



A Burning Issue

A Structured Academic Controversy
Concerning Flag Desecration



A BURNING ISSUE : LESSON PLAN

Critical Engagement Question

Is a Constitutional Amendment required to protect the United States flag from desecration?

Overview

The U.S. flag is a potent symbol of our nation. It embodies all of the strengths and faults of our country, its citizens and its government. Some say that the flag is a sacred symbol that should be legally protected from those who would defame it. Others say that the destruction of the flag is a powerful, symbolic act protected by the Constitution. The debate surrounding flag desecration has been argued for more than a century and numerous attempts to protect it with a Constitutional Amendment have been proposed, and thus far, defeated.

Objectives

- Examine the history and controversy of the flag burning issue.
- Discuss verbal and nonverbal expression.
- Understand the arguments by supporters and opponents of a Constitutional Amendment banning flag desecration.
- Create a compromise that satisfies both sides and upholds the principles of the First Amendment.

Standards

NCHS: Era 10, Standard 2D & 2E

NCSS: Strand 10

Illinois: Goal 14, A, D & F

Student Materials

Item A: Debate Worksheet

Item B: *Texas v. Johnson* Majority Opinion

Item C: *Texas v. Johnson* Stevens Dissent

Item D: Statement from Sen. Dianne Feinstein

Item E: Letter from Colin Powell to Sen. Patrick Leahy

Teacher Materials

A Burning Issue Time Line Poster

Time and Grade Level

One 90-minute or two 45-minute high school class periods with pre-activity homework.

Warm-up

1. Students examine A Burning Issue time line.
2. Lead a discussion about the issue of flag burning. Questions to consider: What does a flag mean? Why do people burn flags? When did flag burning first become popular? Does flag burning communicate an expression of belief? Is flag burning offensive and might it incite violent behavior?
3. Discuss the 1989 Supreme Court case *Texas v. Johnson* and the upholding of the right to burn the U.S. flag.

Activity

Structured Controversy Concerning Flag Burning

1. Divide the class into groups of four individuals. Assign two students to “protect the flag” and two students to “protect free speech.” Give each student one worksheet and one primary source article pertaining to his or her assigned side (Items B and E “protect free speech” and Items C and D “protect the flag”).
2. Instruct students to read their assigned article and follow the steps on the worksheet. Each student should identify three arguments that support the author’s position. (Steps 1 and 2 can be assigned as homework).
3. Groups convene to present arguments and rebuttals, as well as formulate a consensus statement.
4. Assemble the entire class and have each group of four present their consensus statements. Teacher may want to collect assignments at this time.
5. Vote on the amendment. Students may abandon their assigned viewpoint and cast his or her own personal position. The resolution must receive two-thirds of the class vote to become law.

Homework

Students write a one- to two- paragraph essay of their predictions if a flag desecration amendment passes. Who would define “desecration?” Would flag burning be curbed? Would individual rights be bolstered or eroded?

Extensions

- A. Web Quest. Students can learn more about nonverbal speech issues by doing a Web Quest at www.FreedomMuseum.US. Visit the “Education: Learn” page to access Five Freedoms Web Quests.
- B. Letter Writing Campaign. Encourage students to write a letter to their senator or representative urging them to support or oppose a flag desecration amendment.

Name

Assigned Document

A Burning Issue:

A Structured Academic Controversy Concerning Flag Desecration

Proposed Amendment:

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

Directions:

After convening in your assignment group, please follow the steps below in order.

- A. Read your assigned primary document and identify three arguments that support the author’s position.
 - 1.
 - 2.
 - 3.
- B. Meet with the other person in your group that holds a document expressing a similar viewpoint. Share the main points from your respective documents and construct a position that represents the viewpoints of these two authors in the space below.
- C. Present your combined position with your partner to the opposing pair within your group. In the space provided, summarize the opposing viewpoint.
- D. Reconvene with your partner and develop a rebuttal to the opposing viewpoint presented. Upon completion, present the rebuttal to the entire group, once again acknowledging their opposing views.
- E. Formulate and write a consensus position that satisfies the viewpoints of the group as a whole. Individual members may abandon their assigned positions to reach this compromise.



