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## Changing Perspectives: *Senators' Newfound Support for Amending the First Amendment*

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## Introduction

A group of forty-two Senators<sup>1</sup> have sponsored an amendment to the Bill of Rights to the United States Constitution that could, for the first time in history,<sup>2</sup> reduce Americans' First Amendment rights. According to Senate Majority Leader Harry Reid (NV), the amendment, which is sponsored by Sen. Tom Udall (NM), will receive a floor vote this summer.<sup>3</sup>

Many current co-sponsors of the proposal have voted on a constitutional amendment limiting political speech before. At various times throughout the 1990s and 2000s, Congress considered amending the Constitution to ban desecration of the U.S. flag. This report examines the shifting views of current Udall amendment co-sponsors who previously voted against a flag protection amendment on free speech grounds. Many of the arguments these politicians made against a flag protection amendment apply equally, or more so, to the Udall amendment currently under consideration.

During debates on the flag desecration amendment on the Senate and House floor, current Udall amendment co-sponsors made five primary arguments:

**A little more than a decade later, these Senators appear to have changed their minds about free speech...**

(1) the Bill of Rights should never be restricted; (2) amending the Constitution could invite further infringements on the First Amendment in the future; (3) dissenting or offensive speech should not be feared; (4) the proposed amendments were too vague; and (5) the majority party was pushing the amendment out of political self-interest in advance of an upcoming election.

A little more than a decade later, these Senators appear to have changed their minds about free speech, supporting an amendment that can be fairly criticized on all of these grounds.

1 S.J. Res. 19, "List of Co-sponsors," Congress.gov. Retrieved on May 28, 2014. Available at: <http://beta.congress.gov/bill/113th-congress/senate-joint-resolution/19/cosponsors> (2014).

2 This was a central talking point in Democratic opposition during debate on proposed constitutional amendments to ban flag desecration in the 1990s and 2000s. See references 19, 21, and 22.

3 Tom Hamburger, "Dems threaten Kochs with a constitutional amendment," *The Washington Post*. Retrieved on May 28, 2014. Available at: <http://www.washingtonpost.com/blogs/the-fix/wp/2014/05/15/dems-threaten-kochs-with-a-constitutional-amendment/> (May 15, 2014).

## Amendment Text

The amendment, formally known as Senate Joint Resolution 19, is more than quadruple the length of the First Amendment,<sup>4</sup> and reads as follows:

Section 1. To advance the fundamental principle of political equality for all, and to protect the integrity of the legislative and electoral processes, Congress shall have power to regulate the raising and spending of money and in-kind equivalents with respect to Federal elections, including through setting limits on –

(1) the amount of contributions to candidates for nomination for election to, or for election to, Federal office; and

(2) the amount of funds that may be spent by, in support of, or in opposition to such candidates.

Section 2. To advance the fundamental principle of political equality for all, and to protect the integrity of the legislative and electoral processes, each State shall have power to regulate the raising and spending of money and in-kind equivalents with respect to State elections, including through setting limits on –

(1) the amount of contributions to candidates for nomination for election to, or for election to, State office; and

(2) the amount of funds that may be spent by, in support of, or in opposition to such candidates.

Section 3. Nothing in this article shall be construed to grant Congress the power to abridge the freedom of the press.

Section 4. Congress and the States shall have power to implement and enforce this article by appropriate legislation.<sup>5</sup>

<sup>4</sup> The text of the First Amendment is 45 words. The current version of S.J. Res. 19 is 200 words.

<sup>5</sup> S.J. Res. 19, “Text of the amendment,” Congress.gov. Retrieved on May 28, 2014. Available at: <http://beta.congress.gov/bill/113th-congress/senate-joint-resolution/19/text> (2014).



