

# The Flag Protection Amendment and American Greatness

One of the great characteristics of Americans is their candor. Among the reasons we declared independence from what we believed to be the excesses of a corrupt British monarchy and aristocracy was our contempt for pretense, deference, and pomposity. We believed, instead, in simple virtue and simple values such as truth, decency, honesty, temperance, and humility.

Democrats and their increasingly dominant progressive wing fail to understand that Donald Trump has been an extraordinary champion of these traditional virtues, and he proved it again with his warm embrace of the Flag Protection Amendment, which has recently been reintroduced into Congress by Senators Kevin Cramer (R-ND) and Steve Daines (R-Mont.).

The text of the amendment is simple and succinct: “Congress shall have the power to prevent the physical desecration of the flag of the United States,” but it strikes at the heart of contemporary progressivism, with its belief in what psychologists are wont to call “self-actualization,” but more astute observers have always known to be “unbridled license.”

Somehow our culture became so twisted that by 1989, a majority of the Supreme Court in *Texas v. Johnson* declared that burning the flag (or shredding it, or defecating or urinating on it – all behavior formerly prohibited by state and federal law) was simply a form of “speech,” protected by the First Amendment.

It wasn't always so. Earlier, respected liberals such as Earl Warren and Hugo Black had taken the position that flag desecration was obviously harmful *action* – not speech – and that there was no constitutional problem with prohibiting it. As Chief Justice William Rehnquist wrote in a brilliant

dissent in *Texas v. Johnson*, “flag burning is the equivalent of an inarticulate grunt or roar that, it seems fair to say, is most likely to be indulged in not to express any particular idea, but to antagonize others.”

How could it be that five members of the Supreme Court, including the late Justice Antonin Scalia, failed to see that? How could it be that this slim majority thought a protester’s purported right to attack a venerated national icon trumped the right of other Americans to preserve pristinely the symbol of what binds us together?

The answer, it would seem, was an unwise cultural shift, which made too many Americans believe that individual expression was the highest good, and that older notions – notions important in our founding, such as respect for the community, self-sacrifice, and altruism – were of lesser moment.

In 1989, many veterans’ and other civic organizations combined in something called the Citizens’ Flag Alliance (CFA), in order to push for a constitutional amendment overruling *Texas v. Johnson*, or, as some of us privileged enough to work with the CFA argued, simply to correct the Supreme Court majority’s incorrect reading of the First Amendment.

The Flag Protection Amendment was the result, and it quickly garnered the required two-thirds majority in the House of Representatives, and it came within one vote of passing the Senate, but it was defeated by several Republican votes, including that of Mitch McConnell (R-Ky.), who is something of a First Amendment absolutist. To his credit, for example, McConnell believes that laws regarding campaign contributions are a violation of the First Amendment. Unfortunately, he couldn’t grasp the argument that an “inarticulate grunt” is not speech.

Trump, with his characteristic shrewd insight, understands the difference between a harmful *act* calculated to sow discord and

actual articulate *speech*. Anything that a flag desecrator wishes to say can be put into words, meaning there is no restriction on speech in protecting the flag.

Why is that so difficult to understand? Why, indeed, did so many liberals and progressives in the original battle to pass the Flag Protection Amendment see a profound constitutional threat? Those of us who argued for the amendment three decades ago were often smeared as something akin to fascists, as if the hallowed right to besmirch the national symbol was not something that had only sprung into existence in 1989.

Why was it that only three law professors – Robert Nagel of Colorado, Richard Parker of Harvard, and yours truly – were willing openly to lend our support to the CFA's efforts?

The ideology of “anything goes” hyper-individualized liberalism is certainly an explanation, but so is the notion that allowing any object to be sacred is somehow dangerous. There was (and I daresay remains) opposition to the amendment based on the notion that to prohibit desecration of the flag is, in effect, to establish a national religion, an establishment barred by the First Amendment's religion clauses. To forbid the desecration of the flag would violate freedom of religion. Or so the argument runs.

This is, of course, complete nonsense. Prohibiting flag desecration is not flag *worship*; it is simply a recognition that there are some things that any society worth dying for is entitled to hold sacred.

Perhaps when a progressive sees a flag, he sees something that can be trashed to score political points. But for many veterans and their families, and for many other patriotic Americans, some of whom still tear up when they watch the stars and stripes go by, the flag represents what binds us together as a nation and particularly the sacrifices of the men and women who have given life or limb in the service of

our country.

For those Americans – and Donald Trump has now placed himself among them – it is important that the Constitution be understood as a repository of duties as well as rights, as a charter of community as well as a guarantee of liberty and freedom. This is what the Flag Protection Amendment seeks to do.

When the newly self-conscious people of the United States broke with Britain in 1776, we were not rejecting everything we gained from our British heritage. We thought that the British government had become corrupt, but we thought that the English Common Law, with its protections for persons and property, ought still to be the foundation of our Republic, as it came to be.

English Common Law, as Blackstone demonstrated (and Blackstone was the best-selling legal authority in the new American republic for many years) was based on a firm religious foundation. Indeed – as the Americans recognized at the founding and Justice Samuel Chase articulated in 1803, the idea that there can be no order without law, no law without morality, and no morality without religion was inherent in the English and American legal tradition.

Perhaps there is a religious aspect to preventing desecration of the flag but, if so, it is no more than a necessary recognition that something sacred exists about America itself—something worth protecting and preserving. Is it too much to suggest that passage of the Flag Protection Amendment not only would correct an error of the Supreme Court, but would help make America great again?

—

*This [article](#) has been republished with the permission of American Greatness.*

[Image Credit: Official White House Photo by Shealah Craighead]