



## **Flag-burning: Is it constitutional? A lesson on *Texas v. Johnson* (1989) for Flag Day**

**Course** | US History, US Government (AP or non-AP), Civics, Grades 11–12

**Context** | This lesson can be used during a unit on the First Amendment, the Supreme Court, or symbols of the United States.

**Length** | This lesson is designed for a 60-minute class period. Extension activities are included at the end of the lesson.

**Objective** | Students will be able to: understand the meaning of one central idea of the First Amendment (symbolic speech); cite textual evidence to analyze a primary source (Supreme Court opinion and dissent); become familiar with reading and comprehending a Supreme Court opinion and dissent; evaluate two Supreme Court Justices' differing points of view on the same historical event or issue by assessing their claims, reasoning, and evidence; assess different arguments about the meaning and importance of the American flag as a national symbol.

**Common Core State Standards Addressed** | Literacy in History/Social Studies, Grades 11–12:

- CCSS.ELA-Literacy.RH.11-12.1 Cite specific textual evidence to support analysis of primary and secondary sources, connecting insights gained from specific details to an understanding of the text as a whole.
- CCSS.ELA-Literacy.RH.11-12.2 Determine the central ideas or information of a primary or secondary source; provide an accurate summary that makes clear the relationships among the key details and ideas.
- CCSS.ELA-Literacy.RH.11-12.5 Analyze in detail how a complex primary source is structured, including how key sentences, paragraphs, and larger portions of the text contribute to the whole.
- CCSS.ELA-Literacy.RH.11-12.6 Evaluate authors' differing points of view on the same historical event or issue by assessing the authors' claims, reasoning, and evidence.

**Materials Included** | Copies of Brennan's opinion (PDF) and Rehnquist's dissent for each student (PDF); blank organizational chart (PDF)

### **Teacher Background Information**

#### **The Origins and Traditions of Flag Day**

**June 14, 1777:** While finalizing the draft of the Articles of Confederation, the Second Continental Congress passed a resolution “That the flag of the thirteen United States be thirteen stripes, alternate red and white: that the union be thirteen stars, white in a blue field, representing a new constellation.”

Many organizations and cities celebrated Flag Day long before it was an official holiday. Such celebrations rose in popularity shortly after the Civil War, and by the 1890s were common in cities across America. Indeed, it is in part due to their popularity that it is so difficult to single out one celebration as the first instance of Flag Day.

One of the earliest claims, though, comes from a celebration held in Hartford, Connecticut in the summer of 1861. Charles Dudley Warner, the editor of the *Hartford Evening Press*, urged the city’s citizens to celebrate “a day of feasting and jollity. And let the great feature of it be a general display of American flags.” The flag, he continued, “is our dearest symbol of nationality . . . to keep it full high advanced is our highest pride; to strike at it is to arouse all the pride of the nation to defend it.”

Schools across the nation also began to hold Flag Day programs in the 1860s in order to introduce immigrant children to American symbols, a practice that spread to their own communities.

**June 14, 1877:** Boston held a celebration in honor of the 100th anniversary of Congress’s first flag resolution. At the celebration, held at the Old South Meeting House—where the Boston Tea Party had begun—Boston Mayor Frederick O. Prince presided over an unveiling of the original Star-Spangled Banner Francis Scott Key had seen flying over Fort McHenry; citizens then sang the words to Key’s ode to the flag.

A few years later, a young school teacher in Waubeka, Wisconsin by the name of Bernard J. Cigrand began advocating for a nationwide celebration of the flag. In 1885, when he was 19 years old, Cigrand asked his students at the one-room schoolhouse he taught at to write essays on what the American flag meant to them. The following year, Cigrand himself took to the papers, writing in a Chicago newspaper about the need for Flag Day. Though he soon left teaching in order to become a dentist, Cigrand wrote many more articles and gave hundreds of speeches advocating for a holiday to honor the flag.

