



TEXAS v. JOHNSON
SUPREME COURT OF THE UNITED STATES
491 U.S. 397
June 21, 1989
[5 - 4]

OPINION: Justice Brennan...While the Republican National Convention was taking place in Dallas in 1984, [Gregory Lee] Johnson participated in a political demonstration dubbed the "Republican War Chest Tour."...The purpose of this event was to protest the policies of the Reagan administration and of certain Dallas-based corporations. The demonstrators marched through the Dallas streets, chanting political slogans and stopping at several corporate locations to stage "die-ins" intended to dramatize the consequences of nuclear war. On several occasions they spray-painted the walls of buildings and overturned potted plants, but Johnson himself took no part in such activities. **He did, however, accept an American flag handed to him by a fellow protestor who had taken it from a flagpole outside one of the targeted buildings.**

The demonstration ended in front of Dallas City Hall, where **Johnson unfurled the American flag, doused it with kerosene, and set it on fire.** While the flag burned, the protestors chanted: "America, the red, white, and blue, we spit on you." After the demonstrators dispersed, a witness to the flag burning collected the flag's remains and buried them in his backyard. No one was physically injured or threatened with injury, though several witnesses testified that they had been seriously offended by the flag burning.

Of the approximately 100 demonstrators, Johnson alone was charged with [the] crime...[of] **desecration of a venerated object** in violation of *Tex. Penal Code Ann. §42.09(a)(3)* (1989). After

a trial, he was convicted, sentenced to one year in prison, and fined \$2,000. The Court of Appeals ...affirmed Johnson's conviction, but the Texas Court of Criminal Appeals reversed, holding that the State could not, consistent with the First Amendment, punish Johnson for burning the flag in these circumstances.

Texas Penal Code Ann. §42.09 (1989) provides in full:

§ 42.09. Desecration of Venerated Object

(a) 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**.

(b) 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...**

[The Court of Criminal Appeals] reversed Johnson's conviction on the ground that §42.09 was **unconstitutional as applied to him**, the state court did not address Johnson's argument that the statute was, **on its face**, unconstitutionally vague and overbroad. We granted certiorari and now affirm.

Johnson was convicted of flag desecration for burning the flag rather than for uttering insulting words...We must first determine whether Johnson's burning of the flag constituted expressive conduct, permitting him to invoke the First Amendment in challenging his conviction. *Spence v. Washington*.¹ If his conduct was expressive, we next decide whether the State's regulation is related to the suppression of free expression. *United States v. O'Brien*. If the State's regulation is not related to expression, then the less stringent standard we announced in *United States v. O'Brien* for regulations of non-communicative conduct controls. If it is, then we are outside of *O'Brien*'s test, and we must ask whether this interest justifies Johnson's conviction under a more demanding standard.

A third possibility is that the State's asserted interest is simply not implicated on these facts, and in that event the interest drops out of the picture...

In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether "an 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." Hence, we have recognized the expressive nature of students' wearing of black armbands to protest American military involvement in Viet Nam (*Tinker v. Des*

¹Case 1A-S-27 on this website.

*Moines Independent Community School Dist.*²); of a sit-in by blacks in a "whites only" area to protest segregation (*Brown v. Louisiana*); of the wearing of American military uniforms in a dramatic presentation criticizing American involvement in Viet Nam (*Schacht v. United States*); and of picketing about a wide variety of causes (*Food Employees v. Logan Valley Plaza, Inc.*; *United States v. Grace*).

Especially pertinent to this case are our decisions recognizing the communicative nature of conduct relating to flags. Attaching a peace sign to the flag (*Spence*); refusing to salute the flag (*Barnette*³); and displaying a red flag (*Stromberg*⁴)...all may find shelter under the First Amendment. *Smith v. Goguen*⁵ (treating flag "contemptuously" by wearing pants with small flag sewn into their seat is expressive conduct). That we have had little difficulty identifying an expressive element in conduct relating to flags should not be surprising. The very purpose of a national flag is to serve as a symbol of our country; it is, one might say, "the one visible manifestation of two hundred years of nationhood."