## Overview of the Amendment

In a June 2013 press release announcing the introduction of his constitutional amendment proposal, Sen. Udall explained that his motivation is born of a concern that elections are not being decided the right way. According to Udall, “[o]ur elections no longer focus on the best ideas, but the biggest bank accounts, and Americans’ right to free speech should not be determined by their net worth.”<sup>6</sup>

Majority Leader Reid expanded on Sen. Udall’s frustration with recent elections when he formally announced his support for the amendment in a speech on the Senate floor in mid-May. Reid remarked: “More and more we see Koch Industries, Americans for Prosperity, one of their shadowy front groups, dictating the results of primaries and elections across the country. Behind these nonvoting organizations are massively wealthy men hoping for a big monetary return on their political donations.”<sup>7</sup>

**Politicians, campaign finance law experts, and members of the media have all identified major problems with this proposed amendment to the Constitution.**

The significance of amending the First Amendment was downplayed by Sen. Charles Schumer (NY) when he announced at an April 30 Senate hearing that leadership had decided to hold a vote on the Udall amendment this summer. Schumer compared a constitutional amendment to give Congress greater power to regulate political speech to a noise ordinance, saying “[w]e have many, many, many different laws that pose limits on the amendments because through two hundred and some odd years of jurisprudence the Founding Fathers and the Supreme Court have realized that no amendment is absolute... We have noise ordinances. Everyone accepts them. That’s a limitation on the First Amendment.”<sup>8</sup>

Despite these assertions from the amendment’s advocates, the flaws in the proposed amendment, and the risks in amending the Constitution, are clear to outside observers. Politicians, campaign finance law experts, and members of the media have all identified major problems with this proposed amendment to the Constitution. It shrinks First Amendment rights rather than expands them.<sup>9</sup> It is an extreme response to an issue that is complex and contested.<sup>10</sup> It amends a Constitution that has stood the test of time, surviving over two centuries with just 27 total amendments, including the 10

6 U.S. Senator Tom Udall, “Udall introduces constitutional amendment on campaign finance reform,” Office of U.S. Senator Tom Udall. Retrieved on May 28, 2014. Available at: [http://www.tomudall.senate.gov/?p=press\\_release&id=1329](http://www.tomudall.senate.gov/?p=press_release&id=1329) (June 18, 2013).

7 Siobhan Hughes, “Reid calls for amending the constitution to limit campaign money,” *The Wall Street Journal*. Retrieved on May 29, 2014. Available at: <http://blogs.wsj.com/washwire/2014/05/15/reid-calls-for-amending-constitution-to-limit-campaign-money/> (May 15, 2014).

8 Byron Tau, “Kochs are center stage (in absentia) at Senate hearing,” *Politico*. Retrieved on May 29, 2014. Available at: <http://www.politico.com/story/2014/04/kochs-are-center-stage-in-absentia-at-senate-hearing-106199.html>

9 Terry Eastland, “Democrats vs. Free Speech,” *The Weekly Standard* Vol. 19:36. Retrieved on May 30, 2014. Available at: [http://www.weeklystandard.com/articles/democrats-vs-free-speech\\_793490.html](http://www.weeklystandard.com/articles/democrats-vs-free-speech_793490.html) (June 2, 2014).

10 Bob Bauer, “‘Great and extraordinary occasions’ for constitutional reform – and the question of evidence,” *More Soft Money Hard Law*. Retrieved on May 28, 2014. Available at: <http://www.moresoftmoneyhardlaw.com/2014/05/great-extraordinary-occasions-constitutional-reform-question-evidence/> (May 19, 2014).

that make up the Bill of Rights.<sup>11</sup> It limits dissent, which is essential to a democratic republic.<sup>12</sup> It is vague and virtually guaranteed to lead to further Supreme Court involvement in campaign finance,<sup>13</sup> the same Supreme Court that the amendment's supporters claim is the problem in the first place.<sup>14</sup> On top of those weighty concerns, its timing in the summer before midterm elections also suggests a partisan political motive.<sup>15</sup>

Interestingly, many co-sponsors of the Udall amendment prominently voiced these same criticisms when a Republican majority attempted to amend the Constitution to ban desecration of the United States Flag, most notably in the 104<sup>th</sup> (1995-1997), 106<sup>th</sup> (1999-2001), and 109<sup>th</sup> (2005-2007) Congresses. In fact, 15 current co-sponsors of the Udall amendment, including the amendment's author Sen. Tom Udall, voted against a flag desecration amendment on multiple occasions.<sup>16</sup> Only seven current co-sponsors of the Udall amendment ever voted in favor of a flag burning amendment during Congress's multiple floor votes on the issue.<sup>17</sup> (Twenty current co-sponsors never had a chance to vote on any flag desecration amendments).<sup>18</sup> Of those 15, eight took to the floor of the House or Senate to argue against the flag burning amendments, and others did so through press releases or in interviews. Their arguments against the flag desecration amendment display a commitment to First Amendment principles that has apparently waned in recent years.