**June 14, 1889:** Professor George Bolch, the principal of a free kindergarten for poor children in New York City, organized ceremonies at his school to mark the anniversary of the 1777 resolution. Purportedly, this event drew attention from the New York Department of Education, prompting the state legislature to pass a law that public schools should hold similar celebrations for Lincoln’s birthday, Washington’s birthday, Memorial Day, and Flag Day.

Another tale of Flag Day’s origins comes from Pennsylvania, where Elizabeth Duane Gillespie, president of the Society of Colonial Dames and direct descendant of Benjamin Franklin, tried to get the city of Philadelphia to name June 14 as Flag Day in 1893. Eventually, in 1937, Pennsylvania did establish Flag Day as a legal holiday. Today, it remains the only state to officially celebrate Flag Day as a state holiday.

**Mid-1890s:** Flag Day had become a popular event. Governors issued proclamations supporting the celebration of Flag Day in their jurisdictions. Veterans groups and schools were among the first to embrace the holiday as an opportunity to promote patriotism.

**1916:** President Woodrow Wilson issued a presidential proclamation that officially established June 14 as Flag Day to commemorate the 1777 resolution. Nearly 140 years had passed since Congress passed the flag resolution, and the flag had changed 24 times.

It has . . . seemed to me fitting that I should call your attention to the approach of the anniversary of the day upon which the flag of the United States was adopted by the Congress . . . and to suggest to you that it should this year and in the years to come be given special significance as a day of renewal and reminder, a day upon which we should direct our minds with a special desire of renewal to thoughts of the ideals and principles of which we have sought to make our great Government the embodiment.

**1949:** Congress formalized Wilson’s wish, passing legislation that officially requests the president to issue a proclamation each year “calling on United States Government officials to display the flag of the United States on all Government buildings on Flag Day; and urging the people of the United States to observe Flag Day as the anniversary of the adoption on June 14, 1777, by the Continental Congress of the Stars and Stripes as the official flag of the United States.”

Flag Day remained popular well into the 20th century, especially during the national crises of World Wars I and II and the Cold War. In 1966, Congress even called upon the president to issue a proclamation declaring the week of Flag Day to be National Flag Week.

### **Background Information on *Texas v. Johnson* (1989)**

In this famous US Supreme Court flag-burning case of 1989, a split court (5–4) held that **burning an American flag as political protest is a form of symbolic speech protected by the First Amendment.**

Five years earlier, Gregory Lee Johnson, a Communist activist, had burned a flag in front of the Dallas City Hall as a protest against Reagan administration policies. Johnson was tried and convicted under a Texas law outlawing flag desecration. The Supreme Court overturned the conviction, and in so doing, invalidated similar laws in force in 48 of the 50 states.

Justice William Brennan (1906–97) delivered the opinion of the court, emphasizing the supremacy of freedom of expression. In one of his most famous dissents, Chief Justice William Rehnquist (1924–2005) offered a passionate defense of the law, emphasizing the unique meaning of the flag.

The Supreme Court’s decision provoked immediate public controversy. The US Congress passed a statute, the 1989 Flag Protection Act, making it a federal crime to desecrate the flag. That law was struck down by the same five-person majority of justices in *United States v. Eichman* (in an opinion also written by Justice Brennan).

## **Class Activity**

**Student Preparation** | Give half of the students Brennan’s decision on *Texas v. Johnson*, and give the other half Rehnquist’s dissent. Ask them to read their source for homework and to try and understand the content of what their justice is saying. Tell the students that they will be analyzing these documents in class the next day.

**Warm-up (5 minutes)** | Students will be broken into groups of four. Each group should have two students who read Brennan’s opinion for homework, and two students who read Rehnquist’s dissent.

Ask students to think of as many symbols of America as they can in a couple minutes.

Compile the list of American symbols on the board. Ask students to explain why they represent America, and how they learned of these symbols? Did they see them in classrooms, were they taught about them, or did they pick them up by living in America?

If there are students from other countries, ask them if the symbols they believe represent America differ from those of the students who grew up in America.

