

# Landmarks: Historic U.S. Supreme Court Decisions Teacher's Guide

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# Lesson 15

## Texas v. Johnson (1989)

### Overview

This lesson explores *Texas v. Johnson*, the controversial 1989 Supreme Court decision on flag burning.

First, students read about and discuss *Texas v. Johnson*. Then in small groups, students role play aides to a U.S. senator on the Judiciary Committee. The committee is considering a proposed amendment to the U.S. Constitution banning flag burning, and the aides must make a recommendation on whether the senator should support or oppose the proposed amendment.

### Objectives

Students will be able to:

- Identify exceptions to the right to free speech.
- Express a reasoned opinion on whether these exceptions should exist.
- Explain the facts in *Texas v. Johnson*.
- Describe the differing opinions in the case.
- Express a reasoned opinion on which opinion they agree with.
- Analyze a proposed constitutional amendment to ban flag burning and express a reasoned opinion on whether to support or oppose it.

### Standards Addressed

**National High School Civics Standard 2: Understands the essential characteristics of limited and unlimited governments.** (6) Understands how political and economic freedoms serve to limit governmental power.

**National High School Civics Standard 11: Understands the role of diversity in American life and the importance of shared values, political beliefs, and civic beliefs in an increasingly diverse American society.** (6) Knows how shared ideas and values of American political culture are reflected in various sources and documents (e.g., . . . landmark decisions of the Supreme Court of the United States).

**National High School Civics Standard 25: Understands issues regarding personal, political, and economic rights.** (1) Understands the importance to individuals and to society of personal rights such as freedom of thought and conscience, privacy and personal autonomy . . . .

**California History-Social Science Content Standard 12.5: Students summarize landmark U.S. Supreme Court interpretations of the Constitution and its amendments.** (1) Understand the changing interpretations of the Bill of Rights over time, including interpretations of the basic freedoms (religion, speech, press, petition, and assembly) articulated in the First Amendment . . . .

**California History-Social Science Content Standard 12.1: Students explain the fundamental principles and moral values of American democracy as expressed in the U.S. Constitution and other essential documents of American democracy.** (6) Understand that the Bill of Rights limits the powers of the federal government and state governments.

**California History-Social Science Content Standard 12.10: Students formulate questions about and defend their analyses of tensions within our constitutional democracy and the importance of maintaining a balance between the following concepts: majority rule and individual rights . . . .**

### Preparation

Reading in the student text: “*Texas v. Johnson* (1989),” pp. 79–83

Activity in the student text: “The Flag-Burning Amendment,” p. 84

## Vocabulary

Below are vocabulary words from this lesson. Their pronunciations and definitions can be found in the Glossary, which begins on page 91 of the student text.

arbitrary                      compelling governmental interest                      concurring opinion                      desecration  
dissenting opinion                      reverse                      statute

## Procedure

### I. Focus Discussion

- A. Remind students that one of the things the First Amendment to the U.S. Constitution guarantees is freedom of speech. Hold a brief discussion on this freedom by asking students: Why do you think free speech is important?

Students may come up with many reasons. Among the most common arguments for free speech are the following:

- It permits the press and others to play a watchdog role on government, exposing mistakes, misdeeds, and actions that officials would want to keep quiet.
  - It allows a free exchange of ideas about the government, ensuring that citizens have access to all points of view and can make informed political decisions.
  - By letting every idea be examined, it helps scientists, inventors, and ordinary people discover the truth.
  - It serves as a “safety valve,” allowing people to vent their frustration with government and lessening the likelihood that they will foment revolution or commit terrorist acts.
  - It helps people develop as individuals by allowing them to examine and express different thoughts and opinions.
- B. Explain that students are going to examine one of the most controversial U.S. Supreme Court decisions on freedom of speech.

### II. Reading and Discussion—*Texas v. Johnson* (1989)

- A. Ask students to read “*Texas v. Johnson* (1989),” pages 79–83. Ask them to look for:

- Exceptions to the right to free speech.
- The facts of the case in *Texas v. Johnson*.
- The differing opinions in the case.

