

The Burger Court Opinion Writing Database

Cowgill v. California

396 U.S. 371 (1970)

Paul J. Wahlbeck, George Washington University

James F. Spriggs, II, Washington University

Forrest Maltzman, George Washington University



January 15, 1970

MEMORANDUM TO THE CONFERENCE

Re: No. 496 - Cowgill v. California

Dear Brethren:

The vote on this case at the last Conference was four to note (WOD, JMH, WJB and TM) and four to dismiss or affirm (WEB, HLB, PS and BRW). I asked that the case go over with the possibility that I might change my vote to dismiss. I have now decided to do so, and intend to file the attached memorandum in connection with the dismissal.

Sincerely,

J. M. H.

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To: Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall

SUPREME COURT OF THE UNITED STATES

[January —, 1970]

Circulated: JAN 15 1970

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MEMORANDUM OF MR. JUSTICE HARLAN

Re: No. 496—*Cowgill v. California*

While I am of the view this appeal should be dismissed, I deem it appropriate to explain the basis for my conclusion since the issue tendered by appellant—whether symbolic expression by displaying a “mutilated” American flag is protected from punishment by the Fourteenth Amendment—is one that I cannot regard as insubstantial. See *Street v. New York*, 394 U. S. 576, 594.

The record before us is not in my judgment suitable for considering this broad question as it does not adequately flush the narrower and predicate issue of whether there is a recognizable communicative aspect to appellant's conduct which appears to have consisted merely of wearing a vest fashioned out of a cut-up American flag. Such a question, not insubstantial of itself, has been pretermitted in the Court's previous so-called “symbolic speech” cases where the communicative content of the conduct was beyond dispute. See *Tinker v. Des Moines*, 393 U. S. 503; *Gregory v. City of Chicago*, 394 U. S. 111; *Brown v. Louisiana*, 383 U. S. 131; *Bell v. Maryland*, 378 U. S. 226; *Garner v. Louisiana*, 368 U. S. 157, 201 (concurring opinion); *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 632; see generally Note, Symbolic Conduct, 68 Col. L. Rev. 1091 (1968). The Court has, as yet, not established a test for determining at what point conduct becomes so intertwined with expression that it becomes necessary to weigh the State's interest in proscribing conduct against

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To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Fortas
Mr. Justice Marshall

SUPREME COURT OF THE UNITED STATES

October Term, 1969

ALFRED TENNYSON COWGILL, APPELLANT *v.*
CALIFORNIA

From: Harlan, J.

Circulated:

Recirculated:

JAN 16 1970

APPEAL FROM THE APPELLATE DEPARTMENT OF THE
SUPERIOR COURT OF CALIFORNIA, COUNTY OF
LOS ANGELES

No. 496. Decided January 19, 1970

Memorandum of MR. JUSTICE HARLAN, with whom
MR. JUSTICE BRENNAN joins.

While I am of the view this appeal should be dismissed, I deem it appropriate to explain the basis for my conclusion since the issue tendered by appellant—whether symbolic expression by displaying a “mutilated” American flag is protected from punishment by the Fourteenth Amendment—is one that I cannot regard as insubstantial. See *Street v. New York*, 394 U. S. 576, 594.

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