AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 9: Liberalism Divided—Democratic Rights/Free Speech

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

In 1959, Oklahoma banned political activities by state civil servants. The prohibition is modeled on the federal Hatch Act of 1939, and similar laws had been adopted by the other states. Three civil servants at the Oklahoma Corporation Commission (which regulates public utilities in the state) participated in the 1970 re-election campaign of one of the commissioners and tried to organize other commission employees to work in the campaign and solicited campaign funds from them. The State Personnel Board charged them with engaging in partisan political activities in violation of the state law, which could lead to their termination from their government jobs.

With those charges pending, the employees filed suit in federal district court seeking to have the state statutory provision declared unconstitutional. The district court upheld the law and declined to intervene, and they appealed to the U.S. Supreme Court. The Court affirmed the trial judge's ruling. In a 5–4 decision, the Court declined to strike down the law as facially overbroad and invalid. It was broadly conceded that the actions of the employees could be regulated by the state, and so much of the disagreement among the justices focused on whether the courts should intervene in a case of valid application of a sweeping statute to avoid the possibility that the law might chill constitutionally protected speech in situations that were not yet before the bench (and might never be subject to litigation).

JUSTICE WHITE delivered the opinion of the Court,

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Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court. A closely related principle is that constitutional rights are personal and may not be asserted vicariously. These principles rest on more than the fussiness of judges. They reflect the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws. Constitutional judgments, as Mr. Chief Justice Marshall recognized, are justified only out of the necessity of adjudicating rights in particular cases between the litigants brought before the Court. . . .

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It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society. As a corollary, the Court has altered its traditional rules of standing to permit—in the First Amendment area—"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." Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of 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.

Such claims of facial overbreadth have been entertained in cases involving statutes which, by their terms, seek to regulate "only spoken words." In such cases, it has been the judgment of this Court that 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 overly broad statutes. Overbreadth attacks have also been allowed where the Court thought rights of association were ensnared in statutes which, by their broad sweep, might result in burdening innocent associations. Facial overbreadth claims have also been entertained where statutes, by their terms, purport to regulate the time, place, and manner of expressive or communicative conduct, and where such conduct has required official approval under laws that delegated standardless discretionary power to local functionaries, resulting in virtually unreviewable prior restraints on First Amendment rights.

The consequence of our departure from traditional rules of standing in the First Amendment area is that any enforcement of a statute thus placed at issue is totally forbidden until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression. Application of the overbreadth doctrine in this manner is, manifestly, strong medicine. It has been employed by the Court sparingly and only as a last resort. Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute. *Dombrowski v. Pfister* (1965). Equally important, overbreadth claims, if entertained at all, have been curtailed when invoked against ordinary criminal laws that are sought to be applied to protected conduct. *Cantwell v. Connecticut* (1940). . . . Additionally, overbreadth scrutiny has generally been somewhat less rigid in the context of statutes regulating conduct in the shadow of the First Amendment, but doing so in a neutral, noncensorial manner.

It remains a "matter of no little difficulty" to determine when a law may properly be held void on its face and when "such summary action" is inappropriate. But the plain import of our cases is, at the very least, that facial overbreadth adjudication is an exception to our traditional rules of practice and that its function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from "pure speech" toward conduct and that conduct—even if expressive—falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct. Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there 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 statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep. It is our view [the statute] is not substantially overbroad and that whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied.

Unlike ordinary breach-of-the-peace statutes or other broad regulatory acts, § 818 is directed, by its terms, at political expression which if engaged in by private persons would plainly be protected by the First and Fourteenth Amendments. But at the same time, § 818 is not a censorial statute, directed at particular groups or viewpoints. The statute, rather, seeks to regulate political activity in an even-handed and neutral manner. As indicated, such statutes have in the past been subject to a less exacting overbreadth scrutiny. Moreover, the fact remains that § 818 regulates a substantial spectrum of conduct that is as manifestly subject to state regulation as the public peace or criminal trespass. *United Public Workers v. Mitchell* (1947). . . . Under the decision in *United States Civil Service Commission v. National Association of Letter Carriers* (1973), there is no question that § 818 is valid at least insofar as it forbids

classified employees from: soliciting contributions for partisan candidates, political parties, or other partisan political purposes; becoming members of national, state, or local committees of political parties, or officers or committee members in partisan political clubs, or candidates for any paid public office; taking part in the management or affairs of any political party's partisan political campaign; serving as delegates or alternates to caucuses or conventions of political parties; addressing or taking an active part in partisan political rallies or meetings; soliciting votes or assisting voters at the polls or helping in a partisan effort to get voters to the polls; participating in the distribution of partisan campaign literature; initiating or circulating partisan nominating petitions; or riding in caravans for any political party or partisan political candidate.

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. . . [A]s presently construed, we do not believe that § 818 must be discarded *in toto* because some persons' arguably protected conduct may or may not be caught or chilled by the statute. Section 818 is not substantially overbroad and is not, therefore, unconstitutional on its face.

Affirmed.

JUSTICE DOUGLAS, dissenting.