...We have not automatically concluded...that any action taken with respect to our flag is expressive. Instead,...we have considered the context in which it occurred. In *Spence*, for example, we emphasized that Spence's taping of a peace sign to his flag was "roughly simultaneous with and concededly triggered by the Cambodian incursion and the Kent State tragedy." The State of Washington...conceded...that Spence's conduct was a form of communication...

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 renomination of Ronald Reagan for President. The expressive, overtly political nature of this conduct was both intentional and overwhelmingly apparent. At his trial, Johnson explained his reasons for burning the flag as follows: "The American Flag was burned as Ronald Reagan was being re-nominated as President. And a more powerful statement of symbolic speech, whether you agree with it or not, couldn't have been made at that time...**We had new patriotism and no patriotism." In these circumstances, Johnson's burning of the flag was conduct "sufficiently imbued with elements of communication" to implicate the First Amendment.**

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. "What might be termed the more generalized guarantee of freedom of expression makes the communicative nature of conduct an inadequate *basis* for singling out that

²Case 1A-S-18 on this website.

³Case 1A-S-9 on this website.

⁴Case 1A-S-5 on this website.

⁵Case 1A-S-26 on this website.

conduct for proscription. A law *directed at* the communicative nature of conduct must, like a law directed at speech itself, be justified by the substantial showing of need that the First Amendment requires." **It is...not simply the verbal or nonverbal nature of the expression, but the governmental interest at stake, that helps to determine whether a restriction on that expression is valid.**

Thus, although we have recognized that where "speech" and "non-speech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms (*O'Brien*), we have limited the applicability of *O'Brien's* relatively lenient standard to those cases in which "the governmental interest is unrelated to the suppression of free expression." In stating, moreover, that *O'Brien's* test "in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions" (*Clark*), we have highlighted the requirement that the governmental interest in question be unconnected to expression in order to come under *O'Brien's* less demanding rule.

In order to decide whether *O'Brien's* test applies here,...we must decide whether Texas has asserted an interest in support of Johnson's conviction that is unrelated to the suppression of expression. If we find that an interest asserted by the State is simply not implicated on the facts before us, we need not ask whether *O'Brien's* test applies. The State offers two separate interests to justify this conviction: **preventing breaches of the peace and preserving the flag as a symbol of nationhood and national unity. We hold that the first interest is not implicated on this record and that the second is related to the suppression of expression.**

Texas claims that its interest in preventing breaches of the peace justifies Johnson's conviction for flag desecration. However, no disturbance of the peace actually occurred or threatened to occur because of Johnson's burning of the flag. Although the State stresses the disruptive behavior of the protestors during their march toward City Hall, it admits that "no actual breach of the peace occurred at the time of the flag burning or in response to the flag burning." The State's emphasis on the protestors' disorderly actions prior to arriving at City Hall is not only somewhat surprising given that no charges were brought on the basis of this conduct, but it also fails to show that a disturbance of the peace was a likely reaction to Johnson's conduct. The only evidence offered by the State at trial to show the reaction to Johnson's actions was the testimony of several persons who had been seriously offended by the flag burning.

The State's position...amounts to a claim that an audience that takes serious offense at particular expression is necessarily likely to disturb the peace and that the expression may be prohibited on this basis. Our precedents do not countenance such a presumption. On the contrary, they recognize that a principal "function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello v. Chicago*. **It would be odd indeed to conclude *both* that "if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection" (*FCC v. Pacifica***

***Foundation*⁶, opinion of Justice Stevens) and that the government may ban the expression of certain disagreeable ideas on the unsupported presumption that their very disagreeableness will provoke violence.**

Thus, we have not permitted the government to assume that every expression of a provocative idea will incite a riot, but have instead required careful consideration of the actual circumstances surrounding such expression, asking whether the expression "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*⁷. To accept Texas' arguments that it need only demonstrate "the potential for a breach of the peace" and that every flag burning necessarily possesses that potential, would be to eviscerate our holding in *Brandenburg*. This we decline to do.

