Unmarked Opinions Activity—Answer Key

Texas v. Johnson (1989)

After reading the **background, facts, issue, constitutional amendments, state statute, Supreme Court precedents, and arguments,** read Opinion A and Opinion B below. Choose which opinion you agree with and think should be the majority (winning) opinion and circle "Majority." Choose which you disagree with and think should be the dissenting opinion and circle "Dissent." Explain the reasons for your choices. After you have made your decision, compare your answers to those of the Supreme Court by reading the case summary.

Opinion A

Johnson's actions in this case are not protected by the First Amendment, and the state of Texas should be able to punish him for burning the flag. For 200 years, the American flag has occupied a unique position as the symbol of the nation. Congress and many states have enacted laws prohibiting the misuse and mutilation of the American flag. Even if the action of flag burning can be interpreted as speech, we do not have to allow all speech. There must be reasonable limits. There are other ways that Johnson could have expressed his views.

Majority

Texas did not punish Johnson's message, just the means he used to convey it. The flag symbolizes more than national unity. It has strong significance for war veterans and their families. It symbolizes our shared values of freedom, equal opportunity, and religious tolerance. It is in the government's interest to protect this important American symbol. It is not too much to ask that protestors use other means of speech to express their ideas. Johnson's conviction should be affirmed.

Dissent

Opinion B

Johnson's actions in this case should be protected as free speech. While the First Amendment literally protects speech, the Supreme Court has long recognized that speech can be more than the spoken or written word. Actions are symbolic speech when the actor intends to convey a particular message and there is a great likelihood that those watching would understand the message. Johnson burned the flag to express an idea—his dissatisfaction with the country's policies.

Majority

Johnson's actions did not incite violence or disrupt the peace. While it is important for the government to preserve the flag as a symbol, it is more important to ensure Americans' rights to protest when they disagree with the government. The government may not prohibit expression simply because society finds the ideas presented offensive. In this case, the government has not provided enough justification for punishing Johnson's speech. His conviction should be overturned.

Dissent

After students complete the Unmarked Opinions 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.

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 17th 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 14th 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."

- **14th 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.

Arguments for Texas (petitioner)

- For 200 years, the American flag has been regarded as the symbol of the nation. This symbol is considered sacred and is important to many Americans.
- The flag symbolizes more than national unity. It has strong significance for war veterans and their families. It symbolizes the shared values of freedom, equal opportunity, and religious tolerance. It is in the government's interest to protect this important American symbol.
- Texas did not punish Johnson for his message; it punished the way he chose to convey that message. The government has the power to pass laws regulating conduct. There are other laws about burning items in a public space.
- Even if the action of flag burning can be interpreted as speech, *all* speech need not be allowed. There must be reasonable limits. There are other ways that Johnson could have expressed his views.

Arguments for Johnson (respondent)

- The government may not prohibit expression just because society finds the ideas presented offensive. The purpose of the First Amendment is to protect minorities from having their opinions suppressed by the majority.
- The Supreme Court has long recognized that speech can be more than the spoken or written word. Actions are symbolic speech when the actor intends to communicate a particular message that would most likely be understood by those watching.
- Johnson's actions did not incite violence or disrupt the peace. Therefore, this speech is not within one of the exceptions to the First Amendment.
- Although it is important for the government to preserve the flag as a symbol, it is more important to ensure Americans' rights to protest when they disagree with the government.