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. . . [T]he problem here concerns not commerce but the First Amendment. The First Amendment goes further than protecting a person for "privately" expressing his opinion. Public as well as private discourse is included; and the emphasis in § 818, par. 7, that private expression of views is tolerated emphasizes that public expression is not tolerated.

I do not see how government can deprive its employees of the right to speak, write, assemble, or petition once the office is closed and the employee is home on his own. Public discussion of local, state, national, and international affairs is grist for the First Amendment mill. Our decisions emphasize that free debate, uninhibited discussion, robust and wide-open controversy, a multitude of tongues, the pressure of ideas clear across the spectrum set the pattern of First Amendment freedoms. . . .

First Amendment rights are indeed fundamental, for "we the people" are the sovereigns, not those who sit in the seats of the mighty. It is the voice of the people who ultimately have the say; once we fence off a group, and bar them from public dialogue, the public interest is the loser. Those who are tied into the federal regime either by direct employment or by state projects federally financed now amount to about five and a half million. The number included, if all state employees are added, is estimated at over 13 million.

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A bureaucracy that is alert, vigilant, and alive is more efficient than one that is quiet and submissive. It is the First Amendment that makes it alert, vigilant, and alive. It is suppression of First Amendment rights that creates faceless, nameless bureaucrats who are inert in their localities and submissive to some master's voice. . . . Those who work for government have no watered-down constitutional rights. So far as the First Amendment goes, I would keep them on the same plane as all other people.

JUSTICE BRENNAN, with whom JUSTICE STEWART and JUSTICE MARSHALL join, dissenting.

Whatever one's view of the desirability or constitutionality of legislative efforts to restrict the political activities of government employees, one must regard today's decision upholding § 818 of the Oklahoma Merit System of Personnel Administration Act as a wholly unjustified retreat from fundamental and previously well-established First and Fourteenth Amendment principles. For the purposes of this decision, the Court assumes—perhaps even concedes—that the statute at issue here sweeps too broadly, barring speech and conduct that are constitutionally protected. . . .

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[T]he critical phrase of the Oklahoma Act—no employee shall "take part in the management or affairs of any political party or in any political campaign"—is left almost wholly undefined. While the Act does specifically declare that employees have the right to express their views "privately," it nowhere defines the terms "take part" or "management" or "affairs." The reservation of the right to express one's views in private could, moreover, be thought to mean that any public expression of views is forbidden. Of course, the Oklahoma Act can, like its federal counterpart, be viewed in conjunction with the applicable administrative regulations. But in marked contrast with the elaborate set of regulations purporting to define the prohibitions of the Hatch Act, the pertinent regulations of the State Personnel Board are a scant five rules that shed no light at all on the intended reach of the statute. . . .

It is possible, of course, that the inherent ambiguity of the Oklahoma statute might be cured by judicial construction of its terms. But the Oklahoma Supreme Court has never attempted to construe the Act or narrow its apparent reach. . . . I must assume, therefore, that the Act, subject to whatever gloss is provided by the administrative regulations, is capable of applications that would prohibit speech and conduct clearly protected by the First Amendment. Even on the assumption that the statute's regulatory aim is permissible, the manner in which state power is exercised is one that unduly infringes protected freedoms. The State has failed, in other words, to provide the necessary "sensitive tools" to carry out the "separation of legitimate from illegitimate speech."

Although the Court does not expressly hold that the statute is vague and overbroad, it does assume not only that the ban on the wearing of badges and buttons may be "impermissible," but also that the Act "may be susceptible of some other improper applications." Under principles that I had thought were established beyond dispute, that assumption requires a finding that the statute is unconstitutional on its face. Ordinarily, "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." *United States v. Raines* (1960). And appellants apparently concede that the State could prohibit the conduct with which they were charged without infringing the guarantees of the First Amendment. Nevertheless, we have repeatedly recognized that "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.'" We have adhered to that view because the guarantees of the First Amendment are "delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. *Smith v. California* (1959). The mere existence of a statute that sweeps too broadly in areas protected by the First Amendment "results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview. . . . Where regulations of the liberty of free discussion are concerned, there are special reasons for observing the rule that it is the statute, and not the accusation or the evidence under it, which prescribes the limits of permissible conduct and warns against transgression." *Thornhill v. Alabama* (1940).

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[T]he Court offers no rationale to explain its conclusion that, for purposes of overbreadth analysis, deterrence of conduct should be viewed differently from deterrence of speech, even where both are equally protected by the First Amendment. Indeed, in the case before us it is hard to know whether the protected activity falling within the Act should be considered speech or conduct. . . .

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At this stage, it is obviously difficult to estimate the probable impact of today's decision. If the requirement of "substantial" overbreadth is construed to mean only that facial review is inappropriate where the likelihood of an impermissible application of the statute is too small to generate a "chilling effect" on protected speech or conduct, then the impact is likely to be small. On the other hand, if today's decision necessitates the drawing of artificial distinctions between protected speech and protected

conduct, and if the "chill" on protected conduct is rarely, if ever, found sufficient to require the facial invalidation of an overbroad statute, then the effect could be very grave indeed. . . .