

## How Sacred is Old Glory?

### Purpose:

Students will examine First Amendment free speech issues as they relate to the inclusion of symbolic speech as a protected right. The landmark decision of *Texas v. Johnson*, as well as subsequent cases, civic and legislative responses, are used to illustrate guiding principles of the free expression of political and social commentary.

### Procedure:

1. Introduce the lesson by reading aloud the story of P.O.W.s and their experiences with preserving the flag- our national emblem- during the Vietnam War. (Use handout "These Colors Don't Run.") Ask students to brainstorm a class list of what thoughts come to mind when they see an American flag.
2. Inform the class that they will be considering the question of whether free speech includes symbolic gestures such as burning or desecrating the flag. Read aloud the facts of one landmark Supreme Court case involving flag burning, *Texas v. Johnson* (below.) Tell the class to keep these facts in mind for a later role-playing exercise.  
*"The date is August, 1984. The place is Dallas, Texas. The event is the Republican National Convention. A group of young people, organized by Gregory Lee Johnson, gathered in downtown Dallas to protest various party policies. The group stages "die-ins" in which people would collapse on the ground in a symbolic display of the effects of nuclear war. The group also engaged in vandalism by spray-painting buildings, breaking into a bank and overturning potted plants. When the group arrived at a plaza in front of the Dallas Convention Center, an American flag was obtained from a nearby office building. While 40-50 people formed a circle and chanted 'America, the red, white and blue, we spit on you,' Johnson took the flag from the plaza, soaked it in lighter fluid, and set it on fire. Two police officers and an employee of the Army witnessed the burning and testified that they were offended. No violence took place during the flag burning. Approximately 45 minutes later, more police arrive and arrested Johnson. He was convicted of violating Texas State law and sentenced to one year in jail and a \$2,000 fine. The Federal Court of Appeals reserved his conviction based upon his First Amendment rights, but the state of Texas took the case to the Supreme Court, demanding that the Texas State law be upheld."*
3. In order to stimulate student understanding of various viewpoints toward symbolic speech, ask students to form pairs. Give each pair a copy of the handout "Where Do They Stand?" Ask students to read each brief quotation from differing viewpoints. Student pairs should be given time to discuss each quotation, indicating on their handout whether the citizen speaking would support or oppose the right to burn the American flag. Allow volunteers to share their conclusions with the class.
4. Using the case study, *Texas v. Johnson*, divide the class into three groups. They will be conducting a mock Supreme Court oral argument, using the "You Decide" strategy. One group of students will serve as attorneys representing Gregory Johnson, one group will serve as attorneys representing the state of Texas, and one group will serve

as Supreme Court Justices. Allow time for each of the attorney groups to prepare a five-minute speech, outlining their arguments and viewpoints. While attorney groups prepare, the group of justices should make a list of potential questions they might pose to the attorneys. Following preparation time, conduct a mock oral argument, allowing each side of attorneys uninterrupted time to present their case, as well as a five-minute period of time for justices to interact, asking questions of each group of attorneys. Request justices to announce their decisions with a brief explanation of their reasoning.

5. Inform the class of the actual 5-4 decision made by the United States Supreme Court in 1989 by reading passages from the "Oyez " handout. (This website, [www.oyez.org](http://www.oyez.org), can be used to quote lengthier passages from the decision, or even listen to the actual oral arguments made before the Supreme Court.)
6. Ask students the question, "If citizens still disagreed with a Supreme Court ruling, what do they predict might have happened next?" Inform students that various responses were, indeed, made. For example, Congress passed legislation aimed at protecting the flag, entitled the "Flag Protection Act of 1989." (See handout "What Happened Next?") Inform students of a second flag-burning case brought before the Court the following year, *United States v. Eichman*. Discuss that the issue had now gone beyond symbolic speech to a constitutional conflict involving the principle of checks and balances, with the Court ruling the Flag Protection law as unconstitutional action by Congress.
7. Using the handout, "How Do Americans Feel?" students can see public reactions to a Congressional attempt to pass an amendment to the Constitution, forbidding the desecration of the flag. Review the statistics on the handout. What groups of citizens supported the amendment? Which states had already passed their own legislation to protect the flag? (Use the questions on the handout to guide the class discussion.)
8. Give students individual copies of three articles written by notable leaders in government. (See handout "Views From Other Americans.") Ask students to write their own one-page editorial response to one of the three articles of their choice.
9. For enrichment or extension, distribute copies of the "Symbolic Speech Timeline" to pairs of students. Instruct students to access the Oyez website to research four symbolic speech cases and complete the timeline with the necessary information.