11 Jonathan Bernstein, "Watch the Democrats engage in constitutional mischief," *Bloomberg View*. Retrieved on May 28, 2014. Available at: <http://www.bloombergview.com/articles/2014-05-16/watch-the-democrats-engage-in-constitutional-mischief> (May 16, 2014).

12 Trevor Burrus, "Should it be against the law to criticize Harry Reid?" *Boston Herald*. Retrieved on May 28, 2014. Available at: [http://bostonherald.com/news\\_opinion/opinion/op\\_ed/2014/05/burrus\\_should\\_it\\_be\\_against\\_law\\_to\\_criticize\\_harry\\_reid](http://bostonherald.com/news_opinion/opinion/op_ed/2014/05/burrus_should_it_be_against_law_to_criticize_harry_reid) (May 27, 2014).

13 Jim Newell, "Supreme Court's money debacle: the truth behind Dems' campaign finance amendment," *Salon.com*. Retrieved on May 28, 2014. Available at: [http://www.salon.com/2014/05/16/supreme\\_courts\\_money\\_debacle\\_the\\_truth\\_behind\\_dems\\_campaign\\_finance\\_amendment/](http://www.salon.com/2014/05/16/supreme_courts_money_debacle_the_truth_behind_dems_campaign_finance_amendment/) (May 16, 2014).

14 *Ibid.* 6.

15 Greg Sargent, "Reid calls for constitutional amendment on campaign cash," *The Washington Post*. Retrieved on May 28, 2014. Available at: <http://www.washingtonpost.com/blogs/plum-line/wp/2014/05/15/morning-plum-harry-reid-calls-for-constitutional-amendment-on-campaign-cash/> (May 15, 2014).

16 To calculate this number, we examined House and Senate roll call votes on flag desecration amendments in the 104<sup>th</sup> Congress (H.J. Res. 79; S.J. Res. 31), 105<sup>th</sup> Congress (H.J. Res. 54), 106<sup>th</sup> Congress (H.J. Res. 33; S.J. Res. 14), 107<sup>th</sup> Congress (H.J. Res. 36), 108<sup>th</sup> Congress (H.J. Res. 4), and 109<sup>th</sup> Congress (H.J. Res. 10; S.J. Res. 12). Those fifteen Senators are Tammy Baldwin (WI), Barbara Boxer (CA), Benjamin Cardin (MD), Thomas Carper (DE), Richard Durbin (IL), Tom Harkin (IA), Edward Markey (MA), Barbara Mikulski (MD), Patty Murray (WA), Jack Reed (RI), Bernard Sanders (VT), Charles Schumer (NY), Mark Udall (CO), Tom Udall (NM), and Ron Wyden (OR).

17 *Ibid.* Those seven Senators are Sherrod Brown (OH), Dianne Feinstein (CA), Tim Johnson (SD), Robert Menendez (NJ), Harry Reid (NV), Jay Rockefeller (WV), and Debbie Stabenow (MI).

18 *Ibid.* Those twenty Senators are Mark Begich (AK), Michael Bennet (CO), Richard Blumenthal (CT), Cory Booker (NJ), Christopher Coons (DE), Al Franken (MN), Kirsten Gillibrand (NY), Kay Hagan (NC), Martin Heinrich (NM), Mazie Hirono (HI), Angus King (ME), Amy Klobuchar (MN), Jeff Merkley (OR), Christopher Murphy (CT), Brian Schatz (HI), Jeanne Shaheen (NH), Jon Tester (MT), John Walsh (MT), Elizabeth Warren (MA), and Sheldon Whitehouse (RI).



