

By What Authority?: Reflections on the Constitutionality and Wisdom of the Flag Protection Act of 1989

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Over 150 years ago Alexis de Tocqueville observed in his seminal work, *Democracy in America*, that “I know of no country in which there is so little independence of mind and real freedom of discussion as in America.”¹ The political firestorm that has followed *Texas v. Johnson*,² the “flag-burning” case, demonstrates the continuing truth of Tocqueville’s words. Democracy’s principal failing, Tocqueville believed, lay in the timidity of America’s leaders when confronted by the suffocating tide of popular opinion.³ In the President and in Congress such timidity of spirit is currently ascendant. The Flag Protection Act of 1989⁴ (the Act) represents a recent example of the irresolute vision of this nation’s leadership. Its passage was an effort to avoid responsibility for defending the fundamental principle of freedom of speech against the shrill voice of the majority, as well as to avoid the responsibility attending enactment of a constitutional amendment.⁵ But this effort lacks integrity, as a matter

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1. 2 A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 263 (F. Bowen rev. trans. 1945) (Cong. ed. 1835).

2. 109 S. Ct. 2533 (1989).

3. See TOCQUEVILLE, *supra* note 1, at 265-68.

4. Pub. L. No. 101-131, 1989 U.S. CODE CONG. & ADMIN. NEWS (103 Stat.) 777 (to be codified at 18 U.S.C. § 700(a)).

5. See, for example, Senator Kennedy’s remark in the floor debate that “[t]he proposed statute is supported in good faith by many who see it as the only means of heading off a constitutional amendment.” 135 CONG. REC. S12576 (daily ed. Oct. 4, 1989). And Senator Grassley undoubtedly captured the mood of Congress when he observed, “I understand that the pressure on my colleagues to support a statutory response is great. After all, who among us can safely vote against a bill styled to protect our flag from desecration.” *Id.* at S12587.

of both constitutional law and political principle.

Current debate over the Act has focused on its constitutionality under the First Amendment as well as on the wisdom of such an action as compared to amending the Constitution. This Essay also considers the constitutionality of the Act, but it focuses on the text of the Constitution rather than the Bill of Rights. Specifically, Congress has not declared, and a search of the text of the Constitution does not reveal, the source of power for its action. It must be, therefore, that the Act's proponents are relying on some theory, as yet unarticulated, involving the "penumbra"⁶ of Article I to support Congress' authority to protect the flag. Yet these very proponents of flag protection adamantly reject any similar penumbral searches in the Bill of Rights. It is inconsistent for adherents to the original intent doctrine to decry an expansive interpretation of the protections contained in the Bill of Rights while simultaneously advocating an expansive interpretation of the enumerated powers expressed in Article I. This Essay argues that unless proponents of the Act accept some theory of substantive development of the Constitution, authority for the Act is absent from Article I. Even if Congress lacks the power to protect the flag legislatively, however, a comparable outcome can be achieved through constitutional amendment or, alternatively, through state legislation in the manner of the federal Act. Because, through one means or another, Congress or the states might still provide safe sanctuary for the flag, this Essay concludes by examining the wisdom of insulating the flag from the fires of political dissent.

I. Background

If Tocqueville erred in any way in his extraordinary analysis of American democracy, it was in underestimating the future power of the judiciary to check the caprices of the majority. This power is eminently observable in *Johnson*, in which a divided Court upheld Gregory Lee Johnson's right under the First Amendment to express his disapproval of

6. For those uncomfortable with the term "penumbra," a term eschewed by the Court in favor of "substantive due process," an alternative wording in the context of Article I might be "substantive due power." I use the term penumbra in this Essay as a rhetorical device to refer to constitutional interpretation involving the search for those values "'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)); see generally Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063 (1981). Ultimately, commentators who are critical of the right of privacy when it is found in the penumbra of the Bill of Rights are also critical of that right when it is found in the Due Process Clause of the Fourteenth Amendment. This Essay is directed at those commentators who are critical of a fundamental rights search in the Bill of Rights but who also accept a fundamental powers analysis in Article I.

the Reagan administration by burning an American flag outside the 1984 Republican National Convention.⁷ With full recognition of the importance of the question and the emotions that the question elicited,⁸ the Court upheld the fundamental and transcendent value of free political expression.

