

SUPREME COURT OF THE UNITED STATES

491 U.S. 397

Texas v. Johnson

CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 88-155 Argued: March 21, 1989 --- Decided: June 21, 1989

During the 1984 Republican National Convention, respondent Johnson participated in a political demonstration to protest the policies of the Reagan administration and some Dallas-based corporations. After a march through the city streets, Johnson burned an American flag while protesters chanted. No one was physically injured or threatened with injury, although several witnesses were seriously offended by the flag burning. Johnson was convicted of desecration of a venerated object in violation of a Texas statute, and a state court of appeals affirmed. However, the Texas Court of Criminal Appeals reversed, holding 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**. The court concluded that the State could not criminally sanction flag desecration in order to preserve the flag as a symbol of national unity. It also held that the statute did not meet the State's goal of preventing breaches of the peace, since it was not drawn narrowly enough to encompass only those flag burnings that would likely result in a serious disturbance, and since the flag burning in this case did not threaten such a reaction. Further, it stressed that another Texas statute prohibited breaches of the peace and could be used to prevent disturbances without punishing this flag desecration.

Held: Johnson's conviction for flag desecration is inconsistent with the **First Amendment**. Pp. 402-420.

(a) Under the circumstances, Johnson's burning of the flag constituted expressive conduct, permitting him to invoke the **First Amendment**. The State conceded that the conduct was expressive. Occurring as it did at the end of a demonstration coinciding with the Republican National Convention, the expressive, overtly political nature of the conduct was both intentional and overwhelmingly apparent. Pp. 402-406.

(b) Texas has not asserted an interest in support of Johnson's conviction that is unrelated to the suppression of expression and would therefore permit application of the test set forth in *United States v. O'Brien*, 391 U.S. 367, whereby an important governmental interest in regulating nonspeech can justify incidental limitations on **First Amendment** freedoms when speech and nonspeech elements are combined in the same course of conduct.

An interest in preventing breaches of the peace is not implicated on this record. Expression may not be prohibited [p398] on the basis that an audience that takes serious offense to the expression may disturb the peace, since the Government cannot assume that every expression of a provocative idea will incite a riot, but must look to the actual circumstances surrounding the expression. Johnson's expression of dissatisfaction with the Federal Government's policies also does not fall within the class of "fighting words" likely to be seen as a direct personal insult or an invitation to exchange fisticuffs. This Court's holding does not forbid a State to prevent "imminent lawless action" and, in fact, Texas has a law specifically prohibiting breaches of the peace. Texas' interest in preserving the flag as a symbol of nationhood and national unity is related to expression in this case and, thus, falls outside the *O'Brien* test. Pp. 406-410.

(c) The latter interest does not justify Johnson's conviction. The restriction on Johnson's political expression is content based, since the Texas statute is not aimed at protecting the physical integrity of the flag in all circumstances, but is designed to protect it from intentional and knowing abuse that causes serious offense to others. It is therefore subject to "the most exacting scrutiny." *Boos v. Barry*, 485 U.S. 312. The Government may not prohibit the verbal or nonverbal expression of an idea merely because society finds the idea offensive or disagreeable, even where our flag is involved. Nor may a State foster its own view of the flag by prohibiting expressive conduct relating to it, since the Government may not permit designated symbols to be used to communicate a limited set of messages. Moreover, this Court will not create an exception to these principles protected by the **First Amendment** for the American flag alone. Pp. 410-422.

755 S.W.2d 92, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which MARSHALL, BLACKMUN, SCALIA, and KENNEDY, JJ., joined. KENNEDY, J., filed a concurring opinion, *post*, p. 420. REHNQUIST, C.J., filed a dissenting opinion, in which WHITE and O'CONNOR, JJ., joined, *post*, p. 421. STEVENS, J., filed a dissenting opinion, *post*, p. 436.

BRENNAN, J., Opinion of the Court

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JUSTICE BRENNAN delivered the opinion of the Court.

After publicly burning an American flag as a means of political protest, Gregory Lee Johnson was convicted of desecrating a flag in violation of Texas law. This case presents the question whether his conviction is consistent with the **First Amendment**. We hold that it is not.

