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Overbreadth

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I. INTRODUCTION

The concern in constitutional law with "overbreadth" is generally understood to denote a conscious departure from conventional standing concepts in free-expression cases.[1] Assertedly justified by the special vulnerability of protected expression to impermissible deterrence,[2] overbreadth doctrine invites litigants to attack the facial validity of rules which burden expressive interests. A litigant whose expression is admittedly within the constitutionally valid applications of a statute[3] is permitted to assert the sta-

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[1] *E.g.*, United States v. Raines, 362 U.S. 17, 22 (1960); Ulster County Court v. Allen, 442 U.S. 140, 154–55 (1979). Any use of standing concepts is troublesome at the outset. A defendant in an enforcement proceeding or a prospective defendant who initiates a suit for prospective relief has standing in the constitutional sense: These litigants are threatened with injury in fact from application of the act. What is at stake in overbreadth challenges is the *scope* of the issues open to these litigants, and, as will be shown, distinctions can be drawn between actual defendants and prospective defendants initiating actions for anticipatory relief.

Overbreadth challenges have also been entertained on behalf of litigants suffering injury in fact but not readily viewed as either defendants or prospective defendants. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 562 (1975) (denial of a permit to use municipal theater). See also Bogen, *First Amendment Ancillary Doctrines*, 37 MD. L. REV. 679, 706–07 (1978) (overbreadth analysis used in area of statutes imposing civil disabilities, such as denials of licenses and of public employment.)

[2] Overbreadth challenges are typically said to rest on 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." Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973).

[3] While the discussion in this paper is generally applicable to administrative regulations and orders as well as common law rules, I shall for convenience generally confine my discussion to statutes.

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tute's potentially invalid applications with respect to other persons not before the court[4] and with whom the litigant stands in no special relationship.[5] Judicial focus is not on the protected character, *vel non*, of the litigant's expression[6] but on the terms of the statutory rule being invoked to regulate that expression.[7]

Overbreadth methodology has its charms. Avowedly speech protective, it simultaneously fosters at least the illusion of comparative judicial restraint because it holds out the prospect that other means may exist to achieve legislative objectives.[8] But charm is not its only attribute. Overbreadth's facial scrutiny approach has been seen as "strong medicine,"[9] and both the Court and commentators have struggled with various limiting conceptions. The result of these efforts is a body of doctrine widely perceived to be erratic and confusing. It seems appropriate, therefore, to take stock. What does overbreadth analysis entail? Specifically, how does its analytic structure differ from that of the "conventional" constitutional challenge with which it supposedly stands in contrast? Examined from this perspective, an increasingly wide gap appears between the

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[4] A "litigant whose own activities are unprotected may nevertheless challenge a statute by sbowing that it substantially abridges the First Amendment rights of other parties not before the court." Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 634 (1980).

[5] Unlike *ius tertii* standing, *e.g.*, Craig v. Boren, 429 U.S. 190, 194–97 (1976), no requirement exists of an identifiable third party with whom tbe overbreadth litigant stands in a special relationsbip. See Note, *Standing to Raise Constitutional Jus Tertii*, 88 HARV. L. REV. 423, 438–44 (1974).

[6] "The claim that a statute is bad on its face because overbroad does not turn on evaluation of factual data generated by a particular application." Note, *The First Amendment Overbreadtb Doctrine*, 83 HARV. L. REV. 844, 863 (1970) (hereinafter cited as Harvard Note).

[7] If "the statutory line includes conduct which the judicial line protects, the statute is overbroad. . . ." TRIBE, AMERICAN CONSTITUTIONAL LAW, §12-24, p. 710 (1978). Thus a statute regulating pornography must track or fall on the safe side of the applicable constitutional standards on obscenity. Miller v. California, 413 U.S. 15, 24 (1973).

Of course, if the statute is held to be overbroad, the "statute" is not thereby erased from the statute books. The judgment runs against named officials, who cannot enforce the statute (at least not against the same litigants) unless it is rehabilitated along constitutionally acceptable lines. See note 134 *infra*.

[8] By "holding out the prospect that narrower means may be available to achieve legislative objectives, [overbreadth methodology] conveys the appearance of intervening in legislative choices more marginally than outright 'balancing' would." GUNTHER, CONSTITUTIONAL LAW, CASES AND MATERIALS, 1188 (10th ed. 1980); SHAPIRO, FREEDOM OF SPEECH 141–42 (1966); Professor Gunther has been critical of the Court's frequent refusal to articulate what those alternatives are. *Id.* at 1187 n. 7; Gunther, *Reflections on Robel . . .*, 20 STAN. L. REV. 1140, 1147–48 (1968). But see Harvard Note at 916–17 (court under no duty to discuss alternatives).