Nor does Johnson's expressive conduct fall within that small class of "fighting words" that are "likely to provoke the average person to retaliation, and thereby cause a breach of the peace." *Chaplinsky*.⁸ No reasonable onlooker would have regarded Johnson's generalized expression of dissatisfaction with the policies of the Federal Government as a direct personal insult or an invitation to exchange fisticuffs. *Cantwell v. Connecticut*.⁹

We thus conclude that the State's interest in maintaining order is not implicated on these facts. The State need not worry that our holding will disable it from preserving the peace. We do not suggest that the First Amendment forbids a State to prevent "imminent lawless action." *Brandenburg*. And, in fact, Texas already has a statute specifically prohibiting breaches of the peace which tends to confirm that Texas need not punish this flag desecration in order to keep the peace.

The State also asserts an interest in preserving the flag as a symbol of nationhood and national unity. In *Spence*, we acknowledged that the government's interest in preserving the flag's special symbolic value "is directly related to expression in the context of activity" such as affixing a peace symbol to a flag. We are equally persuaded that this interest is related to expression in the case of Johnson's burning of the flag. The State, apparently, is concerned that such conduct will lead people to believe either that the flag does not stand for nationhood and national unity, but instead reflects other, less positive concepts, or that the concepts reflected in the flag do not in fact exist, that is, that we do not enjoy unity as a Nation. These concerns blossom only when a person's treatment of the flag communicates some message, and thus are related "to the suppression of free expression" within the meaning of *O'Brien*. We are thus outside of *O'Brien*'s test altogether.

⁶Case 1A-S-30 on this website.

⁷Case 1A-S-17 on this website.

⁸Case 1A-S-8 on this website.

⁹Case 1A-R-3 on this website.

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.

As in *Spence*, "we are confronted with a case of prosecution for the expression of an idea through activity," and "accordingly, we must examine with particular care the interests advanced by petitioner to support its prosecution." 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.

Moreover, Johnson was prosecuted because he knew that his politically charged expression would cause "serious offense." **If he had burned the flag as a means of disposing of it because it was dirty or torn, he would not have been convicted of flag desecration under this Texas law: federal law designates burning as the preferred means of disposing of a flag "when it is in such condition that it is no longer a fitting emblem for display" and Texas has no quarrel with this means of disposal. The Texas law is thus not aimed at protecting the physical integrity of the flag in all circumstances, but is designed instead to protect it only against impairments that would [intentionally] cause serious offense to others...**

Whether Johnson's treatment of the flag violated Texas law thus depended on the likely communicative impact of his expressive conduct. Our decision in *Boos v. Barry* tells us that this restriction on Johnson's expression is content based. In *Boos*, we considered the constitutionality of a law prohibiting "the display of any sign within 500 feet of a foreign embassy if that sign tends to bring that foreign government into 'public odium' or 'public disrepute.'" Rejecting the argument that the law was content neutral because it was justified by "our international law obligation to shield diplomats from speech that offends their dignity," we held that "the emotive impact of speech on its audience is not a 'secondary effect'" unrelated to the content of the expression itself.

According to the principles announced in *Boos*, Johnson's political expression was restricted because of the content of the message he conveyed. We must therefore subject the State's asserted interest in preserving the special symbolic character of the flag to "the most exacting scrutiny." *Boos v. Barry*.

Texas...emphasizes the "special place" reserved for the flag in our Nation. The State's argument is not that it has an interest simply in maintaining the flag as a symbol of *something*, no matter what it symbolizes; indeed, if that were the State's position, it would be difficult to see how that interest is endangered by highly symbolic conduct such as Johnson's. Rather, the State's claim is that it has an interest in preserving the flag as a symbol of *nationhood* and *national unity*, a symbol with a determinate range of meanings. According to Texas, if one physically treats the flag in a way that would tend to cast doubt on either the idea that nationhood and national unity are the flag's referents or that national unity actually exists, the message conveyed thereby is a harmful one and therefore may be prohibited.

