintains on the ground, or tramples" a flag. Why would anyone presume that, under the proposed constitutional amendment, Congress would be less careful and specific?

That question uncovers the attitude beneath the "Wacky Hypotheticals" argument. For the mocking spirit of the argument suggests disdain not only for people who advocate protection of the American flag. It also depends on an assumption that Congress itself is as wacky -- as frivolous and as mean-spirited -- as many of the hypotheticals themselves. What's more, it depends on an assumption that, in America, law enforcement officials, courts and juries are no less wacky. If the Constitution as a whole had been inspired by so extreme a disdain for our

institutions and our people, could its provisions granting powers to government have been written, much less ratified?

B. Exaggeration

(1) The "Save the Constitution" Argument. Having trivialized the effects of the proposed amendment, its opponents turn to exaggerating those effects. First, they exaggerate the (supposed) effects of "amending the First Amendment." This might, they insist, lead to more amendments that, eventually, might unravel the Bill of Rights and constitutional government altogether. The argument concludes with a ringing insistence that the people and their elected representatives must not "tinker" or "tamper" or "fool around" with the Constitution.

The claim that the debate is about "amending the First Amendment" sows deep confusion. The truth is that the proposed amendment would not alter "the First Amendment" in the slightest. The First Amendment does not itself forbid protection of the flag. Indeed, for almost two centuries, it was understood to permit flag protection. A 5-4 majority of the Court altered this interpretation, only fifteen years ago. That very narrow decision is all that would be altered by the proposed amendment. The debate thus is about a measure that would restore to the First Amendment its long-standing meaning, preserving the Amendment from recent "tampering."

Adding to the confusion is the bizarre claim that one amendment, restoring the historical understanding of freedom of speech, will somehow lead down a slippery slope to a slew of others undermining the Bill of Rights or the whole Constitution. A restorative amendment is not, after all, the same thing as an undermining amendment. What's more, the process of amendment is no downhill slide. More than 11,000 amendments have been proposed. Only 27 -- including the Bill of Rights -- have been ratified. If there is a "slope", it plainly runs uphill. The scare rhetoric, then, isn't only obtuse. It also manifests disdain for the Congress to which it is addressed.

The greatest disdain manifested by this line of argument, however, is for the Constitution and for constitutional democracy -- which it purports to defend. Article V of the Constitution specifically provides for amendment. The use of the amendment process to correct mistaken Court decisions -- as it has been used several times before -- is vital to maintaining the democratic legitimacy of the Constitution and of judicial review itself. To describe the flag amendment as "tinkering with the Bill of Rights" -- when all it does, in fact, is correct a historically aberrant 5-4 decision that turned on the vote of one person appointed to office for life -- is to exalt a small, unelected, tenured elite at the expense of the principle and practice of constitutional democracy.

(2) The "Censorship" Argument. The second exaggeration of (supposed) effects of the proposed amendment portrays it as inviting censorship. If Congress prohibits individuals from trashing the American flag, opponents say, it will stifle the freedom of speech. In particular, they continue, it will suffocate expression of "unpopular" or "minority" points of view. It will thereby discriminate, they conclude, in favor of a competing point of view. This line of argument is, essentially, the one adopted by a 5-4 majority of the Court.

It is, however, mistaken. The argument ignores, first of all, the limited scope of laws that the

amendment would authorize. Such laws would block no message. They would leave untouched a vast variety of opportunities for self-expression. Indeed, they would even allow expression of contempt for the flag by words -- and by deeds short of the "physical" desecration of a flag. Obviously, there must be some limit on permissible conduct. This is so even when the conduct is, in some way, expressive. What's important is this: Plenty of leeway would remain, beyond that narrow limit, for the enjoyment of robust freedom of speech by all.

Secondly, the argument that such laws would impose a limit that discriminates among "competing points of view" misrepresents the nature of the American flag. Our flag does not stand for one "point of view." Ours is not like the flag of Nazi Germany or the Soviet Union -- although opponents of the proposed amendment typically make just that comparison. The American flag doesn't stand for one government or one party or one party platform. Instead, it stands for an aspiration to national community despite -- and transcending -- our differences and our diversity. It doesn't "compete against" contending viewpoints. Rather, it overarches and sponsors their contention. The 5-4 majority on the Court misunderstood the unique nature of our flag. A purpose of the flag amendment is to affirm this uniqueness and, so, correct that mistake.

