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## FLAG DESECRATION, RELIGION AND PATRIOTISM

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### I. INTRODUCTION

Why are so many Americans tempted to sacrifice the First Amendment guarantee of freedom of expression in order to protect the flag? The U.S. flag has never been the target of widespread acts of desecration. Yet the 109th Congress was just one vote short of sending a constitutional amendment protecting the flag to the states for ratification.<sup>1</sup> If ratified, the amendment would modify the Bill of Rights for the first time since its adoption in 1789.<sup>2</sup> Though proponents of the amendment deny it,<sup>3</sup> the flag protection movement calls for the

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<sup>1</sup> On June 27, 2006 the U.S. Senate rejected a constitutional amendment resolution with a 66-34 vote, which is one vote short of the two-thirds majority required for such resolutions. Senate Joint Resolution 12 was identical to House Resolution 10, which passed the House of Representatives on June 22, 2005 in a 312-120 vote. In the 110th Congress two constitutional amendments have been offered, H.R.J. Res. 9 (Jan. 5, 2007) and H.R.J. Res. 12 (Jan. 11, 2007). No such resolutions had been introduced in the Senate as of September 14, 2007.

<sup>2</sup> The amendment does not do so by its express terms but is a response to the Supreme Court's conclusion in *United States v. Eichman*. 496 U.S. 310 (1990) (striking down a federal statute criminalizing flag desecration); see discussion *infra* Part II; H.R. Rep. No. 109-131 (2005).

<sup>3</sup> As the Senate began to debate Senate Joint Resolution 12, Senator Arlen Specter (R-PA), the floor manager of the resolution, stated:

It is important to note that there have been many decisions by the Supreme Court of the United States which have limited freedom of speech under the first amendment . . . . '[Some] utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that

abandonment of core free expression principles. This is conceivable only if we appreciate that the American flag is the equivalent of a sacred religious icon, comparable to Christianity's crucifix, Judaism's Torah and the Koran of Islam.<sup>4</sup> No court has designated patriotism as a religion for Establishment Clause purposes, but in every other significant respect it operates as a religion in American culture.<sup>5</sup> Regardless of the religious beliefs we profess, we simultaneously practice patriotism.

Like traditional religions, patriotism inspires both noble deeds and appalling violence towards people of different faiths.<sup>6</sup> Patriotism has the beneficial effect of uniting Americans across religious, racial, ethnic, and socio-economic lines,<sup>7</sup> but the flag protection movement

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may be derived from them is clearly outweighed by the social interest in order and morality.' I believe that standard applies to flag burning.

152 CONG. REC. 84, S6471 (2006).

<sup>4</sup> Though they do not argue that patriotism is a religion, a number of scholars have characterized the flag as a sacred or iconic symbol. *See, e.g.*, Sheldon H. Nahmod, *The Sacred Flag and the First Amendment*, 66 IND. L.J. 511, 527, 530 (Spring 1991); Sheldon H. Nahmod, *The Pledge as Sacred Political Ritual*, 13 WM. & MARY BILL RTS. J. 797 (2005); Robert Justin Goldstein, *The Great 1989-1990 Flag Flap: An Historical, Political, and Legal Analysis*, 45 U. MIAMI L. REV. 19 (1990); Thomas L. Shaffer, *Nuclear Weapons, Lethal Injection, and American Catholics: Faith Confronting American Civil Religion*, 14 NOTRE DAME J. L. ETHICS & PUB. POL'Y 7 (2000).

<sup>5</sup> My argument that patriotism is a religion allows for the possibility that a future litigant will use it to mount an Establishment Clause claim. Such litigation would build on the argument made by Jehovah's Witnesses who successfully challenged West Virginia's compulsory flag salute on the grounds that it required students to revere a "graven image" contrary to their religious beliefs. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). While pursuit of the Establishment Clause argument is beyond the scope of this essay, my argument does suggest that the flag protection movement is what Professor Alan K. Chen calls "forced patriotism" that infringes on freedom of expression. *Forced Patriot Acts*, 81 DENV. U. L. REV. 703 (2004); *see also* discussion *infra* Part IV.B.

<sup>6</sup> Examples from the 20th and 21st centuries include the genocide by Nazi Germany, the Balkans in the 1990s, Rwanda in the early 21st century, the Northern Ireland conflict between Christians and Protestants and the ongoing struggles in the Middle East (I do not claim that these conflicts are grounded solely in religion).

<sup>7</sup> Some claim that other "religions" of common interests unite Americans. Journalist John Tierney says, "American [sic] has one truly national religion: environmentalism." John Tierney, *And on the Eighth day, God Went Green*, N.Y. TIMES, Feb. 11, 2006, at A15 (op-ed). Baseball has also been construed as a "religion" that unites the nation. *See, e.g.*, JOSEPH L. PRICE,

reveals American patriotism's dangerous side: it would protect the symbol at the expense of the principles and values the symbol represents.<sup>8</sup> It turns on its head the principle that the free speech guarantee exists to ensure tolerance for unpopular ideas.<sup>9</sup>

This effect is more acute in the age of terrorism. In recent Congresses, legislators have struggled with both the inevitable tension between national security and civil liberties<sup>10</sup> and the fact that special constitutional status for the flag requires constraints on the constitutional guarantee of freedom of expression.<sup>11</sup> Amid the noisy rhetorical claims and counterclaims, patriotism is conflated with support for both the government's favored anti-terrorism policies and the flag amendment and putting other core national values at risk.<sup>12</sup>

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ROUNDING THE BASES: BASEBALL AND RELIGION IN AMERICA (Mercer University Press 2006); THE FAITH OF 50 MILLION: BASEBALL, RELIGION, AND AMERICAN CULTURE (Christopher Hodge Evans and William R. Herzog eds., Westminster John Knox Press 2006).

<sup>8</sup> In the words of an amendment opponent in the June 2005 debate:

The real threat to our society is not the occasional burning of a flag . . . the real threat is that some of us have now mistaken the flag for a religious icon to be worshiped as would pagans, rather than to be kept as a beloved symbol of our freedom that is to be cherished.

151 CONG. REC. 83, H4826 (2005) (statement of Rep. Ackerman).

<sup>9</sup> In *West Virginia Bd. of Educ. v. Barnette*, Justice Jackson, writing for the majority observed, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion . . . ." 319 U.S. 624, 642 (1943).

<sup>10</sup> This tension influenced the content and policy debate as Congress responded to the terrorist attacks of September 11, 2001. The Uniting and Strengthening America by Providing Tools Required to Intercept and Obstruct Terrorism [PATRIOT] Act became law on October 26, 2001, just over a month after the terrorist attacks. Pub. L. No. 107-56, 115 Stat. 272 (2001). Only one Senator and sixty-six members of the House voted against it, emphasizing their concerns about civil liberties. See 147 CONG. REC. 142, H7201 (2001) (statement of Rep. Scott).

<sup>11</sup> See discussion of flag protection efforts *infra* Part II.

<sup>12</sup> Historian Alan Brinkley linked flag protection and terrorism in a 1990 essay in which he stated, "[f]or most Americans, the most vivid recent examples of flag burning are not the actions of Gregory Johnson and Shawn Eichman, the defendants in the two cases that came before the Supreme Court in recent years. They are the actions of Islamic revolutionaries in Teheran." Alan Brinkley, *The Nation; Old Glory: The Saga of a National Love Affair in the Flag and the Law*, N.Y. TIMES, July 1, 1990, at A2.

The balance of this essay expands upon these themes. Part II is an overview of key events in the history of the flag protection movement, including statutory efforts to protect the flag and the Supreme Court's rejection of those efforts. Part III is the core of my argument that American patriotism is, in effect, a religion. This part includes a summary of various judicial, statutory and scholarly discussions of what constitutes a "religion." Part IV identifies the elements common to recognized religions and demonstrates how each element applies to American patriotism. Finally, Part V suggests some legal and societal implications of the phenomenon.

## II. FLAG PROTECTION EFFORTS

The resolution amendment adopted by the House of Representatives on June 22, 2005, provides that "[t]he Congress shall have power to prohibit the physical desecration of the flag of the United States."<sup>13</sup> The House has passed equivalent resolutions in each of the previous five Congresses.<sup>14</sup> Fifty state legislatures have passed resolutions stating that they will ratify a flag protection amendment if Congress sends one to them.<sup>15</sup> Though the full Senate has never passed

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<sup>13</sup> H.R.J. Res. 10, 109th Congress (2005). This is related to Senate Joint Resolution 12, which the Senate rejected on June 27, 2006.

<sup>14</sup> On June 28, 1995, during the First Session of the 104th Congress, the amendment resolution passed in the House 312-120. In the 105th Congress it passed the House by a 310-114 vote on June 12, 1997. The House approved a resolution on June 24, 1999 by a vote of 305-124 in the 106th Congress. The House vote in the 107th Congress was 298-125, and in the 108th it was 300-125 on June 6, 2003.

Earlier versions of the amendment provided that the states could enact statutes making flag desecration a crime. H.R.J. Res. 79, 104th Cong. (June 28, 1995). The current language was first adopted during the 105th Congress without explanation for the change. H.R. 105-121, 105th Cong. (1st Sess. 1997); *see also* Constitutional Amendment to Prohibit Physical Desecration of U. S. Flag, S. REP. No. 108-334 (2004) (stating that "unlike earlier proposals for a constitutional amendment prohibiting flag desecration, Senate Joint Resolution 4 may be implemented by Congress only, not by the states.").