- B. When students finish reading, hold a discussion using the questions on page 83.

1. As interpreted by the Supreme Court, the right to free speech is not absolute. What are some exceptions to the right to free speech? Do you agree with the exceptions? Explain.

**The exceptions to the right to free speech mentioned in the article are:**

- a. **Clear and present danger.** Speech may be restricted if the words used “create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.” This has been restricted to the danger of an immediate harm.
- b. **Expressive conduct.** Laws banning expressive conduct must pass all three parts of the *O’Brien* test:
  1. The restriction must further an important or substantial government interest.

2. The interest must be unrelated to the suppression of free expression.
  3. The restriction on First Amendment freedoms must be no greater than is essential to furthering the stated government interest.
- c. **Fighting words.** Words that by their very utterance inflict injury or tend to incite an immediate breach of the peace.

Other exceptions not mentioned in the article include obscenity and defamation (damaging a person’s reputation by making false statements).

As for whether students agree with the exceptions, accept reasoned responses.

2. What were the facts in *Texas v. Johnson*?

**Johnson burned the American flag during a protest denouncing the policies of the Reagan administration at the Republican National Convention in Dallas, Texas. Burning a flag was a criminal offense in Texas, and Johnson was arrested and charged with violating this law.**

3. Justices Brennan and Stevens and Chief Justice Rehnquist wrote separate opinions and analyzed the case differently. How did each analyze the case? Which opinion do you agree with? Why?

**Justice Brennan used the *O’Brien* test mentioned above. He ruled that Texas failed to pass the test because its stated governmental interest was to preserve the flag as a symbol of nationhood and national unity, which failed the second part of the test.**

**Justice Stevens argued that traditional free speech doctrine should not apply to flag burning because of the “intangible dimension” of the flag’s deeply symbolic value.**

**Chief Justice Rehnquist based his opinion on the “fighting words exception” and argued that flag burning, like “fighting words” has low social value and any benefit that may be derived from the act is clearly outweighed by the public interest in avoiding a probable breach of the peace.**

As for which opinion students agree with, accept reasoned responses.

### III. Small-Group Activity—The Flag-Burning Amendment

- A. Remind students that there are two ways of overruling a decision that the Supreme Court has made on the Constitution. One is for the Supreme Court to overrule the decision in a subsequent case; the other is through a constitutional amendment. Inform students that a flag-burning amendment has been proposed many times. Tell them that they are going to get a chance to analyze such an amendment and recommend whether it should be passed.
- B. Divide the class into groups of three to five students each. Tell the groups that they are role playing aides to a U.S. senator on the Judiciary Committee.
- C. Review with students “Activity: The Flag-Burning Amendment” on page 84. Answer any questions students may have.
- D. When the groups finish, call on the groups to make their presentations. After the presentations, hold a class discussion on the proposed amendment. Conclude by holding a vote on whether Congress should pass such an amendment. Remind students that for an amendment to be enacted, both houses of Congress must approve the amendment by a two-thirds majority, and then three-fourths of the state legislatures must pass it.

# Texas v. Johnson (1989)

## Is There a Constitutional Right to Burn the American Flag?



The flag is one of the most widely recognized symbols of the United States.

*I disapprove of what you say, but I will defend to the death your right to say it.*

—Voltaire (1664-1778), French philosopher and writer

*If 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.*

—William J. Brennan Jr. (1906-1997), justice of the U.S. Supreme Court

In 1988, the U.S. Supreme Court agreed to hear *Texas v. Johnson*. This case raised the question of whether the First Amendment protected the right of a protester to burn the American flag. Some argue that the right to burn the American flag is fundamental to the First Amendment's guarantee of freedom of speech. Others maintain that burning the flag constitutes a fundamental rejection of the system that protects freedom of speech, and they conclude that such conduct does not merit First Amendment protection. In *Texas v. Johnson*, the Supreme Court settled the issue as a matter of constitutional law. As a political issue, however, the debate over flag burning remains controversial.

