

FIRST AMENDMENT: FREE SPEECH AND FLAG BURNING

This activity is based on the landmark Supreme Court case *Texas v. Johnson*, 491 U.S. 397 (1989), which deals with First Amendment protection of flag burning as symbolic speech.

About These Resources

- Analyze the [facts and case summary](#) for *Texas v. Johnson*.
- Build arguments for both sides, starting with these [talking points](#).
- Use critical thinking skills and share reflections on the [discussion questions](#).

How to Use These Resources

This activity is a modified [Oxford style debate](#).

1. To get started, have participants read the *Texas v. Johnson* [facts and case summary](#).
2. Assign student attorneys to the issues listed in the [talking points](#). They are suggested points— not a script—for the debate. Student attorneys are encouraged to add their own arguments.
3. All other students are jurors who deliberate (and may refer to these talking points) during the open floor debate. They debate among themselves in the large group or smaller groups and come to a verdict after the attorneys present closing arguments.

Background: *Texas v. Johnson*

***United States v. Eichman*, 496 U.S. 310 (1990)** The Johnson decision only affected a Texas state law. In the wake of the decision, the federal government enacted a law that also prohibited flag burning. In order to try to get around constitutional challenges, the law prohibited all types of flag desecration, with the exception of burning and burying a worn-out flag, regardless of whether the action upset others. The Supreme Court held that this did not cure the constitutional defect and the same 7-3 majority from Johnson held that the law still impermissibly discriminated upon viewpoint and struck it down.

FACTS AND CASE SUMMARY: TEXAS V. JOHNSON

Facts and case summary for *Texas v. Johnson*, 491 U.S. 397 (1989)

Flag burning constitutes symbolic speech that is protected by the First Amendment.

FACTS	Gregory Lee Johnson burned an American flag outside of the convention center where the 1984 Republican National Convention was being held in Dallas, Texas. Johnson burned the flag to protest the policies of President Ronald Reagan. He was arrested and charged with violating a Texas statute that prevented the desecration of a venerated object, including the American flag, if such action were likely to incite anger in others. A Texas court tried and convicted Johnson. He appealed, arguing that his actions were "symbolic speech" protected by the First Amendment. The Supreme Court agreed to hear his case.
ISSUE	Whether flag burning constitutes "symbolic speech" protected by the First Amendment.
RULING	Yes.
REASONING (5-4)	<p>The majority of the Court, according to Justice William Brennan, agreed with Johnson and held that flag burning constitutes a form of "symbolic speech" that is protected by the First Amendment. The majority noted that freedom of speech protects actions that society may find very offensive, but society's outrage alone is not justification for suppressing free speech.</p> <p>In particular, the majority noted that the Texas law discriminated upon viewpoint, i.e., although the law punished actions, such as flag burning, that might arouse anger in others, it specifically exempted from prosecution actions that were respectful of venerated objects, e.g., burning and burying a worn-out flag. The majority said that the government could not discriminate in this manner based solely upon viewpoint.</p>
DISSENT	<p>Justice Stevens</p> <p>Writing for the dissent, Justice Stevens argued that the flag's unique status as a symbol of national unity outweighed "symbolic speech" concerns, and thus, the government could lawfully prohibit flag burning.</p>

TALKING POINTS

Question:

Is flag burning protected as symbolic speech by the First Amendment?

Texas

Johnson

1. Can the government prohibit the act of flag burning as an infringement on the Free Speech Clause of the First Amendment?

Affirmative. Yes.

The Court has interpreted the First Amendment to grant a higher level of protection to speech than it grants to conduct because not all conduct is considered a form of speech. The First Amendment does protect symbolic speech, but some actions do not always rise to the level of “symbolic speech” so as to require protection under the First Amendment. Flag burning is the destruction of a symbol of national unity. Even if the flag that is destroyed is private property, the government has a legitimate interest in regulating its protection because of what the flag represents to the nation. Lines must be drawn when it comes to expressive speech to make sure that otherwise criminal conduct is not couched in “First Amendment” terms.

Negative. No.

The Court has recognized that the First Amendment protects certain forms of symbolic speech. Flag burning is such a form of symbolic speech. When a flag is privately owned, the owner should be able to burn it if the owner chooses, especially if this action is meant in the form of protest. So long as public and/or the property of others is not destroyed in the process (or there is a danger to others by setting the flag on fire), the government cannot prohibit this action without infringing upon free speech rights.

2. Should flag burning as symbolic speech be prohibited as an exception to the First Amendment’s free speech protections?

Affirmative. Yes.

Even though the First Amendment protects symbolic speech, an exception should be made to prohibit burning of the flag. The flag is a symbol of national unity that represents the ideals for which the United States stands. Moreover, it honors those who died in defense of this country. The protection of these concepts, as represented in the flag, constitute a compelling governmental interest that justifies a ban on flag burning/desecration.

Negative. No.

As noble as the argument is, the First Amendment does not recognize an exception for prohibitions on burning the flag. When the defendant burned the flag in this case, he was making a political statement, i.e., he did not agree with the policies of the United States government. Moreover, as ironic as it sounds, by being able to burn the flag, the defendant (and other persons like him) is actually honoring the values the flag is meant to protect. For instance, the flag represents freedom of speech, including giving protections to those who desecrate it. On a more practical note, why should this one action be excepted from the First Amendment’s protections? Could, or should, other exceptions be made? Who would make these decisions?

3. Should the allowance of flag burning depend upon the reasons for, and potential reactions to, the act?

Affirmative. Yes.

Negative. No.

The Texas Act permits the destruction of worn-out flags in a prescribed manner. The Act also acknowledges that prosecutions of flag-burning only occur when this action would be likely to offend others. Although it is argued that the state may have an absolute right to prohibit flag burning, Texas has chosen to limit its proscriptions. For instance, it would permit private burnings, perhaps even in the midst of like-minded individuals. It does not, however, permit flag burning in public when this would be likely to incite others. The state realizes that this action triggers strong emotions in some and may lead to violence. The State has a compelling interest in prohibiting flag burning in order to keep the peace. The State permits respectful burnings of worn-out flags because there is not much chance that this action will lead to violent outbursts.

The Texas Act clearly discriminates on the basis of viewpoint. It allows respectful, but not disrespectful, destruction of the flag. Its antipathy toward disrespectful destruction of the flag is further highlighted by the fact that it prohibits actions that are likely to offend others. First Amendment rights cannot be based on the reaction of others. The First Amendment is meant to protect unpopular ideas. The First Amendment would be undermined if unpopular speech were disallowed.

United States v. Eichman, 496 U.S. 310 (1990)

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DISCUSSION QUESTIONS

Use the discussion questions to improve understanding of the case and how it was decided by the Supreme Court.

1. If you were an Associate Justice serving on the Supreme Court, what legal arguments would you take into account in deciding *Texas v. Johnson*?
2. What emotional arguments would you need to be aware of and set aside?
3. Can you think of other examples of symbolic political speech that might be offensive to some but that would be protected by the First Amendment?

Extra Discussion: To stimulate your thinking, develop several hypothetical situations and identify what differentiates them from each other and from *Texas v. Johnson*.