Discuss as a class what kind of impact a symbol can have on a country’s identity.

Inform students that they will be learning about an important Supreme Court case that centers on the most recognizable American symbol, the American flag.

**Introducing Flag Day and *Texas v. Johnson* (10 minutes)** | Using the Teacher Background Information above, introduce students to the history of Flag Day and the background of *Texas v. Johnson*. Choose the format that works best for your students (PowerPoint, reading assignment, worksheet, etc.).

**Small Group Work (20 minutes)** | Working in the same groups of four, each student should work with his pair (the person who read the same source) to complete the blank chart. The chart asks the students to organize the content in the following way:

- Majority or Minority Opinion
- Significant Words, Symbols, Phrases
- Three Main Arguments
- Sum Up the Author’s Argument in 2-3 Sentences

After completing the chart, each pair should teach the other pair about their source. As the Brennan group teaches the Rehnquist group about Brennan’s opinion, the Rehnquist group should complete the Brennan part of their chart.

**Class Discussion (20 minutes)** | Justice Brennan treats the flag as one of a number of “designated symbols,” whose use in expression the government is improperly trying to regulate. However, Chief Justice Rehnquist denies that the flag is a merely “designated” symbol, but rather “the visible symbol

embodying our Nation,” for which our history has produced “uniquely deep awe and respect.” **Ask the students: Whose view seems to you more correct? Why? Defend your claim by referencing the text.**

Justice Brennan compares Johnson’s burning of the flag with the British bombardment of the Star-Spangled Banner at Fort McHenry, and claims that it is the flag’s and the nation’s resilience to such attacks that the court is upholding. **Ask the students: What do you think of this argument? Is he right in suggesting that “the flag’s cherished place in our community will be strengthened, not weakened” by the court’s opinion?**

Chief Justice Rehnquist says that the flag “is not simply another ‘idea’ or ‘point of view’ competing for recognition in the marketplace of ideas,” but a symbol that “millions and millions of Americans regard . . . with an almost mystical reverence,” regardless of their personal beliefs. And he insists that flag-burning is not so much political speech as it is an “inarticulate grunt or roar that . . . is most likely to be indulged in not to express any particular idea, but to antagonize others.” **Ask the students: What do you think of these arguments? Is Rehnquist right when he claims that it is “one of the high purposes of a democratic society . . . to legislate against conduct that is regarded as evil and profoundly offensive to the majority of people—whether it is murder, embezzlement, pollution, or flag-burning”? Why might flag-burning be regarded as equivalent to the other offensive evils he mentions?**

To wrap up the discussion, ask students: **After learning about this case, what do you think the definition of symbolic speech is? What other symbols, if any, might fall under this category?**

**Wrap-up (5 minutes)** | Instruct students to spend five minutes answering one of the following questions: **(1) If you were a Supreme Court Justice, how would you have decided this case? Why? (2) Leaving the legal question aside, how *should* we treat the American flag? Are there moral limits—limits of decent conduct—to what we may do with and to the flag?**

**Extension Activities** | Read about another First Amendment Supreme Court case and in a T-chart, compare and contrast that decision to the decision in *Texas v. Johnson*.

Find another opinion written by Brennan or Rehnquist and compare the writing style, tone, and mechanics. What makes for a convincing Supreme Court opinion?

Research, write, and record a news story where you report on the ways in which different communities in America celebrate Flag Day.

Brainstorm ways in which you could engage your community in celebrating Flag Day.

Research symbolic speech laws in your state. Are there laws against desecrating the state flag? Do they differ from laws concerning the American flag?

<b>Source:</b>	<b>Justice Brennan's Decision</b>	<b>Chief Justice Rehnquist's Dissent</b>
<b>Majority or Minority Opinion:</b>		
<b>Significant Words, Symbols, Phrases:</b>		
<b>Three Main Arguments:</b>		
<b>Sum Up the Author's Argument in 2-3 Sentences:</b>		