## **"These Colors Don't Run"**

Leo K. Thorsness,  
recipient of The Congressional Medal of Honor.

You've probably seen the bumper sticker somewhere along the road. It depicts an American Flag, accompanied by the words "These colors don't run." I'm always glad to see this, because it reminds me of an incident from my confinement in North Vietnam at the Hao Lo POW Camp, or the "Hanoi Hilton," as it became known. Then a Major in the U.S. Air Force, I had been captured and imprisoned from 1967-1973. Our treatment had been frequently brutal.

During the last year, we were allowed outside most days for a couple of minutes. One day, a young Naval pilot named Mike Christian found the remnants of a handkerchief in a gutter that ran under the prison wall. Mike managed to sneak the grimy rag into our cell and began fashioning it into a flag.

At night, Mike worked on the flag. He made red and blue from ground-up roof tiles and tiny amounts of ink and painted the colors onto the cloth with watery rice glue. Using thread from his own blanket and a homemade bamboo needle, he sewed on the stars.

Early in the morning a few days later, when the guards were not alert, he whispered loudly from the back of our cell, "Hey gang, look here." He proudly held up this tattered piece of cloth. When he raised that smudgy fabric, we automatically stood and saluted and more than a few eyes had tears.

About once a week the guards would go through our clothing. During one of those shakedowns, they found Mike's flag. We all knew what would happen. That night they came for him. We could hear the beginning of the torture before they even had him in the torture cell. They beat him most of the night.

Within two weeks, despite the danger, Mike scrounged another piece of cloth and began another flag. The Stars and Stripes, our national symbol, was worth the sacrifice to him. Now whenever I see the flag, I think of Mike and the morning he first waved that tattered emblem of a nation. It was then, thousands of miles from home in a lonely prison cell, that he showed us what it is to be truly free.



## WHERE DO THEY STAND?

*After reading the editorial statements below, place a check in the lefthand column if you believe the statement supports the right to burn the flag of the United States. Place a check in the righthand column if you believe the statement opposes the right of an individual to burn the flag.*

SUPPORT	STATEMENT:	OPPOSE
	"Patriotism is defined by Webster as 'love for or devotion for one's country.' Unfortunately, we tend to forget that love for one's country in a democracy is often demonstrated in a variety of ways."	
	"Many citizens fly the American flag proudly each day as a symbol of their pride in this great nation. At the other extreme are a small group of individuals who may choose to burn the flag to demonstrate their frustration with a government that does not live up to the ideas for which the flag stands. These are divergent ways of displaying one's love of country."	
	"While it is true that the principle behind the First Amendment is that the government may not prohibit the expression of an idea simply because society finds the idea offensive, society does set limits. And the Supreme Court has ruled that the First Amendment's protection is not absolute."	
	" I have read with disgust the news stories about the terrible destruction being allowed to take place to our nation's flag. Our flag must be protected. When the Constitution was written, no one thought there would be a need to protect the symbol most highly revered and respected. One can't enjoy freedom and then desecrate the symbol by which that freedom is given."	
	"To the people who burn the flag, I say that it is obvious to me that whatever the issue may be, it is obviously of very little importance if it cannot be protested on its own merit, but must draw attention by stepping on the symbol of patriotism that millions of Americans honor."	
	"I was discharged from the Army after spending two years in Korea where I got a firsthand look at a society more repressive than our own. I think the burning of the flag is a terrible thing, however, there is something even more frightening- that is the intolerant attitudes of many Americans."	
	"Freedom of protest is guaranteed to all Americans. Protest is by its nature an offensive act. To suggest that its okay to protest as long as you don't offend anyone is ridiculous. Imagine the men who founded our country, I'm sure the King of England was offended by the Boston Tea Party."	
	"Americans should remember the words of the philosopher Voltaire, 'I may disapprove of what you say, but I will defend to the death your right to say it.' That is what the First Amendment is all about."	
	" For the record, I feel strongly that burning of any nation's flag is a deliberately offensive, provocative act that is certain to aggravate, rather than to clarify, any political situation."	
<i>Statements taken from editorials published by the Des Moines Register, June 24, 1990.</i>		