The Texas statute at issue in *Johnson* prohibited the intentional or knowing desecration of the American flag "in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action."⁹ As Texas conceded in oral argument, Johnson's action of burning the flag was expressive conduct and thus fully within the scope of the First Amendment.¹⁰ The First Amendment is not absolute, however, and Texas forwarded two arguments for removing Johnson's conduct from constitutional protection. First, Texas argued that flag-burning created an imminent harm of a breach of the peace.¹¹ Second, Texas asserted a compelling interest in preserving the flag as a symbol of nationhood.¹²

The Court rejected Texas' claim that flag burning inevitably resulted in breaches of the peace, pointing out that no such breach had occurred in this case.¹³ More importantly, the Court held that the mere possibility that such a deplorable act might give offense cannot be the measure of constitutional protection. It is political dissent intended to provoke unpopular response in the "marketplace of ideas" that is most in need of protection.¹⁴

In responding to Texas' second claim, that it had an interest in preserving the flag as a symbol of nationhood and national unity, the Court marshaled its strongest arguments. As the majority noted, basic to the First Amendment is the principle "that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."¹⁵ The First Amendment bars the government from acting as arbiter of its citizens' ideas. Buttressing this argument, the Court stressed that America's strength lies in its tolerance of dissent, even dissent that impinges on views so generally embraced as to be thought beyond reproach.¹⁶ What is more trenchant, after all, than the

7. *Texas v. Johnson*, 109 S. Ct. 2533, 2536-37 (1989).

8. *See id.* at 2547-48; *id.* at 2548 (Kennedy, J. concurring).

9. TEX. PENAL CODE ANN. § 42.09 (Vernon 1989).

10. *Johnson*, 109 S. Ct. at 2540.

11. *Id.* at 2540.

12. *Id.* at 2542.

13. *Id.* at 2541.

14. *Id.* at 2546.

15. *Id.* at 2544.

16. *Id.* at 2547.

spectacle of a political dissenter standing upon the pulpit of the First Amendment claiming that America does not tolerate dissent. By burning the American flag, Gregory Lee Johnson inadvertently illustrated, better than a thousand Fourth of July rockets, what this country stands for.

Immediately following the decision, a collective outcry of condemnation erupted. The initial reaction was a call for a constitutional amendment, a sentiment seconded by President Bush.¹⁷ Most legislators followed the President's timorous lead, fearing that, otherwise, they would find themselves drowned in the roaring political tide. In an effort to avoid the political whirlpool of opposing a constitutional amendment, but also to avoid the responsibility of standing against the prevailing current, many legislators proposed, and Congress quickly passed, a statute establishing criminal penalties for anyone who "knowingly mutilates, defaces, burns, maintains on the floor or ground or tramples upon any flag of the United States."¹⁸ Unfortunately for Congress, the ship they constructed in such haste has a leak.

II. A Federal Government of Enumerated Powers

Article I, section 1 of the Constitution provides that "[a]ll legislative Powers *herein granted* shall be vested in a Congress of the United States;"¹⁹ it does not grant all legislative power to Congress. Indeed, the Bill of Rights was originally deemed redundant by many drafters of the Constitution because it was generally supposed that a government of enumerated powers could not legislate in the areas to be protected by a Bill of Rights. As Alexander Hamilton explained, "Why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?"²⁰ In fact, not only was a Bill of Rights deemed superfluous, it was considered perilous. Hamilton's argument seems prescient today:

[B]ills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution but would even be dangerous. They would contain various exceptions to powers which are not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there

17. See New York Times, June 28, 1989, at 1, col. 5.

18. The Flag Protection Act of 1989, *supra* note 4.

19. U.S. CONST. art. I, § 1 (emphasis added).

20. THE FEDERALIST No. 84, at 156 (A. Hamilton) (Tudor Publishing Co. ed. 1937).

is no power to do?²¹

The Bill of Rights operates to check government power, not to confer power onto the government. As Hamilton anticipated, this elementary principle has become blurred over time, and the powers of the federal government today reach areas that Hamilton surely would have found surprising. Nonetheless, though expansive, the powers of the federal government are not plenary. Thus, Congress must find a grant of authority, either explicitly in the text or implicitly in the shadow cast by the text, upon which to base enactment of the Flag Protection Act of 1989.²² This section examines the possible sources of this power.