Thirdly -- and most importantly -- opponents obtusely ignore the fact that a primary effect of the amendment would be precisely the opposite of the one "predicted" by their scare rhetoric. Far from "censoring" unpopular and minority viewpoints, the amendment would tend to enhance opportunity for effective expression of those viewpoints. A robust system of free speech depends, after all, on maintaining a sense of community. It depends on some agreement that, despite our differences, we are "one," that the problem of any American is "our" problem. Without this much community, why listen to anyone else? Why not just see who can yell loudest? Or push hardest? It is thus for minority and unpopular viewpoints that the aspiration to -- and respect for the unique symbol of -- national community is thus most important. It helps them get a hearing. The civil rights movement understood this. That is why it displayed the American flag so prominently and so proudly in its great marches of the 1960's.

If we become accustomed to cumulative acts of burning, trampling and urinating on the flag, all under cover of the Supreme Court, where will that leave the next Martin Luther King? Indeed, where will it leave the system of free speech as a whole? As the word goes forth that nothing is sacred, that the aspiration to community is just a "point of view" competing with others, and that any hope of being noticed (if not of getting a hearing) depends on behaving more and more outrageously, won't we tend to trash not just the flag, but the freedom of speech itself? Opponents of the proposed amendment imagine themselves as champions of a theory of free speech -- but their argument is based in a strange disdain for it in practice.

I am, no doubt, preaching to the choir. The Senate voted 91-9 for a flag protection law. Most Senators, therefore, rejected the "censorship" argument in 1989. Now -- with the Court absolutely barring such a law on the mistaken ground that any specific protection of the flag discriminates among competing "points of view" -- Senators who support protection of the American flag simply have no alternative but to support the proposed constitutional amendment.

II. Argument About (Supposed) Sources of Support for the Amendment

Most opponents of the amendment don't confine themselves to misrepresenting its effects. Repeatedly, they supplement those arguments with ad hominem, disparaging claims about its supporters as well. Again, they combine strategies of trivialization and exaggeration. What's remarkable is that they seem to assume their generalizations will go unchallenged. They seem to take for granted a denigrating portrayal of others -- as well as their own entitlement to denigrate.

The denigration is not exactly overt. It often takes the form of descriptive nouns and verbs, adjectives and adverbs, woven into apparently reasonable sentences. By now, we're so used to these terms of derision that we may not notice them or, worse, take them as signs of "wisdom."

The trivializing portrayal of supporters tends to include references to the (supposedly) "simple" or "emotional" nature of their views -- which, in turn, are trivialized as mere "feelings." It's often asserted that they are behaving "frivolously." (Only the opponents, according to themselves, are "thoughtful" people.) Elected officials who back the amendment are said to be "pandering" or "cynical" or taking the "easy" course. (Only opponents, according to themselves, are "courageous" or "honest.") The patriotism of supporters is dismissed as "flag-waving."

The (negatively) exaggerated portrayal tends to include references to the (supposedly) "heated" or "aggressive" or "intolerant" nature of support for the amendment. (Only the opponents, according to themselves, are "deliberative," "restrained" and "respectful of others.") The goal, of course, is to suggest (not so subtly) that the supporters are fanatics or bullies -- that they are like a mob that must be stopped before they overwhelm law, order and reason.

A familiar argument fusing trivialization and exaggeration -- a Washington Post editorial of April 24, 1998 is typical -- lumps the flag amendment's supporters with supporters of a great variety of other recently proposed amendments. It smears the former by equating them to others who advocate very different measures more readily belittled as silly or feared as dangerous. There is a name for this sort of argument. It is guilt-by-association. (But then the opponents of the flag amendment, according to themselves, would never employ such rhetoric, would they?)

This is odd. These "thoughtful" people seem to be in the habit of making descriptive generalizations that are not just obtuse but false -- not just disdainful but insulting. Why?

III. Ignoring Counter-Argument

Part of the answer, I believe, is that opponents of the flag amendment are in another habit. It is the habit of not really listening to the other views. Not listening makes it easier to caricature those views. And, in turn, the caricature of those views makes it easier not to listen to them.