<sup>15</sup> H.R. REP. NO. 109-131 (2005). There is conflicting polling data about the level of public support for the amendment. Proponents rely on public polling data to assert that 81% of Americans favor amending the Constitution to protect the flag from desecration. However, opponents counter that, according to a June 2005 poll, 63% of Americans opposed such an amendment "because of its first amendment restrictions," and that number increased to about 67% when respondents were informed that the measure would represent the first time in U.S. history that any of the five freedoms set forth in the First Amendment would be modified by constitutional amendment. Nevertheless, the number of state legislative votes suggests that the amendment does enjoy wide support and would likely be ratified if presented to the states.

a flag amendment resolution, the votes have been close, and it failed by just one vote in 2006.<sup>16</sup>

The most recent congressional votes were part of a long history of efforts to officially honor and protect the flag<sup>17</sup> after the Continental Congress approved its stars and stripes design in 1777.<sup>18</sup> The flag's growing significance as the iconic patriotic symbol of America occurred primarily through private efforts starting in the mid 19th century.<sup>19</sup> The survival of the "Stars and Stripes" flying over Fort McHenry in Baltimore during the War of 1812 inspired Francis Scott Key to write the "Star Spangled Banner," which was the unofficial national anthem of the North by the start of the Civil War.<sup>20</sup> In 1914, President Woodrow Wilson celebrated the first official Flag Day on June 14th.<sup>21</sup>

Some images of the flag capture profoundly significant events in American history. A photograph of American soldiers planting a flag at Iwo Jima during World War II is perhaps the

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<sup>16</sup> Senate Joint Resolution 31 was rejected 63-36 in the 104th Congress, only four short of the necessary two-thirds on December 12, 1995. In the 105th Congress the Senate Judiciary Committee filed a report on Senate Joint Resolution 40, but the resolution did not come to the Senate floor for a vote. In the 106th Congress, Senate Joint Resolution 14 was rejected on March 29, 2000 by a vote of 63-37. In the 107th Congress Senate Joint Resolution 7 was referred to the Senate Judiciary Committee on March 13, 2001 but did not come to the Senate floor for a vote. In the 108th Congress the Senate Judiciary Committee filed a report on Senate Joint Resolution 4, but there was no floor vote.

<sup>17</sup> There is extensive scholarly literature about the American flag including the history of its design, its military, political and commercial uses and various social and political movements to revere and protect it. *See generally* MARC LEEPSON, FLAG: AN AMERICAN BIOGRAPHY (Thomas Dunne Books 2005); RICHARD J. ELLIS, TO THE FLAG: THE UNLIKELY HISTORY OF THE PLEDGE OF ALLEGIANCE (University of Kansas 2005); ROBERT J. GOLDSTEIN, SAVING "OLD GLORY" (Westview Press 1995) (hereinafter OLD GLORY); ROBERT J. GOLDSTEIN, BURNING THE FLAG: THE GREAT 1989-1900 AMERICAN FLAG DESECRATION CONTROVERSY (Kent State University Press 1996) (hereinafter BURNING THE FLAG); MICHAEL WELCH, FLAG BURNING: MORAL PANIC AND THE CRIMINALIZATION OF PROTEST (Aldine De Bruyter 2000) (focusing on the sociological significance of the flag protection movement); Robert Corn-Revere, *Implementing a Flag-Desecration Amendment to the U.S. Constitution*, FIRST AMENDMENT CENTER (2005).

<sup>18</sup> On June 14, 1777, the Continental Congress adopted a resolution stating "that the flag of the United States be thirteen stripes, alternate red and white: that the union be thirteen stars, white in a blue field, representing a new constellation." J. Cont. Cong. VIII, 464.

<sup>19</sup> LEEPSON, *supra* note 17, at 4; *see generally* OLD GLORY, *supra* note 17, at ch. 1.

<sup>20</sup> LEEPSON, *supra* note 17, at 62-65; OLD GLORY, *supra* note 17, at 3-8.

<sup>21</sup> LEEPSON, *supra* note 17, at 51-53.

most widely recognized image from that war. The first man on the moon planted a flag as a visible symbol of America's conquest in space. A photograph of first responders raising a flag at Ground Zero on September 11, 2001 carries a symbolic force comparable to the Iwo Jima image. Flags of every size are ubiquitous expressions of celebration and remembrance on Flag Day, Independence Day, Memorial Day, and other occasions.

There have been statutes designed to protect the flag since the late 19th century. The House Committee Report on House Joint Resolution 10 notes, "the movement to pass legislation prohibiting the desecration of the American Flag began in the late 1800's, with all of the States having flag desecration laws on the books by 1932."<sup>22</sup>

These statutes spawned a long and complex series of legal battles about whether disrespect for the flag can be made a crime without diminishing the First Amendment guarantee of freedom of expression.<sup>23</sup> The lawsuits challenged the constitutionality of three types of flag veneration statutes: 1) those prohibiting deliberate acts to physically damage the flag;<sup>24</sup> 2) those directed against disrespectful uses of the flag;<sup>25</sup> and 3) those mandating respectful acts such as a

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<sup>22</sup> H.R. REP. NO. 109-131 (2005). Detailed discussion of these earlier statutes is available. See OLD GLORY, *supra* note 17, at 40-47; BURNING THE FLAG, *supra* note 17, at 1-36.

<sup>23</sup> The extensive body of scholarship on flag-related law includes: Kent Greenawalt, *O'er the Land of the Free: Flag Burning as Speech*, 37 U.C.L.A. L. REV. 925, 925-64 (1990); Nahmod, *supra* note 4; Charles Tiefer, *The Flag-Burning Controversy of 1989-1990: Congress' Valid Role in Constitutional Dialogue*, 29 HARV. J. ON LEGIS. 357 (1992); Jeff Rosen, *Was the Flag Burning Amendment Unconstitutional*, 100 YALE L. J. 1073 (1991); Mark Tushnet, *The Flag-Burning Episode: An Essay on the Constitution*, 61 U. COLO. L. REV. 39 (1990); Goldstein, *supra* note 4; Steven G. Gey, *This Is Not a Flag: The Aesthetics of Desecration*, 1990 WIS. L. REV. 1549; Ute Krudewagen, *Political Symbols in Two Constitutional Orders: The Flag Desecration Decisions of the United States Supreme Court and the German Federal Constitutional Court*, 19 ARIZ. J. INT'L & COMP. L. 679 (2002); Sanford Levinson, *Freedom: Politics: They Whisper: Reflections on Flags, Monuments, and State Holidays, and the Construction of Social Meaning in a Multicultural Society*, 70 CHI.-KENT L. REV. 1079 (1995).

<sup>24</sup> In *Street v. New York*, the Court sustained Street's First Amendment claim when he challenged his conviction for violating a New York law making it a crime to cast contempt on an American flag by words or action. 394 U.S. 576, 593-94 (1969). Street had burned a flag he owned after hearing that James Meredith, a civil rights leader, had been shot. *Id.* at 579.

<sup>25</sup> In *Halter v. Nebraska* the Court denied a due process claim challenging a fine for selling bottled beer with a picture of American flag on its label in violation of a state statute prohibiting flag desecration. 205 U.S. 34 (1907). In *Smith v. Goguen*, Goguen was on trial for violating a Massachusetts criminal statute for wearing a small flag sewn into the seat of his blue jeans. 415 U.S. 566 (1974). The Court held the Massachusetts statute, which targeted anyone who "treats contemptuously the flag of the United States," void for vagueness. *Id.* *Spence v. Washington* involved a Washington state law banning "improper use" of a United States flag. 418 U.S. 405

salute or recitation of the Pledge of Allegiance.<sup>26</sup>

**A. *Texas v. Johnson***<sup>27</sup>

The Texas statute struck down by the Supreme Court in *Texas v. Johnson* made it a Class A misdemeanor for a person to “knowingly desecrate” a public monument, a place of worship or burial or a state or national flag. It defined “desecrate” to mean physically mistreat a flag “in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action.”<sup>28</sup>

The Supreme Court reasoned that because the Texas statute served no purpose other than suppressing speech, it was subject to “the most exacting scrutiny,”<sup>29</sup> requiring the Texas law to respond to a “compelling state interest.” The Court concluded that Texas’ effort to ban messages it deemed “harmful” violated the principle that government may not prohibit expression of an idea simply because it countered the State’s own view of the flag.<sup>30</sup>

The dissenters’ passionate rhetoric is typical of flag protectionists. Chief Justice Rehnquist, writing for himself and Justices O’Connor and White, urged that “[t]he flag is not simply another ‘idea’ or ‘point of view’ competing for recognition in the marketplace of ideas. Millions and millions of Americans regard it with an almost *mystical reverence* regardless of what sort of social, political, or philosophical beliefs they may have.”<sup>31</sup> Justice Stevens’ dissent made clear his willingness to constrain the right of free expression in order to protect the flag,

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(1974). Spence taped a peace symbol onto a flag and displayed it upside down from his apartment window. *Id.* The Washington statute specifically prohibited displaying a flag with extraneous material attached. *Id.* The Court upheld Spence’s first Amendment claim that his action was an expression of protest against war and violence and therefore protected under the First Amendment. *Id.* at 422.

<sup>26</sup> *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

<sup>27</sup> 491 U.S. 397 (1989).

<sup>28</sup> Tex. Penal Code Ann. Sec. 42.09 (a)(3) (1989).

<sup>29</sup> *Johnson*, 491 U.S. at 406-07.

<sup>30</sup> *Id.* at 414-16.

<sup>31</sup> *Id.* at 429 (Rehnquist, C.J., dissenting) (emphasis added). The House Committee accompanying House Joint Resolution 10 took note of Chief Justice Rehnquist’s dissent in H.R. REP. No. 109-131, at 3, as well as those by Justices Warren, Black and Fortes in *Street*. In his *Street* dissent, Justice Fortes referred to the flag as though it were a revered person, stating: “[T]he flag is a special kind of personality. Its use is traditionally and universally subject to special rules and regulations.” 394 U.S. 576; H.R. REP. No. 109-131, at 3 n. 9.

which though only an object, has a “special history” and an “intangible dimension.” To him, a statute to preserve the flag’s physical integrity posed no more than a “trivial burden on free expression.”<sup>32</sup>

## **B. The Federal Flag Protection Act**

In the wake of *Texas v. Johnson*, Congress had little choice but to amend a comparable federal flag protection statute, for it presented the same constitutional difficulty as the Texas law. The 1968 federal law provided in pertinent part that, “whoever knowingly casts contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning or trampling upon it” was subject to a fine of up to \$1,000 or imprisonment.<sup>33</sup>

At the time of the 1968 enactment, Title IV of the United States Code already contained detailed requirements designed to ensure treatment of the flag as though it were a religious icon.<sup>34</sup> For example, the law prohibits dipping the flag to honor “any person or thing, permitting the flag to touch anything beneath it, placing anything on it, or fashioning the image of the flag into such objects as . . . paper napkins or boxes or anything that is designed for temporary use and discard.”<sup>35</sup> The statute states that “the flag represents a living country and *is itself considered a living thing.*”<sup>36</sup>

However, no civil or criminal penalties attach to failure to comply with the Title IV provisions. The *Johnson* decision thwarted Congress’ intention to give the flag heightened protection under the law. *Johnson* mandated that the revised statute be “content-neutral . . . so that it would pass constitutional muster.”<sup>37</sup> But the legislation could only target those who damaged the flag to express views critical of the United States. The need to achieve both aims led Senator Orrin Hatch (R-UT), then chairman of the Judiciary Committee, and others to urge that the effort to write constitutional statutory flag protection language in the wake of *Johnson* was futile.<sup>38</sup> Proponents of the statutory approach relied in part on the testimony of legal scholars

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<sup>32</sup> *Johnson*, 491 U.S. at 437 (Stevens, J., dissenting).

