



**Supreme Court of the United States**

**State of Texas v. Gregory Lee Johnson**

**By Christopher Ballesteros**

**IN THE TEXAS STATE COURT OF CRIMINAL APPEALS**

No. 491-397

**STATE OF TEXAS**

Prosecutor-Appellant

V.

**GREGORY LEE JOHNSON**

Defendant-Appellee

**PRIOR HISTORY:** Appeal from the Texas State Court of Criminal Appeals

**DISPOSITION:** Affirmed

*Note: This is a historical reenactment of the real US Supreme Court case of Texas v. Johnson, decided in 1989. You will be arguing and deciding this case as if it were being argued in front of the Court in 1989. Consequently, while you are strongly encouraged to read and consult the actual Supreme Court decision in Johnson - the opinions of which are included below - as well as decisions in subsequent cases, you may only directly cite as precedent cases that were decided prior to 1989.*

*It is important to note here that the actual decision of the Supreme Court in 1989 is irrelevant - the staffers serving as justices will not favor either side based on what actually happened in Texas v. Johnson. You as delegates have tabula rosa - a blank slate - to argue your side of the case.*

**BACKGROUND**

The events which set this case in motion began in 1984 during the Republican National Convention in Dallas, Texas. Gregory Lee Johnson, who was participating in a demonstration against the Reagan Administration and a series of local corporations, proceeded with a large crowd through the streets of Dal-

las towards city hall. Johnson and a number of other demonstrators also chanted and picketed outside of several office buildings. At some point, Johnson was handed a stolen American flag, which he carried to the terminus of the protest. Once at city hall, Johnson soaked the flag in kerosene and set it on fire while other protesters chanted anti-American slogans. A number of bystanders were extremely offended, although no one was injured. Johnson was apprehended by the Dallas Police Department and charged with violating a Texas Statute that forbids the desecration or burning of revered objects. At the time of Johnson's indictment, there were similar laws on the books in forty-seven other states.

### **Prior History**

The defendant was convicted based on the facts of the case in Dallas Criminal Court, and his conviction was affirmed by the Fifth Court of Appeals of Texas. The decision of that court was reversed by the Texas Court of Criminal Appeals in favor of the respondent, leading the State of Texas to petition the United States Supreme Court to hear the case. The Supreme Court granted judicial review, known as *certiorari*, and will hear the case.

### **Texas Penal Code 42.11**

This is the law at issue in the case. The fundamental question is whether or not the following law violates the First Amendment of the United States Constitution:

(a) A person commits an offense if the person intentionally or knowingly damages, defaces, mutilates, or burns the flag of the United States or the State of Texas. (b) In this section, "flag" means an emblem, banner, or other standard or a copy of an emblem, standard, or banner that is an official or commonly recognized depiction of the flag of the United States or of this state and is capable of being flown from a staff of any character or size. The term does not include a representation of a flag on a written or printed document, a periodical, stationery, a painting or photograph, or an article of clothing or jewelry. (c) It is an exception to the application of this section that the act that would otherwise constitute an offense is done in conformity with statutes of the United States or of this state relating to the proper disposal of damaged flags. (d) An offense under this section is a Class A misdemeanor.

As mentioned earlier, there were similar statutes in forty-seven other states. However, since the United States Constitution has jurisdiction over the entire country, all forty-eight state statutes will be invalidated if the Supreme Court overturns the Texas statute. As delegates, you will be responsible for arguing on behalf of two major competing interests - the protection of the First Amendment and the importance/symbolism of the American Flag.

### **First Amendment to the United States Constitution**

The First Amendment is one of the most widely invoked and broadly applicable portions of the US Constitution. There are a number of important precedents involving the First Amendment that will be critical in formulating your arguments. The text of the First Amendment is as follows:

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 peaceably to assemble, and to petition the Government for a redress of grievances (emphasis added).

Surprisingly, the Supreme Court did not hear any cases regarding the free speech clause of the Constitution until well into the 20th century. Much of this results from the first phrase in the Amendment: "*Congress shall make no law...*" (emphasis added). Because of this phrase, the Amendment was understood through most of the country's history to apply only to the federal government - meaning the states were free to abridge the freedom of speech if they so chose. However, beginning in the middle of the 20<sup>th</sup> century, the Supreme Court began "incorporating" the Bill of Rights and causing rights such as those guaranteed in the First Amendment to become applicable against state governments.