A. The Commerce Clause

The Commerce Clause has become the wellspring of a vast array of federal powers. Under the Court's interpretation of the clause, it sometimes appears that Congress has the power to enact virtually any legislation. The Court has upheld Congress' power to regulate commerce in cases where the economic effect on interstate commerce was indirect and seemingly marginal.²³ As long as the activity exerts a substantial aggregate effect on interstate commerce, it may be federally regulated.²⁴ As Chief Justice Rehnquist has emphasized, however, "[I]t would be a mistake to conclude that Congress' power to regulate pursuant to the Commerce Clause is unlimited."²⁵

In fact, unless the Commerce Clause is unlimited, it cannot supply the authority for federal flag protection. First, it is highly speculative that flag burning affects interstate commerce at any level. If it does so at all, it most likely facilitates commerce by the need for more flags. Moreover, Congress made no statement accompanying the Act or in the committee reports specifying the source of its authority as the Commerce Clause or, for that matter, any other section of the Constitution.²⁶ Ab-

21. *Id.*

22. The *Johnson* Court did not consider the power of Congress to legislate in this area, nor did it need to, since a state statute was involved. The Court did observe as follows: "There is, moreover, no indication—either in the text of the Constitution or in our cases interpreting it—that a separate juridical category exists for the American flag alone." *Johnson*, 109 S. Ct. at 2546.

23. See, e.g., *Perez v. United States*, 402 U.S. 146, 154 (1971) (Congress could criminalize purely intrastate "extortionate credit transactions" because of their effect on interstate commerce.); *Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942) (Congress could control home wheat production because of substantial economic effect of home consumption by many farmers.).

24. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 310 (2d ed. 1988).

25. *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 310 (1981) (Rehnquist, C.J., concurring).

26. See S. REP. NO. 152, 101st Cong., 1st Sess. (1989); H.R. REP. NO. 231, 101st Cong., 1st Sess. (1989). The only reference to Congress' authority in the Senate report states that

sent some explicit statement that it was resting on its commerce powers, the Court should not stretch plausibility to supply that statement.²⁷ Finally, the object of the Commerce Clause is commerce, and burning flags is simply not an economic activity. To broaden the interpretation of the Commerce Clause to private noneconomic acts that might affect interstate commerce would extend Congress' power to all private acts.

B. The War Power

Another possible basis for upholding Congress' enactment of the Act might be the war powers of Article I, section 8, subsections 11 and 15. Subsection 11 grants Congress the power "[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water," and subsection 15 provides "for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions." But neither individually nor together do these sections grant to Congress the power to protect the flag within the United States.

One of the most important functions the national flag performs is to represent the United States abroad. Inherent in Congress' power to make war and provide for the common defense lies also the power to direct that the American flag be carried by the military into battle and that it accompany the military in times of peace. This authority, however, does not necessarily extend to controlling the actions of United States citizens toward the flag at home during peacetime. No relationship can be shown between protecting the flag from internal dissent during peacetime and Congress' ability to carry out the mandate of subsection 11.

Subsection 15 also does not provide a basis for Congress' effort to protect the flag. Although this subsection contains the tempting language referring to the power to "suppress insurrections," this power is

"Congress's power to protect the physical integrity of the flag has never been questioned, and is consistent with its authority to protect symbols and landmarks." S. REP., *supra*, at 4. The House report does not address the source of power for the Act.

Congress' failure to specify the source of power for the Act may be explained by the fact that none of the debaters had any motivation for identifying authority for the Act. Traditional "strict constructionists," though often troubled by federal power, favor flag protection in almost any form. Traditional "loose constructionists" have less fear of federal power, and here sought to avoid tampering with the Bill of Rights at any cost. Hence, ideologues on both sides leaped immediately to debate the scope of the Bill of Rights, failing to read the constitutional text along the way.

27. See Bogen, *The Hunting of the Shark: An Inquiry Into the Limits of Congressional Power Under the Commerce Clause*, 8 WAKE FOREST L. REV. 187, 198 (1972) ("[W]here the relationship of the law to interstate commerce is not readily apparent, the Court should require Congress to relate the law to its impact on interstate transactions. This could assist in focusing Congressional concern on the proper issues.").

limited to the more parochial concern of Congress' power to call forth the militia.²⁸ One might speculate that when called forth, the militia might be directed to carry the American flag, but subsection 15 cannot reasonably be construed to grant the power Congress has asserted in order to protect the flag.

It may be argued that implicit in the war power exists the power to make the flag a national symbol, and that this power necessarily confers the authority to protect that symbol. The existence of such inherent powers is the subject of the next part in which I consider whether flag protection is one of those fundamental powers discernible in Article I.

