Burning the Bill of Rights to save the flag

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The American flag is more than just our premier symbol of freedom. It also is a communicative presence unparalleled in its eloquence. It expresses pride, passion and patriotism — whether held high in battle, presiding solemnly over state occasions, or helping raise a citizen’s voice in praise or protest.

It is a uniquely American right to speak through our flag. It is not the government’s right to prohibit or punish such speech, regardless of its intent or message. Nor is it the majority’s right to silence that speaker.

It would be uniquely un-American to erase this revered principle from our democratic heritage.

Yet the U.S. Senate is poised to do just that.

Back from convention recess, the Senate faces a huge backlog of important work to do before the election break, including a barrage of spending bills and intelligence reform. Somehow, however, senators are making a place on their busy agenda to vote on a flag-desecration amendment, most likely the week of Sept. 13.

That raises the question of why this and why now. There is no epidemic of flag-burnings or other acts of desecration. The flag waves more proudly than ever, diminished not one whit by a few scattered acts of disrespect over the years. The Supreme Court has twice ruled that flag-burning is symbolic speech and therefore protected by the First Amendment.

But proponents of this amendment — like the vast majority of Americans — are outraged by even a rare instance of abuse or disrespect to the flag and want the authority to punish such acts. Thus, since 1990, they have brought to a vote — five times in the House and twice in the Senate — a proposal to amend the Bill of Rights for the first time in the nation's history.

Because this proposal would change our Constitution, a super majority (two-thirds) is required for passage in both houses of Congress. The House already has passed the amendment by a substantial margin. In the Senate, supporters of the amendment are within a thread-thin margin of the necessary 67 votes.

The proposed amendment (S.J. Res. 4) is short and simple: “The Congress shall have the power to prohibit the desecration of the flag of the United States.” If passed by the Senate, it goes directly to the state legislatures, where ratification is assured since all 50 legislatures are on record in support of the amendment and only 38 states have to approve it.

This amendment would upset that delicate balance in our national charter in which the Constitution says what the government can do and the Bill of Rights says what the government can't do. But there's more than just the constitutional concerns raised by this amendment.

First and foremost, flag desecration would be a federal crime. An ambitious federal prosecutor could have virtually unchecked power, depending on the implementing legislation, to single out a hapless citizen engaged in any number of everyday activities in a free society and haul him into federal court.

And, of course, constitutional requirements would still come into play, including due process and equal protection. Thus, prosecutors couldn’t target flag-burners alone; they also would have to go after anyone who committed the crime of physical desecration. That could include the triumphant Olympic athlete who drapes Old Glory over sweaty shoulders, steps on it and lets it touch the ground as he takes his victory lap around the track. Or the Fourth of July celebrant who drops her miniature flag in the trash as she leaves the fireworks display. Or the patriotic trucker who fails to replace a flag on his vehicle when wind and weather have done their
damage.

No matter how sincere the motives of those pushing this amendment, it would significantly change the democratic landscape in America. We might well see more flag-burnings because there are some who would want to make an ugly comparison between this nation and the tyrannies that also punish people who “disrespect” the national symbol. We might even see fewer flags displayed because those who wish to make a political, artistic, commercial or fashion statement will not want to invite the attention of a federal prosecutor.

Do we really want to eviscerate the First Amendment, written expressly to protect the voice of the individual or the minority, speaking out against official acts or policies? As Colin Powell, now Secretary of State, wrote in 1999: “I would not amend that great shield of democracy to hammer a few miscreants. The flag will still be flying proudly long after they have slunk away.”

He’s right. Amending the First Amendment would permanently mute the eloquence of our flag as a symbol and send a distressing message to Americans, as well as the rest of the world, that we are not who we thought we were and we don’t stand for what our flag has stood for.

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