CONTROLLING LEGAL PRINCIPLES

Free Exercise Clause Decision – The "Contemplation of Justice"

Hurley v. Irish-American Gay, Lesbian and Bisexual, 515 U.S. 557 (1995)

The selection of contingents to make a parade is entitled to First Amendment protection. Parades such as petitioners' are a form of protected expression because they include marchers who are making some sort of collective point, not just to each other but to bystanders along the way. Cf., *e. g.*, *Gregory* v. *Chicago*, 394 U. S. 111, 112. **Moreover, such protection is not limited to a parade's banners and songs, but extends to symbolic acts. See, *e. g.*, *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 632, 642.**

The state court's application, however, had the effect of declaring the sponsors' speech itself to be the public accommodation. Since every participating parade unit affects the message conveyed by the private organizers, the state courts' peculiar application of the Massachusetts law essentially forced the Council to alter the parade's **expressive content and thereby violated the fundamental First Amendment rule that a speaker has the autonomy to choose the content of his own message and, conversely, to decide what not to say.** . Petitioners' claim to the benefit of this principle is sound, since the Council selects the expressive units of the parade from potential participants and clearly decided to exclude a message it did not like from the communication it chose to make, and that is enough to invoke its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another, free from state interference. The constitutional violation is not saved by *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622

While the guarantees of free speech and equal protection guard only against encroachment by the government and "erec[t] no shield against merely private conduct," *Shelley* v. *Kraemer*, 334 U. S. 1, 13 (1948); see *Hudgens* v. *NLRB*, 424 U. S. 507, 513 (1976),

The "requirement of independent appellate review ... is a rule of federal constitutional law," id., at 510, which does not limit our deference to a trial court on matters of witness credibility, *Harte-Hanks Communications, Inc.* v. *Connaughton*, 491 U. S. 657, 688 (1989), but which generally requires us to "review the finding of facts by a State court ... where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts," *Fiske* v. *Kansas*, 274 U. S. 380, 385-386 (1927). See also *Niemotko* v. *Maryland*, 340 U. S. 268, 271 (1951); *Jacobellis* v. *Ohio*, 378 U. S. 184, 189 (1964) (opinion of Brennan, J.). This obligation rests upon us simply because the reaches of the First Amendment are ultimately defined by the facts it is held to embrace, and we must thus decide for ourselves whether a given course of conduct falls on the near or far side of the line of constitutional protection. See *Bose Corp., supra*, at 503. Even where a speech case has originally been tried in a federal court, subject to the provision of Federal Rule of Civil Procedure 52 (a) that "[f]indings of fact ... shall not be set aside unless clearly erroneous," we are obliged to make a fresh examination of crucial facts.

The protected expression that inheres in a parade is not limited to its banners and songs, however, for the Constitution looks beyond written or spoken words as mediums of expression. Noting that "[s]ymbolism is a primitive but effective way of communicating ideas," *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 632 (1943), our cases have recognized that the First Amendment shields such acts as saluting a flag (and refusing to do so), id., at 632, 642, wearing an armband to protest a war, *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503, 505-506 (1969), displaying a red flag, *Stromberg* v. *California*, 283 U. S. 359, 369 (1931), and even "[m]arching, walking or parading" in uniforms displaying the swastika, *National Socialist Party of America* v. *Skokie*, 432 U. S. 43 (1977). As some of these examples show, a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a "particularized message," cf. *Spence* v. *Washington*, 418 U. S. 405, 411 (1974) *(per curiam)*,