TEXAS v. JOHNSON, 491 U.S. 397 (1989), JUSTICE BRENNAN delivered the opinion of the Court. (Protect Free Speech)

Johnson was convicted of flag desecration for burning the flag rather than for uttering insulting words. This fact somewhat complicates our consideration of his conviction under the First Amendment. We must first determine whether Johnson's burning of the flag constituted expressive conduct, permitting him to invoke the First Amendment in challenging his conviction. If his conduct was expressive, we next decide whether the State's regulation is related to the suppression of free expression.

The First Amendment literally forbids the abridgment only of "speech," but we have long recognized that its protection does not end at the spoken or written word. We have acknowledged that conduct may be "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments." That we have had little difficulty identifying an expressive element in conduct relating to flags should not be surprising. The very purpose of a national flag is to serve as a symbol of our country.

At his trial, Johnson explained his reasons for burning the flag as follows: "The American Flag was burned as Ronald Reagan was being renominated as President. And a more powerful statement of symbolic speech, whether you agree with it or not, couldn't have been made at that time." In these circumstances, Johnson's burning of the flag was conduct "sufficiently imbued with elements of communication," to implicate the First Amendment.

1 The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word. It may not, however, proscribe particular conduct because it has expressive elements.

2 Johnson was prosecuted because he knew that his politically charged expression would cause "serious offense." If he had burned the flag as a means of disposing of it because it was dirty or torn, he would not have been convicted of flag desecration under this Texas law.

3 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.

4 The State's argument cannot depend here on the distinction between written or spoken words and nonverbal conduct.

5 We are fortified in today's conclusion by our conviction that forbidding criminal punishment for conduct such as Johnson's will not endanger the special role played by our flag or the feelings it inspires.

We are tempted to say, in fact, that the flag's deservedly cherished place in our community will be strengthened, not weakened, by our holding today. Our decision is a reaffirmation of the principles of freedom and inclusiveness that the flag best reflects, and of the conviction that our toleration of criticism such as Johnson's is a sign and source of our strength. Indeed, one of the proudest images of our flag, the one immortalized in our own national anthem, is of the bombardment it survived at Fort McHenry. It is the Nation's resilience, not its rigidity, that Texas sees reflected in the flag—and it is that resilience that we reassert today.

The way to preserve the flag's special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong. And, precisely because it is our flag that is involved, one's response to the flag burner may exploit the uniquely persuasive power of the flag itself. We can imagine no more appropriate response to burning a flag than waving one's own, no better way to counter a flag burner's message than by saluting the flag that burns, no surer means of preserving the dignity even of the flag that burned than by—as one witness here did—according its remains a respectful burial. We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents.



TEXAS v. JOHNSON, 491 U.S. 397 (1989), JUSTICE STEVENS, dissenting. (Protect the Flag)

As the Court analyzes this case, it presents the question whether the State of Texas, or indeed the Federal Government, has the power to prohibit the public desecration of the American flag. Even if flag burning could be considered just another species of symbolic speech under the logical application of the rules that the Court has developed in its interpretation of the First Amendment in other contexts, this case has an intangible dimension that makes those rules inapplicable.

A country's flag is a symbol of more than "nationhood and national unity." It also signifies the ideas that characterize the society that has chosen that emblem as well as the special history that has animated the growth and power of those ideas. It is a symbol of freedom, of equal opportunity, of religious tolerance, and of good will for other peoples who share our aspirations. The symbol carries its message to dissidents both at home and abroad who may have no interest at all in our national unity or survival.

The value of the flag as a symbol cannot be measured. Even so, I have no doubt that the interest in preserving that value for the future is both significant and legitimate. Conceivably that value will be enhanced by the Court's conclusion that our national commitment to free expression is so strong that even the United States as ultimate guarantor of that freedom is without power to prohibit the desecration of its unique symbol. But I am unpersuaded. The creation of a federal right to post bulletin boards and graffiti on the Washington Monument might enlarge the market for free expression, but at a cost I would not pay. Similarly, in my considered judgment, sanctioning the public desecration of the flag will tarnish its value—both for those who cherish the ideas for which it waves and for those who desire to don the robes of martyrdom by burning it. That tarnish is not justified by the trivial burden on free expression occasioned by requiring that an available, alternative mode of expression—including uttering words critical of the flag—be employed.