<sup>33</sup> Pub. L. No. 90-381, 82 Stat. 291 (codified as amended at 18 U.S.C. § 700 (2003)). It has not been formally repealed but *Johnson* mooted efforts to enforce it.

<sup>34</sup> 4 U.S.C. § 8 (1998).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* (emphasis added).

<sup>37</sup> H.R. REP. No. 109-131, at 10 (2005).

<sup>38</sup> Senator Hatch argued:

[I]t cannot be denied that the principal, if not the only, purpose in enacting a facially neutral statute is to prohibit expressive conduct that physically desecrates

who urged that the proposed language would likely be deemed constitutional.<sup>39</sup>

In the end, Congress was able to pass the Flag Protection Act in part because the statute's questionable constitutionality was acknowledged with a provision for expedited judicial review.<sup>40</sup> It was also important to the Act's passage that legislators were able, in a relatively short period of time, to reassure their constituents of their love of the flag.<sup>41</sup>

Congress approved the Flag Protection Act in September 1989 by a vote of a 371-43 in the House and 91-9 in the Senate.<sup>42</sup> It deleted the phrase "casts contempt upon" from 18 U.S.C. § 700 and eliminated the requirement that the desecration had to occur publicly but was otherwise materially the same.<sup>43</sup>

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the flag. No one claims that we are interested in protecting the material, the thread, and the dye in the flag . . . . A content-neutral prohibition on draft-card mutilation serves practical, not symbolic, purposes. A content neutral prohibition against misuse of a U.S. military uniform serves practical, not symbolic, purposes . . . . The flag does not have the kind of practical usage of a draft card or military uniform, and we do not seek to protect it for such a purpose.

135 CONG. REC. S12572-02 (1989).

<sup>39</sup> Detailed accounts of the scholarly assessments that influenced congressional decision-making are available. *See* BURNING THE FLAG, *supra* note 17, at 166-83; Tiefer, *supra* note 23.

<sup>40</sup> The provision for expedited judicial review stated that:

An appeal may be taken directly to the Supreme Court of the United States from any interlocutory or final judgment, decree or order issued by a United States district court ruling on the constitutionality of [the statutory prohibitions] . . . The Supreme Court shall, if it has not previously ruled on the question, accept jurisdiction over the appeal and advance on the docket and expedite to the greatest extent possible.

Flag Protection Act of 1989, Pub. L. No. 101-31, 103 Stat. 777, § 3.

<sup>41</sup> Goldstein observes that the failure of a constitutional amendment effort shortly after the House and Senate had passed the Flag Protection Act reflected that the two votes "had the practical effect of providing 'political cover' for those who opposed the amendment but feared being depicted as anti flag . . . ." BURNING THE FLAG, *supra* note 17, at 160.

<sup>42</sup> October 12, 1989 (House) and October 5, 1989 (Senate).

<sup>43</sup> The new provision said that, "[w]hoever knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States shall be fined under this title or imprisoned for not more than a year, or both." Flag Protection Act of 1989, *supra* note 40.

In *United States v. Eichman*,<sup>44</sup> the Supreme Court struck down the Flag Protection Act noting, in part, that its purported content neutrality was destroyed by the prohibitions on mutilating, defacing, defiling and trampling on the flag.<sup>45</sup> The Court also said that the section allowing “proper disposal of a worn flag”<sup>46</sup> further undermined the claim of content neutrality.<sup>47</sup> The dissenters argued that the statute was constitutional because it supported the legitimate societal interest in protecting the unique symbol of the nation and did not interfere with anyone’s freedom to express ideas about the flag or the nation by any other means than flag desecration. The dissenters asserted that “the interest in allowing the speaker complete freedom of choice among alternative methods of expression is less important than the societal interest supporting the prohibition.”<sup>48</sup>

Congress did not have politically viable alternatives to the statutory language rejected in *Eichman*. Without connotation-laden words such as “mutilates,” “defaces,” “defiles” and “tramples,” the statute would have failed to satisfy the public thirst for punishment of those who disrespect the flag. That failure would have robbed the statute of its political utility for legislators.

Nor is it clear that Congress could have achieved its political and policy aims by enacting a statute focused on its uniqueness as a national monument or as an incidence of sovereignty. Either approach would have collided with the *Johnson* and *Eichman* majorities’ rejection of the dissenters’ arguments that its uniqueness placed the flag outside the realm of the First Amendment and that it merited protection as an incident of sovereignty.<sup>49</sup>

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<sup>44</sup> 496 U.S. 310 (1990).

<sup>45</sup> *Id.* at 317.

<sup>46</sup> Flag Protection Act of 1989, *supra* note 40.

<sup>47</sup> *Eichman*, 496 U.S. at 317.

<sup>48</sup> 496 U.S. at 319 (Stevens, J., dissenting) Justice Stevens went on to conclude that the test would satisfy the test he articulated in *Johnson* and was constitutional. *Id.* at 323-24.

<sup>49</sup> Professor Charles Tiefer served as Deputy Counsel to the House of Representatives and represented the Congress in defense of the Flag Protection Act. He provides an authoritative congressional staff account of the deliberations leading up to the passage of the Flag Protection Act in his article titled *The Flag-Burning Controversy of 1989-1990: Congress’ Valid Role in Constitutional Dialogue*. He urges that the *Johnson* and *Eichman* decisions taken together fail to reflect a point the Court acknowledged when quoting the House’s amici brief:

While the symbolic role of the flag is now well established, the flag was an important incident of sovereignty before it was used for symbolic purposes by patriots and others. When the nation’s founders first determined to adopt a national flag, they intended to serves specific functions relating to our status as a

What if Congress had added criminal sanctions for violations of the existing statute on proper flag treatment? Even if there were sufficient political support for creating so many new enforceable affirmative obligations, such a statute might not achieve the goal of punishing those who use flag desecration as a form of political protest. Prosecuting only those violators would surely invite challenges on the grounds that the statute was unconstitutional as applied.

In light of the constraints imposed by *Johnson* and the emotional appeals of those clamoring for flag protection, Congress made understandable choices about the statutory language. The Committee Report on the House Joint Resolution 10 acknowledged that, after *Johnson* and *Eichman*, “the only avenue remaining by which Congress can successfully defend the American flag from acts of desecration is through a constitutional amendment.”<sup>50</sup>

### III. THE RELIGIOUS REVERBERATIONS OF AMERICAN PATRIOTISM

#### A. “Religion” Delineated but Not Defined

The Supreme Court, legislators and legal scholars have no unified understanding of what is or is not a “religion.”<sup>51</sup> The Supreme Court has assigned a variety of meanings of what is or is not religion in the course of both statutory interpretation and decisions about the applicability of the Establishment and Free Exercise Clauses of the Constitution, but it has avoided offering a “definition” in the dictionary sense of that term.<sup>52</sup> For the purposes of this article, the key point is

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sovereign nation.

Tiefer, *supra* note 23.

I wonder whether this point overstates the significance of sovereignty at the expense of the powerful *symbolic* significance of what happened on June 14, 1777.

<sup>50</sup> H.R. Rep. No. 109-131, at 5 (2005).

<sup>51</sup> Scholarly examinations of efforts to identify the precise contours of religion include Kent Greenawalt, *Symposium: The Religion Clauses Article: Religion as a Concept in Constitutional Law*, 72 CALIF. L. REV. 753 (1984); Dimitry N. Feofanov, *Defining Religion: An Immodest Proposal*, 23 HOFSTRA L. REV. 309 (1994); Lee J. Strang, *The Meaning of “Religion” in the First Amendment*, 40 DUQ. L. REV. 181 (2002); Jonathan C. Lipson, *On Balance: Religious Liberty and Third-Party Harms*, 84 MINN. L. REV. 589 (2000); L. Scott Smith, *Constitutional Meanings of ‘Religion’ Past and Present: Explorations in Definition and Theory*, 14 TEMP. POL. & CIV. RTS. L. REV. 89 (2004); Jeffrey L. Oldham, Note, *Constitutional Religion, A Survey of First Amendment Definitions of Religion*, 6 TEX. F. ON C.L. & C.R. 117 (2001); Jesse Choper, *Defining ‘Religion’ in the First Amendment*, 1982 U. IL. L. REV. 579; Eduardo Penalver, *The Concept of Religion*, 107 YALE L. J. 791 (1997); *Torasco v. Watkins*, 367 U.S. 488 (1961); Val D. Ricks, *To God God’s, to Caesar Caesar’s, and to Both the Defining of Religion*, 26 CREIGHTON L. REV. 1053 (1993).

<sup>52</sup> Professor Greenawalt observed two decades ago that, “Achieving a decent fit with what the Supreme Court has said about defining religion in the last few decades is not particularly difficult,

that no Supreme Court holding precludes the conclusion that “religions” may be non-theistic belief systems.<sup>53</sup>

There are two primary reasons statutory definitions offer only limited guidance about what does or does not constitute a “religion” within the meaning of the law. First, they are subject to the Court’s conclusions about what the Constitution permits or requires. Thus, unless and until there is a Supreme Court holding, “religion” is what a statute’s enforcers say it is. Second, Congress employs multiple definitions.

The Universal Military Training and Service Act of 1958 allows exemptions from military service on grounds of “religious training and belief.” Congress expressly provided that “conscientious objection” to the draft was to be based on “an individual’s belief in relation to a Supreme Being”<sup>54</sup> but *not* “essentially political, sociological, or philosophical views, or a merely personal moral code.”<sup>55</sup> Nevertheless, in two decisions about eligibility for the exemption, the Court refused to approve Congress’ attempt to conflate “religious training and belief” with theism.<sup>56</sup>

Title VII of the Civil Rights Act of 1964 provides little guidance for application of the statutory prohibition on religion-based employment discrimination for it employs a circular definition. The statute says religion includes “all aspects of religious observance and practice, as well as belief.”<sup>57</sup> Some scholars have offered definitions,<sup>58</sup> some urge that no single definition is

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because the Court has said very little.” Greenawalt, *supra* note 23, at 759. More recent surveys of Supreme Court “definitions” have drawn similar conclusions. *See, e.g.*, Oldham, *supra* note 51; Smith, *supra* note 51.