Co-Sponsors of S.J. Res. 19					
Senator	State	Senator	State	Senator	State
Tom Udall*	NM	Mark Udall	CO	Edward Markey	MA
Michael Bennet	CO	Tim Johnson	SD	Elizabeth Warren	MA
Tom Harkin	IA	Robert Menendez	NJ	Sherrod Brown	OH
Charles Schumer	NY	Jack Reed	RI	John Walsh	MT
Jeanne Shaheen	NH	Richard Blumenthal	CT	Richard Durbin	IL
Sheldon Whitehouse	RI	Martin Heinrich	NM	Harry Reid	NV
Jon Tester	MT	Jeff Merkley	OR	Mazie Hirono	HI
Barbara Boxer	CA	Dianne Feinstein	CA	Thomas Carper	DE
Christopher Coons	DE	Mark Begich	AK	Patty Murray	WA
Angus King	ME	Benjamin Cardin	MD	Brian Schatz	HI
Christopher Murphy	CT	Kirsten Gillibrand	NY	Bernard Sanders	VT
Ron Wyden	OR	Kay Hagan	NC	John Rockefeller	WV
Al Franken	MN	Barbara Mikulski	MD	Debbie Stabenow	MI
Amy Klobuchar	MN	Tammy Baldwin	WI	Cory Booker	NJ
* Original Sponsor					

### Quotes from Udall Amendment Co-Sponsors Criticizing Flag Desecration Amendments

The following quotes illustrate the intellectual common ground between opponents of a flag desecration amendment and opponents of the Udall amendment. They show how some Senators have changed course in their views on amending the Bill of Rights. The quotes are grouped into five general arguments made by opponents of the flag desecration amendment that apply to the Udall amendment just as well. In opposition to the flag burning amendments, current sponsors of this amendment argued that: (1) the amendments would reduce First Amendment rights; (2) amending the Constitution could permit additional Congressional infringements on the First Amendment in the future; (3) the amendments would limit dissent; (4) the amendments were too vague; and (5) the amendments were politically motivated.

“Yet I cannot support an Amendment to the United States Constitution which would, for the first time in our nation’s history, narrow the reach of the First Amendment guarantee of freedom of speech.”

– Sen. Barbara Mikulski

First and foremost, many current co-sponsors of the Udall amendment, which would shrink First Amendment rights, opposed the flag burning amendments because they did exactly that:

Sen. Barbara Boxer (1995): “The Constitution’s principles transcend the few words which are actually written. Hundreds of thousands of American men and women

have made the ultimate sacrifice in defense of these principles. And this remarkable, living document continues to inspire countless others struggling in distant lands for the promise of freedom. In the 204 years since the ratification of the Bill of Rights, we have never passed a constitutional amendment to restrict the liberties contained therein.”<sup>19</sup>

“...the amendment offered today by the majority would diminish the First Amendment’s guarantee of freedom of expression, one of our most fundamental guarantees of the Bill of Rights.”

– Then-Rep. Tom Udall (NM-3)

we support flag burning but whether we should amend the Constitution, whether we should amend the Bill of Rights for the first time in the history of the United States of America, whether we should narrow the precious freedoms ensured by the first amendment for the very first time in our Nation’s history.”<sup>21</sup>

Sen. Barbara Mikulski (2000): “Yet I cannot support an Amendment to the United States Constitution which would, for the first time in our nation’s history, narrow the reach of the First Amendment guarantee of freedom of speech.”<sup>22</sup>

Sen. Jack Reed (2000): “I would argue the way to encourage patriotism is through encouraging civic involvement, not constitutional amendments.”<sup>23</sup>

Then-Rep. Mark Udall (CO-2) (2003): “I am not in support of burning the flag. But I am even more opposed to weakening the First Amendment, one of

Sen. Barbara Mikulski (1995): “Now is not the time to change the course. Now is not the time to tamper with laws, precedents and principles that have kept us in good stead for two centuries.”<sup>20</sup>

Sen. Richard Durbin (2000): “But the issue before us is not whether

“...A Bill of Rights that has stood unchanged for more than two centuries--despite Civil War, Depression, two world wars, and powerful internal movements of dissent. Even at those times of profound turmoil, we resisted any temptation to amend the Bill of Rights.”