[9] Broadrick v. Oklahoma, note 2 *supra*, at 613.

views of the commentators and holdings of the Court, a gap obscured by the rhetoric accompanying the doctrine.

Judicial and academic fascination with overbreadth standing tends to obscure an important point: Overbreadth is, in fact, a label that has been utilized to cover not one but two doctrines.[10] One is concerned with the content of the substantive constitutional standards for determining the validity of a statute affecting expression. This substantive dimension of overbreadth methodology is most frequently concerned with matters of regulatory precision; the means chosen by the legislature must be no broader than necessary to achieve legitimate governmental purposes.[11] The other, more dramatic aspect of overbreadth analysis is the procedural dimension—a supposed special First Amendment standing rule permitting litigants to raise the rights of "third parties." In this essay, I propose to show that, for the Court at least, overbreadth doctrine does not in fact possess a distinctive standing component; it is, rather, the application of conventional standing concepts in the First Amendment context. Accordingly, overbreadth analysis is simply an examination of the merits of the substantive constitutional claim.

Under "conventional" standing principles, a litigant has always had the right to be judged in accordance with a constitutionally valid rule of law. Put differently, a litigant could make a facial challenge to the constitutional sufficiency of the rule actually applied to him, irrespective of the privileged character of his own activity. To be sure, the litigant's challenge is to the statute in operation, including the interpretive gloss placed on it; and in general the interpretive process can operate to narrow the statute to appropriate constitutional dimensions. But however narrowed, the boundary line of the rule actually invoked must either track or fall on the safe side of the relevant rule of constitutional privilege,

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[10] This dual aspect of the overbreadth label is recognized in ELY, DEMOCRACY AND DISTRUST 100–01, 229 n.1 (1980).

[11] This test necessarily also involves, at least at the margins, some form of fact-dependent balancing. Thus the governmental interest must be sufficiently substantial to support the infringement on expression. *E.g.*, ELY, note 10 *supra*, at 105–06; LOCKHART, KAMISAR, & CHOPER, CONSTITUTIONAL LAW, CASES-COMMENTS-QUESTIONS 735–38 (5th ed. 1980). For illustrative balancing decisions, see United States v. Robel, 389 U.S. 258, 268 n.20 (1967), despite its balancing disclaimer, and Procunier v. Martinez, 416 U.S. 396 (1974). Compare Struve, *The Less Restrictive Alternative Principle and Economic Due Process*, 80 HARV. L. REV. 1463, 1480–88 (1967).

that is, the judicially prescribed boundary line separating protected from unprotected activity.[12]

Viewed as a special "standing" concept, overbreadth theory is, therefore, not unique in permitting facial challenges to rules. Rather, for academic writers its distinctive aspect is the formulation of constitutionally based limits on the traditional judicial power to truncate statutes to constitutionally satisfactory boundaries in the process of applying them. The theoretical and practical difficulties with such a "standing" doctrine are considerable, and judicial doctrine has not evolved in this manner.

For the Court, its doctrinal difficulties notwithstanding, overbreadth is simply a disposition on the merits of the litigants' First Amendment claim. The litigant's right to insist on the application of a constitutionally valid rule translates into a requirement of congruence between the boundaries of the statute and the Constitution. This congruence requirement is of central importance not only in the First Amendment context but wherever any standard of review other than the rational basis test is mandated by the applicable substantive constitutional law. Overbreadth challenges are, therefore, not confined to First Amendment adjudication. Nor does an overbreadth litigant invoke the rights of third parties; as "a theoretical matter the [overbreadth] claimant is asserting his own right not to be burdened by an unconstitutional rule of law, though naturally the claim is not one which depends on the privileged character of his own conduct."[13]

II. Facial Challenges in the Conventional Context: The Litigant's Right to Challenge Unconstitutional Rules

"Conventional" constitutional challenges are widely assumed to involve distinctive characteristics. Generally, a litigant may raise only his "own" rights, not those of others; thus he can challenge a statute only "as applied" to him.[14] Formulations of this character can suggest that a conventional constitutional challenge can be completely reduced to a claim of substantive constitutional

[12] Bator, Mishkin, Shapiro, & Wechsler, Hart & Wechsler's The Federal Courts and the Federal System 212 (2d ed. 1973) (hereinafter cited as Hart & Wechsler).

[13] Harvard Note at 848.

