

## Applying Precedents Activity—Answer Key

**Comparison case:** *Texas v. Johnson* (1989)

**Precedent cases:** *United States v. O'Brien* (1968) and *Spence v. Washington* (1974)

**What you need to know before you begin:** When the Supreme Court decides a case, it clarifies the law and serves as guidance for how future cases should be decided. Before the Supreme Court makes a decision, it always looks to precedents—past Supreme Court decisions about the same topic—to help make the decision. A principle called *stare decisis* (literally “let the decision stand”) requires that the precedent be followed. If the case being decided is legally identical to a past decision, then the precedent is considered binding and the Supreme Court must decide the matter the same way. However, cases that make it to the Supreme Court are typically not completely identical to past cases, and justices must consider the similarities and differences when deciding a case.

The process of comparing past decisions to new cases is called applying precedent. Lawyers often argue for their side by showing how previous decisions would support the Supreme Court deciding in their favor. This might mean showing how a previous decision that supports their side is analogous (similar) to the case at hand. It can also involve showing that a previous decision that does not support their side is distinguishable (different) from the case they are arguing.

**How it's done:** You have been provided with information about three cases: **1)** the background, facts, issue, and constitutional amendments/state statute/precedents of a comparison case (*Texas v. Johnson*) and **2)** brief summaries of two precedent cases (*United States v. O'Brien* and *Spence v. Washington*), which can be found within the *Texas v. Johnson* case materials.

After reading about the cases, you will find evidence that *Texas v. Johnson* is **analogous** (similar) to the precedent case and evidence that the cases are **distinguished** (different) from each other. After considering both possibilities, you must decide whether the precedents are analogous enough to command the same outcome in the comparison case, or whether the comparison case is different enough to distinguish itself from the precedents, and, therefore, is not bound by their holdings.

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**Precedent case:** *United States v. O'Brien* (1968)

1. Using factual and legal similarities, show how *Texas v. Johnson* is **analogous** (similar) to the precedent case (*United States v. O'Brien*):

Student answers will vary but should include:

- In both cases the question of whether actions taken to protest policies of the government were “speech” and therefore protected by the First Amendment
- In both cases the person arrested was protesting the government by burning a symbol (flag and draft card)

- In both cases the demonstrators won in the court below and therefore were the respondents in the Supreme Court case.
2. Using factual and legal similarities, show how *Texas v. Johnson* is **distinguished** (different) from the precedent case (*United States v. O'Brien*) by pointing out factual and legal differences:

Student answers will vary but should include:

- In *Texas v. Johnson* the symbol being burned was symbolic (flag), whereas in *United States v. O'Brien* the symbol being burned was a government issued draft card with an official function.
  - In *Texas v. Johnson* the government's "compelling reason" for the law was to prevent violent reactions to the flag desecration, whereas in *United States v. O'Brien* the government's argument was that burning the draft cards would endanger national security by depleting the armed forces.
  - In *Texas v. Johnson* Johnson was convicted of breaking a state law and the constitutionality of the state law was in question, whereas in *United States v. O'Brien* O'Brien was convicted of breaking a federal law and the constitutionality of the federal law was in question.
3. We found that *Texas v. Johnson* is \_\_\_\_\_ (**analogous to** or **distinguished from**) the precedent case (*United States v. O'Brien*) because:

Student answers will vary but should be based on their answers to questions #1 and #2.

4. Based on the application of the precedent, *United States v. O'Brien*, how should *Texas v. Johnson* be decided?

\_\_\_\_\_ Decision for Johnson

\_\_\_\_\_ Decision for Texas

Student answers will vary but should be based on their answer to #3.

**Precedent case: *Spence v. Washington* (1974)**

5. Using factual and legal similarities, show how *Texas v. Johnson* is **analogous** (similar) to the precedent case (*Spence v. Washington*):

Student answers will vary but should include:

- In both cases the question of whether actions taken to protest policies of the government were "speech" and therefore protected by the First Amendment
- In both cases the person arrested was protesting the government by desecrating or dishonoring the American flag.
- Both cases dealt with constitutional challenges to state laws.

6. Using factual and legal similarities, show how *Texas v. Johnson* is **distinguished** (different) from the precedent case (*Spence v. Washington*) by pointing out factual and legal differences:

Student answers will vary but should include:

- In *Texas v. Johnson* the flag was burned, whereas in *Spence v. Washington* Spence put a peace symbol in tape over the flag.
- In *Texas v. Johnson* the demonstration was on public land, whereas in *Spence v. Washington* the demonstration was in Spence's apartment.
- In *Texas v. Johnson* Johnson won in the lower court and is the respondent at the Supreme Court, whereas in *Spence v. Washington* Spence lost at the lower court and is the petitioner at the Supreme Court.

7. We found that *Texas v. Johnson* is \_\_\_\_\_ (analogous to or distinguished from) the precedent case (*Spence v. Washington*) because:

Student answers will vary but should be based on their answers to questions #5 and #6.

