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POL 316 Midterm Examination

Mr. O’Brien

Submitted at:

**PLEASANTVILLE PATRIOTS V. PLEASANTVILLE**

After recent waves of immigration, the proportion of Pleasantville residents of Mexican descent has grown dramatically, increasing racial conflicts between the town’s Anglo and Mexican residents. The racial tension has allegedly increased gang membership, and based on the rioting that occurred during last year’s Cinco de Mayo parade, there is a real threat of violence for this year’s parade. For this reason, the Pleasantville Board of Supervisors enacted an ordinance that bans the wearing of t-shirts depicting the American flag and burning of all national flags in public on May 5, 2014. The Pleasantville Patriots have challenged the ordinance, arguing that the ordinance unfairly restricts their freedom of expression. The District and Appeals Courts have sided with the plaintiffs in granting an injunction. The Court should affirm.

In making its decision, the Court must address the real and legitimate government concern of preserving the peace. The role of government, since before Thomas Hobbes developed the social contract in his *Leviathan*, has been to ensure order. According to Hobbes, in a state of nature, there are no laws, so all men have liberty to all things. Because resources are limited but man’s desires infinite, conflicts inevitably arise that can lead to the loss of life, so in a state of nature, no man’s life is secure. Hobbes argues that man must surrender his absolute liberty to a sovereign in order to secure his right to life, in what he calls the social contract. While Hobbes used this argument to affirm absolute monarchy, James Madison alludes to the Hobbesian social contract in his *The Federalist Papers: No. 51* when arguing for the separation of powers in a federal republic, showing the applicability of Hobbesian political theory to our liberal democracy. Based on the Hobbesian social contract theory affirmed by our Founding Fathers, the government has the right and responsibility to curb its subjects’ liberties in order to ensure security.

John Stuart Mill furthers Pleasantville’s justification for enacting the ordinance with his articulation of the “harm principle” in *On Liberty*, saying that “the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others” (*On Liberty,* 14). While Pleasantville’s ordinance does restrict the actions of those who wish to wear an American flag shirt or burn a Mexican flag, it is justified, according to Mill, because the threat to the public peace outweighs individual rights of expression. Mill, a strong proponent of liberty and the ability to lead a life without government intervention, acknowledges a role for government in restricting a man’s actions when they cause harm to the community. Because of Mill’s “harm principle,” Pleasantville argues that it is justified in creating an ordinance that restricts the liberty of its residents.

The Tenth Amendment of the Bill of Rights affirms the view that government can restrict rights when necessary. While the Bill of Rights enumerates restrictions on the federal government, the Tenth Amendment leaves police power, or the ability to regulate actions in the name of the general welfare, to the States. Under its right of police power, Pleasantville argues that its regulation of its residents’ actions is justified. Because Pleasantville banned wearing American flag t-shirts, but not the American flag itself, its ban appears to be targeted towards gang behavior. The American flag shirts are indicators of gang membership and could constitute gang colors, so the government, according to the defendant, is justified in attempting to limit gangs and the violence and lawlessness associated with them. Pleasantville claims to be able to restrict the burning of the Mexican flag under the umbrella of police power because of the violence that the burning incites.

However, Pleasantville’s ordinance restricts free expression, a First Amendment right, so Pleasantville’s statute must undergo strict scrutiny, and the burden of proof is on Pleasantville to ensure that its ban is justified. From *Texas v. Johnson* and *Cohen v. California,* the Court has shown that expressive conduct is a form of speech. Such conduct is a form of speech because it is used to express clearly communicable ideas, but the speaker feels that such conduct is necessary to adequately express the message they wish to convey. For this reason, both the American flag shirts and the Mexican flag burnings are forms of speech subject to the First Amendment. Because the freedom of speech is fundamental to the functioning of a democracy and is for that reason protected in the Bill of Rights, any infringement of the freedom of speech must follow the strict scrutiny test laid out in *US v. O’Brien*. In that decision, the Court established that the restriction of speech must be furthering a compelling government interest, or an interest necessary for government to function; its purpose must be content-neutral, or unrelated to the suppression of speech, and it must be the least restrictive means of achieving the government interest, or there is not a different manner in which the government can further the same interest while restricting fewer rights. The purpose of these guidelines is to ensure that the government cannot indiscriminately restrict speech, but that when such a restriction is necessary for the basic functioning of government, the government can curb the expression of its citizens.

The Court acknowledges that Pleasantville’s interest in limiting violence from a racial conflict is a compelling one. As demonstrated above, the essential role of government is the security of its subjects, because without an insurance of life, other liberties cannot be fully utilized. While the First Amendment protects political speech, it does not protect speech that is likely to incite violence, what the Court calls fighting words. The Court argued in *Brandenburg v. Ohio* that speech that incites violence but has no real threat is protected under the First Amendment, because its restriction furthers no real government interest while unnecessarily restricting expression. The defendant argues that the situation in Pleasantville is fundamentally different however, because the banned forms of expression are fighting words, and it is therefore not subject to First Amendment scrutiny. The Court should disagree in part, and therefore must continue to subject the ordinance to the remaining strict scrutiny tests.