The content of respondent's message has no relevance whatsoever to the case. The concept of "desecration" does not turn on the substance of the message the actor intends to convey, but rather on whether those who view the act will take serious offense. The case has nothing to do with "disagreeable ideas." It involves disagreeable conduct that, in my opinion, diminishes the value of an important national asset.

The Court is therefore quite wrong in blandly asserting that respondent "was prosecuted for his expression of dissatisfaction with the policies of this country, expression situated at the core of our First Amendment values." Respondent was prosecuted because of the method he chose to express his dissatisfaction with those policies. Had he chosen to spray-paint-or perhaps convey with a motion picture projector-his message of dissatisfaction on the facade of the Lincoln Memorial, there would be no question about the power of the Government to prohibit his means of expression. The prohibition would be supported by the legitimate interest in preserving the quality of an important national asset. Though the asset at stake in this case is intangible, given its unique value, the same interest supports a prohibition on the desecration of the American flag.

The ideas of liberty and equality have been an irresistible force in motivating leaders. If those ideas are worth fighting for—and our history demonstrates that they are—it cannot be true that the flag that uniquely symbolizes their power is not itself worthy of protection from unnecessary desecration.

I respectfully dissent.



SEN. DIANNE FEINSTEIN : Statement on Flag Burning Amendment to U.S. Senate June 14, 2005 (Protect the Flag)

Today, we celebrate Flag Day, honoring an enduring symbol of our democracy, of our shared values, of our allegiance to justice, and of those who have sacrificed to defend these principles. On this day, I renew my support for S.J. Res. 12, a resolution that would let the people decide whether they want a Constitutional Amendment to protect the American flag.

Many moving images of the flag are etched into our nation's collective conscience. We are all familiar with the image of Marines raising the flag on Iwo Jima, with the New York firefighters raising the flag amid the debris of the World Trade Center and with the large flag that hung over the side of the Pentagon while part of it was rebuilt after 9/11.

It is more than a piece of material to so many of us. For our veterans, the flag represents what they fought for—democracy and freedom. Today there are almost 300,000 troops serving overseas, putting their lives on the line every day fighting for the fundamental principles that our flag symbolizes.

Last December, I traveled to Iraq and met with some of the brave men and women in the armed forces that are stationed there. We flew out of Baghdad on a C-130 that we shared with a flag-draped coffin being accompanied by a military escort. This was very moving. It showed clearly how significant the meaning of the flag is and why protecting it is so important.

In the 1989 case *Texas v. Johnson*, the Supreme Court struck down a State law prohibiting the desecration of American flags in a manner that would be offensive to others. The Court held that the prohibition amounted to an impermissible content-based regulation of the First Amendment right to free speech. Until this case, 48 of the 50 states had statutes preventing burning or otherwise defacing our flag. After the *Johnson* case was decided, Congress passed the Flag Protection Act of 1989, which sought to ban flag desecration in a content-neutral way that would withstand judicial scrutiny. Nevertheless, the Supreme Court justices struck down that federal statute as well.

It is clear that without a Constitutional Amendment, there is no federal statute protecting the flag which will pass constitutional muster. S.J. Res. 12 would not ban flag burning. It would not ban flag desecration. This amendment would do one thing only: give Congress the opportunity to construct, deliberately and carefully, precise statutory language that clearly defines the contours of prohibitive conduct.

Some critics say that we are making a choice between trampling on the flag and trampling on the First Amendment. I strongly disagree. Protecting the flag will not prevent people from expressing their points of view. I believe a Constitutional Amendment returning to our flag the protected status it has had through most of this nation's history, and that it deserves, is consistent with free speech.

I do not take amending the Constitution lightly. It is serious business and we need to tread carefully. But the Constitution is a living text. In all, it has been amended 27 times. Securing protection for this powerful symbol of America would be an important, but very limited, change to the Constitution. It is a change that would leave both the flag and free speech safe.

