

# 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.<sup>1</sup>*

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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*

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<sup>1</sup> *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 REHNQUIST

In holding this Texas statute unconstitutional, the Court ignores Justice Holmes’ familiar aphorism that “a page of history is worth a volume of logic.” *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921). 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.

At the time of the American Revolution, the flag served to unify the Thirteen Colonies at home while obtaining recognition of national sovereignty abroad. Ralph Waldo Emerson’s “Concord Hymn” describes the first skirmishes of the Revolutionary War in these lines:

By the rude bridge that arched the flood  
Their flag to April’s breeze unfurled,  
Here once the embattled farmers stood  
And fired the shot heard round the world.

During that time, there were many colonial and regimental flags, adorned with such symbols as pine trees, beavers, anchors, and rattlesnakes, bearing slogans such as “Liberty or Death,” “Hope,” “An Appeal to Heaven,” and “Don’t Tread on Me.” 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.

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One immediate result of the flag's adoption was that American vessels harassing British shipping sailed under an authorized national flag. Without such a flag, the British could treat captured seamen as pirates and hang them summarily; with a national flag, such seamen were treated as prisoners of war.

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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. G. Preble, *History of the Flag of the United States of America* 453 (1880). 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. *Id.* at 411. By war's end, the American flag again flew over "an indestructible union, composed of indestructible states." *Texas v. White*, 7 Wall. 700, 725 (1869). . . .

In the First and Second World Wars, thousands of our countrymen died on foreign soil fighting for the American cause. 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. The Iwo Jima Memorial in Arlington National Cemetery memorializes that event. 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. Presidential Proclamation No. 2605, 58 Stat. 1126.

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During the Korean War, the successful amphibious landing of American troops at Inchon was marked by the raising of an American flag within an hour of the event. 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 Vietnam. Representative L. Mendel Rivers, then Chairman of the House Armed Services Committee, testified that

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The burning of the flag . . . has caused my mail to increase 100 percent from the boys in Vietnam, writing me and asking me what is going on in America. Desecration of the Flag, Hearings on H.R. 271 before Subcommittee No. 4 of the House Committee on the Judiciary, 90th Cong., 1st Sess., 189 (1967).

Representative Charles Wiggins stated:

The public act of desecration of our flag tends to undermine the morale of American troops. That this finding is true can be attested by many Members who have received correspondence from servicemen expressing their shock and disgust of such conduct. 113 Cong. Rec. 16459 (1967).

The flag symbolizes the Nation in peace as well as in war. It signifies our national presence on battleships, airplanes, military installations, and public buildings from the United States Capitol to the thousands of county courthouses and city halls throughout the country. Two flags are prominently placed in our courtroom. Countless flags are placed by the graves of loved ones each year on what was first called Decoration Day, and is now called Memorial Day. The flag is traditionally placed on the casket of deceased members of the Armed Forces, and it is later given to the deceased's family. Congress has provided that the flag be flown at half-staff upon the death of the President, Vice President, and other government officials "as a mark of respect to their memory." The flag identifies United States merchant ships, and "[t]he laws of the Union protect our commerce wherever the flag of the country may float." *United States v. Guthrie*, 17 How. 284, 309 (1855).

No other American symbol has been as universally honored as the flag. In 1931, Congress declared "The Star-Spangled Banner" to be our national anthem. 36 U.S.C. § 170. In 1949, Congress declared June 14th to be Flag Day. In 1987, John Philip Sousa's "The Stars and Stripes Forever" was designated as the national march. Pub. L. 101-186, 101 Stat. 1286. Congress has also established "The Pledge of Allegiance to the Flag" and the manner of its deliverance. 36 U.S.C. § 172. The flag has appeared as the principal

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symbol on approximately 33 United States postal stamps and in the design of at least 43 more, more times than any other symbol. United States Postal Service, Definitive Mint Set 15 (1988).

Both Congress and the States have enacted numerous laws regulating misuse of the American flag. Until 1967, Congress left the regulation of misuse of the flag up to the States. Now, however, Title 18 U.S.C. § 700(a) provides that:

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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, *inter alia*, detailed rules for the design of the flag, 4 U.S.C. § 1 the time and occasion of flag's display, 36 U.S.C. § 174 the position and manner of its display, § 175, respect for the flag, § 176, and conduct during hoisting, lowering, and passing of the flag, § 177. 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. Proceedings of National Conference of Commissioners on Uniform State Laws 323-324 (1917).

Most were passed by the States at about the time of World War I. Rosenblatt, *Flag Desecration Statutes: History and Analysis*, 1972 Wash. U. L. Q. 193, 197.

The American flag, then, throughout more than 200 years of our history, has come to be the visible symbol embodying our Nation. It does not represent the views of any particular political party, and it does not represent any particular political philosophy. The flag is not simply another "idea" or "point of view" competing for recognition in the marketplace of ideas. Millions and millions of Americans regard it with an almost mystical reverence, regardless of what sort of social, political, or philosophical beliefs they may have. 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.

More than 80 years ago, in *Halter v. Nebraska*, 205 U.S. 34 (1907), this Court upheld the constitutionality of a Nebraska statute that forbade the use of representations of the

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American flag for advertising purposes upon articles of merchandise. The Court there said:

For that flag every true American has not simply an appreciation, but a deep affection. . . . Hence, it has often occurred that insults to a flag have been the cause of war, and indignities put upon it, in the presence of those who revere it, have often been resented and sometimes punished on the spot. *Id.* at 41. . . .

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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. . . . In *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), a unanimous Court said:

Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which, by their very utterance, inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. *Id.* at 571–572 (footnotes omitted).

The Court upheld Chaplinsky's conviction under a state statute that made it unlawful to "address any offensive, derisive or annoying word to any person who is lawfully in any street or other public place." *Id.* at 569. Chaplinsky had told a local marshal, "You are a God damned racketeer" and a "damned Fascist and the whole government of Rochester are Fascists or agents of Fascists." *Ibid.*

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

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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.” Brief for Respondent 3. 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.

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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 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. Only five years ago we said in *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 812 (1984), that “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

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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. . . .

But the Court today will have none of this. The uniquely deep awe and respect for our flag felt by virtually all of us are bundled off under the rubric of “designated symbols,” *ante* at 417, that the First Amendment prohibits the government from “establishing.” But the government has not “established” this feeling; 200 years of history have done that. The government is simply recognizing as a fact the profound regard for the American flag created by that history when it enacts statutes prohibiting the disrespectful public burning of the flag.

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The Court concludes its opinion with a regrettably patronizing civics lecture, presumably addressed to the Members of both Houses of Congress, the members of the 48 state legislatures that enacted prohibitions against flag burning, and the troops fighting under that flag in Vietnam who objected to its being burned:

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. *Ante* at 419.

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.

Our Constitution wisely places limits on powers of legislative majorities to act, but the declaration of such limits by this Court “is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case.” *Fletcher v. Peck*, 6 Cranch 87, 128 (1810) (Marshall, C. J.). Uncritical extension of constitutional protection to the burning of the flag risks the frustration of the very purpose for which organized governments are instituted. The Court decides that the American flag is just another symbol, about which not only must opinions pro and con be tolerated, but for which the most minimal public respect may not be enjoined. The government may

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conscript men into the Armed Forces where they must fight and perhaps die for the flag, but the government may not prohibit the public burning of the banner under which they fight. I would uphold the Texas statute as applied in this case.

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