Quiz: Test Your Knowledge on the Freedom of Speech

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This is the 11th year that Delaware Law School and The News Journal have teamed up to provide you with a collection of essays to celebrate Constitution Day. September 17, the national observance marking the date in 1787 when the Framers signed the Constitution in Philadelphia. This year’s collection is a series of quizzes to test your knowledge of constitutional law. Of course, we realize that most of you are not judges or lawyers so don’t feel badly if you get stumped by some or all of the questions. But we do hope you welcome this opportunity to expand your knowledge of constitutional law. After all, lawyers and judges did not “ordain and establish” the Constitution; “We the People” did. If our nation is to continue becoming an ever “more perfect Union,” it needs citizens who are educated and engaged, and who are eager to participate in the democratic process with their voices and votes. That’s why Justice Louis Brandeis said “the greatest menace to freedom is an inert people” and “public discussion is a political duty.”

I. The Supreme Court has held that the First Amendment protects the right to burn which of the following?

a. A draft card as a symbol of protest.
b. The American Flag as a symbol of protest.
c. Wood for a campfire in a national park even when a “no fires” sign is posted.
d. A cross when burned as a racist threat.

II. Under the First Amendment, which of the following forms of expression would a court most likely hold that a high school principal would not be permitted to punish a high school student for?

a. Setting a homecoming float on fire as a symbol of protest against the student organization sponsoring the float.
b. Texting uninvited, vulgar, sexually explicit messages to other students during school hours.
c. Wearing a black armband as a symbol of protest against a decision of the President of the United States commencing war against a foreign nation.
d. Posting on the student’s own personal Facebook page the lyrics to a song the student composed describing sexual and violent attacks the student would like to make against those persons.

Answers

I. The correct answer is (b). The Supreme Court held in a famous case, Texas v. Johnson (1989), that there is a constitutional right to burn the American Flag as an act of protest. The flag burner must be burning his or her own flag. There is no constitutional right to burn someone else’s property, including someone else’s flag. Most Americans of good will would not dream of burning the American Flag, and most find flag-burning deeply offensive. Yet protecting speech that we loathe and find repulsive is, the Court reasoned, the very core of what freedom of speech is all about. The Court thus stated: “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.” Choice (a) is wrong. Now you might be thinking, well, if you can burn the Flag, why can’t you burn a draft card? For those of you too young to know the reference, there was a time in which we did not have a volunteer armed forces, as we do now, and so people were drafted to serve in the military. A draft card was an individual’s registration with the Selective Service System, which administered the draft. During the Vietnam War, one form of protest against the War was to publicly burn draft cards. In a case called United States v. O’Brien (1968), the Supreme Court reasoned that draft cards had a functional quality, assisting the government in the efficient administration of the draft. A law banning the burning of a draft card could thus be upheld, because the purpose of Congress in prohibiting the altering of draft cards interfered with this practical function, and thus was not simply a law aimed at suppressing unpopular speech. If you were tempted to pick (d), I can’t blame you. In Virginia v. Black (2003), a cross-burning case in which I was the lawyer and was fortunate enough to argue it before the Supreme Court, the Court held that the First Amendment does protect cross-burning as a form of freedom of speech, even though burning the Cross (or the Star of David, or any other symbol deemed sacred by some members of society) is deeply offensive, if all the burner is doing is expressing an opinion. However, if the cross-burner is burning the cross to intimidate or threaten somebody, then the First Amendment does not protect the burning. It is against the law to threaten people, whether you do it with a gun or a burning cross. Notice that choice (d) is worded “racist threat.” That word “threat” is the key. Now of course, there are going to be difficult tricky cases in which it will be hard to tell whether the burning of a cross is just the expression of an opinion, or is a true threat. If you find the exploration of such issues fascinating, maybe you should consider applying to law school. We are always looking for intellectually curious people at Delaware Law School! If you don’t feel badly if you get stumped by some or all of the questions. But we do hope you welcome this opportunity to expand your knowledge of constitutional law. Of course, we realize that most of you are not judges or lawyers so don’t feel badly if you get stumped by some or all of the questions. But we do hope you welcome this opportunity to expand your knowledge of constitutional law. After all, lawyers and judges did not “ordain and establish” the Constitution; “We the People” did. If our nation is to continue becoming an ever “more perfect Union,” it needs citizens who are educated and engaged, and who are eager to participate in the democratic process with their voices and votes. That’s why Justice Louis Brandeis said “the greatest menace to freedom is an inert people” and “public discussion is a political duty.”

II. The best answer is (c), as the Supreme Court held in Tinker v. Des Moines (1969). If you picked (a), my only response is: “Dude—seriously?” I like the movie Animal House too, but you can’t adopt it as a way of life. Burning other people’s stuff is not allowed. We covered this in the answer to (I). Both (b) and (d) involve issues that school officials struggle with all the time these days, and so do courts. Choice (b) is the easier choice to rule out. There is no constitutional right to harass fellow students, which is basically what is going on here. Choice (d) is trickier, for two reasons. First, the speech is posted on Facebook, and so doesn’t directly involve speech conducted “at school.” Second, the expression takes place within song lyrics, and so the student might argue it was just artistic expression, and not a serious threat of any kind against the people named. Even so, given that actual people at the school are named by name and that the lyrics involve descriptions of explicit violent and sexual attacks upon them, I suspect most courts would uphold the power of a school principal to discipline the student. If you think this issue is a close call, however, and would like to learn more, then come to Delaware Law School! Rod Smolla is Dean of the Delaware Law School @ Widener University.

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