– Sen. Tom Harkin

19 Senator Boxer (CA). *Congressional Record* 141:197 (December 12, 1995) p. 18381. Retrieved on May 28, 2014. Available at: <http://beta.congress.gov/crec/1995/12/12/CREC-1995-12-12-pt1-PgS18373-6.pdf>.

20 Senator Mikulski (MD). *Congressional Record* 141:197 (December 12, 1995) p. 183830. Retrieved on May 28, 2014. Available at: <http://beta.congress.gov/crec/1995/12/12/CREC-1995-12-12-pt1-PgS18373-6.pdf>.

21 Senator Durbin (IL). *Congressional Record* 146:36 (March 28, 2000) p. 1791. Retrieved on May 28, 2014. Available at: <http://beta.congress.gov/crec/2000/03/28/CREC-2000-03-28-pt1-PgS1765-8.pdf>.

22 Senator Mikulski (MD). *Congressional Record* 146:37 (March 29, 2000) p. 1871. Retrieved on May 28, 2014. Available at: <http://beta.congress.gov/crec/2000/03/29/CREC-2000-03-29-pt1-PgS1863.pdf>.

23 Senator Reed (RI). *Congressional Record* 146:48 (April 25, 2000) p. 2857. Retrieved on May 28, 2014. Available at: <http://beta.congress.gov/crec/2000/04/25/CREC-2000-04-25-pt1-PgS2856-3.pdf>.



the most important things for which the flag itself stands.”<sup>24</sup>

Then-Rep. Tom Udall (NM-3) (2003): “the amendment offered today by the majority would diminish the First Amendment’s guarantee of freedom of expression, one of our most fundamental guarantees of the Bill of Rights.”<sup>25</sup>

Sen. Barbara Boxer (2006): “I agree with the approach of Senator Durbin to the protests--proposing a statutory solution to address a problem rather than unnecessarily amending our Constitution. There are many things in life that we find offensive, repugnant to beliefs that we hold dear, but we cannot amend the Constitution every time there is something we consider outrageous, offensive, or repugnant.”<sup>26</sup>

Sen. Richard Durbin (2006): “The Bill of Rights has served this Nation since 1791, and with one swift blow of this ax, we are going to chop into the first amendment.”<sup>27</sup>

Sen. Tom Harkin (2006): “And once the Communist regimes began to fall, what came next? Calls for Western-style guarantees of rights to freedom of the press, freedom of association, and freedom of speech. Many called for a constitution. They knew what some of us seem to forget: That the only way those freedoms can be protected is with

“It takes a great deal of audacity for anyone to step up and suggest to change the Constitution... I think we should show a little humility around here when it comes to changing the Constitution. So many of my colleagues are anxious to take a roller to a Rembrandt.”

– Sen. Richard Durbin

an inviolable Bill of Rights such as our own. A Bill of Rights that has stood unchanged for more than two centuries--despite Civil War, Depression, two world wars, and powerful internal movements of dissent. Even at those times of profound turmoil, we resisted any temptation to amend the Bill of Rights.”<sup>28</sup>

Further agreement between critics of the Udall and flag desecration amendments can be found in the shared concern that the amendments would be an unnecessary and dangerous invitation for future Congresses to pass stronger restrictions on First Amendment rights. The risk of degrading the Bill of Rights was too severe for many members to favor a flag desecration amendment. Some current co-sponsors of the Udall amendment had this to say back then:

24 Congressman Udall (CO-2). *Congressional Record* 149:80 (June 3, 2003) p. 4831. Retrieved on May 28, 2014. Available at: <http://beta.congress.gov/crec/2003/06/03/CREC-2003-06-03-pt1-PgH4811-4.pdf>.

25 Congressman Udall (NM-3). *Congressional Record* 149:81 (June 4, 2003) p. E1133. Retrieved on May 28, 2014. Available at: <http://beta.congress.gov/crec/2003/06/04/CREC-2003-06-04-pt1-PgE1133.pdf>.

26 Senator Boxer (CA). *Congressional Record* 152:85 (June 27, 2006) p. 6547. Retrieved on May 28, 2014. Available at: <http://beta.congress.gov/crec/2006/06/27/CREC-2006-06-27-pt1-PgS6516-2.pdf>.

