CONTROLLING LEGAL PRINCIPLES

Free Exercise Clause Decision – The "Contemplation of Justice"

Rumsfeld v. Forum for Academic & Institutional Rights, Inc. 547 U.S. 47 (2006)

Other decisions, however, recognize a limit on Congress' ability to place conditions on the receipt of funds. We recently held that " 'the government may not deny a benefit to a person on a basis that infringes his constitutionally protected … freedom of speech even if he has no entitlement to that benefit.' " *United States* v. *American Library Assn., Inc.*, 539 U. S. 194, 210 (2003) (quoting *Board of Comm'rs, Wabaunsee Cty.* v. *Umbehr*, 518 U. S. 668, 674 (1996) (some internal quotation marks omitted)).

It is clear that a funding condition cannot be unconstitutional if it could be constitutionally imposed directly. See *Speiser* v. *Randall*, 357 U. S. 513, 526 (1958).

Some of this Court's leading First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say. In *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 642 (1943), we held unconstitutional a state law requiring schoolchildren to recite the Pledge of Allegiance and to salute the flag. And in *Wooley* v. *Maynard*, 430 U. S. 705, 717 (1977), we held unconstitutional another that required New Hampshire motorists to display the state motto—"Live Free or Die"—on their license plates.

Our compelled-speech cases are not limited to the situation in which an individual must personally speak the government's message. We have also in a number of instances limited the government's ability to force one speaker to host or accommodate another speaker's message. See *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557, 566 (1995) (state law cannot require a parade to include a group whose message the parade's organizer does not wish to send); *Pacific Gas & Elec. Co.* v. *Public Util. Comm'n of Cal.*, 475 U. S. 1, 20–21 (1986) (plurality opinion); accord, *id.*, at 25 (Marshall, J., concurring in judgment) (state agency cannot require a utility company to include a third-party newsletter in its billing envelope); *Miami Herald*

Publishing Co. v. *Tornillo*, 418 U. S. 241, 258 (1974) (right-of-reply statute violates editors' right to determine the content of their newspapers).

The compelled-speech violation in each of our prior cases, however, resulted from the fact that the complaining speaker's own message was affected by the speech it was forced to accommodate.

Having rejected the view that the Solomon Amendment impermissibly regulates *speech*, we must still consider whether the expressive nature of the *conduct* regulated by the statute brings that conduct within the First Amendment's protection. In *O'Brien*, we recognized that some forms of " 'symbolic speech' " were deserving of First Amendment protection. 391 U. S., at 376. But we rejected the view that "conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *Ibid.* Instead, we have extended First Amendment protection only to conduct that is inherently expressive. In *Texas* v. *Johnson*, 491 U. S. 397, 406 (1989), for example, we applied *O'Brien* and held that burning the American flag was sufficiently expressive to warrant First Amendment protection.

If combining speech and conduct were enough to create expressive conduct, a regulated party could always transform conduct into "speech" simply by talking about it. For instance, if an individual announces that he intends to express his disapproval of the Internal Revenue Service by refusing to pay his income taxes, we would have to apply *O'Brien* to determine whether the Tax Code violates the First Amendment. Neither *O'Brien* nor its progeny supports such a result.

We have recognized a First Amendment right to associate for the purpose of speaking, which we have termed a "right of expressive association." See, *e.g., Boy Scouts of America* v. *Dale*, 530 U. S. 640, 644 (2000). The reason we have extended First Amendment protection in this way is clear: The right to speak is often exercised most effectively by combining one's voice with the voices of others. See *Roberts* v. *United States Jaycees*, 468 U. S. 609, 622 (1984). If the government were free to restrict individuals' ability to join together and speak, it could essentially silence views that the First Amendment is intended to protect. *Ibid*.

…***correctly notes that the freedom of expressive association protects more than just a group's membership decisions***. For example, we have held laws unconstitutional that require disclosure of membership lists for groups seeking anonymity, *Brown* v. *Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U. S. 87, 101–102 (1982), or impose penalties or withhold benefits based on membership in a disfavored group, *Healy* v. *James*, 408 U. S. 169, 180–184 (1972). *Although these laws did not directly interfere with an organization's composition,* ***they made group membership less attractive****, raising the same First Amendment concerns* ***about affecting the group's ability to express its message.*** *(Emphasis added)*