## Texas v. Johnson

**Docket:** 88-155  
**Citation:** 491 U.S. 397 (1989)  
**Petitioner:** Texas  
**Respondent:** Johnson

## Abstract

**Oral Argument:** Tuesday, March 21, 1989  
**Decision:** Wednesday, June 21, 1989  
**Issues:** First Amendment, Protest Demonstrations

## Case Media

- [Oral Argument](#)
- [Written Opinion](#)

## Advocates

[Kathi Alyce Drew](#) (Argued the cause for the petitioner)  
[William M. Kunstler](#) (Argued the cause for the respondent)

## Facts of the Case

In 1984, in front of the Dallas City Hall, Gregory Lee Johnson burned an American flag as a means of protest against Reagan administration policies. Johnson was tried and convicted under a Texas law outlawing flag desecration. He was sentenced to one year in jail and assessed a \$2,000 fine. After the Texas Court of Criminal Appeals reversed the conviction, the case went to the Supreme Court.

## Question

Is the desecration of an American flag, by burning or otherwise, a form of speech that is protected under the First Amendment?

## Conclusion

In a 5-to-4 decision, the Court held that Johnson's burning of a flag was protected expression under the First Amendment. The Court found that Johnson's actions fell into the category of expressive conduct and had a distinctively political nature. The fact that an audience takes offense to certain ideas or expression, the Court found, does not justify prohibitions of speech. The Court also held that state officials did not have the authority to designate symbols to be used to communicate only limited sets of messages, noting that "[i]f there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."

## Supreme Court Justice Opinions and Votes



The Oyez Project, Texas v. Johnson, 491 U.S. 397 (1989),  
available at: <[http://www.oyez.org/cases/1980-1989/1988/1988\\_88\\_155/](http://www.oyez.org/cases/1980-1989/1988/1988_88_155/)>

## WHAT HAPPENED NEXT???

### Roll call on July 17, 2001, on HJ Res 36:

"Proposing an amendment to the Constitution of the United States authorizing the Congress to prohibit the physical desecration of the flag of the United States."

	Yeas	Nays	Not Voting
Republican	207	11	3
Democratic	90	113	7
Independent	1	1	0
<b>Totals</b>	<b>298</b>	<b>125</b>	<b>10</b>

**"The Congress shall have power to prohibit the physical desecration of the flag of the United States."**

...a proposed amendment to the United States Constitution

*\* Although the U.S. Supreme Court has twice invalidated state flag laws, 47 states still have on the books laws, many modeled after the Uniform Flag Law of 1917, that prohibit the desecration of the flag or its use for advertising and publicity purposes.*