Because most laws restricting speech were state laws, the Court's late adoption of the incorporation doctrine, combined with the ideological makeup of the Supreme Court, lead to a Court that, at least during the first half of the 1900s, held very few statutes to be unconstitutional on the basis of free speech. In the second half of the century, however, particularly under an ideologically liberal Supreme Court led by Chief Justice Earl Warren, free speech protections were dramatically

expanded into the broad protections that exist today.

### **Expressive Content and *United States v. O'Brien***

Many Supreme Court decisions have expanded the definition of free speech to include some non-verbal acts, known legally as "expressive content." Expressive content often encompasses acts that do not involve "speech" or speaking per se but still contain an element of expression that justifies their First Amendment protections. For example, in the cases of *Stromberg v. California* and *Tinker v. Des Moines Independent Community School District*, the Court held that politically-motivated displays constituted free speech.

However, perhaps the clearest example of expressive content jurisprudence was the 1968 decision in *United States v. O'Brien*. *O'Brien* was a Vietnam War-era case that centered around a law passed by Congress which prevented any male citizen from "knowingly destroy[ing]" his draft card, as the draft card carried important information related to the war and the draft. David Paul O'Brien, the defendant, burned his draft card as part of a public protest against the Vietnam War. O'Brien was convicted based on the facts of the case but eventually appealed the case to the Supreme Court, arguing that the law was an unconstitutional violation of his First Amendment rights.

In a 7-1 decision, the Supreme Court upheld O'Brien's conviction. Chief Justice Warren, writing for the majority, held that in cases such as this one, which combine "speech" and "nonspeech" elements, any governmental regulations must pass a three-pronged test. To be constitutional, a law must:

Be "content neutral" - that is, the government interest it furthers must be unrelated to the suppression of speech  
Prohibit speech no more than is essential to further that government interest.

Because the law prohibiting the burning of draft cards narrowly furthered the government goal of keeping track of all potential draftees and soldiers and because the interest in raising and regulating troops was unrelated to speech or expression, the Court upheld the statute. That said, the jurisprudence surrounding expressive content is quite tricky, as courts must constantly try to balance the interwoven speech elements often present in actions with the adverse nonspeech consequences of many

of those same actions. As lawyers and justices on the Supreme Court, it will be up to you to determine to what extent *O'Brien* and other doctrine related to expressive content is applicable to flag burning and the case at hand.

### **Incitement and *Brandenburg v. Ohio***

The state of Texas may also try to justify the flag burning laws by noting that flag burning may incite bystanders or citizens into violence, either against the government or the person who burns the flag. This doctrine, known as "incitement" relates to the common-sense argument that speech may not be protected if it threatens to cause physical harm to the public. For example, the great Supreme Court Justice Oliver Wendell Holmes famously noted that "the most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing panic." Of course, most examples of speech are not so clear cut, and the Court has struggled to provide a clear-cut method of determining just what speech is unprotected due to its advocacy of violence.

The governing precedent in this area of the law is *Brandenburg v. Ohio*, which dealt with a local Ku Klux Klan leader in Ohio who was arrested in 1966 on charges of advocating violence after he gave an inflammatory speech against blacks, Jews, and liberals. He was convicted under an Ohio statute prohibiting the advocacy of violence, and subsequently appealed the decision, eventually to the Supreme Court. The Supreme Court ruled that speech cannot be proscribed unless three elements are met - intent, imminence, and likelihood of potential lawlessness. The unanimous opinion of the Supreme Court was issued "per curiam," and read in part:

[Recent] decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is *directed to inciting or producing imminent lawless action* and is *likely to incite or produce such action* (emphasis added).

### **The American Flag**

The American Flag - 50 white stars on a blue field, and thirteen alternating stripes of red and white - is the most easily recognizable symbol of the United States of America. It has

existed in dozens of different forms since it was first woven, according to legend, by Betsey Ross during the American Revolutionary War. It is, without a doubt, an object which arouses strong passions in many citizens of the country and the world. It has been carried into battle, flown in times of peace, and flown above millions of locations across the globe. The Flag is displayed at all major sporting events, buried with deceased service members, and revered out of general custom. It is possible for the state of Texas to argue that there is a compelling governmental interest in protecting the American flag as a symbol of the United States, and of freedom and democracy at large. The state will want to allege, and the attorneys for Mr. Johnson will want to deny, that the desecration of the American flag devalues the value of a national symbol, consequently weakening an important symbol of democratic principles and national unity.

### **The Marketplace of Ideas**

Legal scholars and Supreme Court Justices have often presented and discussed a concept known as the "marketplace of ideas," considered analogous to a free market in the economic sector. The theory behind the marketplace of ideas is that, if differing viewpoints are placed in the public eye and judged by the populace, then the best or correct idea will emerge the victor due to its intellectual integrity and veracity. It is often used as a justification for maintaining a liberal definition of freedom of speech and as a reason for broadly interpreting the First Amendment to the Constitution. Justice Holmes wrote in *Abrams v. United States* that,

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition...But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas...that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.