I

While the Republican National Convention was taking place in Dallas in 1984, respondent Johnson participated in a political demonstration dubbed the "Republican War Chest Tour." As explained in literature distributed by the demonstrators and in speeches made by them, the purpose of this event was to protest the policies of the Reagan administration and of certain Dallas-based corporations. The demonstrators marched through the Dallas streets, chanting political slogans and stopping at several corporate locations to stage "die-ins" intended to dramatize the consequences of nuclear war. On several occasions they spray-painted the walls of buildings and overturned potted plants, but Johnson himself took no part in such activities. He did, however, accept an American flag handed to him by a fellow protestor who had taken it from a flagpole outside one of the targeted buildings.

The demonstration ended in front of Dallas City Hall, where Johnson unfurled the American flag, doused it with kerosene, and set it on fire. While the flag burned, the protestors chanted, "America, the red, white, and blue, we spit on you." After the demonstrators dispersed, a witness to the flag burning collected the flag's remains and buried them in his backyard. No one was physically injured or threatened with injury, though several witnesses testified that they had been seriously offended by the flag burning. [p400]

Of the approximately 100 demonstrators, Johnson alone was charged with a crime. The only criminal offense with which he was charged was the desecration of a venerated object in violation of Tex. Penal Code Ann. § 42.09(a)(3) (1989).^[n1] After a trial, he was convicted, sentenced to one year in prison, and fined \$2,000. The Court of Appeals for the Fifth District of Texas at Dallas affirmed Johnson's conviction, 706 S.W.2d 120 (1986), but the Texas Court of Criminal Appeals reversed, 755 S.W.2d 92 (1988), holding that the State could not, consistent with the **First Amendment**, punish Johnson for burning the flag in these circumstances.

The Court of Criminal Appeals began by recognizing that Johnson's conduct was symbolic speech protected by the **First Amendment**:

Given the context of an organized demonstration, speeches, slogans, and the distribution of literature, anyone who observed appellant's act would have understood the message that appellant intended to convey. The act for which appellant was convicted was clearly "speech" contemplated by the **First Amendment**.

Id. at 95. To justify Johnson's conviction for engaging in symbolic speech, the State asserted two interests: preserving the flag as a symbol of national unity and preventing breaches of the peace. The Court of Criminal Appeals held that neither interest supported his conviction. [p401]

Acknowledging that this Court had not yet decided whether the Government may criminally sanction flag desecration in order to preserve the flag's symbolic value, the Texas court nevertheless concluded that our decision in *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), suggested that furthering this interest by curtailing speech was impermissible. "Recognizing that the right to differ is the centerpiece of our **First Amendment** freedoms," the court explained,

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 when it cannot mandate the status or feeling the symbol purports to represent.

755 S.W.2d at 97. Noting that the State had not shown that the flag was in "grave and immediate danger," *Barnette, supra*, at 639, of being stripped of its symbolic value, the Texas court also decided that the flag's special status was not endangered by Johnson's conduct. 755 S.W.2d at 97.

As to the State's goal of preventing breaches of the peace, the court concluded that the flag desecration statute was not drawn narrowly enough to encompass only those flag burnings that were likely to result in a serious disturbance of the peace. And in fact, the court

emphasized, the flag burning in this particular case did not threaten such a reaction. "'Serious offense' occurred," the court admitted,

but there was no breach of peace, nor does the record reflect that the situation was potentially explosive. One cannot equate "serious offense" with incitement to breach the peace.

Id. at 96. The court also stressed that another Texas statute, Tex. Penal Code Ann. § 42.01 (1989), prohibited breaches of the peace. Citing *Boos v. Barry*, 485 U.S. 312 (1988), the court decided that § 42.01 demonstrated Texas' ability to prevent disturbances of the peace without punishing this flag desecration. 755 S.W.2d at 96. [p402]

Because it reversed Johnson's conviction on the ground that § 42.09 was unconstitutional as applied to him, the state court did not address Johnson's argument that the statute was, on its face, unconstitutionally vague and overbroad. We granted certiorari, 488 U.S. 907 (1988), and now affirm.

