CONTROLLING LEGAL PRINCIPLES

Free Exercise Clause Decision – The "Contemplation of Justice"

City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984)

The seminal cases in which the Court held state legislation unconstitutional "on its face" did not involve any departure from the general rule that a litigant only has standing to vindicate his own constitutional rights. In Stromberg v. California, 283 U. S. 359 (1931), [Footnote 12] and Lovell v. Griffin, 303 U.S.

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444 (1938), [Footnote 13] the statutes were unconstitutional as applied to the defendants' conduct, but they were also unconstitutional on their face because it was apparent that any attempt to enforce such legislation would create an unacceptable risk of the suppression of ideas. [Footnote 14] In cases of this character, a holding of facial invalidity expresses the conclusion that the statute

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could never be applied in a valid manner. Such holdings [Footnote 15] invalidated entire statutes, but did not create any exception from the general rule that constitutional adjudication requires a review of the application of a statute to the conduct of the party before the Court.

Subsequently, however, the Court did recognize an exception to this general rule for laws that are written so broadly that they may inhibit the constitutionally protected speech of third parties. This "overbreadth" doctrine has its source in Thornhill v. Alabama, 310 U. S. 88 (1940). In that case, the Court concluded that the very existence of some broadly written statutes may have such a deterrent effect on free expression that they should be subject to challenge even by a party whose own conduct may be unprotected. [Footnote 16] The Court

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has repeatedly held that such a statute may be challenged on its face even though a more narrowly drawn statute would be valid as applied to the party in the case before it. [Footnote 17] This exception from the general rule is predicated on

"a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression."

Broadrick v. Oklahoma, 413 U. S. 601, 413 U. S. 612 (1973).

In the development of the overbreadth doctrine, the Court has been sensitive to the risk that the doctrine itself might sweep so broadly that the exception to ordinary standing requirements would swallow the general rule. In order to decide whether the overbreadth exception is applicable in a particular case, we have weighed the likelihood that the statute's very existence will inhibit free expression.

"[T]here comes a point where that effect -- at best a prediction -- cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe. To put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of a

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statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."

Broadrick v. Oklahoma, 413 U.S. at 413 U. S. 615 (citation omitted). [Footnote 18]

The concept of "substantial overbreadth" is not readily reduced to an exact definition. It is clear, however, that the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge. [Footnote 19] On the contrary, the requirement of substantial overbreadth stems from the underlying justification for the overbreadth exception itself -- the interest in preventing an invalid statute from inhibiting the speech of third parties who are not before the Court.

"The requirement of substantial overbreadth is directly derived from the purpose and nature of the doctrine. While a sweeping statute, or one incapable of limitation,

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has the potential to repeatedly chill the exercise of expressive activity by many individuals, the extent of deterrence of protected speech can be expected to decrease with the declining reach of the regulation."

New York v. Ferber, 458 U. S. 747, 458 U. S. 772 (1982) (footnote omitted).

In short, there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds. See Erznoznik v. City of Jacksonville, 422 U. S. 205, 422 U. S. 216 (1975). See also Ohralik v. Ohio State Bar Assn., 436 U. S. 447, 436 U. S. 462, n. 20 (1978); Parker v. Levy, 417 U. S. 733, 417 U. S. 760-761 (1974).

"But to say the ordinance presents a

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First Amendment issue is not necessarily to say that it constitutes a First Amendment violation."

Metromedia, Inc. v. San Diego, 453 U.S. at 453 U. S. 561 (BURGER, C.J., dissenting). It has been clear since this Court's earliest decisions concerning the freedom of speech that the state may sometimes curtail speech when necessary to advance a significant and legitimate state interest. Schenck v. United States, 249 U. S. 47, 249 U. S. 52 (1919).

As Stromberg and Lovell demonstrate, there are some purported interests -- such as a desire to suppress support for a minority party or an unpopular cause, or to exclude the expression of certain points of view from the marketplace of ideas -- that are so plainly illegitimate that they would immediately invalidate the rule. The general principle that has emerged from this line of cases is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others. See Bolger v. Youngs Drug Products Corp., 463 U. S. 60, 463 U. S. 65, 463 U. S. 72 (1983); Consolidated Edison Co. v. Public Service Comm'n, 447 U. S. 530, 447 U. S. 535-536 (1980); Carey v. Brown, 447 U. S. 455, 447 U. S. 462-463 (1980); Young v. American Mini Theatres, Inc., 427 U. S. 50, 427 U. S. 63-65, 427 U. S. 67-68 (1976) (plurality opinion); Police Department of Chicago v. Mosley, 408 U. S. 92, 408 U. S. 95-96 (1972).

In United States v. O'Brien, 391 U. S. 367 (1968), the Court set forth the appropriate framework for reviewing a viewpoint-neutral regulation of this kind:

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"[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

Id. at 391 U. S. 377.

It is well settled that the state may legitimately exercise its police powers to advance esthetic values. Thus, in Berman v. Parker, 348 U. S. 26, 348 U. S. 32-33 (1954), in referring to the power of the legislature to remove blighted housing, this Court observed that such housing may be "an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn." Ibid. We concluded:

"The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary."

Id. at 348 U. S. 33 (citation omitted). See also Penn Central Transportation Co. v. New York City, 438 U. S. 104, 438 U. S. 129 (1978); Village of Belle Terre v. Boraas, 416 U. S. 1, 416 U. S. 9 (1974); Euclid v. Ambler Co., 272 U. S. 365, 272 U. S. 387-388 (1926); Welch v. Swasey, 214 U. S. 91, 214 U. S. 108 (1909).