C. A Penumbra Theory of Article I

In his most recent book, Judge Bork criticizes the *Johnson* Court for nullifying the manifest will of the majority of Americans by invalidating the laws of forty-eight states and the federal government which prohibited "desecration or defilement of the American flag."²⁹ He appears to base his argument, and I presume the federal power to legislate, on the fundamental value of the flag as symbol of the United States.³⁰ Chief Justice Rehnquist explicated this argument in his dissent in *Spence v. Washington*,³¹ asserting that the "true nature of the State's interest . . . [is] one of preserving the flag as 'an important symbol of nationhood and unity. . . . [T]he flag is a national property, and the Nation may regulate

28. See, e.g., *Stearns v. Wood*, 236 U.S. 75 (1915); *In re The Brig Amy Warwick*, 67 U.S. 635 (1862); *Perpich v. United States*, 880 F.2d 11 (8th Cir. 1989) (en banc).

29. R. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 126-28 (1989).

30. *Id.* at 128. Judge Bork has not specifically addressed the question of Congress' authority to pass flag protection legislation. In comments before the House Judiciary Committee he argued that although *Johnson* was incorrectly decided, it could not be avoided through legislation. He advocated enactment of a constitutional amendment to protect the flag because he believed the Act would not pass scrutiny under *Johnson's* interpretation of the First Amendment. Bork, *Flag Burning Should Be Unconstitutional*, *Newsday*, Aug. 9, 1989, at 63 (excerpt of testimony before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee, August 1, 1989). Nonetheless, Judge Bork's comments clearly indicate that he would not question Congress' power to enact such legislation if *Johnson* had been decided in favor of Texas. See *supra* note 29 and accompanying text.

The proposed constitutional amendment endorsed by President Bush states: "The Congress and the States shall have power to prohibit the physical desecration of the flag of the United States." In this form, the amendment confers power onto Congress in the manner of Article I, but is ambiguous as to its effect on the First Amendment. Ironically, therefore, this amendment would resolve the present criticism over Congress' authority to protect the flag, but leaves unresolved the issue so far the subject of most debate: the effect of the First Amendment on efforts to protect the flag. See *Hearings on Measures to Protect the Physical Integrity of the American Flag: Hearings Before the Senate Judiciary Committee*, 101st Cong., 1st Sess. 549-55 (1989) (testimony of Walter Dellinger).

31. 418 U.S. 405 (1974).

those who would make, imitate, sell, possess, or use it.' ”³² Nevertheless, the principle of the national flag as the symbol of nationhood is not explicit in the Constitution; this suggests that specific guarantees in Article I have “penumbras, formed by emanations from those guarantees that help give them life and substance.”³³

But identifying powers within the penumbra of Article I is fraught with difficulties. Principal among these is the lack of textual guidance. If the power is not contained in the text, how can we be sure it is justified? Judge Bork has made this very argument, but in another context:

[T]he choice of “fundamental values” by the Court cannot be justified. Where constitutional materials do not clearly specify the value to be preferred, there is no principled way to prefer any claimed human value to any other. The judge must stick close to the text and the history, and their fair implications, and not construct new rights.³⁴

If the power to protect the flag were to be recognized, how should the scope of that power be ascertained? Again, Judge Bork made the point well: “We are left with no idea of the sweep of the [right] and hence no notion of the cases to which it may or may not be applied in the future.”³⁵ In *Johnson*, Justice Brennan echoed Judge Bork’s concern:

To conclude that the Government may permit designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernible or defensible boundaries. Could the Government, on this theory, prohibit the burning of state flags? Of copies of the Presidential Seal? Of the Constitution?³⁶

When the Court protects “fundamental values” not explicitly enumerated in the text of the Constitution, it is susceptible to the criticism of acting as a super legislature. Judge Bork has repeatedly warned that when the Court fails to abide by those neutral principles specified in the Constitution, it simply substitutes its own value preferences for those of the majority.³⁷ This is an illegitimate practice in a democratic society.³⁸

32. *Spence v. Washington*, 418 U.S. 405, 421-22 (1974) (Rehnquist, J., dissenting) (quoting *Smith v. Goguen*, 415 U.S. 566, 587 (1974) (White, J., concurring)); see also *Goguen*, 415 U.S. at 586-87 (White, J., concurring) (“[I]t is well within the powers of Congress to adopt and prescribe a national flag and to protect the integrity of that flag. . . . [The] flag is an important symbol of nationhood and unity. . . .”).

33. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

34. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 8 (1971) (criticizing the *Griswold* Court’s identification of the right of privacy in the penumbra of the Bill of Rights).

35. Bork, *supra* note 30, at 9.

36. *Johnson*, 109 S. Ct. at 2546.

37. Bork, *supra* note 30, at 3.

In *Bowers v. Hardwick*,³⁹ the Court, in an opinion by Justice White, joined by Chief Justice Burger and Justices Rehnquist, O'Connor and Powell, refused to extend the right of privacy to consensual adult homosexual conduct on this very basis: "The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution."⁴⁰

Yet the Court has often stepped into the mire and selected out for special protection certain values not explicitly stated in the Constitution. In fact, every member of the present Court has accepted at one time or another the need to supplement the express words of the Constitution.⁴¹ Perhaps we should have more confidence in the Court's ability to identify

38. *Id.* at 1-2.

39. 478 U.S. 186 (1986).

40. *Id.* at 194.

41. Justice Brennan's view that the Bill of Rights is broader than the guarantees expressed therein is well known. See Brennan, *Color-Blind, Creed Blind, Status Blind, Sex-Blind, It's All There, In the Fourteenth Amendment. But Why Are These Principles Under Relentless Attack Today?*, 14 HUM. RTS. No. 2, 30 (1987). Justice Blackmun similarly accepts a broad vision of the Constitution, as reflected in his majority opinion in *Roe v. Wade*, 410 U.S. 113 (1973), in which he concluded "that the right of personal privacy includes the abortion decision" made by a woman. *Id.* at 154. Chief Justice Rehnquist has also recognized the need to supplement the Constitution. In fact, in his dissent in *Roe*, 410 U.S. at 172-73, he stated that the liberty protected by the Fourteenth Amendment "embraces more than the rights found in the Bill of Rights." Justice Marshall, who had joined the *Roe* majority, also identified the "right to marry" as a fundamental right deserving fourteenth amendment protection in *Zablocki v. Redhail*, 434 U.S. 374, 384-86 (1978). In *Turner v. Safley*, 482 U.S. 78, 95-96 (1986), Justice O'Connor extended the holding in *Zablocki* to prison inmates, concluding that there is a "constitutionally protected marital relationship in the prison context." *Id.* at 96. (The *Turner* court, however, did not apply a compelling state interest test, finding that "even under the reasonable relationship test, the marriage regulation [did] not withstand scrutiny." *Id.* at 97. See also *Clark v. Jeter*, 108 S. Ct. 1910, 1914-16 (1988) (Justice O'Connor, for a unanimous court, applied intermediate scrutiny in striking down Pennsylvania's 6-year limitations period for child support actions involving illegitimate children.). Justice White, writing for the majority in *Bowers v. Hardwick*, 478 U.S. 186 (1986), in which the Court refused to find that homosexuals have a fundamental right to engage in consensual sexual relations, nonetheless accepted the line of decisions that defined the privacy rights conferred by the Constitution. *Id.* at 190. Recently, Justice Scalia, in an opinion upholding the imposition of the death penalty on a 16-year-old and a 17-year-old offender under *Stanford v. Kentucky*, 109 S. Ct. 2969 (1989), reiterated that the Court uses " 'evolving standards of decency,' " *id.* at 2974 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)), while interpreting the Amendment " 'in a flexible and dynamic manner,' " (quoting *Gregg v. Georgia*, 428 U.S. 153, 171 (1976)). He added that "in determining what standards have 'evolved' [in the present case], we have looked [to the conceptions of decency] of modern American society as a whole." *Id.* at 2974. Justice Stevens, who was also a member of the *Roe* majority, clarified his support for the interest in liberty in his concurrence in *Thornburgh v. American College of Obstetricians*, 476 U.S. 747, 773-82 (1986). While the dissenting Justice White denied that a woman has a fundamental right to choose an abortion over childbirth, Justice Stevens stated that he believes that the liberty interest "is significantly broader than Justice White does," *id.* at 772, and unequivocally affirmed

those principles “ ‘so rooted in the tradition and conscience of our people as to be ranked as fundamental.’ ”⁴² In *Moore v. City of East Cleveland*,⁴³ in a plurality opinion, Justice Powell, joined by Justices Brennan, Marshall, and Blackmun, argued that the Court could conduct the appropriate inquiry. Justice Powell urged that “limits on substantive due process come [from] careful ‘respect for the teachings of history [and] solid recognition of the basic values that underlie our society.’ ”⁴⁴ But many academic commentators, with Judge Bork being one of the most visible, have steadfastly refused to accept any substantive development of the Bill of Rights.