<u>Alabama</u>	<u>Louisiana</u>	<u>North Dakota</u>
<u>Arizona</u>	<u>Maine</u>	<u>Ohio</u>
<u>Arkansas</u>	<u>Maryland</u>	<u>Oklahoma</u>
<u>California</u>	<u>Massachusetts</u>	<u>Oregon</u>
<u>Colorado</u>	<u>Michigan</u>	<u>Pennsylvania</u>
<u>Connecticut</u>	<u>Minnesota</u>	<u>Rhode Island</u>
<u>Delaware</u>	<u>Mississippi</u>	<u>South Carolina</u>
<u>Florida</u>	<u>Missouri</u>	<u>South Dakota</u>
<u>Georgia</u>	<u>Montana</u>	<u>Texas</u>
<u>Hawaii</u>	<u>Nebraska</u>	<u>Utah</u>
<u>Idaho</u>	<u>Nevada</u>	<u>Vermont</u>
<u>Illinois</u>	<u>New Hampshire</u>	<u>Virginia</u>
<u>Indiana</u>	<u>New Jersey</u>	<u>Washington</u>
<u>Iowa</u>	<u>New Mexico</u>	<u>West Virginia</u>
<u>Kansas</u>	<u>New York</u>	<u>Wisconsin</u>
<u>Kentucky</u>	<u>North Carolina</u>	

## How Do Americans Feel?

### Survey I.

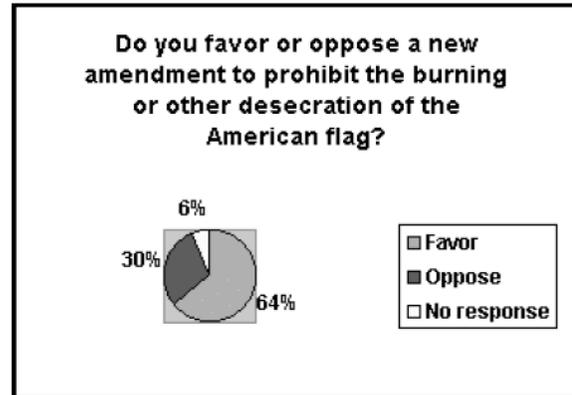
Source: *The ABA News Center, May 2002.*

Group	Percentage who would vote for a Constitutional Amendment to protect the flag
Men	78%
Women	83%
Age 18–34	76%
Age 35–54	80%
Age 55+	84%
Northeast	82%
Midwest	83%
South	78%
West	80%
HS Education	86%
College Graduates	67%
Republicans	85%
Democrats	78%
Independents	78%

1. According to the table, which demographic group listed below is most in favor of a Constitutional Amendment to protect the flag?

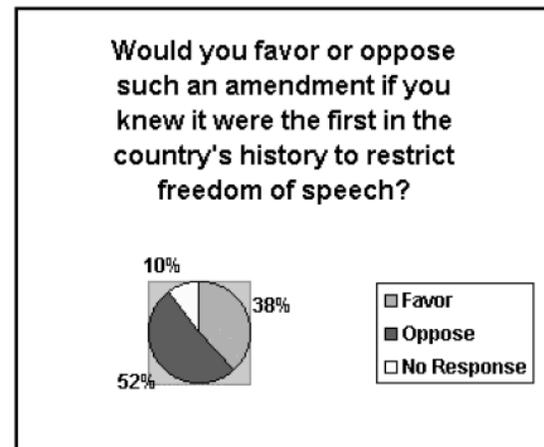
2. What conclusions can be drawn from the data regarding the Constitutional Amendment to protect the flag?

### Survey II.



3. According to the chart, how do the majority of Americans feel about a Constitutional amendment to protect the flag?

### Survey III.



4. What conclusions can be drawn from this chart?

5. What would account for the differences in results in Survey II and Survey III?

## IEWS FROM OTHER AMERICANS

### **General Colin L. Powell, USA (Ret.)**

I love our flag, our Constitution and our country. I defended all three for 35 years as a soldier and was willing to give my life in their defense. Americans revere their flag as a symbol of the Nation. We are rightfully outraged when anyone attacks or desecrates our flag. Few Americans do such things and when they do they are subject to rightful condemnation of their fellow citizens. They may be destroying a piece of cloth, but they do no damage to our system of freedom which tolerates such desecration.