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. *Hustler Magazine, Inc. v. Falwell*.¹⁰

We have not recognized an exception to this principle even where our flag has been involved. In *Street v. New York*¹¹, we held that a State may not criminally punish a person for uttering words critical of the flag. Rejecting the argument that the conviction could be sustained on the ground that Street had "failed to show the respect for our national symbol which may properly be demanded of every citizen," we concluded that "the constitutionally guaranteed 'freedom to be intellectually... diverse or even contrary,' and the 'right to differ as to things that touch the heart of the existing order,' encompass the freedom to express publicly one's opinions about our flag, including those opinions which are defiant or contemptuous." Nor may the government, we have held, compel conduct that would evince respect for the flag. "To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind."

In holding in *Barnette* that the Constitution did not leave this course open to the government, Justice Jackson described one of our society's defining principles in words deserving of their frequent repetition: "**If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can 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.**" In *Spence*, we held that the same interest asserted by Texas here was insufficient to support a criminal conviction under a flag-misuse statute for the taping of a peace sign to an American flag. "Given the protected character of Spence's expression and in light of the fact that no interest the State may have in preserving the physical integrity of a privately owned flag was significantly impaired on these facts," we held, "the conviction must be invalidated." See also *Goguen* (to convict person who had sewn a flag onto the seat of his pants for "contemptuous" treatment of the flag would be "to convict not to protect the physical integrity or to protect against acts interfering with the proper use of the flag, but to punish for communicating ideas unacceptable to the controlling majority in the legislature").

In short, nothing in our precedents suggests that a State may foster its own view of the flag by prohibiting expressive conduct relating to it. To bring its argument outside our precedents, Texas attempts to convince us that even if its interest in preserving the flag's symbolic role does not allow it to prohibit words or some expressive conduct critical of the flag, it does permit it to forbid the outright destruction of the flag. The State's argument cannot depend here on the distinction between written or spoken words and nonverbal conduct. **That distinction, we have shown, is of no moment where the nonverbal conduct is expressive, as it is here, and where the regulation of that conduct is related to expression, as it is here.** In addition, both *Barnette* and *Spence* involved expressive conduct, not only verbal communication, and both found that conduct protected.

¹⁰Case 1A-S-34 on this website.

¹¹Case 1A-S-16 on this website.

Texas' focus on the precise nature of Johnson's expression, moreover, misses the point of our prior decisions: their enduring lesson, that the government may not prohibit expression simply because it disagrees with its message, is not dependent on the particular mode in which one chooses to express an idea. If we were to hold that a State may forbid flag burning wherever it is likely to endanger the flag's symbolic role, but allow it wherever burning a flag promotes that role -- as where, for example, a person ceremoniously burns a dirty flag -- we would be saying that when it comes to impairing the flag's physical integrity, the flag itself may be used as a symbol -- as a substitute for the written or spoken word or a "short cut from mind to mind" -- only in one direction. We would be permitting a State to "prescribe what shall be orthodox" by saying that one may burn the flag to convey one's attitude toward it and its referents only if one does not endanger the flag's representation of nationhood and national unity.

We never before have held that the Government may ensure that a symbol be used to express only one view of that symbol or its referents. Indeed, in *Schacht v. United States*, we invalidated a federal statute permitting an actor portraying a member of one of our Armed Forces to "wear the uniform of that armed force if the portrayal does not tend to discredit that armed force." This proviso, we held, "which leaves Americans free to praise the war in Viet Nam but can send persons like Schacht to prison for opposing it, cannot survive in a country which has the First Amendment."

We perceive no basis on which to hold that the principle underlying our decision in *Schacht* does not apply to this case. 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...