Judge Bork, however, implicitly accepts the lesson of *Griswold* when he argues that the American flag can be protected by Congress. In effect, Judge Bork has found the American flag to be one of those principles “ ‘so rooted in the tradition and conscience of our people as to be ranked as fundamental.’ ”⁴⁵ Although Judge Bork finds no shadow cast by the Bill of Rights, he readily accepts the shadow cast by Article I. As for the dangers of “substantive due power,” Judge Bork apparently agrees with Justice Powell’s statement in *Moore* that limits come from “careful ‘respect for the teachings of history [and] solid recognition of the basic values that underlie our society.’ ”⁴⁶ For example, in singling out the flag for special treatment, Judge Bork observed as follows:

The national flag is different from other symbols. Nobody pledges allegiance to the Presidential seal or salutes when it goes by. Marines did not fight their way up Mount Suribachi on Iwo Jima

that the post-conception decision to bear a child is an individual decision in one of the “sensitive areas of liberty” protected by the Constitution, *id.* at 777.

Justice Kennedy supported a broad interpretation of the Constitution during the hearing for his Supreme Court nomination before the Senate Judiciary Committee. In response to questions by committee member Senator Patrick J. Leahy, Justice Kennedy said, “I think that the concept of liberty in the due process clause is quite expansive, quite sufficient to protect the values of privacy that Americans legitimately think are part of their constitutional heritage.” *Nomination of Anthony M. Kennedy to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Committee on the Judiciary*, 100th Cong., 1st Sess. 165 (1987). Nonetheless, witnesses who spoke in opposition to Justice Kennedy’s nomination questioned his belief in individual rights. Molly Yard, president of the National Organization of Women, based her criticism on his decisions on the Court of Appeals of the Ninth Circuit. For example, she stated that Justice Kennedy’s support for the right of privacy in *Beller v. Middendorf*, 632 F.2d 788 (1980), was easily superseded by governmental interests. *Nomination of Anthony M. Kennedy: Hearings, supra*, at 358.

42. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

43. 431 U.S. 494 (1977).

44. *Moore*, 431 U.S. at 503 (quoting *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring)).

45. *Palko*, 302 U.S. at 325 (quoting *Snyder*, 291 U.S. at 105).

46. *Moore*, 431 U.S. at 503 (quoting *Griswold*, 381 U.S. at 501 (Harlan, J., concurring)).

to raise a copy of the Constitution on a length of pipe. Nor did forty-eight states and the United States enact these laws to protect these symbols from desecration.⁴⁷

Perhaps it is too late to doubt the Court's mandate to protect certain fundamental principles not enumerated in the Constitution. The Constitution simply cannot provide concrete answers to the sundry problems for which we consult its hallowed words. Hence, the issue is not whether the Constitution should be supplemented, but rather which of its sections require supplementing and what values qualify as supplements. I shall not attempt to address these questions exhaustively. My present goal is more modest, limited to a brief discussion of whether the body of the Constitution should be treated differently from the amendments and whether flag protection is a fundamental value within the penumbra of Article I.

1. Interpreting the Text Consistently with the Amendments

The Bill of Rights was conceived as a counterbalance to the powers of the federal government. In 1789 the Bill of Rights was a virtual nullity because the founders interpreted the principle of enumerated powers literally.⁴⁸ Hence, the power of the federal government was not substantial, limited to only a few spheres of activity, and the Bill of Rights had little more than symbolic importance. At least since the time of *Gibbons v. Ogden*,⁴⁹ however, the power of the national government has been interpreted broadly and today we typically fail even to consider the basis for Congress' power to legislate. The original balance struck between the text and the amendments of the Constitution thus changed with increasingly expansive interpretations of federal power; in order to re-establish that balance, life had to be breathed into the Bill of Rights. Indeed, in order to remain faithful to the original structure of the document, the Bill of Rights has to expand in proportion to the constitutional text.

