

## **Texas v. Johnson (1989)** **Key Excerpts from the Majority Opinion**

**The case was decided 5 to 4.**

**Justice Brennan delivered the opinion of the Court.**

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. While we have rejected "the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea," . . . we have acknowledged that conduct may be "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments," . . .

We have not automatically concluded, however, that any action taken with respect to our flag is expressive. Instead, in characterizing such action for First Amendment purposes, we have considered the context in which it occurred.

. . . Johnson burned an American flag as part—indeed, as the culmination—of a political demonstration that coincided with the convening of the Republican Party and its renomination of Ronald Reagan for President. The expressive, overtly political nature of this conduct was both intentional and overwhelmingly apparent. . . .

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. . . .

It remains to consider whether the State's interest in preserving the flag as a symbol of nationhood and national unity justifies Johnson's conviction.

. . . Johnson was not, we add, prosecuted for the expression of just any idea; he was prosecuted for his expression of dissatisfaction with the policies of this country, expression situated at the core of our First Amendment values. . . .

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. . . .

. . . To conclude that the government may permit designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernible or defensible boundaries. Could the government, on this theory, prohibit the burning of state flags? Of copies of the Presidential seal? Of the Constitution? In evaluating these choices under the First Amendment, how would we decide which symbols were sufficiently special to warrant this unique status? To do so, we would be forced to consult our own political preferences, and impose them on the citizenry, in the very way that the First Amendment forbids us to do. . . .

There is, moreover, no indication—either in the text of the Constitution or in our cases interpreting it—that a separate juridical category exists for the American flag alone . . . It is not the State's ends, but its means, to which we object. It cannot be gainsaid that there is a special place reserved for the flag in this Nation, and thus we do not doubt that the government has a legitimate interest in making efforts to "preserv[e] the national flag as an unalloyed symbol of our country." . . . To say that the government has an interest in encouraging proper treatment of the flag, however, is not to say that it may criminally punish a person for burning a flag as a means of political protest.

We are tempted to say . . . 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 . . . 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.

Johnson was convicted for engaging in expressive conduct. The State's interest in preventing breaches of the peace does not support his conviction because Johnson's conduct did not threaten to disturb the peace. Nor does the State's interest in preserving the flag as a symbol of nationhood and national unity justify his criminal conviction for engaging in political expression. The judgment of the Texas Court of Criminal Appeals is therefore Affirmed.



5. Why does the Court say that the flag's position as a symbol will be strengthened, not weakened, by their decision in this case?

6. How does the Court recommend that supporters of the flag respond to those who desecrate it?

## **Texas v. Johnson (1989)**

### **Key Excerpts from the Dissenting Opinion**

**The case was decided 5 to 4.**

**Chief Justice Rehnquist wrote the dissenting opinion.**

. . . For more than 200 years, the American flag has occupied a unique position as the symbol of our Nation, a uniqueness that justifies a governmental prohibition against flag burning in the way respondent Johnson did here.

The American flag . . . throughout more than 200 years of our history, has come to be the visible symbol embodying our Nation. It does not represent the views of any particular political party, and it does not represent any particular political philosophy. The flag is not simply another "idea" or "point of view" competing for recognition in the marketplace of ideas. Millions and millions of Americans regard it with an almost mystical reverence regardless of what sort of social, political, or philosophical beliefs they may have. I cannot agree that the First Amendment invalidates the Act of Congress, and the laws of 48 of the 50 States, which make criminal the public burning of the flag.

The result of the Texas statute is obviously to deny one in Johnson's frame of mind one of many means of "symbolic speech." Far from being a case of "one picture being worth a thousand words," flag burning is the equivalent of an inarticulate grunt or roar that, it seems fair to say, is most likely to be indulged in not to express any particular idea, but to antagonize others. . . . The Texas statute deprived Johnson of only one rather inarticulate symbolic form of protest—a form of protest that was profoundly offensive to many—and left him with a full panoply of other symbols and every conceivable form of verbal expression to express his deep disapproval of national policy. Thus, in no way can it be said that Texas is punishing him because his hearers—or any other group of people—were profoundly opposed to the message that he sought to convey. Such opposition is no proper basis for restricting speech or expression under the First Amendment. It was Johnson's use of this particular symbol, and not the idea that he sought to convey by it or by his many other expressions, for which he was punished.