<sup>53</sup> In *Torasco v. Watkins*, the Court considered the constitutionality of a provision in the Maryland Constitution requiring officeholders to say they believed in God. It struck down the provision on the grounds that it favored theistic religions over non-theistic ones and thus violated the Establishment Clause. The Court expressly noted that not all religions are based on a belief in the existence of God, including Buddhism, Taoism, Ethical Culture and Secular Humanism. *Torasco*, *supra* note 51, at 495; *see also* *Founding Church of Scientology v. United States*, 409 F. 2d 1146 (D.C. Cir. 1969) (deeming Scientology a religion for constitutional purposes though it is not theistic).

<sup>54</sup> In 1967 Congress deleted this phrase from the statute. 81 Stat. 104, 50 U.S.C. App. § 456(j).

<sup>55</sup> 42 U.S.C. App. § 456(j) (1958).

<sup>56</sup> In *United States v. Seeger*, the Court drew in part upon theologian Paul Tillich’s notion that a religion could be “a sincere and meaningful belief” that functioned like the belief in God of those whose eligibility for the exemption was not in doubt. 380 U.S. 173, 176 (1965). The plurality in *Welsh v. United States* wrote of “those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war.” 398 U.S. 333, 344 (1970).

<sup>57</sup> 42 U.S.C. 2000e.

possible,<sup>59</sup> and others argue that even the attempt at definition is misguided.<sup>60</sup>

In the face of myriad perspectives on what constitutes “religion,” I join those who eschew the search for a “definition.” However an analysis of patriotism’s religious nature can proceed after a delineation of the elements common to all recognized religions. A review of the central tenets of major world religions,<sup>61</sup> federal statutes, Supreme Court opinions in statutory and constitutional interpretation cases and scholarly insights supports the notion that a religion is a belief system that includes all of the following: (1) a primary reference point for answers to fundamental questions about the nature and meaning of the human experience, which may or may not include belief in a deity or other supernatural force; (2) a common understanding of the past that includes both historical and mythological stories and heroes; (3) shared aspirations for the future; (4) membership requirements; (5) a sense of collective identity; (6) worshipful behaviors; (7) consequences and rewards based on the obligations of worshipful behaviors; and (8) sacred texts and objects.<sup>62</sup>

Section C presents these elements in turn and shows that each applies to American patriotism. But it is important to distinguish this from the related phenomena of civil religion and nationalism.

## **B. American Patriotism Distinguished from Civil Religion and Nationalism**

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<sup>58</sup> See Choper, *supra* note 51 (offering a number of necessary elements leading to a content based definition); Oldham, *supra* note 51; Penalver, *supra* note 51.

<sup>59</sup> See Marci A. Hamilton, *What Does Religion Mean in the Public Square*, 89 MINN. L. REV. 1153-78 (2005); Smith, *supra* note 51; Greenawalt, *supra* note 51; Andrew Koppelman, *Secular Purpose*, 88 V. L. REV. 87 (2002).

<sup>60</sup> See, e.g., George C. Freeman III, *The Misguided Search for the Constitutional Definition of “Religion.”* 71 GEO. L. J. 1519 (1983). Professor Kent Greenawalt has urged that in the context of Free Exercise and Establishment Clause cases, “courts should decide whether something is religious by comparison with the indisputably religious, in light of the particular legal problem involved. No single characteristic should be regarded as essential to religiousness.” Greenawalt, *supra* note 51, at 754.

<sup>61</sup> There are many books about Christianity, Judaism, Islam, Buddhism, Hinduism, Taoism and Shinto. A useful resource with chapters detailing the history and beliefs of each is THE NEW PENGUIN HANDBOOK OF LIVING RELIGIONS, (John R. Hinnells ed., Penguin Reference 1997) (each chapter concludes with citations to full-length scholarly treatments).

<sup>62</sup> Rabbi and Professor of Religion Rebecca Alpert notes with favor a popular summary of the elements of religion as the “three Bs: belief, belonging and behavior.” Email to the author, Dec. 22, 2005.

Civil religion, nationalism and patriotism have in common a deeply held love of country but they are distinguishable in important ways.<sup>63</sup> Civil religion is widely used by scholars in law, sociology, history and religion to refer to widely held faith in the superiority of American legal and social arrangements. The concept of American civil religion achieved prominence among scholars in 1967 with publication of the essay *American Civil Religion* by sociologist Robert Bellah.<sup>64</sup> While Bellah offered no precise “definition” of civil religion in a dictionary sense, he asserted that there are certain common elements of religious orientation that the great majority of

Americans share. These have played a crucial role in the development of American institutions and still provide a religious dimension for the whole fabric of American life, including the political sphere. This public religious dimension is expressed in a set of beliefs, symbols, and rituals that I am calling the American civil religion.<sup>65</sup>

He argued that at its best, civil religion is a “a genuine apprehension of universal and transcendent religious reality.”<sup>66</sup> He noted its deep roots in both European and American values and religious belief systems, the secular values of public morality and the structure of governmental institutions. Civil religion, he said, “is concerned that America be a society as perfectly in accord with the will of God as men can make it, and a light to all the nations.”<sup>67</sup>

In the wake of the 1967 essay, scholars began an ongoing examination of civil religion’s role in American public life and its relationship to traditional religion.<sup>68</sup> While summarizing all of the themes and perspectives in this voluminous literature is impossible, there is widespread agreement that it is a pervasive secular belief system grounded in both the religious convictions and traditions of the nation’s Founding Fathers and the Constitution.<sup>69</sup>

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<sup>63</sup> Thomas Shaffer argues that the American civil religion *is* patriotism. Shaffer, *supra* note 4, at 11.

<sup>64</sup> Winter Daedalus, *Religion in America*, J. AM. ACAD. ARTS & SCI. (reprinted in AMERICAN CIVIL RELIGION, at 21-44 (Donald G. Jones and Russell E. Richey eds., Mellen Research University Press 1990)) (hereinafter ACR).

<sup>65</sup> ACR, *supra* note 64, at 24.

<sup>66</sup> *Id.* at 33.

<sup>67</sup> *Id.* at 41.

<sup>68</sup> *See, e.g.*, ACR, *supra* note 64.

<sup>69</sup> *See id.*; Deborah K. Hepler, *The Constitutional Challenge to American Civil Religion*, 5 KAN. J. L. & PUB. POL’Y 93 (1996); Akhil Reed Amar, *Civil Religion and Its Discontent*, 67 TEX. L. REV. 1153 (1989); Sanford Levinson, *1787: The Constitution In Perspective: Pledging Faith In the Civil Religion; Or, Would You Sign the Constitution*, 29 WM. & MARY L. REV. 113 (1987); W.

Though nationalism shares a conviction about the superiority of our system of government and our values with civil religion and patriotism, historical and scholarly commentary on it emphasizes the significance of geographical territory, ethnic commonality and cultural identity.<sup>70</sup> For many, nationalism includes justifications for militarily imposed domination.

American patriotism has elements of both civil religion and nationalism.<sup>71</sup> It shares with civil religion a deep regard for the democratic values, principles and processes articulated in the United States Constitution. More generally, the American way of life and its appeal is widespread among the population. When Americans speak with pride of the country that goes “from sea to shining sea,” we seldom acknowledge the nationalistic drive of European settlers and their descendants to dominate and supplant indigenous populations from the 17th century in Virginia through the overthrow of the Hawaiian monarchy in the late 19th century.

To understand patriotism’s significance in American life we must appreciate its distinctive features. First, while Protestant Christian religious themes occur frequently in patriotic rhetoric and discourse,<sup>72</sup> policy debates grounded in patriotism are not dependent for their force on any particular recognized religious themes. Second, patriotism brings substantive content, compelling rhetoric, and emotional urgency to public policy debates in a way that civil religion does not. The flag desecration debate is a key example. Framed most narrowly it is a legal argument about the application of the First Amendment principles to certain expressions of ideas. But patriotism drives the discussion far beyond the legal inquiry.<sup>73</sup> Third, unlike civil religion, patriotism’s pervasive significance in American life is not limited to scholarly interest. Despite the many scholarly examinations of civil religion, the concept has no perceptible widespread impact on American political and social culture.

Finally, patriotism’s implications fall within the purview of several scholarly disciplines. Viewing it as a religion can aid historians’ analyses of other important political and social developments with religious overtones—abolition, prohibition and the civil rights movement of

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Tarver Rountree, Jr., *Constitutionalism as the American Religion: The Good Portion*, 39 EMORY L. J. 203 (1990); Michael M. Madigan, *The Establishment Clause, Civil Religion, and the Public Church*, 81 CALIF. L. REV. 293 (1993); Shaffer, *supra* note 4.

<sup>70</sup> See, e.g., NATIONALISM, ch. 1 (John Hutchinson and Anthony D. Smith, eds., Oxford University Press, 1994); Viet D. Dinh, *Dunwoody Distinguished Lecture in Law: Nationalism In the Age of Terror*, 56 FLA. L. REV. 867 (2004).

<sup>71</sup> Thomas L. Shaffer suggests that civil religion and religious nationalism are equivalents. Shaffer, *supra* note 4, at 7, 11.

<sup>72</sup> For examples see *infra*, Part IV.

<sup>73</sup> For example, in the Senate floor debate about Senate Joint Resolution 12, Senator Charles K. Grassley (R-IA) said, “No other image depicts as readily the freedoms and ideals our men and women in uniform have battled for.” 152 CONG. REC. 85, S6487 (2006); see also *supra* Part IV.A. (quotations provided from the House debate on H. J. Res. 10).

the 1960s are examples. Sociological inquiries into social movements that transcend racial or religious boundaries can be enriched with the inclusion of how patriotism motivates collective action.<sup>74</sup> Political scientists can incorporate patriotism into analyses of the role of religion in American politics.<sup>75</sup> In addition, patriotism may be a fruitful area of analysis of our linguistic traditions. For example, linguist Leo Marx concluded that there are two civil religions: one is “polite, upper class, bookish, convention, churchy [sic] and hereditary,” while the other is the American vernacular: democratic and egalitarian, populist and even crude.<sup>76</sup> During the June 27, 2006 Senate floor debate about the flag amendment, Senator Dick Durbin (D-IL) said, “I think burning the flag is a form of protest that is crude and contemptible. But being contemptible and stupid is not unconstitutional . . . .”<sup>77</sup> Another senator stated eloquently that “[t]he American flag has been flown in times of battle, of victory and of national tragedy. It is the most recognized symbol of freedom and democracy in the world.”<sup>78</sup>

None of these scholarly disciplines needs to characterize patriotism as a religion in order to study its role in American life, but the characterization increases the potential for new and insightful lines of inquiry.

