

WHAT SO ★ PROUDLY ★ WE HAIL

The American Soul in Story, Speech, and Song

From *Texas v. Johnson*

This selection consists of two opinions (both excerpted here) from the famous US Supreme Court flag-burning case of 1989, in which a split court (5–4) held that burning an American flag as political protest is a form of symbolic speech protected by the First Amendment. Five years earlier, Gregory Lee Johnson, a Communist activist, had burned a flag in front of the Dallas City Hall as a protest against Reagan administration policies. Johnson was tried and convicted under a Texas law outlawing flag desecration. The court overturned the conviction, and in so doing, invalidated similar laws in force in 48 of the 50 states. Justice William Brennan (1906–97) delivered the opinion of the court, emphasizing the supremacy of freedom of expression. In one of his most famous dissents, Chief Justice William Rehnquist (1924–2005) offered a passionate defense of the law, emphasizing the unique meaning of the flag.¹

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Review both opinions carefully, and try to summarize the argument of each. Justice Brennan treats the flag as one of a number of “designated symbols,” whose use in expression the government is improperly trying to regulate. Chief Justice Rehnquist denies that the flag is a merely “designated” symbol, but rather “the visible symbol embodying our Nation,” for which our history has produced “uniquely deep awe and respect.” Whose view seems to you more correct?

Justice Brennan compares Johnson’s burning of the flag with the British bombardment of the Star-Spangled Banner at Fort McHenry, and claims that it is the flag’s and the nation’s resilience to such attacks that the court is upholding. What do you think of this argument? Is he right in suggesting that “the flag’s cherished place in our community will be strengthened, not weakened” by the court’s opinion?

Chief Justice Rehnquist says that the flag “is not simply another ‘idea’ or ‘point of view’ competing for recognition in the marketplace of ideas,” but a symbol that “millions and millions of Americans regard . . . with an almost mystical reverence,” regardless of their personal beliefs. And he insists that flag-burning is not so much political speech as it is an “inarticulate grunt or roar that . . . is most likely to be indulged in not to express

¹ *The Supreme Court’s decision provoked immediate public controversy. The US Congress passed a statute, the 1989 Flag Protection Act, making it a federal crime to desecrate the flag. That law was struck down by the same five-person majority of justices in United States v. Eichman (in an opinion also written by Justice Brennan).*

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any particular idea, but to antagonize others.” What do you think of these arguments? Is Rehnquist right when he claims that it is “one of the high purposes of a democratic society . . . to legislate against conduct that is regarded as evil and profoundly offensive to the majority of people—whether it is murder, embezzlement, pollution, or flag-burning”? Why might flag-burning be regarded as equivalent to the other offensive evils he mentions? How would you have decided this case?

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WILLIAM BRENNAN

The State . . . 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. 418 U.S., at 414, n. 8. 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. . . .

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*, “[w]e are confronted with a case of prosecution for the expression of an idea through activity,” and “[a]ccordingly, we must examine with particular care the interests advanced by [petitioner] to support its prosecution.” 418 U.S., at 411. 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. See, e. g., *Boos v. Barry, supra*, at 318; *Frisby v. Schultz*, 487 U.S. 474, 479 (1988).

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,” 36 U.S.C. 176(k), 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

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circumstances, but is designed instead to protect it only against impairments that would 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*, *supra*, 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 “[t]he emotive impact of speech on its audience is not a ‘secondary effect’” unrelated to the content of the expression itself.

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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.”

Texas argues that its interest in preserving the flag as a symbol of nationhood and national unity survives this close analysis. Quoting extensively from the writings of this Court chronicling the flag’s historic and symbolic role in our society, the State 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. . . .

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We have not recognized an exception to this principle even where our flag has been involved. In *Street v. New York*, 394 U.S. 576 (1969), 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.” *Id.*, at 593, quoting *Barnette*, 319 U.S., at 642. 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.”

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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. . . .

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. . . .

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

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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. . . .

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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. See *Carey v. Brown*, 447 U.S., at 466–467.

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. Indeed, we would not be surprised to learn that the persons who framed our Constitution and wrote the Amendment that we now construe were not known for their reverence for the Union Jack. The First Amendment does not guarantee that other concepts virtually sacred to our Nation as a whole—such as the principle that discrimination on the basis of race is odious and destructive—will go unquestioned in the marketplace of ideas. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969). We decline, therefore, to create for the flag an exception to the joust of principles protected by the First Amendment.

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.” *Spence*, 418 U.S., at 412. 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 precatory² 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

² *Of, relating to, or expressing a wish or request.*

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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.” *Barnette*, 319 U.S., at 640.

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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. See *Abrams v. United States*, 250 U.S. 616, 628 (1919) (Holmes, J., dissenting). Indeed, Texas’ argument that the burning of an American flag “is an act having a high likelihood to cause a breach of the peace,” Brief for Petitioner 31, quoting *Sutherland v. DeWulf*, 323 F. Supp. 740, 745 (SD Ill. 1971), 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. “To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.” *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). And, precisely because it is our flag that is involved, one’s response to the flag burner may exploit the uniquely persuasive power of the flag itself. We can imagine no more appropriate response to burning a flag than

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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.

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