27 Senator Durbin (IL). *Congressional Record* 152:84 (June 26, 2006) p. 6484. Retrieved on May 28, 2014. Available at: <http://beta.congress.gov/crec/2006/06/26/CREC-2006-06-26-pt1-PgS6471-2.pdf>.

28 Senator Harkin (IA). *Congressional Record* 152:85 (June 27, 2006) p. s6527. Retrieved on May 28, 2014. Available at: <http://beta.congress.gov/crec/2006/06/27/CREC-2006-06-27-pt1-PgS6516-2.pdf>.



Sen. Patty Murray (1995): “Our Constitution guarantees all of us this freedom, including the right to free speech. I believe we should be very cautious about altering this document, because to do so alters the fundamental ideals on which our country was built.”<sup>29</sup>

Sen. Barbara Boxer (2006): “This Constitution is more than just an outlet for our justifiable frustrations. It is concise. It has worked. It is the enduring ideal of our Nation, and we should not unnecessarily amend it.”<sup>30</sup>

Sen. Richard Durbin (2006): “It is a matter which we will likely debate the rest of this week. The reason we are going to spend this much time on it is because this one-page document represents a historic change in America. If this amendment were to be ratified, it would mark the first time in our nation’s history that we would amend the Bill of Rights of the United States of America.”<sup>31</sup>

Sen. Richard Durbin (2006): “It takes a great deal of audacity for anyone to step up and suggest to change the Constitution... I think we should show a little humility around here when it comes to changing the Constitution. So many of my colleagues are anxious to take a roller to a Rembrandt.”<sup>32</sup>

Sen. Barbara Mikulski (2006): “The Constitution protects our liberty and it is the symbol of the strength of our Nation. I believe that it is my obligation as a Member of this body to protect its integrity and strength.”<sup>33</sup>

“In a great country like the United States of America, you don’t fear dissent. In a great country you allow dissent, even if it is ugly, even if it makes you sick to your stomach, even if it disgusts you.”

– Sen. Barbara Boxer

Critics of the Udall amendment and critics of an amendment to punish desecration of the flag also share the view that dissent should not be punished or restricted. Many co-sponsors of the Udall amendment eloquently defended the right to criticize government and adulated the importance of dissent in a free republic when it was a Republican majority seeking to crack down on flag desecration:

29 Senator Murray (WA). *Congressional Record* 141:197 (December 12, 1995) p. 18379-80. Retrieved on May 28, 2014. Available at: <http://beta.congress.gov/crec/1995/12/12/CREC-1995-12-12-pt1-PgS18373-6.pdf>.

30 Senator Boxer (CA). *Congressional Record* 152:85 (June 27, 2006) p. 6547. Retrieved on May 28, 2014. Available at: <http://beta.congress.gov/crec/2006/06/27/CREC-2006-06-27-pt1-PgS6516-2.pdf>.

31 Senator Durbin (IL). *Congressional Record* 152:84 (June 26, 2006) p. 6483. Retrieved on May 28, 2014. Available at: <http://beta.congress.gov/crec/2006/06/26/CREC-2006-06-26-pt1-PgS6471-2.pdf>.

32 *Ibid.*

33 Senator Mikulski (MD). *Congressional Record* 152:85 (June 27, 2006) p. s6526. Retrieved on May 28, 2014. Available at: <http://beta.congress.gov/crec/2000/03/29/CREC-2000-03-29-pt1-PgS1863.pdf>.



“The language of the amendment is vague and fails to offer a clear statement of just what conduct the supporters of the amendment propose to prohibit...”