### **C. American Patriotism and Recognized Religions**

The link between secular government and religion is much older than the United States. Though historians and legal scholars find much to scrutinize, question and argue about regarding the founding of the country, none claim that the Founders were indifferent to religion. The Declaration of Independence invokes the “Laws of Nature and of Nature’s God” as bases for colonies’ right to “separate and equal Station” as an independent nation. With the Establishment and Free Exercise clauses of the First Amendment, the Founders sought to ensure religious freedom and, at the same time, constrain religion’s power. Today, 217 years after the ratification

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<sup>74</sup> WELCH, *supra* note 17 (focusing on the sociological significance of the flag protection movement).

<sup>75</sup> The implications of religion for American government and politics are the subject of numerous scholarly articles and books and journalistic treatments that focus on the impact of the recognized religions, but do not characterize patriotism as a religion. *See, e.g.*, Hamilton, *supra* note 59; Kathleen M. Sullivan, *Religion and Liberal Democracy*, 159 U. CHI. L. REV. 195 (1984); ONE ELECTORATE UNDER GOD? A DIALOGUE ON RELIGION AND AMERICAN POLITICS (Elshtain Dionne, Jr. and Drogoz, eds., Brookings Institution Press 2004); WILLS, GARRY, UNDER GOD: RELIGION AND AMERICAN POLITICS (Simon and Shuster 1990); RELIGION RETURNS TO THE PUBLIC SQUARE: FAITH AND POLICY IN AMERICA (Hugh Hecllo and Wilfred M. McCay, eds., 2003).

<sup>76</sup> ACR, *supra* note 62, at 222-51.

<sup>77</sup> 152 CONG. REC. 85, S6506 (2006) (statement of Sen. Durbin).

<sup>78</sup> 152 CONG. REC. 84, S6487 (2006) (statement of Sen. Grassley).

of the Bill of Rights, lawsuits claiming violations of those clauses prove the vitality and complexity of the nation's commitment to both religious freedom and secular government.

Patriotic expressions often invoke religious terms, themes and analogies. The Battle Hymn of the Republic, a rallying cry for the Union during the Civil War, is one familiar example. The righteousness of the cause is conflated with "the glory of the coming of the Lord," and soldiers dying in the war are analogized to Jesus: "as He died to make men holy/let us die to make men free."<sup>79</sup> Similarly, when Congress added the phrase "under God" to the Pledge of Allegiance it sent a message around the world that the American enterprise was the work of religious people who enjoyed the favor and protection of God. The modified Pledge alleviated widespread fear of the godless, communist Soviet Union's growing power and expansionist aims.<sup>80</sup>

Patriotism is more than a tool for exciting public passions through the use of religion-flavored rhetorical devices. Beyond the historical and rhetorical connections between love of country and religion is the reality that patriotism has become a force all its own in American culture and public life, comparable in its implications to recognized religions. A point-by-point application of patriotism to the essential elements of religion presented *infra* Part III.A supports this claim.<sup>81</sup>

### **1. A Primary Reference Point for Answers to Fundamental Questions About the Nature and Meaning of the Human Experience**

This primary reference point is the God of Judaism, Christianity and Islam. Jesus personifies the Christian God. Islam teaches that Mohammed is God's anointed messenger. Shinto views the Emperor of Japan as the earthly descendent of the Sun Goddess. However, the reference point may not be a supernatural deity. For example, Taoism's reference point is a system of guidelines for life, the *Tao Te Ching*, a group of poems that historians and scholars of religion generally attribute to the writings of Lao-tze, a Chinese philosopher of the 6th century B.C.E. Lao-tze himself was no deity or even the earthly embodiment of one.<sup>82</sup> In the American legal context, secular humanism qualifies as a religion for Free Exercise purposes though it has no supernatural reference point.<sup>83</sup>

While the primary reference point need not be a deity or other supernatural entity, it must provide answers to basic questions about the meaning of life and the range of human relationships and obligations. American patriotism's primary reference point consists of two documents – the

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<sup>79</sup> LEEPSON, *supra* note 17; *see also* WELCH, *supra* note 17.

<sup>80</sup> GOLDSTEIN, *supra* note 17.

<sup>81</sup> *See* THE NEW PENGUIN HANDBOOK OF LIVING RELIGIONS, *supra* note 61 (setting forth each point made about a specific religion made in the following discussion).

<sup>82</sup> THE NEW PENGUIN HANDBOOK OF LIVING RELIGIONS, *supra* note 61 at 166-67.

<sup>83</sup> *Torasco v. Watkins*, 367 U.S. 488 (1961).

Declaration of Independence and the United States Constitution, including the Bill of Rights and subsequent amendments.<sup>84</sup>

The Declaration opens with references to “the Course of human Events” and what at times becomes “necessary,” and proclaims that people have the right to “assume among the Powers of the Earth, the separate and equal station to which the Laws of Nature and of Nature’s God entitle them.” The “self-evident” truths are that people are “endowed by their Creator with certain unalienable Rights” and “that among these are Life, Liberty, and the Pursuit of Happiness.” The purpose of government is to “secure these Rights,” and the people have the right to organize “Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness.”<sup>85</sup> The Constitution is ordained and created to “Establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Liberty and Blessings of Liberty to ourselves and our Posterity.”<sup>86</sup> These words proclaim that the nature and meaning of the human experience is the pursuit of personal aspirations with respect for the right of others to do the same. The founding documents establish America as the “land of opportunity,” offering the world’s best hope for the positive transformation of human lives.

## 2. A Common Understanding of the Past

Religious believers rely on stories of people and events to provide a framework in which to understand the past and account for their situation in the world. For example, the history of Islam centers on the religion’s founder, Mohammed. He was born in the 6th century C.E. in or near Mecca. After years of success as a merchant, Mohammed received in a vision the Angel Gabriel’s command that he, Mohammed, was Allah’s anointed messenger. By his death Mohammed had founded a religious movement moving out from Mecca to the rest of the Arab region. His speeches and sermons became the sacred text of Islam, the Koran.<sup>87</sup>

The religious significance of such stories for the faithful accounts for their tenacity and the intense and hostile reaction to those who challenge their validity. The recent growing prominence of evangelical Christianity provides a useful example. Many evangelicals assert that the biblical account of the origins of the earth and humans should be taught in public schools on a par with the scientific theory.<sup>88</sup>

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<sup>84</sup> See, e.g., Levinson, *supra* note 23 (referring to the Constitution as the sacred text of American civil religion.); Madigan, *supra* note 69.

<sup>85</sup> THE DECLARATION OF INDEPENDENCE, para. 1, 2 (U.S. 1776).

<sup>86</sup> U.S. CONST. pmbl.

<sup>87</sup> THE NEW PENGUIN HANDBOOK OF LIVING RELIGIONS, *supra* note 61 at 447-48, 463.

<sup>88</sup> See *Kitzmiller v. Dover Area School Dist.*, 400 F. Supp. 2d 707 (M.D.P.A. 2005) (finding a Pennsylvania School District’s resolution requiring the inclusion of “intelligent design” in instruction about Darwin’s theory of evolution unconstitutional on Establishment Clause grounds).

The stories that form the common historical understanding of American patriotism center on colonization, the eventual rebellion from England, the Revolutionary War, and the creation of a republic. The heroes include the signers of the Declaration of Independence, war-hero and first President, George Washington and early international supporters of the revolution such as the French aristocrat the Marquis de Lafayette.<sup>89</sup>

The tenacity of even discredited stories about the history of American flag underscores the significance of such common understandings. Among the most famous artistic images of the Revolutionary era is the iconic 1851 painting of George Washington crossing the Delaware on Christmas night, 1776. The artist, German-born Emanuel Gottlieb Leutze, depicts Washington on a small boat, tossed by the river's currents. The future president, Lieutenant James Monroe, stands behind him holding the Stars and Stripes. It is true that Washington crossed the Delaware that night, but he could not have been displaying the Stars and Stripes. Congress did not pass the resolution calling for an American flag with stars and stripes until June 14, 1777. If George Washington carried a flag that night, historians believe it would have been his personal headquarters flag.<sup>90</sup>

Though history confirms the existence of Elizabeth (Betsy) Ross and her occasional profession as a seamstress, the story that she sewed the first flag is a myth. It was probably developed in the oral history of her family and gained widespread attention and credence in the wake of an 1870 paper written by one of her grandsons, William Canby, who was eleven years old when she died.<sup>91</sup>

The Betsy Ross tale remains a key feature of what most Americans believe about the nation's history. The house in Philadelphia where she may have lived from 1773 until 1786<sup>92</sup> draws more than 250,000 visitors a year. This is more than any other Philadelphia historical site except the Liberty Bell and Independence Hall, which houses the original Declaration of Independence.

The common understandings of American patriotism also include grievous distortions by omission. Neither the violent displacement of American Indians nor the length, breadth and brutality of slavery receive thorough treatment in the school texts that are the foundation of most Americans' historical knowledge.<sup>93</sup>

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<sup>89</sup> P.L. 107-209 posthumously granted honorary citizenship to Marie Joseph Paul Yves Roche Gilbert du Motier the Marquis de Lafayette. The joint resolution noted, "an American flag has flown over his grave in France since his death and has not been removed, even while France was occupied by Nazi Germany during World War II." P.L. 107-209 Aug. 6, 2002.

<sup>90</sup> LEEPSON, *supra* note 17, at 25.

<sup>91</sup> *Id.* at ch. 3.

<sup>92</sup> *Id.* at 48 (noting that historical records leave some uncertainty about which of two side-by-side houses is the one in which she lived).

<sup>93</sup> See Sean Wilentz, *What Was Liberal History?*, THE NEW REPUBLIC, July 10, 2006, (reviewing

Despite flaws in the history and mythology of America, historically valid stories and heroes remain at the core of patriotism. The writing of the National Anthem is a compelling example. Francis Scott Key observed the British bombing of Baltimore Harbor during the War of 1812. He saw the Stars and Stripes remain aloft and identifiable despite the multiple hits from the barrage of canon fire. The sight inspired the words to “The Star Spangled Banner.”<sup>94</sup>

### 3. Shared Aspirations for the Future

Just as religions have stories about the past, they offer believers a vision of a future that is better than the present. Christians aspire to reach heaven. Hindus and Buddhists seek nirvana at the end of multiple reincarnations.