If they are destroying a flag that belongs to someone else, that's a prosecutable crime. But if it is a flag they own, I really don't want to amend the Constitution to prosecute someone for foolishly desecrating their own property. We should condemn them and pity them instead. I understand how strongly so many of my fellow veterans and citizens feel about the flag and I understand the powerful sentiment in state legislatures for such an amendment. But I step back from amending the Constitution to relieve that outrage. The First Amendment exists to insure that freedom of speech and expression applies not just to that with which we agree or disagree, but also that which we find outrageous.

If I were a member of Congress, I would not vote for the proposed amendment and would fully understand and respect the views of those who would. For or against, we all love our flag with equal devotion.

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### **Senator Dianne Feinstein, California**

THERE SEEMS to be a mind-set, particularly among Democrats, that if you support a constitutional amendment to protect the American flag you are either (a) opposed to free speech, (b) undermining the most fundamental tenets of a free society or (c) singing like a political wind-chime to the popular tune of the day.

The fact is, there are intelligent arguments on both sides of the flag-amendment debate. I, for one, support a constitutional amendment to restore protection to our national flag, because I believe it is the right thing to do and have for a long time. Our national flag has come to hold a unique position in our society as the most important and universally recognized symbol that unites us as a nation. No other symbol crosses the political, cultural and ideological patchwork that makes up this great nation and binds us as a whole.

It wasn't until the flag was fired upon at Fort Sumter -- in an act of war -- that Americans came to look upon the flag as more than just a symbol of their government. Our history books are replete with stories of soldiers who were charged with the responsibility of leading their units into battle by carrying the flag. It was an honor worth dying for -- and many did.

It is my belief that restoring legal protection to our nation's flag would not infringe on our long-standing tradition of free speech under the First Amendment. Until the Supreme Court's 1990 decision overturning the federal law banning desecration of the flag, 48 of 50 states had laws preventing the burning or defacing of our nation's flag. I do not believe one can credibly claim that, over the course of those years, these laws prevented anyone from speaking out, even against the United States itself, in the strongest possible terms.

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### **Patrick Brady, Medal of Honor, retired U.S. Army Major General**

The 1989 Supreme Court decision defining flag burning as free speech should outrage every American, flag burners as well as those who love Old Glory. The Constitution is our only protection against tyranny. Our Constitution is the source of most of the freedom in the world, paid for by the blood and sweat of our veterans who swore to protect and defend it. Those veterans did not swear allegiance to a king or a queen, they swore allegiance to the Constitution, a set of values. The values in the Constitution reflect ideals that are timeless. Our Founders knew that if the people were to replace autocrats and properly exercise their responsibility as rulers, they needed to be politically able to freely express themselves.

The Founders were dedicated to rational and reasoned rhetoric. Burning the flag is not rhetoric, it is not reasonable or rational and it has no part in a peaceful assembly. The flag burners are not the enemies of our Constitution, it is those who call flag burning free speech, who seek to control our Constitution, who are the real enemies. These same people have compared those who would protect Old Glory with Nazis. But worse, they are distorting the Constitution to achieve their political agenda. If the majority of the people in the United States want to ban flag burning, they should have that right. General Phillip Sheridan once said: "I never discussed the Constitution much, and I never made many speeches upon it, but I have done a great deal of fighting for it."

**Tinker v. DesMoines (1969)**

*Students' rights to protest in a non-disruptive manner (armbands) upheld as protected symbolic speech.*

**U.S. v. O'Brien (1969)**

**Barnes, St. Joseph Co. Indiana v. Glen (1991)**

## SYMBOLIC SPEECH TIMELINE

**Smith v. Collin (1978)**

**NAACP v. Claiborne (1982)**

*Civil rights protestors' non-violent boycott of white merchants upheld as protected form of symbolic speech.*

**Texas v. Johnson (1989)**

*Texas flag desecration law struck down as unconstitutional restriction of free speech.*

**R.A.V. v. City St. Paul (1992)**