



Fourth Circuit Strikes Down Maryland Statute Regulating Adult Entertainment

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In *Legend Night Club v. Miller*, a panel majority found unconstitutional a Maryland statute that sought to “limit[] the range of permissible conduct, attire, and entertainment at establishments licensed to serve alcoholic beverages.” In *Miller*, the plaintiffs brought a facial challenge to the statute, claiming it was overly broad in violation of the First Amendment. In addition, the plaintiffs challenged on equal protection grounds a grandfather provision they alleged was adopted for the purpose of exempting from the reach of the statute a club owned by a prominent former state senator. Because the majority struck down the statute on overbreadth grounds, it did not consider plaintiff’s equal protection claim.

As a doctrinal matter, unlike an as-applied challenge, a First Amendment facial challenge under the overbreadth doctrine involves allegations that a statute, while legitimately applying to the conduct or speech of the plaintiff, applies also to a broader range of protected activity in which others are engaged or may in the future become engaged. Thus, under the doctrine, the *Miller* plaintiffs were free to assert claims on behalf of others who wish to engage in constitutionally protected activities that the statute arguably proscribed.

Because the effect of finding a statute overly broad nullifies a legislative act, the Supreme Court has counseled courts to apply the doctrine “sparingly and only as a last resort,” lest the courts impermissibly act outside the bounds of their constitutional authority. As such, in cases involving conduct and not merely speech, a statute’s overbreadth must be not only real, but substantial; meaning the statute must reach a substantial range of protected conduct as judged in relation to the statute’s legitimate sweep.

According to the majority in *Miller*, the statute in question reached a substantial number of protected activities because the statute could be applied not only to adult entertainment provided at clubs serving alcoholic beverages, but also to ballet performances, Shakespearean plays, and other productions with clear artistic merit.

In addition to their unsuccessful claim that the statute could be construed constitutionally, the defendants attempted to save the statute by assuring the court that the law would be enforced only against adult entertainment establishments. The majority overruled this argument, concluding it would be unwise to leave unprotected persons and entities performing works having legitimate artistic value because the Government promised to enforce the law only against establishments featuring adult entertainment.

Senior Judge Hamilton concurred in part and dissented in part, finding that the offending portions of the statute could be excised without infringing on the legislative function. He also argued that the grandfather clause should

be stricken as a violation of equal protection.

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