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### Arguments for Texas

- For 200 years, the American flag has occupied a unique position as the symbol of the nation.
- The flag symbolizes more than national unity. It has strong significance for war veterans and their families. It symbolizes our shared values of freedom, equal opportunity, and religious tolerance. It is in the government's interest to protect this important American symbol.
- Texas did not punish Johnson's message, just the means he used to convey it.
- Even if the action of flag burning can be interpreted as speech, we don't have to allow all speech. There must be reasonable limits. There are other ways that Johnson could have expressed his views.



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- The government may not prohibit expression simply because society finds the ideas presented offensive.
- The Supreme Court has long recognized that speech can be more than the spoken or written word. Actions are symbolic speech when the actor intends to convey a particular message and there is a great likelihood that those watching would understand the message.
- Johnson's actions did not incite violence or disrupt the peace.
- While it is important for the government to preserve the flag as a symbol, it is more important to ensure Americans' rights to protest when they disagree with the government.

# STREET LAW<sup>TM</sup> INC

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## ***Texas v. Johnson (1989)***

**Facts:** During the Republican National Convention in 1984, Gregory Lee Johnson participated in a group political demonstration. The demonstrators were opposed to nuclear weapons. One demonstrator took an American flag from a flagpole and gave it to Johnson. The demonstration ended in front of the Dallas, Texas, city hall, where Johnson set fire to the American flag. While the flag burned, protesters chanted “America, the red, white, and blue, we spit on you.” There were no injuries or threats of injury during the demonstration.

Johnson was arrested and charged with violating a Texas state law that banned the desecration of the American flag in a way that would seriously offend one or more persons likely to observe his action. Several people were offended by the flag burning and said so in court. Johnson was convicted, but he appealed, saying that the Texas law violated the First Amendment, which protects free speech.

**Issue:** Does a law banning the burning of the flag violate the First Amendment?

**Precedents:** Arguments in a Supreme Court case are often based on precedents—previous cases the Court has decided about similar issues. Both sides argue that a particular precedent does or does not apply to the present case. These are First Amendment precedents:

***United States v. O’Brien (1968):*** To protest the war in Vietnam, four men burned their draft cards at a public demonstration. A federal law said that mutilating a draft card was illegal. When the men were convicted of breaking this law, they challenged it, saying the law violated their freedom of speech. The Supreme Court ruled that the law was constitutional. The Court said a person could not simply say any activity was “speech.” In addition, it said that the nation’s need to maintain the armed forces was more important than free speech.

***Spence v. Washington (1974):*** Spence, a college student, wanted to protest the actions of American troops in Cambodia. He hung an American flag upside down from his apartment window. Over the flag he placed a peace symbol made from black tape. At his trial, Spence stated his purpose was to associate the American flag with peace instead of war and violence. Spence was convicted of violating a Washington law that prohibited placing anything over a flag. The Supreme Court ruled for Spence, saying that the flag was displayed on his own home, and that he was clearly expressing an idea through his action. The state could not demonstrate a clear reason for preventing the expression of this idea.

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## **Decision Overview of *Texas v. Johnson***

Justice Brennan delivered the majority opinion of the Court.

The Court first had to decide whether Johnson's flag burning constituted expressive conduct enabling him to invoke his First Amendment protection. In so doing the Court had to consider whether the act had sufficient communicative elements to fall within the right to free speech protected by the First Amendment and to assess "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." [p.404] The Court said that not every conduct associated with a flag or emblem is expressive conduct but determined that Johnson's act qualified as expressive conduct because it occurred as part of a political demonstration and that "the expressive, overtly political nature of this conduct was both intentional and overwhelmingly apparent." [p. 406]

The Court then had to decide what level of scrutiny to apply in assessing the constitutionality of the impugned statute under the First Amendment. If the provision related to the expression itself, it had to withstand a more heightened level of scrutiny. According to the Court, "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." [p. 406] On the other hand, a lower level of scrutiny applies when government interference is unrelated to the suppression of expression.

In this case, Texas argued two separate interests to justify Johnson's conviction: preventing breaches of the peace and preserving the flag as a symbol of nationhood and national unity. On the breach of peace argument, the Court reasoned that the act of flag burning was not intended to incite or produce imminent unlawful action. Nor did it fall under the classification of fighting words, unprotected under the First Amendment. Therefore, the Supreme Court reasoned, that the facts of the case did not evidence the State's interest in maintaining order. As to the second justification, the Court had little problem viewing it as directly related to the suppression of expression because the state's concern that burning the flag would lead people to be less positive about the ideal of unity could only be realized if the treatment of the flag communicated some message.

The Court then addressed whether the State's interest in preserving the flag as a symbol of nationhood and national unity justified Johnson's conviction. The Court reaffirmed its jurisprudence on the First Amendment stating that "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." [p. 414] The Court referred to