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 "preserve the national flag as an unalloyed symbol of our country." *Spence*. We reject the suggestion, urged at oral argument by counsel for Johnson, that the government lacks "any state interest whatsoever" in regulating the manner in which the flag may be displayed. Congress has, for example, enacted **precatory regulations** describing the proper treatment of the flag, see *36 U.S.C. §§173-177*, and we cast no doubt on the legitimacy of its interest in making such **recommendations**. 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. "National unity as an end which officials may foster by persuasion and example is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement."

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. To paraphrase Justice Holmes, we submit that nobody can suppose that this one gesture of an unknown man will change our Nation's attitude towards its flag. Indeed, Texas' argument that the burning of an American flag "is an act having a high likelihood to cause a breach of the peace" and its statute's implicit assumption that physical mistreatment of the flag will lead to "serious offense," tend to confirm that the flag's special role is not in danger; if it were, no one would riot or take offense because a flag had been burned.

We are tempted to say, in fact, 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...**The judgment of the Texas Court of Criminal Appeals is therefore *Affirmed*.

CONCURRENCE: Justice Kennedy...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...

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.

...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.

DISSENT: Justice Rehnquist/White/O'Connor...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.

HISTORY ALERT!

...The first distinctive flag of the Colonies was the "Grand Union Flag" -- with 13 stripes and a British flag in the left corner -- which was flown for the first time on January 2, 1776, by troops of the Continental Army around Boston. By June 14, 1777, after we declared our independence from England, the Continental Congress resolved: "That the flag of the thirteen United States be thirteen stripes, alternate red and white: that the union be thirteen stars, white in a blue field, representing a new constellation."

...During the War of 1812, British naval forces sailed up Chesapeake Bay and marched overland to sack and burn the city of Washington. They then sailed up the Patapsco River to invest the city of Baltimore, but to do so it was first necessary to reduce Fort McHenry in Baltimore Harbor. Francis Scott Key, a Washington lawyer, had been granted permission by the British to board one of their warships to negotiate the release of an American who had been taken prisoner. That night, waiting anxiously on the British ship, Key watched the British fleet firing on Fort McHenry. Finally, at daybreak, he saw the fort's American flag still flying; the British attack had failed. Intensely moved, he began to scribble on the back of an envelope the poem that became our national anthem...

The American flag played a central role in our Nation's most tragic conflict, when the North fought against the South. The lowering of the American flag at Fort Sumter was viewed as the start of the war. The Southern States, to formalize their separation from the Union, adopted the "Stars and Bars" of the Confederacy. The Union troops marched to the sound of "Yes We'll Rally Round The Flag Boys, We'll Rally Once Again." President Abraham Lincoln refused proposals to remove from the American flag the stars representing the rebel States, because he considered the conflict not a war between two nations but an attack by 11 States against the National Government. By war's end, the American flag again flew over "an indestructible union, composed of indestructible states."...

At Iwo Jima in the Second World War, United States Marines fought hand to hand against thousands of Japanese. By the time the Marines reached the top of Mount Suribachi, they raised a piece of pipe upright and from one end fluttered a flag. That ascent had cost nearly **6,000** American lives. President Franklin Roosevelt authorized the use of the flag on labels, packages, cartons, and containers intended for export as lend-lease aid, in order to inform people in other countries of the United States' assistance.

...Impetus for the enactment of the Federal Flag Desecration Statute in 1967 came from the impact of flag burnings in the United States on troop morale in Viet Nam...The flag symbolizes the Nation in peace as well as in war...No other American symbol has been as universally honored as the

flag...Until 1967, Congress left the regulation of misuse of the flag up to the States. Now, however, 18 U.S.C. §700(a) provides that:

“Whoever knowingly casts contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it shall be fined not more than \$1,000 or imprisoned for not more than one year, or both.”