8. Based on the application of the precedent, *Spence v. Washington*, how should *Texas v. Johnson* be decided?

\_\_\_\_\_ Decision for Johnson

\_\_\_\_\_ Decision for Texas

Student answers will vary but should be based on their answer to #7.

### Questions to Consider

9. Which precedent, *United States v. O'Brien* or *Spence v. Washington*, is more analogous (similar) to *Texas v. Johnson*?

Student answers will vary but should reflect their answers to questions #1 - #8.

10. How should the Supreme Court rule in *Texas v. Johnson*? Explain your reasoning.

Student answers will vary. In a 5-4 decision, the Court ruled in favor of Johnson.

After students complete the Applying Precedents Activity, consider sharing the [complete case summary of \*Texas v. Johnson\* \(1989\)](#), the [Summary of the Decision, Key Excerpts of the Majority Decision, and Key Excerpts from the Dissenting Opinion](#).

## Comparison Case: *Texas v. Johnson* (1989)

**Argued:** March 21, 1989

**Decided:** June 21, 1989

### Background

Before the founding of the United States, people under British rule did not have freedom of speech. The British government had many rules regarding what kind of material could be written, printed, or spoken. In 17<sup>th</sup> century England, judges created the principle of **constructive treason**. This idea stated that a person could be found guilty of treason, or the betrayal of one's own country, for owning written material that was critical of the king of England.

After the American Revolution, the founders wanted to make sure that the American government did not have the power over speech that Britain had. They believed that it was important for members of society to be able to discuss different ideas and viewpoints freely, even if they were critical of the government.

To protect this right, the founders included the freedom of speech in the First Amendment, which states that "Congress shall make no law... abridging the freedom of speech." This means that it is unconstitutional for Congress to pass laws that punish people for their speech. Later, the 14<sup>th</sup> Amendment made it unconstitutional for states to abridge the freedom of speech as well. The U.S. Supreme Court has interpreted the First Amendment to protect **symbolic speech**, which is the expression of ideas through actions instead of written or spoken words.

However, the Supreme Court has held that there are several kinds of speech that are not protected by the First Amendment. Unprotected speech includes **incitement** (using speech to cause violence), **defamation** (saying or writing false information about people with the intent to harm them), threats, and **obscene** material (something that is offensive or indecent, usually involving sexual content).

### Facts

During the Republican National Convention in 1984, Gregory Lee Johnson participated in a political demonstration on the steps of Dallas City Hall. The demonstrators were opposed to nuclear weapons. One demonstrator took an American flag from a flagpole and gave it to Johnson, who set fire to the flag. While the flag burned, protesters chanted "America, the red, white, and blue, we spit on you." There were no injuries or threats of injury during the demonstration, although some people who witnessed it said that they were very upset or offended by it.

Following the protest, Johnson was arrested, charged with, and convicted of violating a Texas law banning the **desecration** (damage or disrespect) of the American flag in a way that would seriously offend one or more persons observing the action. Johnson appealed, arguing that the Texas law violated the First Amendment. On appeal, the Texas Court of Criminal Appeals agreed with Johnson and overturned his conviction. The state of Texas asked the U.S. Supreme Court to hear the case, and it agreed.

**Issue**

Does a law banning the burning of the American flag violate the First Amendment?

**Constitutional Amendments, State Statute, and Supreme Court Precedents****– First Amendment to the U.S. Constitution**

“Congress shall make no law... abridging the freedom of speech...or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

**– 14<sup>th</sup> Amendment to the U.S. Constitution**

“No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law...”

This amendment prohibits state and local governments as well as Congress from abridging the protections guaranteed in the Bill of Rights, such as the freedom of speech.

**– Texas Penal Code Section 42.09: “Desecration of Venerated Object”**

“A person commits an offense if he intentionally or knowingly desecrates: (1) a public monument; (2) a place of worship or burial; or (3) a state or national flag. For purposes of this section, ‘desecrate’ means deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action. An offense under this section is a Class A misdemeanor.”

**– *United States v. O’Brien* (1968)**

To protest the Vietnam War, four men burned their draft cards at a public demonstration. They were convicted of breaking a federal law prohibiting the destruction or changing of a draft card. They challenged it, saying the law violated their freedom of speech. The Supreme Court ruled that the law was constitutional. The Court said that not every activity constitutes “speech.” Here, burning of draft cards was closer to conduct than speech. The government is free to make laws regulating conduct. In addition, it said that the nation’s need to maintain the armed forces was more important than free speech.

**– *Spence v. Washington* (1974)**

Harold Spence, a college student, wanted to protest the actions of American troops in Cambodia. He hung an American flag upside down from his apartment window. Over the flag, he placed a peace symbol made from black tape. At his trial for a criminal offense based on his treatment of the flag, Spence stated that his purpose was to associate the American flag with peace instead of war and violence. Spence was convicted of violating a Washington state law that prohibited placing anything over a flag. The U.S. Supreme Court ruled in favor of Spence. It stated that the flag was displayed in his own home, and that he was clearly expressing

an idea through his action. The state could not demonstrate a clear reason for preventing the expression of that idea.