. . . Uncritical extension of constitutional protection to the burning of the flag risks the frustration of the very purpose for which organized governments are instituted. The Court decides that the American flag is just another symbol, about which not only must opinions pro and con be tolerated, but for which the most minimal public respect may not be enjoined. The government may conscript men into the Armed Forces where they must fight and perhaps die for the flag, but the government may not prohibit the public burning of the banner under which they fight. I would uphold the Texas statute as applied in this case.

## ***Texas v. Johnson* (1989)**

### **Key Excerpts from the Dissenting Opinion**

#### **Questions to Consider:**

1. Chief Justice Rehnquist agrees with the majority that expression may not be punished because of the negative reaction of people who observe that expression. What does he say is the real justification for anti-flag burning laws?
2. In Chief Justice Rehnquist's opinion, how was the unique status that the flag enjoys established?
3. What point is Chief Justice Rehnquist trying to make about flag burning when he mentions that the government may send young men into battle to die for the flag, but may not prohibit the public burning of the flag? Do you agree or disagree with this argument? Explain.

## **Texas v. Johnson (1989)**

### **What Is Symbolic Speech? When Is It Protected?**

*(Note to teachers: When you assign this activity, you may want to invite a lawyer or law student to help with discussion of these cases. For recommendations on using community resources, visit the Landmark Cases home page ([www.landmarkcases.org](http://www.landmarkcases.org)) and click on Community Resources.)*

#### **The First Amendment**

*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.*

Almost everyone knows that the First Amendment contains the right to freedom of speech. What does this mean? 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. However, it does not mean you can say anything you want, whenever you want. For instance, slander—speech that harms a person's reputation—is not protected. In addition, obscene expressions are not protected by the First Amendment.

While most people understand these basic limitations on the right to free speech, understanding what constitutes "free speech" is complicated. For instance, some people argue that books, art, music, and other genres are also forms of speech because they, too, are expressive in nature. Over the years, the Supreme Court of the United States has debated what limitations should apply to these genres. The Court has also debated the claims made by others that actions that express an opinion are also protected. Often, these actions are referred to as "symbolic speech," which is below:

"Expression may be symbolic, as well as verbal. 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.

In order 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" (Arbetman, 442-3)

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.

Examine the actions below. Based on the information you have just read, determine if each action listed is a form of constitutionally protected "symbolic speech." In the last column, provide a brief rationale for your response.

<b>Action</b>	Is the action a form of constitutionally protected "symbolic speech"?		<b>Rationale</b>
	<b>YES</b>	<b>NO</b>	
In order to protest against a former employer, an individual joins a picket line. State law says picketing is illegal. The individual is arrested and fined \$100. <i>Read the case abstract and ruling at <a href="http://oyez.itcs.northwestern.edu/oyez/resource/case/389/">http://oyez.itcs.northwestern.edu/oyez/resource/case/389/</a>.</i>			
An individual burns a draft card to express opposition to the war. Federal law says that burning draft cards is a crime. <i>Read the case abstract and ruling at <a href="http://oyez.itcs.northwestern.edu/oyez/resource/case/645/">http://oyez.itcs.northwestern.edu/oyez/resource/case/645/</a>.</i>			
A department store employee wears a jacket that says "F--- the draft. Stop the War." The individual is convicted for violating a law that forbids "maliciously and willfully disturb[ing] the peace and quiet of any neighborhood or person [by] offensive conduct." The individual is arrested and sentenced to 30 days in jail. <i>Read the case abstract and ruling at <a href="http://oyez.itcs.northwestern.edu/oyez/resource/case/77/">http://oyez.itcs.northwestern.edu/oyez/resource/case/77/</a>.</i>			
An organization applies for a permit to hold a demonstration on the National Mall. Members plan to erect "tent cities" in order to demonstrate the plight of the homeless. The permit was denied on the grounds that camping is forbidden on the Mall. <i>Read the case abstract and ruling at <a href="http://oyez.itcs.northwestern.edu/oyez/resource/case/74/">http://oyez.itcs.northwestern.edu/oyez/resource/case/74/</a>.</i>			
New Hampshire's state motto, "Live Free or Die" appears on license plates. An individual covers "or die" on the grounds that it goes against his religious and political beliefs. He is convicted for violating a state law, fined, and sentenced to jail time. <i>Read the case abstract and ruling at <a href="http://oyez.itcs.northwestern.edu/oyez/resource/case/453/">http://oyez.itcs.northwestern.edu/oyez/resource/case/453/</a>.</i>			