Proponents of federal legislation protecting the flag must rely on a very broad interpretation of Article I. Without such a theory, Congress does not have the authority to legislate in this area. It is of course ironic that many of these proponents adamantly oppose similarly broad constructions of the Bill of Rights. But the balance between the text and the amendments is too closely calibrated to allow different modes of interpretation. As the sword of government authority enlarges, so must the shield protecting individual liberty. Thus, the task of identifying those

47. R. BORK, *supra* note 29, at 128.

48. THE FEDERALIST, *supra* note 20, at 156.

49. 22 U.S. (9 Wheat.) 1 (1824).

principles “ ‘so rooted in the tradition and conscience of our people as to be ranked as fundamental’ ”⁵⁰ should be the same in Article I as it is in the Bill of Rights.⁵¹

2. *Is Flag Protection a Fundamental Value?*

Strictly as a matter of Congress’ Article I power, to adjudge the American flag a fundamental principle is unremarkable. From the dawn of the American Republic the stars and stripes has symbolized the history and aspirations of the nation.⁵² Judge Bork is certainly correct in finding special significance in the American flag above and beyond other cherished symbols. And notwithstanding Justice Brennan’s concern over the limits of Congress’ power to protect symbols, the flag’s distinctive features justify finding such power in Article I. Implicitly relying on a fundamental values analysis, the Senate Judiciary Committee quoted Justice Holmes, in a history of Chief Justice John Marshall, as follows:

The flag is but a bit of bunting to one who insists on prose. Yet, thanks to Marshall and the men of his generation—and for this above all we celebrate him and them—its red is our lifeblood, its stars our world, its blue our heaven. It owns our land. At will it throws away our lives.⁵³

As long as proponents of flag protection accept a broad theory of constitutional interpretation, the Act appears to withstand a challenge under Article I. Protection of the national flag is one of those fundamental interests identifiable within the penumbra of Article I and probably to

50. *Palko*, 302 U.S. at 325 (quoting *Snyder*, 291 U.S. at 105).

51. It might even be argued that the structure of the Constitution mandates a *stricter* interpretation of Article I than of the Bill of Rights. Whereas the original concept of the text of the Constitution limited federal power to those spheres specifically enumerated in Article I, the Bill of Rights appears to sweep more broadly and is written in more expansive prose than Article I. But the original view perceived the Bill of Rights more narrowly, directed solely to check federal excess. At least in 1789, Article I and the Bill of Rights were in balance and should have been interpreted in a parallel manner.

Of course, the nature of the American Republic is very different today, and through the very broad language of the Fourteenth Amendment much of the Bill of Rights now applies to the states. The original balance has thus been altered, at least as regards the greater issue of identifying an overarching theory of constitutional interpretation. In regard to federal power, however, no reason presents itself for not maintaining the original balance. In any case, the effect of applying the Bill of Rights to the states creates a sufficient complication to take the greater issue outside of the scope of this short Essay. This question merits attention and I hope to return to it at another time.

52. See 8 JOURNALS OF THE CONTINENTAL CONGRESS 464 (Rule 16) (Philadelphia 1777).

53. S. REP. NO. 152, 101st Cong., 1st Sess. 2 (1989) (quoting O.W. Holmes, *John Marshall (1901)*, in COLLECTED LEGAL PAPERS 266, 270-71 (1920)).

be found, ultimately, within the Necessary and Proper Clause.⁵⁴ This conclusion does not mean, however, that the First Amendment does not place a check on this power, nor does it mean that Congress ought to wield that power. The first issue, the Act's constitutionality under the First Amendment, is beyond the scope of the present Essay.⁵⁵ As for the second question, the Essay began with concern over Congress' reluctance to confront majority caprice. It concludes, therefore, by considering the wisdom of protecting the flag, by legislation or constitutional amendment, from the fires of political dissent.

III. Conclusion: The Wisdom of Protecting the Flag

Without doubt, an American flag burned in hatred prompts in the hearts of most Americans a similar sentiment against the dissenter. So often, as with the Nazis who marched in Skokie, those who take shelter in the First Amendment are those who hold its protections in contempt. But the genius of the Constitution lies in its indifference to the individual's cause; our scheme of government does not sacrifice individuals for the satisfaction of the majority. It is not only the Nazis who need protection, as little as they deserve it, but every one of us might have occasion to invoke the patronage of the Bill of Rights.

