AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 12: The Contemporary Era – Judicial Power and Constitutional Authority/Constitutional Litigation

**United States v. Sineneng-Smith, 140 S. Ct. 1575** (2020).

*Evelyn Sineneng Smith operating a business that charged a fee to immigrants working without legal authorization in the United States for assistance in their efforts to obtain labor certifications. She was subsequently charged with mail fraud and violating a provision of the Immigration and Naturalization Act that makes forbids anyone from “encourag[ing] or induc[ing] an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law.” Smith claimed this law was unconstitutionally vague and violated the First Amendment. When she repeated these arguments on appeal from her conviction, the Court of Appeals for the Ninth Circuit invited various amici to brief and argue whether the federal law in question was unconstitutionally overbroad. A law is constitutionally overbroad, under contemporary precedent, if the law penalizes substantial constitutional conduct, if even the actual conduct before the court may not be constitutionally protected. A law punishing all false statements is overbroad, even if a particular defendant’s libelous statement is false and made with reckless disregard of the truth. Relying on this overbroad doctrine, the Ninth Circuit struck down’s Smith’s convictions.*

 *The Supreme Court unanimously reversed. Justice Ruth Bader Ginsburg majority opinion held that courts had no business substituting their preferred constitutional arguments for those made by counsel. Justice Thomas issued a concurring opinion suggesting that the justices should abandon the overbreadth doctrine. Why does Thomas make that claim? Why did no other justice sign on to the opinions? The justices unanimously maintained that the Ninth Circuit should decide Smith’s appeal only on the basis of the argument’s Smith’s counsel initially made. Why should this be the rule? Suppose counsel did not make the overbreadth argument because he or she thought it was a loser. Should Smith go to jail because her lawyer made a tactical mistake?*

Justice [GINSBURG](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=I5c006e00900111ea9f6c9250ee334868&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I5c006e00900111ea9f6c9250ee334868) delivered the opinion of the Court.

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In our adversarial system of adjudication, we follow the principle of party presentation. As this Court stated, “in both civil and criminal cases, in the first instance and on appeal ..., we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.”  In criminal cases, departures from the party presentation principle have usually occurred “to protect a *pro se* litigant's rights.”  But as a general rule, our system “is designed around the premise that [parties represented by competent counsel] know what is best for them, and are responsible for advancing the facts and argument entitling them to relief.”  In short: “[C]ourts are essentially passive instruments of government.”  They “do not, or should not, sally forth each day looking for wrongs to right. [They] wait for cases to come to [them], and when [cases arise, courts] normally decide only questions presented by the parties.”

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No extraordinary circumstances justified the panel's takeover of the appeal. Sineneng-Smith herself had raised a vagueness argument and First Amendment arguments homing in on her own conduct, not that of others. Electing not to address the party-presented controversy, the panel projected that [the statute] might cover a wide swath of protected speech, including political advocacy, legal advice, even a grandmother's plea to her alien grandchild to remain in the United States. Nevermind that Sineneng-Smith's counsel had presented a contrary theory of the case in the District Court, and that this Court has repeatedly warned that “invalidation for [First Amendment] overbreadth is ‘strong medicine’ that is not to be ‘casually employed.’”

As earlier observed, a court is not hidebound by the precise arguments of counsel, but the Ninth Circuit's radical transformation of this case goes well beyond the pale.

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This Court has sought supplemental briefing: to determine whether a case presented a controversy suitable for the Court's review. In rare instances, we have ordered briefing on a constitutional issue implicated, but not directly presented, by the question on which we granted certiorari. But in both cases, the parties had raised the relevant constitutional challenge in lower courts; the question was not interjected into the case for the first time by an appellate forum. . . . We have appointed *amicus curiae*: to present argument in support of the judgment below when a prevailing party has declined to defend the lower court's decision or an aspect of it and to address the Court's jurisdiction to decide the question presented.

Justice [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I5c006e00900111ea9f6c9250ee334868&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I5c006e00900111ea9f6c9250ee334868), concurring.

The merits of that decision also highlight the troubling nature of this Court's overbreadth doctrine. That doctrine provides that “a law may be invalidated as overbroad if ‘a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.’ ”  Although I have previously joined the Court in applying this doctrine, I have since developed doubts about its origins and application. It appears that the overbreadth doctrine lacks any basis in the Constitution's text, violates the usual standard for facial challenges, and contravenes traditional standing principles. I would therefore consider revisiting this doctrine in an appropriate case.

This Court's overbreadth jurisprudence is untethered from the text and history of the First Amendment. It first emerged in the mid-20th century. In *Thornhill v. Alabama* (1940), the Court determined that an antipicketing statute was “invalid on its face” due to its “sweeping proscription of freedom of discussion.”  The Court rejected the State's argument that the statute was constitutional because it was “limited or restricted in its application” to proscribable “violence and breaches of the peace [that] are the concomitants of picketing.”  Without considering whether the defendant's actual conduct was entitled to First Amendment protection, the Court concluded that the law was unconstitutional because it “d[id] not aim specifically at evils within the allowable area of state control but, on the contrary, swe[pt] within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press.”

