

## Is Flag Burning Protected Speech?

### **Purpose:**

It is important to understand that the First Amendment changes as our society evolves. While citizens may disagree about such controversial First Amendment issues as flag burning, their ability to take and defend a position is a critical element in preserving our freedoms. In this lesson students participate in a moot court activity based on the case of *Texas v. Johnson*. At the conclusion they will be able to explain what is meant by *symbolic speech*. They will also be able to take and defend a position on free speech issues.

### **Procedure:**

1. Remind students of the First Amendment cases they analyzed in previous lessons. Point out that the First Amendment is constantly changing through court interpretations developed in cases such as these.
2. Tell students that a continuing First Amendment controversy involves burning the American flag. Ask students to speculate about why burning the flag would be a First Amendment issue. Write the words *symbolic speech* on the board, explaining that actions such as burning the flag are known as symbolic speech. Review with students what a symbol is, using their familiarity with map symbols as a reference point. (A dictionary definition of *symbol* is "something that stands for or represents something else.") Symbolic speech is therefore an action that represents someone's thought or ideas.
3. Distribute the handout *Flag Burning and the First Amendment*, which describes the case, and go over it with students. Tell students that they will be enacting the Supreme Court hearing in the case. Read the following directions aloud to the class, noting such key points as the order and length of presentation on the board.

When the Supreme Court hears an appeal, each team of attorneys is given a chance to present its position. The petitioners, who are appealing the lower court decision, present their case first. In this case, the Dallas district attorney is the petitioner. The other party is called the respondent. Johnson and his attorneys are the respondents in this case. While the attorneys are making their presentation, the justices can interrupt to ask questions.

After hearing the case, the Court may take months to reach its decision. They read and reread briefs – written arguments prepared by the attorneys. The justices meet in private session in which they discuss their views on the case. They try to change each other's minds through this discussion and through writing memos and sending them to each other.

When the final vote has been taken, one justice is selected to write the court's opinion. Any other justice may write a concurring or dissenting opinion. A concurring opinion agrees with the Court's overall decision but may disagree with the reason behind it. A dissenting opinion disagrees with the decision.

4. Divide the class into three groups – the defense team, the prosecution team and the Supreme Court Justices. Give the groups the information sheets appropriate for their positions as well as the handout *Previous Court Cases*. Explain that they will have the rest of the class time to prepare their arguments or questions. Decisions on who will actually speak for Johnson's defense team and the Dallas district attorney should be delayed until the second day, to prevent the work from being done by only the students who will be speaking. When these decisions have been made, you may want to assign students who do not have active roles to be newspaper and television reporters.

5. Before the moot court begins, review the steps to be followed. Conduct the moot court. The justice should conduct deliberations in front of the class. Class members can therefore note what arguments seemed to be most persuasive.

6. Discuss the outcome with the class. The following questions can be used in the debriefing:

- What arguments did the attorney for Johnson present?
- What arguments did the Dallas district attorney present?
- What arguments were not presented at all?
- Which arguments seemed to influence the justices most?
- What was the decision? Do you think it was a good decision?

7. At this time, you may want to explain that the Supreme Court decided the case in 1989. By a 5 to 4 vote, the Court ruled that flag burning was protected by the First Amendment, as long as there was no danger of "rioting or other breach of peace." Justice Brennan said, "We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents." Many people, including such leaders as then President George H. W. Bush, were outraged by the decision. Said Bush, "flag-burning is wrong, dead wrong, and the flag of the United States is very, very special." Congress then passed a law making flag burning illegal. The Supreme Court struck down this law in 1990, again by a 5 to 4 vote. Periodically, a member of Congress will attempt to pass a constitutional amendment to ban flag burning but the proposal is consistently defeated.

8. Assign students to write brief (one-page) essays presenting and defending their position on the case.

**Enrichment/Extension**

1. If any students were assigned to act as reporters for the moot court, they could present a news broadcast on the case or write news articles and editorials.
2. Have students research the responses to the Supreme Court ruling in *Texas v. Johnson*. What remedies were proposed? What arguments were made for and against such actions? What subsequent decision on flag burning has the Court made? What has happened because of it? Who is supporting the proposed constitutional amendment? What are the arguments for and against it?

## **Flag Burning and the First Amendment**

**The time:** August 1984

**The place:** Dallas, Texas

**The event:** The Republican National Convention

Gregory Lee Johnson was the leader of a protest group that marched around downtown Dallas. Sometimes they would collapse on the ground. They said they were acting out the effects of a nuclear war.

Vandalism also occurred during the protest. Group members sprayed paint on buildings. They broke into a bank, where they tore up papers and turned over plants. Two plainclothes police officers in the group took no action.

In front of the Dallas City Hall, an American flag was taken from the flagpole. Johnson poured lighter fluid on the flag and set it on fire. Other group members stood in a circle around the flag, chanting. No violence occurred.

About 45 minutes later, uniformed police arrested Johnson. He was charged with violating a Texas law against desecrating (treating without respect) the flag.

A jury found Johnson guilty. He was sentenced to a year in jail, and he was fined \$2,000. Johnson appealed. The state court of appeals upheld the conviction. Johnson appealed again. This time, the Texas Court of Criminal Appeals reversed the decision. Then, the Dallas district attorney appealed on behalf of the state of Texas. The case went to the Supreme Court.

## Previous Court Cases

In deciding cases, courts must consider earlier cases on similar issues. Such earlier cases are called precedents. Below are three precedents related to *Texas v. Johnson*. Decide which cases support your position and which do not.

***United States v. O'Brien*** – To protest the war in Vietnam, David Paul O'Brien and three friends burned their draft cards on the steps of the South Boston Courthouse. A draft card was a paper indicating that you were registered to be called into the armed services. A crowd of people who had gathered on the steps attacked O'Brien and his friends. O'Brien was arrested. He was charged with violating a law that said mutilating a draft card was illegal. O'Brien said the law violated his freedom of speech.

*The Supreme Court ruled 8-1 that O'Brien's freedom of speech had not been violated. The Court said that a person could not simply say any activity was "speech." In addition, it said that the nation's need to maintain the armed forces was more important than free speech.*

***Street v. New York*** – In 1966, James Meredith, the first African-American student at Old Miss University, was shot. To protest, a New York man named Street burned a U. S. flag in an intersection. When a police officer asked Street if he had burned the flag. Street said, "Yes, that is my flag; I burned it. If they let that happen to Meredith, we don't need an American flag." Street was charged with violating a New York law that made it a crime to mutilate, deface or "cast contempt upon either by words or act" the flag. Street said the law violated his free speech rights.

*In a 5-4 vote, The Supreme Court agreed with Street. The Court said that though we might disagree with Street's opinion, his right to express his views was protected by the Constitution. It also said that the words were not "fighting words" likely to cause violence among the people who saw Street burning the flag. The justices who disagreed said, "Protest does not exonerate [allow] lawlessness."*

***Spence v. Washington*** – Spence, a college student in 1970, wanted to protest the war in Vietnam and the killing of students by National Guardsmen at Kent State University. He hung an American flag upside down from his apartment window. Over the flag he placed a peace symbol made from black tape. Spence was convicted of violating a Washington law that prohibited placing anything over a flag. Spence said he was using his freedom of speech. He also pointed out that the tape could be removed.

*In a 6-3 ruling, the Supreme Court agreed with Spence. It pointed out that the flag belonged to Spence and was displayed on his home. The Court also said Spence was clearly expressing an idea through his action and that the state could not demonstrate a clear reason for preventing the expression of this idea.*