Frequently enough in our history dissenters might have fought against government oppression by using the burning flag as the ultimate symbol of patriotism. Surely, as the Court observed in *Johnson*, the framers did not hold the Union Jack in reverence.⁵⁶ Burning the Ameri-

54. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819); see also *Smith v. Goguen*, 415 U.S. 566, 586 (1974) (White, J., concurring) ("Congress may provide for the general welfare, control interstate commerce, provide for the common defense, and exercise any powers necessary and proper for those ends. These powers, and the inherent attributes of sovereignty as well, surely encompass the designation and protection of a flag.").

55. The first two courts to consider the constitutionality of the Flag Protection Act invalidated it on first amendment grounds. *United States v. Eichmann*, No. CR89-0419 (D.D.C. March 5, 1990) WL 23807; *United States v. Haggerty*, No. CR89-315R (W.D. Wash. Feb. 21, 1990) WL 26813. Of special note in *Eichmann* is the court's discussion of the argument the United States House of Representatives made before it. According to the court, "[t]he House claims that the government seeks to protect the state's sovereign interest in the flag. . . . The House argues that 'while the public may generally look to the flag for symbolizing values such as patriotism . . . the government has in the flag an incident of sovereignty, with definite concrete legal significance.'" *Eichmann*, WL 23807 at 13-14 (quoting Motion of the Speaker and Leadership Group of the U.S. House of Representatives in Opposition to Defendants' Motion to Dismiss, at 3). The court, however, did not discuss the authority for the Act's passage in light of the sovereignty interest, but instead limited its analysis to rejecting the House's claim that the sovereignty interest rendered the Act content-neutral and thus not subject to strict scrutiny. *Id.* at 14.

56. *Johnson*, 109 S. Ct. at 2546.

can flag following *Dred Scott*⁵⁷ or *Korematsu*,⁵⁸ or during the McCarthy witchhunts, would have demonstrated the highest allegiance to the enduring values of this Nation. Today's dissent has often proved itself to be tomorrow's consensus. Many of this Nation's greatest victories, such as the battles for civil rights and equality for women, were fought against the "tyranny of the majority." Sometimes these battles demand extraordinary means.

Chief Justice Rehnquist in his *Johnson* dissent argued that "the American flag has occupied a unique position as the symbol of our Nation, a uniqueness that justifies a governmental prohibition against flag burning."⁵⁹ But the flag's uniqueness also makes political dissent directed at it uniquely potent. A nation's commitment to freedom of speech is measured by the intensity of the dissent it tolerates. In *West Virginia State Board v. Barnette*,⁶⁰ Justice Jackson explained the lesson well: "[F]reedom 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."⁶¹

Chief Justice Rehnquist also pointed to the Americans who have fought and died defending the flag in order to illustrate the special place the flag occupies in this Nation.⁶² But it was not the flag that so many died to defend; it was the Nation and its principles. Although the flag is a powerful symbol of all this Nation stands for, it is still only a symbol. Ironically, the flag as a symbol incorporates the principle that potentially leads to its own physical destruction. But whatever number of flags are burned, the flames consume only the corporeal object; the history, traditions, hopes, and dreams the flag embodies cannot be so easily destroyed. Indeed, the values that the flag symbolizes are more likely to be laid to ashes by the lack of fortitude demonstrated by this country's leaders than by the burning of American flags in dissent. In protecting a symbol, in elevating form over substance, the flag may be protected, but a principle is lost.

The abhorrence most feel toward flag burning, coupled with the political advantages legislators gain by forbidding such action, creates an imminent danger of crippling an enduring principle of this nation. Tocqueville saw the tranquilizing effect public opinion has on a democracy's

57. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

58. *Korematsu v. United States*, 323 U.S. 214 (1944).

59. *Johnson*, 109 S. Ct. at 2548 (Rehnquist, C.J., dissenting).

60. 319 U.S. 624 (1943).

61. *Id.* at 642.

62. *Johnson*, 109 S. Ct. at 2550-51.

leaders. He observed in 1831 that “[i]n that immense crowd which throngs the avenues to power in the United States, I found very few . . . who displayed that . . . candor and . . . independence of opinion which frequently distinguished the Americans in former times, and which constitutes the leading feature in distinguished characters wheresoever they may be found.”⁶³ It remains to be seen whether the leaders of today can match the independence of opinion of the leaders who implanted the principle of freedom of speech in this nation’s law.

63. TOCQUEVILLE, *supra* note 1, at 267.