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Notably, this Court has not attempted to ground its void-for-overbreadth rule in the text or history of the First Amendment. . . . Rather, the Court has justified this doctrine solely by reference to policy considerations and value judgments. It has stated that facially invalidating overbroad statutes is sometimes necessary because “[First Amendment] freedoms are delicate and vulnerable, as well as supremely precious in our society,” and thus “need breathing space to survive.” And, in the context of the freedom of speech, the Court has justified the overbreadth doctrine's departure from traditional principles of adjudication by noting free speech's “transcendent value to all society, and not merely to those exercising their rights.”

In order to protect this “transcendent” right, the Court will deem a statute unconstitutional when, in “the judgment of this Court[,] the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted and perceived grievances left to fester because of the possible inhibitory effects of [the] statut[e].”  In other words, the doctrine is driven by a judicial determination of what serves the public good. But there is “no evidence [from the founding] indicat[ing] that the First Amendment empowered judges to determine whether particular restrictions of speech promoted the general welfare. This makes sense given that the Founders viewed value judgments and policy considerations to be the work of legislatures, not unelected judges. . . .

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In addition to its questionable origins, the overbreadth doctrine violates the usual standard for facial challenges. Typically, this Court will deem a statute unconstitutional on its face only if “no set of circumstances exists under which the Act would be valid.”  But the overbreadth doctrine empowers courts to hold statutes facially unconstitutional even when they can be validly applied in numerous circumstances, including the very case before the court.

By lowering the bar for facial challenges in the First Amendment context, the overbreadth doctrine exacerbates the many pitfalls of what is already a “disfavored” method of adjudication.  “[U]nder our constitutional system[,] courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws.”  But when a court entertains—or in this case, seeks out—an overbreadth challenge, it casts aside the “judicial restraint” necessary to avoid “ ‘premature’ ” and “ ‘unnecessary pronouncement[s] on constitutional issues.’”  This principle of restraint has long served as a fundamental limit on the scope of judicial power. “[T]here is good evidence that courts [in the early Republic] understood judicial review to consist [simply] ‘of a refusal to give a statute effect as operative law in resolving a case’ ” once that statute was determined to be unconstitutional. Thus, our “modern practice of strik[ing] down” legislation as facially unconstitutional bears little resemblance to the practices of 18th and 19th century courts.

Moreover, by relaxing the standard for facial challenges, the overbreadth doctrine encourages “speculat[ion]” about “ ‘imaginary’ cases,” and “summon[s] forth an endless stream of fanciful hypotheticals.”  And, when a court invalidates a statute based on its theoretical, illicit applications at the expense of its real-world, lawful applications, the court “threaten[s] to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution.”

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Finally, by allowing individuals to challenge a statute based on a third party's constitutional rights, the overbreadth doctrine is at odds with traditional standing principles. This Court has long adhered to the rule that “a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties.”  The Court has created a “limited” exception to this rule, allowing third-party standing in certain cases in which the litigant has “a close relation to the third-party” and there is a substantial “hindrance to the third party's ability to protect his or her own interests.”  Litigants raising overbreadth challenges rarely satisfy either requirement, but the Court nevertheless allows third-party standing to “avoi[d] making vindication of freedom of expression await the outcome of protracted litigation.” . . .

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These statements find support in a historical understanding of Article III. To understand the scope of the Constitution's case-or-controversy requirement, “we must ‘refer directly to the traditional, fundamental limitations upon the powers of common-law courts.’” “Common-law courts imposed different limitations on a plaintiff 's right to bring suit depending on the type of right the plaintiff sought to vindicate.”  “In a suit for the violation of a private right, courts historically presumed that the plaintiff suffered a *de facto* injury [if] his personal, legal rights [were] invaded.” Personal constitutional rights, such as those protected under the First Amendment, are “private rights” in that they “ ‘belon[g] to individuals, considered as individuals.’ ” Thus, when a litigant challenges a statute on the grounds that it has violated his First Amendment rights, he has alleged an injury sufficient to establish standing for his claim, regardless of the attendant damages or other real-world harms he may or may not have suffered.

Overbreadth doctrine turns this traditional common-law rule on its head: It allows a litigant without a legal injury to assert the First Amendment rights of hypothetical third parties, so long as he has personally suffered a real-world injury. In other words, the litigant has no private right of his own that is genuinely at stake.

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The overbreadth doctrine appears to be the handiwork of judges, based on the misguided “notion that some constitutional rights demand preferential treatment.”  It seemingly lacks any basis in the text or history of the First Amendment, relaxes the traditional standard for facial challenges, and violates Article III principles regarding judicial power and standing. In an appropriate case, we should consider revisiting this doctrine.