American patriots look to full participation in the American dream of prosperity—the “pursuit of happiness.” A common cliché offered to children is “you can grow up to be anything you want to be,” usually a reference to career aspirations. At the start of the 21st century the patriotic aspiration seems to have an equivalent in foreign and military policy: promoting freedom and democracy around the world.<sup>95</sup>

### 4. Membership Requirements

Requirements for membership in certain religions take a variety of forms, including Christian Protestant baptism and Roman Catholic confirmation, each of which is marked by a religious ceremony. Being a Jew has traditionally required birth to a Jewish mother, though some contemporary branches of Judaism recognize converted Jews. Traditionally, Japanese birth was

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DAVID S. BROWN, RICHARD HOFSTADTER: AN INTELLECTUAL BIOGRAPHY (2006), and providing a recent summary of this complaint).

<sup>94</sup> LEEPSON, *supra* note 17.

<sup>95</sup> In a January 23, 2006 speech President Bush said:

History has shown that democracies yield the peace. Europe is free, whole, and at peace because the nations are democratic . . . . [I believe that] deep in everybody's soul is the desire to live free. I believe there's an Almighty, and I believe the Almighty's great gift to each man and woman in this world is the desire to be free . . . . [I]t's important for the United States of America, with friends, to lead the cause of liberty . . . . Some day an American President will be sitting down with elected leaders from a country like Iraq talking about how to keep the peace. This generation is rising to the challenge. We're looking at history, we understand our values, and we're laying that foundation of peace for generations to come.

President George W. Bush, Remarks on the Global War on Terror at Kansas State University (Jan. 23, 2006), available at [www.whitehouse.gov/news/releases/2006/01/20060123-4.html](http://www.whitehouse.gov/news/releases/2006/01/20060123-4.html).

required to be Shinto. In American patriotism the essential membership requirement is belief in and loyalty to the United States. Full status as Americans comes only with citizenship, which guarantees the right to vote and the possibility of employment by the federal government. But observance of the rituals of patriotism discussed below<sup>96</sup> is available to all who choose to participate<sup>97</sup> without regard to indicia of citizenship, such as the right to vote or employment by the federal government.

## 5. A Sense of Collective Identity

Membership in a religion brings believers into the comforting fold of a defined community bound by shared beliefs and values. Participation in the religion's traditions demonstrates devotion of course, but these traditions serve equally the purpose of reinforcing the intangible sense of collective identity. In addition, voluntary acts such as the wearing of crosses by some Christians, allows members of the religion to make themselves known as such. The head coverings Judaism and Islam prescribe for certain circumstances also serve the dual purpose of religious observance and identification. Americans use the patriotic holidays, Independence Day and Memorial Day, to exult in their collective American identity. They celebrate the nation's founding and mourn those who have died in its wards with the display of countless flags.<sup>98</sup> Moreover, as Professor Nahmod observes, "[A]n emotional attachment to the American flag as a sacred symbol of nationhood and national unity constitutes an important aspect of emotional attachment and allegiance to the political community as well."<sup>99</sup>

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<sup>96</sup> See *infra* Part III. B. 6.

<sup>97</sup> News accounts of Spring 2006 pro-immigration rallies around the country reported that many waved American flags. See, e.g., *Demonstrators Crowded the Mall for a Pro-immigration Rally that Featured Impassioned Speeches, American Flags and an Oft-repeated Cheer*, WASH. POST WEEK IN REVIEW, Apr. 16, 2006 at CO4; *Hoy, Marchamos; Mañana, Votamos. Today, We March; Tomorrow, We Vote.*, WASH. POST WEEK IN REVIEW, Apr. 16, 2006 at CO4.

<sup>98</sup> A member of the House of Representatives, though an opponent of the flag protection resolution, stated:

Like the majority of Americans, I have the utmost respect and reverence for our flag. For all of us, this reverence begins early on, when as school children we are taught the Pledge of Allegiance and recite it each day with our classmates. Or it begins when we attend a Memorial Day Parade with our parents and look in awe at the veterans, young and old, who still carry the flag with such pride.

152 CONG. REC. 82, H4916 (2006) (statement of Rep. Kind).

<sup>99</sup> Nahmod, *supra* note 4, at 540.

## 6. Worshipful Behaviors

All religions have a number of behaviors associated with both regular worship and special occasions of profound significance. Regular attendance at religious services is the most common example, but there are others. In the Roman Catholic Church for example, priests administer last rites to those near death. Many Jews adhere to Kosher rules and rituals surrounding the preparation and consumption of food. Muslims seek to complete at least one ritual pilgrimage to Mecca in their lifetime. Hindus live by Karma, or the Law of the Deed, which states that every thought and act is either good or bad.

The Pledge of Allegiance is the pre-eminent worshipful rite of American patriots. It is imprinted on every person who recites it each day in American public schools. Though the Supreme Court has stated schools may not make recitation compulsory<sup>100</sup> many do so voluntarily. Even if, in the wake of constitutional challenges, the Supreme Court required the elimination of the phrase “under God,” the Pledge would lose no force as a rite of American patriotism since patriotism is not a theistic religion and therefore requires no theistic reference points.<sup>101</sup>

In addition to the statutory requirements about respectful treatment of the flag,<sup>102</sup> there

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<sup>100</sup> West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

<sup>101</sup> Professor Sheldon Nahmod makes this point in his article *The Pledge as Sacred Political Ritual*. 13 WM. & MARY BILL RTS. J. 771 (2005). In the 109th Congress there have been 11 bills and resolutions supporting the use of the phrase “under God” in the pledge. For example, House Resolution 453 “[e]xpresses the sense of the House of Representatives that: (1) the phrase “one Nation, under God” should remain in the Pledge of Allegiance; and 2) voluntary recitation of the Pledge in school classrooms should be encouraged.”

On July 19, 2006 the House of Representatives passed H.R. 2389, amending title 28 of the United States Code, which strips federal courts of authority over cases and controversies involving the Pledge of Allegiance. While there has been no action in the Senate on Senate Resolution 1046, the equivalent of House Resolution 2389, there were 10 bills and resolutions introduced in the Senate to protect or honor the Pledge of Allegiance. They include Senate Resolution 243, which provides:

SEC. 1. That the Senate strongly disapproves of the Sept. 14, 2005, decision by the United States District Court for the Eastern District of California in *Newdow, et al. v. The Congress of the United States of America, et al.*

SEC. 2. That the Senate authorizes and instructs the Senate Legal Counsel to continue to cooperate fully with the Attorney General in this case in order to vigorously defend the constitutionality of the Pledge of Allegiance.

It passed the Senate on September 15, 2005.

<sup>102</sup> 4 U.S.C. § 8. As noted *supra*, they lack enforcement mechanisms and thus are merely precatory.

are rules about the daily raising and lowering of the flag at civilian government offices and military facilities. Federal government employees and members of the military carry out their responsibilities under the flag, both literally and figuratively. There is much demand for flags that have flown over the United States Capitol. To meet that demand flags are raised and lowered virtually without interruption throughout the daytime hours.<sup>103</sup> The ritual of gun salutes at the funerals of veterans is one of the ways the military services officially acknowledge a veteran's service to the country. Such funerals normally end with the presentation of a folded American flag to the veteran's next of kin "with the thanks of a grateful nation."<sup>104</sup> We also have informal traditions of great significance such as the practice of standing for the singing of the "Star-Spangled Banner" at sports events.

## **7. Consequences and Rewards Based on the Obligations of Worshipful Behaviors**

Christians expect eventual transition to heaven or hell. During life on earth Roman Catholic priests have the power to deny communion for certain sins.<sup>105</sup> Hinduism teaches that one's behavior in life determines status at the point of reincarnation. In American patriotism, failure to behave like a true believer brings ostracism to private citizens and vulnerability in the public sphere.<sup>106</sup> Two wartime incidents, one from the 1960s and one from 2002, illustrate the point.

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<sup>103</sup> For example, the website of Senator Patrick Leahy (D-VT), Ranking Democrat on the Senate Judiciary and an opponent of the flag protection amendment, offers constituents a flag that has flown over the Capitol. The purchaser gets a certification of authenticity, including the date on which the flag flew over the Capitol. The cost ranges from \$17.05 to \$28.05 depending upon the size and material of the flag. The Senator's web page notes that "due to a high volume of flag requests, it can take up to eight weeks to process a request after a flag is flown." <http://leahy.senate.gov/services/flags.html> (Aug. 23, 2006).

<sup>104</sup> U.S. Dept. of Army, Reg. 600-25, Salutes, Honors, and Visits of Courtesy, para. 7-17(b) Sept. 1, 1983 (burial honors include "presenting the flag to the designated recipient.").

<sup>105</sup> In the 2004 presidential campaign some Catholic priests urged that the democratic nominee, John Kerry, should be denied communion because his support for abortion rights violated his obligations as a Roman Catholic. Jodi Wilgoren and Bill Keller, *Kerry and Religion. Pressure Builds for Public Discussions*, N. Y. TIMES, Oct. 7, 2004, at A30.

<sup>106</sup> A journalist writing on the day the House passed the most recent flag amendment remarked that "though the public sides with the Democrats on more key issues than it does with Republicans, it's Republicans who have won more elections, in good measure because the GOP has raised its ad hominem attacks on Democrats' character and patriotism to a science." Hal Meyerson, WASH. POST, June 22, 2005; see discussion *infra* Part IV.

During the 1968 Summer Olympic Games held in Mexico City, both the gold and bronze medalists in the 200-meter race, Tommie Smith and John Carlos, were African-American students from San Jose State College in California.<sup>107</sup> By Olympic tradition, each winners' flag rose high above the medal platform with the gold medal winner's flag highest of all. As the "Star Spangled Banner" played, Smith and Carlos chose to use that moment of international attention to express concern about civil rights, the Vietnam War and the assassinations of Martin Luther King and Sen. Robert Kennedy. Instead of standing at attention for their national anthem, Smith and Carlos lowered their heads and raise their arms high with clinched fists, an unmistakable unspoken salute to "Black Power."<sup>108</sup> They were immediately ejected from the Olympic Village and sent home. Outrage over their "unpatriotic" actions overshadowed their athletic achievements and had negative effects on their careers for decades afterward.<sup>109</sup>

In the 2002 elections, Senator Max Cleland (D-Ga.) lost his seat to an opponent who successfully labeled Cleland unpatriotic based on his publicly voiced concerns about the Iraq war, despite the fact that the senator became a paraplegic as a result of his Vietnam War injuries.<sup>110</sup>

In its most extreme manifestations targeting some as unpatriotic can spur the kind of career-destructive witch-hunts many experienced during the height of Sen. Joseph McCarthy's power in the 1950s.<sup>111</sup>

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<sup>107</sup> For a sociologist's account of this incident that places it in the broad context of the flag desecration movement see WELCH, *supra* note 17, at 3-4. He cites R. Lipsyte, *Silent Salute Ringing Impact: Two Small Gloved Fists, One Large Revolution*, N. Y. TIMES, Oct. 17, 1993 (the 25th anniversary of the event). Lipsyte quotes Bill Toomey, the decathlon gold medalist who recalled, "It was a modest gesture that became one of the most dramatic—almost religious — symbols, saying we just want to remind you that all is not well." *Id.*

<sup>108</sup> The Black Power movement was a confrontational leftist movement of the late 1960s based primarily on college campuses.