– Sen. Jack Reed

Then-Rep. Jack Reed (1995): “I do not think we should be afraid of freedom. I think we should in fact support freedom.”<sup>35</sup>

Sen. Barbara Boxer (2006): “In a great country like the United States of America, you don’t fear dissent. In a great country you allow dissent, even if it is ugly, even if it makes you sick to your stomach, even if it disgusts you.”<sup>36</sup>

Sen. Richard Durbin (2006): “The real test of our belief in the Bill of Rights--the real test of our patriotism--is when we rise in defense of the rights of those whose views we disagree with or even despise. The right to free speech is a bedrock of our democracy.”<sup>37</sup>

Critics of both amendments also share technical concerns about vagueness in the amendment language. In both cases, vagueness would lead to further clarification from the Supreme Court, whose decisions sparked calls for an amendment. While banning desecration of the flag seems much simpler than the Udall amendment’s broad grant of authority to regulate spending on political speech, even the flag desecration amendment had too much potential to go awry for many current supporters of the Udall amendment to sign on:

Sen. Jack Reed (2000): “The language of the amendment is vague and fails to offer a clear statement of just what conduct the supporters of the amendment propose to prohibit, or to advise the American people of the actions for which they may be imprisoned... This leaves the Supreme Court to clarify these meanings, the same court that supporters believe erred in protecting flag burning as freedom of speech in the first place.”<sup>38</sup>

Sen. Richard Durbin (2006): “S.J. Res. 12 is overly vague and filled with potential loopholes. What do the words “flag desecration” mean? ... But this amendment is

34 Senator Mikulski (MD). *Congressional Record* 141:197 (December 12, 1995) p. 18380. Retrieved on May 28, 2014. Available at: <http://beta.congress.gov/crec/1995/12/12/CREC-1995-12-12-pt1-PgS18373-6.pdf>.

35 Congressman Reed (D, RI-2). *Congressional Record* 141:107 (June 28, 1995) p. 6420. Retrieved on May 28, 2014. Available at: <http://beta.congress.gov/crec/1995/06/28/CREC-1995-06-28-pt1-PgH6415-4.pdf>.

36 *Ibid.* 30.

37 Senator Durbin (IL). *Congressional Record* 152:84 (June 26, 2006) p. 6487. Retrieved on May 28, 2014. Available at: <http://beta.congress.gov/crec/2006/06/26/CREC-2006-06-26-pt1-PgS6471-2.pdf>.

38 *Ibid.* 23

not clear as to where you would draw a line. As gifted as my colleagues may be who have brought this amendment to the floor, I am afraid the language they brought is not going to stand the test of time.”<sup>39</sup>

Lastly, the Udall amendment has been accused of being a political ploy. Upon Senate Majority Leader Reid’s announcement of his support for the Udall amendment on the Senate floor, Senate Minority Leader Mitch McConnell (KY) characterized the proposal as “an all-out assault on the right to free speech, a right which undergirds all others in our democracy... It’s also a clear sign of just how desperate elected Washington Democrats have become in their quest to hold onto power.”<sup>40</sup> Others, such as *National Review*, have similarly criticized the proposal as politically motivated.<sup>41</sup>

The last time the flag desecration amendment was seriously considered was the summer of 2006, when Republicans held a slight majority in the Senate that was threatened by upcoming midterm elections. Senate Democrats repeatedly accused Republicans of pushing the flag desecration amendment to excite their base during a heated campaign season:

“That we would so quickly consider amending this Constitution, which has served our Nation so well and for so many years, so frequently suggests to me that there may be something at work here that goes beyond constitutional law and constitutional study...”

– Sen. Richard Durbin

Sen. Richard Durbin (2006): “That we would so quickly consider amending this Constitution, which has served our Nation so well and for so many years, so frequently suggests to me that there may be something at work here that goes beyond constitutional law and constitutional study... This amendment is truly a solution in search of a problem. Why are we debating it again? We know the answer. We are here because the White House and the congressional Republican leadership are nervous about the upcoming elections... The real issue here isn’t the protection of the flag, it is the protection of the Republican majority. We are not setting out to protect Old Glory; we are setting out to protect old politicians. That is what this is about.”<sup>42</sup>

Sen. Richard Durbin (2006): “I am also considering an amendment which I think is long overdue. It would ban the consideration of constitutional amendments in election years. We have seen too darned much politicking with the Constitution in this Chamber this month.”<sup>43</sup>

<sup>39</sup> Senator Durbin (IL). *Congressional Record* 152:84 (June 26, 2006) p. 6485. Retrieved on May 28, 2014. Available at: <http://beta.congress.gov/crec/2006/06/26/CREC-2006-06-26-pt1-PgS6471-2.pdf>.