Pleasantville argues that its ordinance is content neutral because its bans on expression do not restrict a certain viewpoint. The broad ban on the burning of all national flags ensures that the ban is not targeting those who wish to protest the Cinco de Mayo parade, because it bans any message that burning a flag of any nationality can convey. The ban on the American flags is not targeted towards diminishing the expression of the Anglo gangs for the sake of limiting their expression, but is framed as a broad ban on anyone wearing an American flag shirt because of the racial sensitivities present on Cinco de Mayo. The broad nature of the bans, claims Pleasantville, ensures that they are not targeting a certain content of speech, but instead are based in furthering the compelling government interest of preventing the violence that such symbolic forms of speech can cause.

While the broad nature of the bans is what ensures that they are content neutral, it has the potential to contradict the requirement that the government further its interest using the least restrictive means. While the government can and must at times restrict rights, it must do so while infringing upon as few unrelated rights as possible. While Pleasantville argues that its ordinance adheres to the least restrictive means requirements because it is only applicable for one day, it fails to take into account the other forms of speech that it unjustly restricts with its ban. The Court finds fault with the broad ban on expressions because while it is tailored to affect only one day, it still unnecessarily restricts protected forms of expression.

The marketplace of ideas is the basis for democracy. In *On Liberty,* Mill discusses the importance of the free discussion of ideas. It is only through open and unhindered dialogue that society as a whole can progress towards truth, and governmental censorship is antithetical to a democracy based on limited government and protected civil liberties. While Mill’s “harm principle” is a justification for government abridgement of the freedom of speech, it is important that such government interference is narrowly tailored enough to only prevent its subjects from harming others. If not, governments can broadly sweep aside civil liberties in the name of security and order. Such is the fault of Pleasantville’s ordinance.

The First Amendment, as applied to the States through incorporation into the Fourteenth Amendment, prevents any government from curbing the freedom of speech. Pleasantville, while claiming to prohibit fighting words, extends its reach too far and restricts protected forms of speech. In judging the case, the Court must first look to the point of the ordinance, namely to prevent violence. While the ordinance suppresses expression that can lead to violence, it suppresses content that is unrelated to the preservation of the peace as well, and is for this reason unconstitutional.

The ban on the American flag t-shirts is overbroad. While the shirts themselves may indicate gang membership, there is nothing inherently offensive about the American flag. In *Cohen v. California*, the Court establishes that in order for content to be categorized as fighting words, it must be directed at the hearer, because otherwise it is not likely to incite violence. The American flag is not an offensive form of expression; the Mexicans residents live in the US and are aware of the country’s flag, and it therefore cannot be considered unprotected speech as fighting words. Even if they do find the content offensive given the celebration of Cinco de Mayo, the wearers of the shirt are imposing nothing upon the public. The Court must look again to the purpose of the ordinance: to prevent violence. It is not the shirts in themselves that incite violence, but the actions and words of the wearers of the clothing. A ban on American flag shirts will not change the attitude of the Anglos, so the cause of conflict remains. Just as it would be overbroad for South Central Los Angeles or East St. Louis to prevent the wearing of royal blue or red in the name of decreasing gang violence, Pleasantville cannot ban the wearing of American flags to protect the peace. The ban on American flag shirts is for the above reasons facially unconstitutional, and in no circumstances could such a ban pass the Court’s strict scrutiny.

Pleasantville’s ban on burning all national flags is overbroad as well. While the burning of the Mexican flag can be considered fighting words, because it is directed at the Mexican “hearers” with spiteful intent, the broad ban on flag burning unnecessarily restricts the rights of Pleasantville’s citizens. This ordinance broadly bans protected forms of flag burning that are unlikely to incite violence, such as the burning of a flag to protest an event unrelated to Mexico or Cinco de Mayo. However, as the Court has established, fighting words are unprotected speech not because of their content, but because of the violence that results. For this reason, an Anglo who wishes to burn a Mexican flag with spiteful intent, *when there exists no imminent threat of violence*, is protected in doing so under the First Amendment. The government interest cannot be the suppression of content in general, but only of speech in circumstances in which a real threat to the public peace exists. For this reason, the ban on flag burning is, as applied, unconstitutional. While the government is justified in restricting fighting words, the burning of the Mexican flag inclusive, the overbroad prohibition proscribes protected speech, and is therefore unconstitutional in its current form.

For the reasons set forth, Pleasantville’s bans on American flag shirts and the burning of national flags on May 5, 2014 are overbroad and unconstitutional.

Word Count: 1982

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