While the First Amendment does not guarantee the right to employ every conceivable method of communication at all times and in all places, Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. at 452 U. S. 647, a restriction on expressive activity may be invalid if the remaining modes of communication are inadequate. See, e.g., United States v. Grace, 461

U. S. 171, 461 U. S. 177 (1983); Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. at 452 U. S. 654-655; Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. at 447 U. S. 535; Linmark Associates, Inc. v. Willingboro, 431 U. S. 85, 431 U. S. 93 (1977).

[Footnote 12]

The question before the Court was whether Stromberg could constitutionally be convicted for displaying a red flag as a symbol of opposition to organized government. Stromberg was a supervisor at a summer camp for children. The camp's curriculum stressed class consciousness and the solidarity of workers. Each morning at the camp, a red flag was raised and the children recited a pledge of allegiance to the "workers' flag." The statute under which Stromberg was convicted prohibited peaceful display of a symbol of opposition to organized government. The Court wrote:

"The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. A statute which, upon its face and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment. The . . . statute being invalid upon its face, the conviction of the appellant . . . must be set aside."

283 U.S. at 283 U. S. 369-370.

[Footnote 13]

Lovell was convicted of distributing religious pamphlets without a license. A local ordinance required a license to distribute any literature, and gave the chief of police the power to deny a license in order to abate anything he considered to be a "nuisance." The Court wrote:

"We think that the ordinance is invalid on its face. Whatever the motive which induced its adoption, its character is such that it strikes at the very foundation of the freedom of the press by subjecting it to license and censorship. The struggle for the freedom of the press was primarily directed against the power of the licensor. It was against that power that John Milton directed his assault by his 'Appeal for the Liberty of Unlicensed Printing.' And the liberty of the press became initially a right to publish 'without a license what formerly could be published only with one.' While this freedom from previous restraint upon publication cannot be regarded as exhausting the guaranty of liberty, the prevention of that restraint was a leading purpose in the adoption of the constitutional provision."

303 U.S. at 303 U. S. 451-462 (footnote omitted).

[Footnote 14]

In Stromberg, the only justification for the statute was the suppression of ideas. In Lovell, since no attempt was made to tailor the licensing requirement to a substantive evil unrelated to the suppression of ideas, the statute created an unacceptable risk that it would be used to suppress. Under such statutes, any enforcement carries with it the risk that the enforcement is being used

merely to suppress speech, since the statute is not aimed at a substantive evil within the power of the government to prohibit.

[Footnote 15]

Subsequent cases have continued to employ facial invalidation where it was found that every application of the statute created an impermissible risk of suppression of ideas. See Saia v. New York, 334 U. S. 558 (1948) (ordinance prohibited use of loudspeaker in public places without permission of the chief of police, whose discretion was unlimited); Cantwell v. Connecticut, 310 U. S. 296 (1940) (ordinance required license to distribute religious literature without standards for the exercising of licensing discretion); Schneider v. State, 308 U. S. 147 (1939) (ordinances prohibited distributing leaflets without a license and provided no standards for issuance of licenses); Hague v. CIO, 307 U. S. 496, 307 U. S. 516 (1939) (plurality opinion) (statute permitted city to deny permit for a public demonstration subject only to the uncontrolled discretion of the director of public safety).

[Footnote 16]

"It is not merely the sporadic abuse of power by the censor, but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion. One who might have had a license for the asking may therefor call into question the whole scheme of licensing when he is prosecuted for failure to procure it. A like threat is inherent in a penal statute, like that in question here, which does not aim specifically at evils within the allowable area of state control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press. The existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview."

310 U.S. at 310 U. S. 97-98 (citation omitted).

[Footnote 17]

A representative statement of the doctrine is found in Gooding v. Wilson, 405 U. S. 518 (1972).

"At least when statutes regulate or proscribe speech and when 'no readily apparent construction suggests itself as a vehicle for rehabilitating the statutes in a single prosecution,' Dombrowski v. Pfister, 380 U. S. 479, 380 U. S. 491 (1965), the transcendent value to all society of constitutionally protected expression is deemed to justify allowing"

"attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity,"

"id. at 380 U. S. 486. This is deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression."

Id. at 405 U. S. 520-521 (citations omitted). See also e.g., Dombrowski v. Pfister, 380 U. S. 479, 380 U. S. 494 (1965).

[Footnote 19]

"We have never held that a statute should be held invalid on its face merely because it is possible to conceive of a single impermissible application, and in that sense, a requirement of substantial overbreadth is already implicit in the doctrine."

Broadrick, 413 U.S. at 413 U. S. 630 (BRENNAN, J., dissenting).

"Simply put, the doctrine asserts that an overbroad regulation of speech or publication may be subject to facial review and invalidation, even though its application in the instant case is constitutionally unobjectionable. Thus, a person whose activity could validly be suppressed under a more narrowly drawn law is allowed to challenge an overbroad law because of its application to others. The bare possibility of unconstitutional application is not enough; the law is unconstitutionally overbroad only if it reaches substantially beyond the permissible scope of legislative regulation. Thus, the issue under the overbreadth doctrine is whether a government restriction of speech that is arguably valid as applied to the case at hand should nevertheless be invalidated to avoid the substantial prospect of unconstitutional application elsewhere."

Jeffries, Rethinking Prior Restraint, 92 Yale L.J. 409, 425 (1983) (emphasis supplied).

However, where the statute unquestionably attaches sanctions to protected conduct, the likelihood that the statute will deter that conduct is ordinarily sufficiently great to justify an overbreadth attack. Erznoznik v. City of Jacksonville, 422 U. S. 205, 422 U. S. 217 (1975).