The lawyers for Johnson will want to argue that the burning of a United States flag is a valid portion of the marketplace of

ideas and should be accorded the same rights as any other form of expression. The state of Texas will want to allege that the burning of a US flag accomplishes nothing but the subversion of the marketplace of ideas because the flag is a symbol of unity and compromise, rather than simply another generic viewpoint in the marketplace.

## DECISIONS OF THE SUPREME COURT

### Majority Opinion, delivered by Justice Brennan

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 re-nomination 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 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.

**Concurring Opinion, delivered by Justice Kennedy**

I write not to qualify the words Justice Brennan chooses so well, for he says with power all that is necessary to explain our ruling. I join his opinion without reservation, but with a keen sense that this case, like others before us from time to time, exacts its personal toll. This prompts me to add to our pages these few remarks.

The case before us illustrates better than most that the judicial power is often difficult in its exercise. We cannot here ask another Branch to share responsibility, as when the argument is made that a statute is flawed or incomplete. For we are presented with a clear and simple statute to be judged against a pure command of the Constitution. The outcome can be laid at no door but ours.

The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result. And so great is our commitment to the process that, except in the rare case, we do not pause to express distaste for the result, perhaps for fear of undermining a valued principle that dictates the decision. This is one of those rare cases.

Our colleagues in dissent advance powerful arguments why respondent may be convicted for his expression, reminding us that among those who will be dismayed by our holding will be some who

have had the singular honor of carrying the flag in battle. And I agree that the flag holds a lonely place of honor in an age when absolutes are distrusted and simple truths are burdened by unneeded apologetics.

With all respect to those views, I do not believe the Constitution gives us the right to rule as the dissenting Members of the Court urge, however painful this judgment is to announce. Though symbols often are what we ourselves make of them, the flag is constant in expressing beliefs Americans share, beliefs in law and peace and that freedom which sustains the human spirit. The case here today forces recognition of the costs to which those beliefs commit us. It is poignant but fundamental that the flag protects those who hold it in contempt.

For all the record shows, this respondent was not a philosopher and perhaps did not even possess the ability to comprehend how repellent his statements must be to the Republic itself. But whether or not he could appreciate the enormity of the offense he gave, the fact remains that his acts were speech, in both the technical and the fundamental meaning of the Constitution. So I agree with the Court that he must go free.

#### **Dissenting Opinion, delivered by Justice Rehnquist**

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.

#### **Dissenting Opinion, delivered by Justice Stevens**

As the Court analyzes this case, it presents the question whether the State of Texas, or indeed the Federal Government, has the power to prohibit the public desecration of the American flag. The question is unique. In my judgment, rules that apply to a host of other symbols, such as state flags, armbands, or various privately promoted emblems of political or commercial identity, are not necessarily controlling. Even if flag burning could be considered just another species of symbolic speech under the logical application of the rules that the Court has developed in its interpretation of the First Amendment in other contexts, this case has an intangible dimension that makes those rules inapplicable.

A country's flag is a symbol of more than "nationhood and na-

tional unity." It also signifies the ideas that characterize the society that has chosen that emblem as well as the special history that has animated the growth and power of those ideas. The fleurs-de-lis and the tricolor both symbolized "nationhood and national unity," but they had vastly different meanings. The message conveyed by some flags -- the swastika, for example -- may survive long after it has outlived its usefulness as a symbol of regimented unity in a particular nation.

So it is with the American flag. It is more than a proud symbol of the courage, the determination, and the gifts of nature that transformed 13 fledgling Colonies into a world power. It is a symbol of freedom, of equal opportunity, of religious tolerance, and of goodwill for other peoples who share our aspirations. The symbol carries its message to dissidents both at home and abroad who may have no interest at all in our national unity or survival.

The value of the flag as a symbol cannot be measured. Even so, I have no doubt that the interest in preserving that value for the future is both significant and legitimate. Conceivably, that value will be enhanced by the Court's conclusion that our national commitment to free expression is so strong that even the United States, as ultimate guarantor of that freedom, is without power to prohibit the desecration of its unique symbol. But I am unpersuaded. The creation of a federal right to post bulletin boards and graffiti on the Washington Monument might enlarge the market for free expression, but at a cost I would not pay. Similarly, in my considered judgment, sanctioning the public desecration of the flag will tarnish its value -- both for those who cherish the ideas for which it waves and for those who desire to don the robes of martyrdom by burning it. That tarnish is not justified by the trivial burden on free expression occasioned by requiring that an available, alternative mode of expression -- including uttering words critical of the flag, see *Street v. New York* -- be employed. It is appropriate to emphasize certain propositions that are not implicated by this case. The statutory prohibition of flag desecration does not prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. The statute does not compel any conduct or any profession of respect for any idea or any symbol.