Anyone who's been involved with this issue -- on either side -- over the years, and who's had an opportunity to see every reference to it in the media across the country, can describe one repeating pattern. Most of the time, the issue is not mentioned. Then, in the weeks before one or another congressional consideration of it, there comes a cascade of editorials and commentary -- about 90% hostile to and professing alarm about the amendment. Supporters can describe the other aspect of the pattern: most of the media simply will not disseminate disagreement with that point of view. Speaking from my experience, I can tell you that only a few newspapers have

been willing to publish brief responses to what they assume is the one "enlightened" view -- their own.

There is an irony here. Those most alarmed about (supposed) discrimination against the views of people who burn or urinate on the American flag are themselves in the habit of discriminating against the views others who favor protecting the flag. Warning of a (supposed) dampening of robust debate, they dampen robust debate -- and they do it in good conscience and with no conscious intent to apply a double standard. What explains such puzzling behavior?

IV. The Value of Public Patriotism

I've characterized the question presented by the flag amendment as involving the value of "community" at the national level. But most opponents seem disinclined to accept that formulation. The question for them seems to involve something they imagine to be narrower than community. For them, the question seems to involve the value of "patriotism." Beneath much of the opposition is, I think, an uneasiness about patriotism as a public value.

I know: Every opponent of the flag amendment insists that he or she is a patriot, that he or she "loves the flag" and, personally, would defend one with life and limb. I don't doubt their sincerity. But I trust I'll be forgiven if I also try to understand the actual behavior of opponents and the language they use to describe the amendment and its source of support. I trust I'll be forgiven if I try to understand all this in terms of a distinction that I think they make between "personal" and "public" patriotism.

I believe that many opponents of the amendment have come to see patriotism as a strictly personal matter -- much like religious faith. As such, they affirm its value. But they are, I believe, uneasy about public patriotism. If the uneasiness were focused only on government coercion of patriotism (a coerced flag salute, for example) few would differ. But it is focused, also, on its protection by government (that's what the flag amendment is about), and to some degree it may extend to governmental subsidization and facilitation of public patriotism as well.

For the implicit comparison made by opponents of the flag amendment between patriotism and religious faith carries consequences with it. Two main assumptions lead them to oppose even minor sorts of government assistance to religion. First, there is the assumption that religion is not just deeply personal, but deeply emotional and potentially explosive as well, and that any entanglement of government with religion may therefore produce dangerous conflict and official oppression of freedom and diversity. Second, there is the assumption that, in an increasingly secular age, religious faith is not really terribly relevant to good "governance" anyway -- that is, unless "religion" is defined to encompass a wide range of currently accepted secular values.

The same kinds of assumptions underlie both the "exaggeration" and the "trivialization" arguments made by opponents of the flag amendment. First, they imagine that public patriotism taps into raw emotions that threaten to cause conflict and official oppression. Thus they insist that the proposed amendment endangers constitutionalism and freedom. Second, they imagine public patriotism as narrowly militaristic and old-fashioned. In an age of "multiculturalism," on one hand, and of "globalism," on the other, what need is there for it in government and in public

life? When the amendment's opponents do affirm the public value of the flag, moreover, they tend to do so by defining "the flag" to stand simply for "the freedom to burn it."

These assumptions and these arguments are perverse. So, too, is the underlying equation of patriotism to religion. For public patriotism is surely basic to motivating broad participation in, and commitment to, our democracy. Far from endangering freedom and political order, it is essential to the effective enjoyment of freedom and maintenance of the legitimacy of government. If national projects, civilian or military, are to be undertaken -- if our inherited ideals of liberty and equality are to be realized through concentrated national effort -- public patriotism simply has to be valued; its unique symbol should, therefore, be protected.

Let me speak, finally, as a Democrat: When I was growing up, Democrats knew all this. My own hero, Senator Robert Kennedy, would never have doubted the value of public patriotism. He would never have dismissed it as trivial, dangerous or "right wing." I believe that he would have voted -- as his son did in 1995 and 1997 -- to restore to the First Amendment the meaning it had, in effect, for two centuries of our history. That belief encourages me to see this as a truly nonpartisan effort, deserving fully bipartisan support. And, so, it encourages me to urge the United States Senate to permit consideration of the proposed amendment by representatives of the people in the states, submitting this matter to the great democratic process established by Article V of the Constitution.