Congress has also prescribed detailed rules for the design of the flag, the time and occasion of flag's display, the position and manner of its display, respect for the flag, and conduct during hoisting, lowering, and passing of the flag. With the exception of Alaska and Wyoming, all of the States now have statutes prohibiting the burning of the flag. Most of the state statutes are patterned after the Uniform Flag Act of 1917, which in §3 provides: "No person shall publicly mutilate, deface, defile, defy, trample upon, or by word or act cast contempt upon any such flag, standard, color, ensign or shield."...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...

But the Court insists that the Texas statute prohibiting the public burning of the American flag infringes on respondent Johnson's freedom of expression. Such freedom, of course, is not absolute. *Schenck v. United States*¹²; *Chaplinsky v. New Hampshire*...

Here it may equally well be said that the public burning of the American flag by Johnson was no essential part of any exposition of ideas, and at the same time it had a tendency to incite a breach of the peace.

Johnson was free to make any verbal denunciation of the flag that he wished; indeed, he was free to burn the flag in private. He could publicly burn other symbols of the Government or effigies of political leaders. He did lead a march through the streets of Dallas, and conducted a rally in front of the Dallas City Hall. He engaged in a "die-in" to protest nuclear weapons. He shouted out various slogans during the march, including: "Reagan, Mondale which will it be? Either one means World War III"; "Ronald Reagan, killer of the hour, Perfect example of U. S. power"; and "red, white and blue, we spit on you, you stand for plunder, you will go under." For none of these acts was he arrested or prosecuted; it was only when he proceeded to burn publicly an American flag stolen from its rightful owner that he violated the Texas statute.

The Court could not, and did not, say that Chaplinsky's utterances were not expressive phrases -- they clearly and succinctly conveyed an extremely low opinion of the addressee. The same may be said of Johnson's public burning of the flag in this case; it obviously did convey Johnson's bitter dislike of his country. But his act, like Chaplinsky's provocative words, conveyed nothing that could not have been conveyed and was not conveyed just as forcefully in a dozen different ways. As with "fighting words," so with flag burning, for purposes of the First Amendment: It is "no essential part of any exposition of ideas, and is of such slight social value as a step to truth that any benefit that

¹²Case 1A-S-2 on this website.

may be derived from it is clearly outweighed" by the public interest in avoiding a probable breach of the peace. The highest courts of several States have upheld state statutes prohibiting the public burning of the flag on the grounds that it is so inherently inflammatory that it may cause a breach of public order. 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.

As much as I may personally be reviled by burning the flag, I just cannot agree with fiction. The very reason a flag burning case gets the attention of the Supreme Court is the fact that flag burning sends a powerful message of dissent. Powerful for the very reason that it, more so than a postcard, does, in fact, antagonize. And, messages that antagonize are all the more likely to either be met with stronger opposition because of being antagonized or with victory of persuasion.

...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...

The Court concludes its opinion with a regrettably patronizing civics lecture...The Court's role as the final expositor of the Constitution is well established, but its role as a Platonic guardian admonishing those responsible to public opinion as if they were truant schoolchildren has no similar place in our system of government. The cry of "no taxation without representation" animated those who revolted against the English Crown to found our Nation -- the idea that those who submitted to government should have some say as to what kind of laws would be passed. Surely one of the high purposes of a democratic society is to legislate against conduct that is regarded as evil and profoundly offensive to the majority of people -- whether it be murder, embezzlement, pollution, or flag burning...I would uphold the Texas statute as applied in this case.

DISSENT: Justice Stevens...A country's flag is a symbol of more than "nationhood and national unity."...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 good will 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...**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.

Intelligent men expect us to buy into the argument that if we permit desecration of the flag to go unpunished, to be consistent we must permit graffiti on the Washington Monument to go unpunished!?!?! Apples & Oranges!

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...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." *West Virginia Board of Education v. Barnette*. 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 communication." *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...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." **Respondent was prosecuted because of the method he chose to express his dissatisfaction with those policies.** Had he chosen to spray-paint -- 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...I respectfully dissent.