II

Johnson was convicted of flag desecration for burning the flag, rather than for uttering insulting words.^[n2] This fact [p403] somewhat complicates our consideration of his conviction under the **First Amendment**. We must first determine whether Johnson's burning of the flag constituted expressive conduct, permitting him to invoke the **First Amendment** in challenging his conviction. *See, e.g., Spence v. Washington*, 418 U.S. 405, 409-411 (1974). If his conduct was expressive, we next decide whether the State's regulation is related to the suppression of free expression. *See, e.g., United States v. O'Brien*, 391 U.S. 367, 377 (1968); *Spence, supra*, at 414, n. 8. If the State's regulation is not related to expression, then the less stringent standard we announced in *United States v. O'Brien* for regulations of noncommunicative conduct controls. *See O'Brien, supra*, at 377. If it is, then we are outside of *O'Brien's* test, and we must ask whether this interest justifies Johnson's conviction under a more demanding standard.^[n3] *See Spence, supra*, at 411. A [p404] third possibility is that the State's asserted interest is simply not implicated on these facts, and, in that event, the interest drops out of the picture. *See* 418 U.S. at 414, n. 8.

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,

United States v. O'Brien, supra, at 376, we have acknowledged that conduct may be "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments," *Spence, supra*, at 409...

...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.

REHNQUIST, C.J., Dissenting Opinion

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CHIEF JUSTICE REHNQUIST, with whom JUSTICE WHITE and JUSTICE O'CONNOR join, dissenting.

In holding this Texas statute unconstitutional, the Court ignores Justice Holmes' familiar aphorism that "a page of history is worth a volume of logic." *New York Trust Co. v. [p422] Eisner*, 256 U.S. 345, 349 (1921). 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.

At the time of the American Revolution, the flag served to unify the Thirteen Colonies at home while obtaining recognition of national sovereignty abroad. Ralph Waldo Emerson's Concord Hymn describes the first skirmishes of the Revolutionary War in these lines:

By the rude bridge that arched the flood

Their flag to April's breeze unfurled,
Here once the embattled farmers stood
And fired the shot heard round the world.

During that time, there were many colonial and regimental flags, adorned with such symbols as pine trees, beavers, anchors, and rattlesnakes, bearing slogans such as "Liberty or Death," "Hope," "An Appeal to Heaven," and "Don't Tread on Me." The first distinctive flag of the Colonies was the "Grand Union Flag" -- with 13 stripes and a British flag in the left corner -- which was flown for the first time on January 2, 1776, by troops of the Continental Army around Boston. By June 14, 1777, after we declared our independence from England, the Continental Congress resolved:

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.

8 Journal of the Continental Congress 1774-1789, p. 464 (W. Ford ed.1907). One immediate result of the flag's adoption was that American vessels harassing British shipping sailed under an authorized national flag. Without such a flag, the British could treat captured seamen as pirates and hang them summarily; with a national flag, such seamen were treated as prisoners of war. [p423]

During the War of 1812, British naval forces sailed up Chesapeake Bay and marched overland to sack and burn the city of Washington. They then sailed up the Patapsco River to invest the city of Baltimore, but to do so it was first necessary to reduce Fort McHenry in Baltimore Harbor. Francis Scott Key, a Washington lawyer, had been granted permission by the British to board one of their warships to negotiate the release of an American who had been taken prisoner. That night, waiting anxiously on the British ship, Key watched the British fleet firing on Fort McHenry. Finally, at daybreak, he saw the fort's American flag still flying; the British attack had failed. Intensely moved, he began to scribble on the back of an envelope the poem that became our national anthem:

O say can you see by the dawn's early light

What so proudly we hail'd at the twilight's last
gleaming,

Whose broad stripes & bright stars through the
perilous fight

O'er the ramparts we watch'd, were so gallantly
streaming?

And the rocket's red glare, the bomb bursting in air,

Gave proof through the night that our flag was still
there,

O say does that star-spangled banner yet wave

O'er the land of the free & the home of the brave?

The American flag played a central role in our Nation's most tragic conflict, when the North fought against the South. The lowering of the American flag at Fort Sumter was viewed as the start of the war. G. Preble, *History of the Flag of the United States of America* 453 (1880). The Southern States, to formalize their separation from the Union, adopted the "Stars and Bars" of the Confederacy. The Union troops marched to the sound of "Yes We'll Rally Round The Flag Boys, We'll Rally Once Again." President Abraham Lincoln refused proposals to remove from the [p424] American flag the stars representing the rebel States, because he considered the conflict not a war between two nations, but an attack by 11 States against the National Government. *Id.* at 411. By war's end, the American flag again flew over "an indestructible union, composed of indestructible states." *Texas v. White*, 7 Wall. 700, 725 (1869)....

http://supct.law.cornell.edu/supct/html/historics/USSC_CR_0491_0397_ZS.html