Constitution Day: Texas v Johnson Name\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_
Foundations of Government
Mr. Faulhaber Class Period\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**The First Amendment says:**  Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people to peaceably assemble and to petition the government for a redress of grievances.

**Is all speech free?**

The freedom of speech clause of the First Amendment guarantees the right to express information and ideas. On its most basic level, it means you can express an opinion without fear of censorship by the government, even if that opinion is an unpopular one. It protects all forms of communication: speeches, books, art, newspapers, telecommunications, and other media.

The First Amendment does not mean you can say anything you want, wherever you want, or whenever you want. For instance, fighting words – words that cause distress or incite violence – are not protected. In addition, obscene expressions are not protected by the First Amendment. If you tell a lie about someone who then sues you because you damaged their reputation, you will not be able to claim that the First Amendment protects you.

**What is symbolic speech?**

Sometimes speech is spoken or written. Sometimes speech is symbolic or an action. Symbolic speech is conduct that expresses an idea. Although speech is commonly thought of as verbal expression, we are all aware of nonverbal communication. Sit-ins, flag waving, demonstrations, and wearing . . . protest buttons are examples of symbolic speech. While most forms of conduct could be said to express ideas in some way, only some conduct is protected as symbolic speech. In analyzing such cases, the courts ask whether the speaker intended to convey a particular message and whether it is likely that the message was understood by those who viewed it. To convince a court that symbolic conduct should be punished and not protected as speech, the government must show it has an important reason. However, the reason cannot be that the government disapproves of the message conveyed by the symbolic conduct.

So, just as there are limitations on the extent to which "free speech" applies to the spoken word, there are restrictions on the actions that people seek to have protected as symbolic speech.

**Case Study: Texas v. Johnson**

Gregory Lee Johnson participated in a political demonstration during the Republican National Convention in Dallas, Texas, in 1984. The purpose of the demonstration was to protest policies of the Reagan Administration and of certain corporations based in Dallas. Demonstrators marched through the streets, chanted slogans, and held protests outside the offices of several corporations. At one point, another demonstrator handed Johnson an American flag.

When the demonstrators reached Dallas City Hall, Johnson doused the flag with kerosene and set it on fire. During the burning of the flag, the demonstrators shouted, "America, the red, white, and blue, we spit on you." No one was hurt or threatened with injury, but some witnesses to the flag burning said they were seriously offended. One witness picked up the flag's charred remains and buried them in his backyard.

Johnson was charged with the desecration of a venerated object, in violation of the Texas Penal Code. He was convicted, sentenced to one year in prison, and fined $2,000. He appealed his conviction to the Court of Appeals for the Fifth District of Texas, which let his conviction stand. He then appealed to the Texas Court of Criminal Appeals, which is the highest court in Texas that hears criminal cases. That court overturned his conviction saying that the State, consistent with the First Amendment, could not punish Johnson for burning the flag in these circumstances.

The court first found that Johnson's burning of the flag was expressive conduct protected by the First Amendment. Therefore in order for a state to criminalize or regulate such conduct it would have to serve a compelling state interest that would outweigh the protection of the First Amendment. The court concluded that criminally sanctioning flag desecration in order to preserve the flag as a symbol of national unity was not a compelling enough interest to survive the constitutional challenge. It also held that while preventing breaches of the peace qualified as a compelling state interest the statute was not drawn narrowly enough to only punish those flag burnings that would likely result in a serious disturbance. Further, it stressed that another Texas statute prohibited breaches of the peace and could serve the same purpose of preventing disturbances without punishing this flag desecration.

The court said, "Recognizing that the right to differ is the centerpiece of our First Amendment freedoms . . . a government cannot mandate by fiat a feeling of unity in its citizens. Therefore that very same government cannot carve out a symbol of unity and prescribe a set of approved messages to be associated with that symbol. . . . " The court also concluded that the flag burning in this case did not cause or threaten to cause a breach of the peace.

The State of Texas filed a petition for a writ of certiorari and, in 1988, the Supreme Court of the United States agreed to hear the case. In 1989, the Court handed down its decision.

Questions to Consider:

1. Based on your reading on page 1 background on free speech and this case, what argument(s) could you make on behalf of the Texas law? Do you think that flag burning threatens to cause violence and therefore should be against the law?

2. Based on your reading on page 1 background on free speech and this case, what argument(s) could you make that the First Amendment should protect flag burning? Do you think Johnson’s burning of the flag constituted "symbolic speech?"

3. Read page 61 “Opinion A” and summarize what you believe the Supreme Court Justice is saying. Does he appear to be on the side of Texas or Johnson? Explain.

4. Read page 61 “Opinion B” and summarize what you believe the Supreme Court Justice is Saying. Do he appear to be on the side of Texas or Johnson? Explain.

5. How should the Supreme Court of the United States decide this case? Why?

6. What are some other examples of symbolic speech cases?