## Regulation of Speech Under the First Amendment

Although the First Amendment guarantees freedom of speech, the guarantee is not absolute. Oliver Wendell Holmes Jr., a justice on the U.S. Supreme Court in the early 20th century, described one limitation on First Amendment freedoms in the case of *Schenck v. U.S.* He noted: “The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.” The *Schenck* case announced the “clear and present danger” test: Speech may be restricted if the words used “create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.”

Another aspect of freedom of speech is expressive conduct (such as flag burning). The Supreme Court has grappled with whether laws banning expressive conduct are permissible under the First Amendment. In *U.S. v. O'Brien*, the court upheld O'Brien's conviction for burning his draft card during the Vietnam War, even though this constituted expressive conduct. In so doing, the court crafted a three-part test for the constitutionality of restrictions on expressive conduct:

1. The restriction must further an important or substantial government interest. In this case, the court found that the government had a strong interest in issuing draft cards to help raise an army for national defense.
2. That interest must be unrelated to the suppression of free expression. The court found that a proper purpose for outlawing the destruction of draft cards was to ease the draft process and had nothing to do with suppressing free speech.
3. The incidental restriction on First Amendment freedoms must be no greater than is essential to the furtherance of the stated government interest. The court found that the government had an interest in draft-age men carrying draft cards, and the court saw no other way for the government to protect this interest than outlawing their destruction.

Since the law passed all three parts of the test, it was upheld as constitutional.

## Facts of the Case

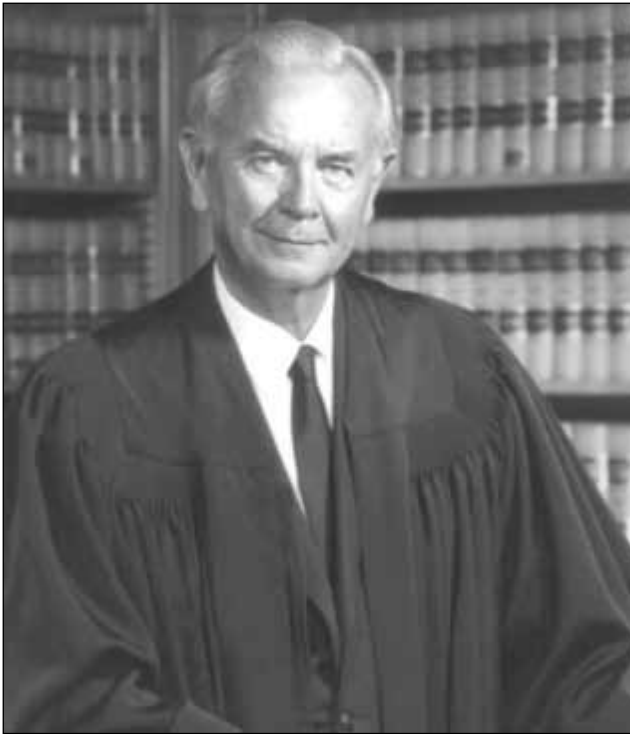
In 1984, the Republican Party held its convention in Dallas, Texas. As it re-nominated President Ronald Reagan as its candidate for president, protesters outside the convention hall denounced the policies of the Reagan administration. One of the protesters was Gregory Lee Johnson. Johnson and other protesters marched through the streets of Dallas, spray-painting buildings and causing other property damage. At several points, the protesters paused to stage “die-ins” in an effort to demonstrate the consequences of a potential nuclear war. At the end of the protest, Johnson doused an American flag in kerosene and set it on fire. As the flag burned, fellow protesters chanted anti-American slogans such as “red, white, and blue, we spit on you, you stand for plunder, you will go under.”

Desecrating an American flag was a criminal offense in Texas, as it was under federal law and in 48 of the 50 U.S. states. Johnson was arrested and charged with violating the Texas flag desecration law. The trial court convicted Johnson, sentencing him to one year in prison and fining him \$2,000. A Texas appeals court reversed Johnson's conviction, and the U.S. Supreme Court agreed to hear the case.

