

## ***Texas v. Johnson* / Summary of Decision**

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In a 5-4 decision, the U.S. Supreme Court ruled for Johnson. Justice Brennan wrote the opinion for the majority, ruling that Johnson's act of burning the American flag was protected by the First Amendment because it was expressive conduct. Chief Justice Rehnquist and Justices Stevens, White, and O'Connor dissented.

The justices in the majority first considered whether expressive conduct was protected by the First Amendment, which only explicitly guarantees "freedom of speech." Noting that the Court has "long recognized that [First Amendment] protection does not end at the spoken or written word," they added that conduct may be "sufficiently imbued with elements of communication to fall within the scope of the First and 14<sup>th</sup> Amendments." Conduct is sufficiently expressive when "an intent to convey a particularized message was present, and the likelihood was great that the message would be understood by those who viewed it." Given the context of political protest in which Johnson's conduct occurred, the justices concluded that it was sufficiently expressive to invoke First Amendment protection.

The Court acknowledged that while "the government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word," it still cannot prohibit certain conduct just because it disapproves of the ideas expressed. The justices declared that "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." The government must have reasons for regulating the conduct that are unrelated to the popularity of the ideas it expresses.

The Court considered two central arguments asserted by Texas. The first was that the government can prevent expressive speech to prevent breaches of the peace. According to Supreme Court precedent, speech can be prohibited when it would incite "imminent lawless action." The justices decided that the Texas law prohibiting flag burning did not limit its prohibition to situations in which it would incite "imminent lawless action," and no such violent disturbance of the peace occurred when Johnson burned the flag. This reason was, therefore, not sufficient.

Second, Texas argued that the reason for prohibiting flag burning was to preserve the flag as a symbol of national unity. The Court decided, however, that the Court had never "recognized an exception to [the First Amendment] even where our flag has been involved." They acknowledged that while the government does have an interest in encouraging its citizens to treat the flag with respect, this interest did not justify the criminal prosecution of a man who burned the flag as part of a political protest.

A better way to encourage respect for the American flag would be to persuade people to recognize its unique symbolic value. The justices urged that there is "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 . . . according its remains a respectful burial." The Court concluded that "we do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents."

In his dissenting opinion, Chief Justice Rehnquist acknowledged the special place the flag holds as the "visible symbol embodying our nation," noting that "millions and millions of Americans regard it with an almost mystical reverence." Because of its unique position, Rehnquist concluded that it was constitutionally permissible to prohibit burning the flag as a means of symbolic expression. He argued that Texas' prohibition on flag burning did not regulate the content of Johnson's message, but only removed one of the ways in which this message could be expressed. Johnson was left with "a full panoply of other symbols and every conceivable form of verbal expression" to convey his message. A ban on flag burning is thus consistent with the First Amendment, the chief justice concluded, because it is not directed at suppressing particular ideas, but rather seeks only to protect the special significance of the flag as the symbol of the United States.