

Texas v. Johnson / Excerpts from the Majority Opinion— Answer Key

The following are excerpts from Justice Brennan's majority opinion:

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 of 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.

Questions to Consider

1. According to the majority opinion, why does the First Amendment protect the flag burning in which Johnson engaged?

According to the majority opinion, the First Amendment protects the flag burning in which Johnson engaged because it is a form of free speech or "expressive conduct."

2. How would prohibiting flag burning prevent “breaches of the peace” according to Texas? Did the Court accept the state’s argument to this effect?

People might react violently to flag burning. However, according to the Court, prohibiting flag burning would not prevent "breaches of the peace" because Johnson's conduct did not threaten to disturb the peace.

3. According to the Court, Texas asserted an interest in preserving the flag as a symbol of national unity. How does the Court respond to this assertion?

The Court responds to this assertion by questioning where the boundary ends as to which symbols warrant this "unique status." It also says that encouraging the proper treatment of the flag is not the same as, nor does it warrant, punishing a person for burning the flag.

4. Why does the Court say that the flag's position as a symbol will be strengthened, not weakened, by their decision in this case?

The Court says that the flag's position as a symbol of freedom will be strengthened, not weakened, by their decision in this case. It is when we tolerate unpopular opinions—such as the burning of the flag—that we truly demonstrate that we are a democratic nation founded on the principle of freedom that the flag represents.

5. How does the Court recommend that supporters of the flag respond to those who desecrate it?

The Court recommends that supporters of the flag respond to those who desecrate it by trying to "persuade them that they are wrong," by waving one's own flag, by saluting a burning flag and by "according its remains a proper burial."