<sup>109</sup> Years later Carlos showed his patriotism, saying the protest was "basically, an act of love. Tough love, but love." John Jeanson, *Then and Now; Distant Fists Return; Carlos and Smith, Whose Victory-stand Protest is an Indelible Olympic Moment, are Second Fiddle to Fashion*, NEWSDAY, July 15, 2004.

<sup>110</sup> See Tatsha Robertson, *War Stance Influencing Close Races Even Veterans Face Queries on Patriotism*, THE BOSTON GLOBE, Nov. 1, 2002, at A3. See also Liz Marlantes, *Patriotism Becomes Nasty Campaign Issue*, CHRISTIAN SCIENCE MONITOR, July 5, 2002, at 2.

<sup>111</sup> In February 1950, Senator McCarthy gave a speech claiming to have the names of members of a Communist Party spy ring while employed by the State Department. Beginning in 1953 as Chairman of the Permanent Subcommittee on Investigations, he conducted 160 closed-door hearings with 500 witnesses including low level government employees and famous Americans. In 1954, highly confrontational, nationally televised hearings damaged his credibility and eventually led to censure by the United States Senate. JOSEPH R. MCCARTHY: A FEATURED BIOGRAPHY (2007), [http://www.senate.gov/artandhistory/history/common/generic/Featured\\_Bio](http://www.senate.gov/artandhistory/history/common/generic/Featured_Bio)

## 8. Sacred Texts and Symbolic Objects

Sacred texts and symbols are the tangible manifestations of religious belief, and it is possible for one thing to be both. Thus, the physical desecration of a Torah or Koran is deeply offensive beyond the fact that the text itself is sacred.<sup>112</sup> As a sacred text the United States Constitution is the equivalent of the Christian Bible, the Taoist writings of Lao Tze and the Buddhist Ten Commandments and Ten Perfections.

The flag is the most significant sacred object of American patriotism.<sup>113</sup> All nations have documents, symbols, physical structures and rituals that represent and communicate what they value. Flags have long served as means of identification for military, commercial, safety, health and humanitarian purposes. In a sense, therefore, the American flag's special status is not inherently remarkable, but it is unique. No other country has such an intense, worshipful attitude towards its flag.<sup>114</sup>

## IV. IMPLICATIONS

American patriotism has the beneficial effect of unifying Americans across the often divisive lines of race, ethnicity, class, gender, education and religion. It fosters loyalty and a sense of community. It reflects national pride in the democracy established by the Constitution.<sup>115</sup> The parades on Independence Day, Memorial Day and Inauguration Day focus the entire nation on how the United States began, the struggles to keep it free and the unprecedented cycle of peaceful transitions of power. Though the Civil War was a devastating challenge to that cycle, the United States remained intact and survived what President Abraham

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[McCarthy.htm](#). For a book-length treatments of the McCarthy era, see SHELBY SCATES, MAURICE ROSENBLATT AND THE FALL OF JOSEPH MCCARTHY (2006).

<sup>112</sup> See Eric Schmitt, *Military Details Koran Incidents at Base in Cuba*, N. Y. TIMES, June 4, 2005, at A1. (Press report declaring U.S. Marines had flushed a Koran down a toilet "led to violence in the Muslim world that left at least 17 people dead.").

<sup>113</sup> 152 CONG. REC. 82, H4911 (2005). As one amendment supporter, Representative Candice Miller (R-MI) said, "[s]ome things in this Nation are sacred, and the flag is the most sacred symbol of all. The flag binds our Nation together and must be protected." *Id.*

<sup>114</sup> "[N]o country in the world can match the intensity of the American citizenry's attachment to [the flag] which is as familiar an American icon as any that has existed in the nation's history." LEEPSON, *supra* note 17, at 1.

<sup>115</sup> See Laura Little, *Loyalty, Gratitude and the Federal Judiciary*, 44 AM. U. L. REV. 699, 701-10 (1995) (discussing scholarly examinations of loyalty and friendship that, by analogy, offer insights into the emotional rewards and social connections patriotism offers).

Lincoln called the test to determine “whether [this] nation, or any nation so conceived, and so dedicated, can long endure.”<sup>116</sup> But patriotism’s pervasive presence in American life warrants consideration of the negative implications.

**A. Patriotism Lends Credibility to Deeply Flawed Justifications for Amending the Constitution**

Support for the flag desecration amendment cannot be explained by analogy to previous constitutional amendments, because of the earlier justifications applies. Unlike the amendments abolishing slavery,<sup>117</sup> expanding Fifth Amendment protections to encompass state action<sup>118</sup> and granting former slaves<sup>119</sup> and women<sup>120</sup> the right vote, it would guarantee no rights.<sup>121</sup> Unlike the amendment establishing presidential term limits<sup>122</sup> and the barrier to federal court as a forum for citizen claims against the states,<sup>123</sup> it would make no change in the operations of the federal

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<sup>116</sup> Abraham Lincoln, President of the United States, Gettysburg Address (Nov. 19, 1863), available at [http://rmc.library.cornell.edu/gettysburg/good\\_cause/transcript.htm](http://rmc.library.cornell.edu/gettysburg/good_cause/transcript.htm).

<sup>117</sup> U.S. CONST. amend. XIII.

<sup>118</sup> U.S. CONST. amend. XIV.

<sup>119</sup> U.S. CONST. amend. XV.

<sup>120</sup> U.S. CONST. amend. XIX.

<sup>121</sup> 152 CONG. REC. 82, H4916 (2005). Representative Steny Hoyer (D-MD) observed during the June 2005 House floor debate:

In its more than 200 years, the Constitution has been amended only 27 times. With the exception of the Eighteenth Amendment, which was later repealed, these amendments have reaffirmed and expanded individual freedoms and the specific mechanisms that allow our self-government to function. This Resolution before us today would not perfect the operation of our self-government. It would not expand our citizen's rights.

*Id.* Rep. James Sensenbrenner, floor manager for the resolution, disputes this claim and compares House Joint Resolution 10 to the 13th, 14th and 15th amendments that corrected flawed Supreme Court analysis in the Dred Scott Case. *Id.* at H4923.

<sup>122</sup> U.S. CONST. amend. XXII.

<sup>123</sup> U.S. CONST. amend. XI (providing that “[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”).

government. Unlike Prohibition,<sup>124</sup> the proposed amendment does not address any widespread practices with troubling implications for public health, safety or morality.

Nor would the flag protection amendment protect a unique national treasure. With the exception of particular flags of specific historical significance, such as the flag that flew over Fort McHenry in 1814 and inspired the writing of the “Star Spangled Banner,” flags can be replicated and replaced endlessly.<sup>125</sup> Even the amendment’s sponsors acknowledge that there is no widespread epidemic of flag desecration.<sup>126</sup> Moreover, the flag amendment would empower Congress to enact criminal sanctions, a distinction it shares only with Prohibition.

Most significant is the fact that the flag amendment would have the effect of amending the Bill of Rights for the first time in the nation’s history.<sup>127</sup> While the proposed amendment does not say so explicitly, and proponents make claims to the contrary, the history of the amendment demonstrates that it is directed against certain points of view. According to the House Report, “the resolution simply seeks to remove the physical flag as a mode of communication, without regard to the content of such speech or the particular viewpoint attempting to be expressed.”<sup>128</sup>

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<sup>124</sup> U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI..

<sup>125</sup> The dissenters in the two most recent Supreme Court flag desecration decisions urged that the flag is unique in its status and symbolic power, but they did not claim that it was impossible to replace or replicate any particular flag. Professor Nahmod observes, writing about the dissent in *Johnson*:

Chief Justice Rehnquist conflated signifier—the flag—and what the flag represents, thus suggesting that one who physically harms an American flag is at the same time harming the nation. Under this view, the flag not only represents the nation but, in some important sense, it *is* the nation.

Nahmod, *supra* note 4, at 526 (emphasis in original).

<sup>126</sup> House Report 109-131 states that since 1994 there have been just 119 instances nationally. (An amendment opponent, Rep. Hastings (D-FL), asserted that the correct number was fifteen between 2000 and 2005. *Id.*) During the Senate debate, Senator Orrin Hatch (R-UT) cited a report that there have been over 130 since 1994. 152 CONG. REC. 85, S6503 (2006).

<sup>127</sup> Representative Steny Hoyer (D-MD) made the point during the House floor debate: In its more than 200 years, the Constitution has been amended only twenty seven times. With the exception of the 18th Amendment, which was later repealed, these amendments have reaffirmed and expanded individual freedoms and the specific mechanisms that allow our self-government to function. This Resolution before us today would not perfect the operation of our self-government. It would not expand our citizens’ rights.

<sup>128</sup> H. REP. No. 109-131, at 5.

The report quotes with approval Justice Stevens' dissent in *U.S. v. Eichman*,<sup>129</sup> in which he argued that a statutory ban on flag desecration “does not entail any interference with the speaker's freedom to express his or her ideas by other means.”<sup>130</sup> But supporters' remarks during the June 22 debate rebut such disclaimers. For example, Rep. Cliff Stearns (R-Fla.), noted that, “[a]nyone can still freely say that they hate America and everything for which it stands, they just cannot burn a flag to prove their point.”<sup>131</sup>

By contrast, the basis of each Supreme Court decision limiting the scope of the free expression guarantee has been either the special status of commercial speech or concerns that some forms of expression threaten the public health and safety or offend public standards of decency so deeply that they deserve little, if any, protection.<sup>132</sup> The proponents of a flag protection amendment assert that the flag is equally worthy of an exception to the guarantee of free expression, but they offer no evidence that public health, morality or commerce are at risk.