## The Issues

The Supreme Court in *U.S. v. O'Brien* had set three tests for any restriction on expressive conduct. For such a restriction to be constitutional, it had to pass all three tests. The court in *Texas v. Johnson* thus had to determine whether Texas could demonstrate:

1. Texas had an important or substantial government interest in prohibiting the desecration of the flag.
2. This interest was unrelated to the suppression of free expression.
3. Prohibiting the desecration of the flag was narrowly tailored to furthering this interest.



William J. Brennan Jr. (1906–1997) served as a justice for 34 years (from 1956 to 1990). In his career, he wrote 1,360 opinions, the second greatest number in the history of the Supreme Court.

## Justice Brennan’s Majority Opinion

Justice Brennan, writing for a narrow majority of five justices, held that laws against desecrating the American flag violated the First Amendment. He reasoned that burning an American flag conveyed a political message, an act lying at the core of the freedom of speech guaranteed by the First Amendment.

As a preliminary matter, Justice Brennan found that burning the flag in a political demonstration constituted “conduct ‘sufficiently imbued with elements of communication,’ to implicate the First Amendment.”

Texas argued that it had two compelling governmental interests in regulating such expression: (1) preventing breaches of the peace that flag desecration may cause and (2) preserving the flag as a symbol of nationhood and national unity. Justice Brennan rejected Texas’ argument on preventing breaches of the peace, because no breach of the peace occurred in this instance, and

because Johnson’s actions did not incite imminent lawless action. Justice Brennan next wrote that the government interest in preserving the flag as a symbol of nationhood and national unity was related to the suppression of expression. It thus, he stated, did not meet the *O’Brien* test regarding incidental restrictions on expression.

Justice Brennan then turned to the part of the flag-burning statute that he found particularly objectionable. The Texas statute only criminalized flag burning done “in a way that the [flag burner] knows will seriously offend” others. In analyzing this language, Brennan relied on Justice Robert H. Jackson’s famous description of “one of our society’s defining principles.” In *West Virginia State Board of Education v. Barnette*, Justice Jackson wrote, “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 or force citizens to confess by word or act their faith therein.” Justice Brennan explained:

If we were to hold that a State may forbid flag burning wherever it is likely to endanger the flag’s symbolic role, but allow it wherever burning a flag promotes that role—as where, for example, a person ceremoniously burns a dirty flag—we would be saying that when it comes to impairing the flag’s physical integrity, the flag itself may be used as a symbol . . . only in one direction. We would be permitting a State to “prescribe what shall be orthodox” by saying that one may burn the flag to convey one’s attitude toward it and its referents only if one does not endanger the flag’s representation of nationhood and national unity.

Justice Brennan also noted that creating a special exception to the First Amendment to permit the criminalization of flag burning could lead to similar exceptions, such as for burning state flags, copies of the presidential seal, the Constitution, or other venerated objects. The line

that would be drawn between those objects protected by such exceptions and those not so protected would necessarily be arbitrary.

Finally, Justice Brennan argued:

The way to preserve the flag's special role is not to punish those who feel differently about [nationhood and national unity]. It is to persuade them that they are wrong.

Brennan quoted Justice Louis D. Brandeis' concurring opinion in the 1927 case *Whitney v. California*. Justice Brandeis wrote, "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." Justice Brennan concluded: "We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents."

Justices Marshall, Blackmun, Scalia, and Kennedy joined Brennan's majority opinion.

## Justice Kennedy's Concurring Opinion

Justice Anthony Kennedy, the newest member of the court in 1989, wrote an unusual concurring opinion. Justice Kennedy joined the majority opinion "without reservation." He wrote separately only to emphasize the difficulty he had in deciding to join the majority in this controversial case. Justice Kennedy wrote:

The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result.

## Chief Justice Rehnquist's Dissenting Opinion

Chief Justice William Rehnquist, joined by Justices White and O'Connor, opened his dissent with a detailed history of the American flag. Chief Justice Rehnquist described the first national flag

that the Continental Congress adopted in 1777: It had "thirteen stripes, alternate red and white, [and] thirteen stars, white in a blue field, representing a new constellation." Rehnquist explained: "At the time of the American Revolution, the flag served to unify the Thirteen Colonies at home, while obtaining recognition of national sovereignty abroad."

