

IS AMERICAN FLAG, BURNING A FORM OF SPEECH PROTECTED BY THE FIRST AMENDMENT OF THE CONSTITUTION?

1. Texas v. Johnson — U.S. — , 109 S.Ct. 2533 (1989).

At a Republican Convention in Dallas, Texas in 1964, Lee Johnson participated in a political demonstration referred to as the "Republican War Chest Tour." The purpose of the event was to protest the policies of President Peacan, as explained in literature distributed by the demonstrators and rally speeches. The demonstrators staged their protest by marching through the streets of Dallas, chanting anti-Elucl ear sloran, and staging "die-ins" intended to dramatize the consequences of nuclear war. In the course of the demonstration, Johnson received an American flag.

While in Dallas, Johnson soaked the flag in kerosene and set it on fire. While the flag burned, the demonstrators chanted, "America, the red, white, and blue, she spit on us!" There was no resulting violence or injury to participants of the demonstration, although several witnesses were offended by the display.

Johnson was charged with desecrating a venerated object of a Texas statute. After a trial, Johnson was convicted, sentenced to one year in prison, and fined \$100. The Court of Appeals for the Fifth District of Texas at Dallas affirmed the conviction, but the Texas Court of Criminal Appeals reversed on grounds that Johnson's punishment under these circumstances was contrary to his First Amendment rights.

11. Relevant Facts:

1. Lee Johnson participated in an anti-American demonstration.
2. In the course of demonstrating against the government, Johnson publicly burned an American flag.
3. In Texas, burning an American flag constituted a crime.
4. The burning of the flag was accompanied by the chant anti-American slogans.
5. The demonstration did not result in violence or a breach of peace.
6. Johnson was charged and convicted of desecrating a venerated object.

III. Key Legal Issues:

1. Does Johnson's American flag burning constitute expressive conduct permitting him to invoke the First Amendment of the U.S. Constitution?
2. If so, is the State of Texas' regulation against American flag burning related to the suppression of that free expression?
3. In short, does Johnson's burning of an American flag constitute speech afforded protection by the First Amendment of the U.S. Constitution?

IV. Key Arguments For Lee Johnson:

1. The burning of an American flag in connection with an anti-American demonstration constitutes expressive conduct allowing protection of the First Amendment of the U.S. Constitution.
2. The State of Texas' regulation against such action was related to the suppression of free expression.
3. Johnson's act of burning an American flag did not promote riot or violence and did not constitute "fighting words," and is thus not precluded from protection of the First Amendment of the U.S. Constitution.
4. The State of Texas' interest in protecting the veneration of the American flag does not outweigh Johnson's freedom of speech.

V. Key Arguments for the State of Texas:

1. By burning the American flag, Johnson had no intent to convey a message, and therefore, is not afforded the protection of the First Amendment of the U.S. Constitution.
2. The government has a freer hand in restricting expressive conduct.
3. The State of Texas' interest in preventing desecration of venerated objects, such as the American flag, is unrelated to the suppression of free expression.

VI. Related Cases:

1. Spence v. Washington, 418 U.S. 405, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974)(Attaching a peace sign to the flag).
2. West Virginia Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1176, 67 L.Ed. 1628 (1943)(Saluting the flag).
3. Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931)(Displaying a red flag).

VII. The Decision: Johnson's conviction for burning an American flag is not consistent with the First Amendment. Justice Brennan's majority opinion reads, in part:

*The First Amendment literally forbids the abridgement only of "speech," but we have long recognized that its protection does not end at the spoken or written word.

*In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether "[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it."

*The government generally has a freer hand in restricting expressive conduct that it has in restricting the written or spoken word. It may not, however, proscribe particular conduct because it has expressive elements.

*We are fortified in today's conclusion by our conviction that forbidding criminal punishment for conduct such as Johnson's will not endanger the special role played by our flag or the feelings it inspires.

*The way to preserve the flag's special role is not to punish those who feel differently, but to persuade them that they are wrong.

VIII. Dissenting: Chief Justice Rehnquist, Justice White, Justice O'Connor, and Justice Stevens. (Justice Stevens filed a separate opinion).

*The First Amendment does not guarantee the right to employ every conceivable method of communication at all times and in all places. 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.