

## 4.2: TEXAS v. JOHNSON

### SAMPLE CASES AND CASE BRIEFS:

The following is one of two landmark First Amendment cases. It is edited for easier reading, which is called a case syllabus. The original texts of this case is much longer and more difficult to read. Following is a sample case brief.

#### Texas v. Johnson

491 U.S. 397 (1989)

(Case Syllabus edited by the Author)

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.

(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.

(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 non-speech can justify incidental limitations on First Amendment freedoms when speech and non-speech 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 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.

(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.

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. REHNQUIST, C.J., filed a dissenting opinion, in which WHITE and O'CONNOR, JJ., joined. STEVENS, J., filed a dissenting opinion.

## SAMPLE CASE BRIEF FOR *TEXAS V. JOHNSON* :

### CITATION:

*Texas v. Johnson*, 491 U.S. 397 (1989)

### FACTS:

Mr. Johnson publicly burned an American flag during a political demonstration. He was arrested and convicted by of violating a Texas penal code prohibiting the desecration of “a venerated object”, in other words the American Flag.

### PROCEDURAL HISTORY:

The Texas Court of Appeals affirmed the trial court verdict. The Texas Court of Criminal Appeals reversed. The U.S. Supreme Court granted certiorari.

### ISSUE:

Whether the First Amendment, which protects freedom of speech, is violated when a person is convicted for burning an American flag during a political demonstration?

### HOLDING:

Yes. The First Amendment, which protects freedom of speech, is violated when a person is convicted for burning an American flag during a political demonstration.

REASONING: While the First Amendment literally forbids the abridgment only of “speech,” the Court has previously held that it also protects conduct when conduct is “sufficiently imbued with elements of communication.” Here Johnson’s flag burning was part of a political demonstration, and therefore was the type of conduct meant to be protected as speech. The Court also rejected the state’s two arguments. First, there was no evidence on the record that Johnson’s conviction was necessary to prevent a breach of the peace. No breach of the peace actually occurred, and his conduct did not fall into the “fighting words” exception. Second, the state claimed that it has an interest in preserving the flag as a symbol of national unity. However, if that means prohibiting the type of expression that occurred in this case, then the government is enforcing its own political preferences, something the First Amendment prohibits. The Court actually suggested that its holding will strengthen, and not weaken, our loyalty to the flag.

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