Now it is time to give Americans the opportunity to amend the Constitution for something that we all agree is sacred to so many people all across this country. It is time to let the people decide.



LETTER FROM GENERAL COLIN POWELL
(Protect Free Speech)

May 18, 1999

Dear Senator Leahy,

Thank you for your recent letter asking my views on the proposed flag protection amendment.

I love our flag, our Constitution and our country with a love that has no bounds. 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. Indeed, it is because of that reverence that the amendment is under consideration. Few countries in the world would think of amending their Constitution for the purpose of protecting such a symbol.

We are rightfully outraged when anyone attacks or desecrates our flag. Few Americans do such things and when they do they are subject to the 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. 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. I feel the same sense of outrage. 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. I would not amend that great shield of democracy to hammer a few miscreants. The flag will be flying proudly long after they have slunk away.

Finally, I shudder to think of the legal morass we will create trying to implement the body of law that will emerge from such an amendment. 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.

Sincerely,
General Colin Powell, USA (RET)



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LOCATION

445 North Michigan Avenue
 Chicago, Illinois 60611
 312 222 4860
www.FreedomMuseum.US

MUSEUM HOURS

General:

Wednesday – Monday
 10 a.m. – 6 p.m.
(subject to change)

Closed:

Tuesdays, Thanksgiving Day,
 Christmas Day and New Year's Day

Note:

The museum will have special hours from Memorial Day through Labor Day and November through December (please call for times).

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- First Division Museum at Cantigny
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A Burning Issue

The political turmoil of the 1960s—fueled by conflict over civil rights and the Vietnam War—created a charged atmosphere in which the American flag became a contested symbol.

When some burned the Stars and Stripes to protest government policies, others rushed to defend the flag from attack. State laws against flag desecration, in place since the early 1900s, were reinforced by federal statutes. In 1989, the Supreme Court ruled that flag burning is a constitutionally protected form of free speech. The flag controversy reignited, fueled by calls to amend the Constitution to protect the national symbol.



Protect the Flag

Protect Free Speech

1968

Congress passes the 1968 Federal Flag Desecration Law.

1970

In New York, a record shop owner is arrested for advertising American flag cigarette-rolling papers.

1984

In Dallas, Texas, Gregory Lee Johnson is convicted of burning a flag in protest during the Republican National Convention. Johnson is sentenced to one year in prison and fined \$2,000. His case is appealed to the U.S. Supreme Court.

1989

Four months after the Supreme Court decision, Congress passes the Federal Flag Protection Act of 1989 in an effort to re-criminalize burning. The act triggers the largest wave of flag burning in American history.

1967

During a demonstration against the Vietnam War in New York's Central Park, protesters burn an American flag along with their draft cards. Photographs of the incident inspire proposals for a federal law against flag burning.

1969

In *Street v. New York*, the U.S. Supreme Court overturns Sidney Street's 1966 conviction for flag desecration.

1979

Media images of anti-American demonstrators in Iran burning the U.S. flag revive the practice among some political groups as a means of protesting government policies.

1966

In Brooklyn, New York, black World War II veteran Sidney Street burns a 48-star flag to protest the shooting of civil rights activist James Meredith. He is arrested and convicted under an 1899 state law.

1970

In Texas, 19-year-old antiwar protester Gary Deeds receives the nation's harshest penalty for flag burning: four years in prison.

1989

In *Texas v. Johnson*, the U.S. Supreme Court overturns Gregory Lee Johnson's 1984 conviction for flag burning and strikes down all flag desecration laws, ruling that they violate the First Amendment right to free speech.

1990

In *U.S. v. Eichman*, the U.S. Supreme Court strikes down the Federal Flag Protection Act of 1989 as unconstitutional.

1995-2005

The flag desecration amendment is repeatedly introduced, debated, and defeated in Congress. Each time it fails to win the necessary two-thirds majority vote in either the House or the Senate.

2006

An amendment to the Constitution is defeated in the Senate after being passed in the House. The legislation is one vote shy of the required two-thirds majority.