Nor does the statute violate "the government's paramount obligation of neutrality in its regulation of protected communica-

tion." *Young v. American Mini Theatres, Inc.*" The content of respondent's message has no relevance whatsoever to the case. The concept of "desecration" does not turn on the substance of the message the actor intends to convey, but rather on whether those who view the act will take serious offense. Accordingly, one intending to convey a message of respect for the flag by burning it in a public square might nonetheless be guilty of desecration if he knows that others -- perhaps simply because they misperceive the intended message -- will be seriously offended. Indeed, even if the actor knows that all possible witnesses will understand that he intends to send a message of respect, he might still be guilty of desecration if he also knows that this understanding does not lessen the offense taken by some of those witnesses. Thus, this is not a case in which the fact that "it is the speaker's opinion that gives offense" provides a special "reason for according it constitutional protection," *FCC v. Pacifica Foundation*, 438 U.S. 726, 745 (1978) (plurality opinion). The case has nothing to do with "disagreeable ideas. It involves disagreeable conduct that, in my opinion, diminishes the value of an important national asset.

The Court is therefore quite wrong in blandly asserting that respondent was prosecuted for his expression of dissatisfaction with the policies of this country, expression situated at the core of our First Amendment values.

Ante at 411. Respondent was prosecuted because of the method he chose to express his dissatisfaction with those policies. Had he chosen to spraypaint -- or perhaps convey with a motion picture projector -- his message of dissatisfaction on the facade of the Lincoln Memorial, there would be no question about the power of the Government to prohibit his means of expression. The prohibition would be supported by the legitimate interest in preserving the quality of an important national asset. Though the asset at stake in this case is intangible, given its unique value, the same interest supports a prohibition on the desecration of the American flag.

The ideas of liberty and equality have been an irresistible force in motivating leaders like Patrick Henry, Susan B. Anthony, and Abraham Lincoln, schoolteachers like Nathan Hale and Booker T. Washington, the Philippine Scouts who fought at Bataan, and the soldiers who scaled the bluff at Omaha Beach. If those ideas are worth fighting for -- and our history demonstrates that they are -- it cannot be true that the flag that

uniquely symbolizes their power is not itself worthy of protection from unnecessary desecration.

I respectfully dissent.

\*The Court suggests that a prohibition against flag desecration is not content-neutral, because this form of symbolic speech is only used by persons who are critical of the flag or the ideas it represents. In making this suggestion, the Court does not pause to consider the far-reaching consequences of its introduction of disparate-impact analysis into our First Amendment jurisprudence. It seems obvious that a prohibition against the desecration of a gravesite is content-neutral even if it denies some protesters the right to make a symbolic statement by extinguishing the flame in Arlington Cemetery where John F. Kennedy is buried while permitting others to salute the flame by bowing their heads. Few would doubt that a protester who extinguishes the flame has desecrated the gravesite, regardless of whether he prefaces that act with a speech explaining that his purpose is to express deep admiration or unmitigated scorn for the late President. Likewise, few would claim that the protester who bows his head has desecrated the gravesite, even if he makes clear that his purpose is to show disrespect. In such a case, as in a flag burning case, the prohibition against desecration has absolutely nothing to do with the content of the message that the symbolic speech is intended to convey.

#### **Further Reading and Additional Resources**

First Amendment Center. [http://www.firstamendmentcenter.org/faclibrary/case.aspx?case=TX\\_v\\_Johnson](http://www.firstamendmentcenter.org/faclibrary/case.aspx?case=TX_v_Johnson)

Goldstein, Robert Justin (2000). *Flag Burning and Free Speech: The Case of Texas v. Johnson*. Lawrence, KS: University Press of Kansas. ISBN 0700610537.

Landmark Cases: Texas v. Johnson <http://www.landmarkcases.org/texas/home.html>

Vergobbi, David J. (2003). "Texas v. Johnson". in Parker, Richard A. (ed.). *Free Speech on Trial: Communication Perspectives on Landmark Supreme Court Decisions*. Tuscaloosa, AL: University of Alabama Press. pp. 281-297. ISBN 081731301X.