<sup>40</sup> Siobhan Hughes, “Reid Calls for Amending Constitution to Limit Campaign Money,” *The Wall Street Journal*. Retrieved on May 30, 2014. Available at: <http://blogs.wsj.com/washwire/2014/05/15/reid-calls-for-amending-constitution-to-limit-campaign-money/> (May 15, 2014).

<sup>41</sup> Charles C. W. Cooke, “Harry’s Dirty Amendment,” *National Review*. Retrieved on May 30, 2014. Available at: <http://www.nationalreview.com/article/378172/harrys-dirty-amendment-charles-c-w-cooke> (May 16, 2014), p. 1.

<sup>42</sup> *Ibid.* 27.

<sup>43</sup> *Ibid.*



Sen. Richard Durbin (2006): “James Madison wrote in Federalist 49 in 1788 that  
“But this is a campaign year, and the majority appears to want the Senate to spend time on topics which defer and deflect us from concentrating finding solutions to pressing issues facing our Nation...”

– Sen. Jack Reed

the U.S. Constitution should be amended only on “great and extraordinary occasions.” It appears now that biennial elections are great and extraordinary occasions in the minds of the Republican leadership of the Senate.”<sup>44</sup>

Sen. Jack Reed (2006): “But this is a campaign year, and the majority appears to want the Senate to spend time on topics which defer and deflect us from concentrating finding solutions to pressing issues facing our Nation: restoring fiscal discipline, creating safe and affordable housing for working families, securing our borders, expanding health insurance coverage to the uninsured, ensuring students have the skills and tools to compete in an ever-expanding global economy, and redeploying our troops as quickly as possible out of Iraq. Unfortunately, the majority has provided limited time to debate most of these issues.”<sup>45</sup>

<sup>44</sup> *Ibid.* 37.

<sup>45</sup> Senator Reed (RI). *Congressional Record* 152:826 (June 28, 2006) p. 6628. Retrieved on May 28, 2014. Available at: <http://beta.congress.gov/crec/2006/06/28/CREC-2006-06-28-pt1-PgS6627-3.pdf>.

## Conclusion

The arguments marshaled in opposition to a constitutional amendment to ban desecration of the flag logically also apply to one that grants Congress authority to control political speech rights in unprecedented ways. In some cases, the arguments are even more applicable.

The Udall amendment would rebuke nearly four decades of campaign finance jurisprudence from the Supreme Court and greatly reduce the quantity of debate in this country. The amendment could be read as a broad grant to Congress to regulate virtually all political speech and association. It reads like a rhetorical document, introduced during an election year, and displays little care in drafting.

Sen. Udall has said of his proposed amendment, “[i]t’s clearer than ever that we need a constitutional amendment to restore integrity in our election system... I’m looking forward to working with Senator Schumer to bring common-sense campaign finance reform to a vote as soon as possible so we can ensure our elections are about the quality of ideas and not the quantity of cash.”<sup>46</sup> Here, the Senator sounds like the proponents of an amendment to punish flag desecration, parading vague terms like “integrity” and “common-sense” instead of interrogating these advocates and the censorship they serve to justify. When the debate was over desecration of the flag, then-Rep. Udall opposed it because it “would diminish the First Amendment’s guarantee of freedom of expression.”<sup>47</sup> Now, apparently, the standard has changed from protecting guaranteed free expression for all, to promoting “quality of ideas” as understood by the U.S. Congress.

Once again, we see that politicians’ fidelity to the First Amendment appears to come second to getting re-elected. Perhaps unsurprisingly, Sen. Udall’s constitutional amendment, if adopted, would help entrench those in Congress by insulating incumbent politicians from criticism and granting the same politicians abundant power to make laws regulating political speech.

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<sup>46</sup> Matthew Reichbach, “Senate will vote on Udall campaign finance constitutional amendment,” *New Mexico Telegram*. Retrieved on May 29, 2014. Available at: <http://www.nmtelegram.com/2014/04/30/senate-will-vote-on-udall-constitutional-amendment/> (April 30, 2014).

<sup>47</sup> *Ibid.* 25.



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