## **B. Compelled Ideas**

The patriotism exemplified by the flag protection movement has risen to the level of a compelled idea, the danger articulated by Justice Jackson in *Barnette* when he noted that requiring students to salute the flag constituted “a compulsion of students to declare a belief.”<sup>133</sup> He added:

Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. . . . Symbols of State often convey political ideas just as religious symbols come to convey theological ones . . . . [T]he compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind.<sup>134</sup>

Justice Jackson urged that the Bill of Rights prohibits government demands that a person “to

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<sup>129</sup> *U.S. v. Eichman*, 496 U.S. 310 (1990).

<sup>130</sup> *Id.* at 319 (Stevens, J., dissenting).

<sup>131</sup> 152 CONG. REC. 87, H4915 (2006).

<sup>132</sup> In *Reno v. American Civil Liberties Union*, the Supreme Court reviewed its decisions in these areas as it struck down portions of the Communications Decency Act that criminalized the “knowing” internet transmission to minors of “obscene and indecent communications. 521 U.S. 844 (1996).

<sup>133</sup> 319 U.S. at 631.

<sup>134</sup> 319 U.S. at 633.

utter what is not in his mind.”<sup>135</sup>

That patriotism and the flag protection movement demand “affirmation of a belief and an attitude of mind” is evident in the penalties for failure to conform.

### C. Opprobrium and Intimidation

Patriotism can exact significant penalties for those who violate its precepts. The Iraq War has spawned many accusations of unpatriotic conduct. Rep. Peter T. King (R-N.Y.), former chair of the House Homeland Security Committee, accused the New York Times’ editors and reporters of treason—the most unpatriotic of all acts—for reporting on a program used to trace terrorists’ international financial transactions<sup>136</sup> even though the existence of the program was known to Congress and reported in the news media years before.<sup>137</sup>

A flag amendment proponent stated during the House debate that flag desecration is an attack on liberty “to all patriots” and added “if it were merely a piece of cloth, *our enemies* would not trouble themselves to desecrate it.”<sup>138</sup> The implications of such pressure are profound for children. While the Supreme Court has said that public schools may not require students to recite the Pledge of Allegiance,<sup>139</sup> the child who refuses to do so risks social opprobrium. The Philadelphia Board of Education prevailed in a challenge to its ban on the wearing of religious apparel or accessories by school teachers, on the basis that it served a compelling state interest in

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<sup>135</sup> 319 U.S. at 634. In his essay, Professor Chen notes that forced patriotism occurs when the government either chills expression or compels it. Chen, *supra* note 5, at 703. He includes in the second category laws requiring salutes or other gestures “in support of national icons such as the United States flag . . . .” *Id.*

<sup>136</sup> Devin Barrett, *Lawmaker Wants Times Prosecuted*, WASH. POST, June 26, 2006, at A02. Andrew C. McCarthy in National Review Online said, regarding the New York Times, “appealing to the patriotism of these newspapers proved about as promising as appealing to the humanity of the terrorists they so insouciantly edify.” Greg Pierce, WASH. TIMES, June 26, 2006.

<sup>137</sup> Bill Keller, Executive Editor of the New York Times, stated in a television interview:

This was a case where clearly the terrorists, or the people who finance terrorism, know quite well because the Treasury Department and the White House have talked openly about it, that they monitor international banking transactions. It's not news to the terrorists. The scope of the program and its evident successes and the questions about its oversight were news to voters and citizens.

Bill Keller, Face the Nation (CBS television broadcast July 2, 2006).

<sup>138</sup> 151 CONG. REC. 84, H4910 (2005) (emphasis added) (statement of Rep. Sodrel).

<sup>139</sup> West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

maintaining the appearance of religious neutrality.<sup>140</sup> However there is no comparable limitation on the countless, unchallenged messages school children receive about the importance of being patriotic. The flags flying outside many schools and churches, most state and local government buildings and all federal buildings reinforce the point.

The “Star Spangled Banner,” though secular in its terms, is in effect a religious anthem. At sporting events, particularly in current climate of terrorism fears and anti-immigrant sentiment, standing for the national anthem is essential to avoid the appearance of being unpatriotic. The unpatriotic label carries a connotation as harsh as any non-criminal charge in contemporary America.<sup>141</sup> In short, the costs of being deemed “unpatriotic” are so high that observance of patriotism’s rites and rituals are effectively compelled.<sup>142</sup>

#### **D. Implications for Multi-ethnic Society**

Patriotism transcends the boundaries of ethnicity and religion and fosters mutual

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<sup>140</sup> United States v. Bd. of Educ. of the School Dist. of Phila., 911 F.2d 882 (3d Cir. 1990) (Plaintiff school teacher brought a religious discrimination claim under Title VII of the Civil Rights Act of 1964).

<sup>141</sup> Representative Jerald Nadler (D-NY) suggested another risk that would follow from adopting the flag amendment:

I am certain we will hear speeches invoking the sacrifice of our troops in the field as a pretext for carving up the first amendment. We already have. That is a shameful exploitation of the patriotism and courage of these fine and courageous young people. It is the civic equivalent of violating the commandment against taking the Lord's name in vain.

151 Cong. Rec. 84, H4907 (2005) (statement of Rep. Jerald Nadler).

Similarly, Representative Ron Paul (R-TX) objected that:

[B]y using the word “desecration,” which is traditionally reserved for religious symbols, the authors of this amendment are placing the symbol of the state on the same plane as the symbol of the church. The practical effect of this is to either lower religious symbols to the level of the secular state, or raise the state symbol to the status of a holy icon.

*Id.* at H4912.

<sup>142</sup> Professor Alan K. Chen describes and critiques what he calls “forced patriotism.” He urges that forced acts of patriotism may be impermissible infringements on freedom of expression. Chen, *supra* note 5.

understanding and shared goals, but its dangerous manifestations reinforce xenophobia. It provides a simplistic way to divide populations into “us” and “them.”<sup>143</sup> The intersection of patriotism with the response to terrorism increases the possibility that those who appear to be immigrants will be the target of hostile treatment or worse.<sup>144</sup>

The “Minuteman Project” illustrates the close link between anti-immigrant sentiment and claims of patriotism. Its participants imply that they are 21st century spiritual descendants of those who fought the battles of Lexington and Concord, Massachusetts, two of the earliest battles of the Revolutionary War.<sup>145</sup> They have become vigilante border guards. In the words of one founder of the Minuteman Project, “when the rule of law is dictated by a mob of illegal aliens taking to the streets, especially under a foreign flag, then that means the nation is not governed by the rule of law—it is a mobocracy.”<sup>146</sup> In communities with substantial immigrant populations they claim patriotism justifies their efforts to close programs that facilitate immigrant

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<sup>143</sup> A biologist writing about the tension between the theory of evolution and the concepts of creationism and intelligent design might have been writing about the religious essence of American patriotism:

There is something deep in religious belief that divides people and amplifies societal conflict . . . the dilemma to be solved is truly profound. On the one side the input of religion on human history has been beneficent in many ways. It has generated much of which is best in culture, including the ideals of altruism and public service. From the beginning of history it has inspired the arts . . . .

Yet the high risk is the ease with which alliances between religions and tribalism are made. Then comes bigotry and the dehumanization of infidels. Our gods, the true believer asserts, stand against your false idols, our spiritual purity against your corruption, our divinely sanctioned knowledge against your errancy.

Edward O. Wilson, *Intelligent Evolution, Introduction to FROM SO SIMPLE A BEGINNING: THE FOUR GREAT BOOKS OF CHARLES DARWIN* (2005).

<sup>144</sup> See Andrea Elliott, *Immigrants Fear Filing Suits, Advocates Say*, N. Y. TIMES, Apr. 30, 2005 at B4. Discrimination cases involving Muslims in the workplace, at school and in airports increased markedly after Sept. 11 but are most commonly brought by American-born Muslims because immigrants are reluctant to take legal action, lawyers and civil rights advocates say. A fear of retaliation by employers or more extreme outcomes, like deportation, drives many Muslim immigrants to stay quiet. *Id.*

<sup>145</sup> *Anderson Cooper 360* (CNN television broadcast May 25, 2006). For example, in their two-way radio conversations the Minutemen call each other “Patriot 10” and “Patriot 2.” *Id.*

<sup>146</sup> Randal C. Archibold, *The Immigration Debate: The Overview; Immigrants Take to the U.S. Streets in Show of Strength*, N. Y. TIMES, May 2, 2006 (quoting Jim Gilchrist).

employment, and access to housing and social services.<sup>147</sup>

## V. CONCLUSION

American patriotism reflects an admirable regard for our nation and the flag is an appropriate symbol for our democratic principles and practices. However, patriotism can also nurture troubling offspring. The flag protection movement is a quintessential example.

Representative Ron Paul (R-Tex.), a conservative republican, opposed the amendment for reasons he expressed in graphic terms: “This is in many ways patriotism with a gun—if your actions do not fit the official definition of a ‘patriot’ we will send somebody to arrest you.”<sup>148</sup> Another opponent recalled some of the unfortunate historical examples of patriotism being used to hurt those who speak out against majority viewpoints. He cited an April 7, 1917 headline: “Diners Resent Slight to the Anthem: Attack a Man and Two Women Who Refuse to Stand When It is Played.”<sup>149</sup> Senator Patrick Leahy (D-VT) expressed the tension between patriotism and concern for civil liberties that permeates the flag protection debate:

If someone seeks to do harm to the flag I proudly fly in my home...they would be prosecuted under Vermont law....but I can replace a flag of mine that was destroyed, and would...But if we act to diminish the Bill of Rights that protect our freedoms of a quarter billion Americans and of generations to come, we cannot replace that. We cannot go to the store and buy a new Bill of Rights once it is diminished.<sup>150</sup>

As these legislators suggest, the flag symbolizes the United States' core principles. It should not be used to undermine those principles in the name of patriotism; yet this would be the effect of making flag desecration a crime. Like religion, patriotism demonstrates the dangers of deeply held beliefs devolving into excuses for intolerance or even at times violence.

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<sup>147</sup> Karin Bruilliard, *Herndon Group to Keep Eye on Day Labor Sites; Patrols Meant to Discourage Hiring of Illegal Immigrants*, WASH. POST, Oct. 22, 2005, at B5 (referring to Herndon, Va.).

<sup>148</sup> 151 CONG. REC. 84, H4912 (2005) (statement of Rep. Paul).

<sup>149</sup> *Id.* at H4913 (statement of Rep. Snyder).

<sup>150</sup> 152 CONG REC. 84, S6478 (2006) (statement of Sen. Leahy).