Chief Justice Rehnquist described the role the flag played in American wars. He told about the flag in the War of 1812 inspiring Francis Scott Key to write "The Star Spangled Banner." Rehnquist noted that the Southern states' rejection of the national flag marked the start of the Civil War. He wrote of the 6,000 Marines who died in hand-to-hand combat in order to raise the American flag over Iwo Jima in World War II. Finally, Rehnquist noted the dire impact flag burnings had on troop morale in Vietnam, which provided the impetus for enacting the Federal Flag Desecration Statute in 1967.

Rehnquist argued:

The 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.

Rehnquist turned to the 1942 case of *Chaplinsky v. New Hampshire*. In that case the Supreme Court set out the "fighting words" exception to First Amendment freedom of speech protection. The court said:

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.



Rehnquist argued that flag burning, like “fighting words” in *Chaplinsky*, is “‘of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed’ by the public interest in avoiding a probable breach of the peace.”

## Justice Stevens’ Dissenting Opinion

Justice Stevens did not join the main dissent, but instead wrote his own dissenting opinion. Justice Stevens had received the Bronze Star as an officer in the Navy in World War II. He argued that traditional free speech doctrine should not apply to flag burning because of the “intangible dimension” of the flag’s deeply symbolic value.

## Aftermath of the Decision

The court announced the decision on June 21, 1989, in a rare moment of constitutional drama. Instead of following the customary practice of merely announcing the court’s decision, Justice Brennan read much of his opinion aloud. In an even more unusual act, Justice Stevens read his dissenting opinion aloud. The next morning, the *New York Times* reported on the decision as one “virtually certain to be a First Amendment landmark.”

Polls found that large majorities of Americans strongly disagreed with the court’s ruling. Politicians moved quickly to condemn the decision. President George H.W. Bush, while insisting that he would “fully support” the decision, registered his displeasure with the ruling, calling it “dead wrong.” The U.S. Senate, by a margin of 97–3, adopted a resolution expressing “profound disappointment” in the decision. Several Republican members of Congress called for a constitutional amendment to overturn the decision. Many Democrats favored amending the statutory language on flag desecration to comply with a narrow loophole some argued the court had left open.

Eventually Congress passed the Flag Protection Act of 1989. It banned flag burning regardless of

whether the person burning the flag intended to cause offense to others. (The Supreme Court had specifically objected to the Texas law because it stressed causing offense.) The new federal law made exceptions for people disposing of a torn or damaged flag. This new law was challenged and reached the Supreme Court next term in *U.S. v. Eichman* (1990). As many had expected, the Supreme Court, with the same justices composing the same 5–4 majority, ruled this statute unconstitutional.

Since 1990, members of Congress have regularly proposed a constitutional amendment to ban flag burning. Such an amendment would require a two-thirds majority in both the House of Representatives and the Senate. Then three-fourths of the state legislatures would have to ratify it. The House has approved such an amendment six times, including, most recently, on June 22, 2005. No proposed amendment, however, has attained the two-thirds majority required in the Senate.

## For Discussion

1. As interpreted by the Supreme Court, the right to free speech is not absolute. What are some exceptions to the right to free speech? Do you agree with the exceptions? Explain.
2. What were the facts in *Texas v. Johnson*?
3. Justices Brennan and Stevens and Chief Justice Rehnquist wrote separate opinions and analyzed the case differently. How did each analyze the case? Which opinion do you agree with? Why?

## ACTIVITY

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### The Flag-Burning Amendment

Imagine that you work as aides to a U.S. senator who is on the Judiciary Committee. This committee will be considering the following proposed amendment to the U.S. Constitution:

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

This amendment would have the effect of overturning the decision in *Texas v. Johnson* and allow Congress to pass legislation against flag burning or other physical acts of disrespect toward the flag.

Your senator has asked for your opinion on this amendment. As a group, do the following:

1. Think of arguments for and against the amendment.
2. Discuss the arguments.
3. Decide whether the senator should support or oppose the amendment.
4. Prepare a presentation to make to the senator, citing reasons for your recommendation.