[14] United States v. Raines, note 1 *supra*.

privilege; that is, the litigant must demonstrate that the conduct established by the evidence is, as a matter of substantive constitutional law, simply immune from regulation. Professor Gunther, for example, says that in as-applied review, "the Court asks simply whether the challenger's activities are protected."[15] A litigant, of course, can always make such a challenge, and that contention can be framed either in privilege terms, or alternatively, as a challenge to the statute "as applied."[16] However phrased, the challenge is wholly fact dependent: Do the determinative facts shown by the evidence fall on the protected side of the applicable rule of constitutional privilege?[17]

In their efforts to identify the distinctive standing aspects of overbreadth methodology, many commentators assume that conventional constitutional challenges are invariably restricted to such fact-dependent claims of privilege.[18] This conclusion seems to be entailed by the fact that courts can narrow the literal sweep of statutes to fit governing constitutional standards. In other words, in the process of applying a statute, courts can narrow the legislative prescription to a set of criteria which (*a*) are constitutionally permissible and (*b*) fit the general facts of the litigant's conduct as established by the evidence.[19]

Inherent in the narrowing process is a judicial conclusion that the challenged statute is "separable"; that is, the legislature intended the statute to be applied whenever it validly could be, with any invalid applications excised in the application process.[20] Volumes of judicial decisions attest to the fact that courts are thoroughly

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[15] GUNTHER, note 8 *supra*, at 1187.

[16] "Whenever the application point has merit, the party who asserts it could forego the challenge to the statute [as applied], asserting his federal right or immunity on the determinative facts, . . ." HART & WECHSLER at 591.

[17] In this context, the only consequence of casting the constitutional contention in as-applied rather than privilege terms relates to the technical difference between seeking Supreme Court review by way of appeal rather than certiorari. Casting the point as a challenge to the statute as applied makes an appeal available under 28 U.S.C. § 1257. *E.g.*, McCarty v. McCarty, 101 S. Ct., 2728, 2734 n.12 (1981). The distinction between those two modes of review has become increasingly blurred. HART & WECHSLER'S 1981 Supplement at 160–63; see also Metromedia, Inc. v. City of San Diego, 101 S. Ct. 2882 (1981).

[18] *E.g.*, Shaman, *The First Amendment Rule against Overbreadth*, 52 TEMPLE L. Q. 259, 261 (1979).

[19] *E.g.*, United States v. Raines, note 1 *supra*, at 21–22.

[20] In this context, the policy of implementing presumed legislative intent is, of course, strongly reinforced by the policy counseling avoidance of constitutional questions. United States v. Raines, note 1 *supra*.

familiar with the separability technique;[21] indeed, the normal judicial course is to approach the issue of constitutional validity with a presumption of separability. That presumption inclines the reviewing court toward reducing the broad legislative command to a permissible subrule general enough to cover the facts of the case before it.[22] Vagueness challenges are no exception to this process; ordinarily the Court considers such a challenge in terms of the statute as construed.[23]

Moreover, in reviewing state court decisions, the Supreme Court will presume that the state statute is separable unless the contrary otherwise clearly appears. *Yazoo & Mississippi Valley R.R. v. Jackson Vinegar Co.*[24] is the paradigm. There a railroad company challenged the constitutionality of an award of actual damages and a $25.00 penalty for a partial loss of a shipment of vinegar. The state court had made the award under a statute that "required [the railroad] to settle all claims for lost or damaged freight within a specified time period. The state court made no effort to explicate the reach of the statute; the court simply held that it embraced (and constitutionally could embrace) defendant's refusal to settle. In the Supreme Court, the railroad argued that, as written, the statute also re-

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[21] Stern, *Separability and Separability Clauses in the Supreme Court*, 51 HARV. L. REV. 76 (1937). See also, for example, United States v. Raines, note 1 *supra*.

[22] The narrowing process is, of course, circumscribed by fair-warning requirements. See Dombrowski v. Pfister, 380 U.S. 479, 491 n.7 (1965) (limiting construction "may be applied to conduct occurring prior to the construction, . . . provided such application affords fair warning . . ."). Narrowing of criminal statutes at the appellate stage may come too late. Ashton v. Kentucky, 384 U.S. 195, 198 (1966). Finally, the narrowing process may itself on occasion render the statute impermissibly vague. See, for example, Smith v. Cahoon, 283 U.S. 553, 563–65 (1931); Winters v. New York, 333 U.S. 507 (1948). Compare the cases cited in note 23 *infra*.

[23] "For the purposes of determining whether a state statute is too vague and indefinite to constitute valid legislation 'we must take the state statute as though it read precisely as the highest court of the state has interpreted it.' " Wainright v. Stone, 414 U.S. 21, 22–23 (1973), quoting Minnesota ex rel Pearson v. Probate Court, 309 U.S. 270, 273 (1940). ". . . [A]lthough it is usual to conceive of the void-for-vagueness cases as cases in which the Supreme Court passes upon the 'face' validity of statutes, in fact what the Court is far more frequently reviewing is a state court's reading of the statute.' " Amsterdam, *The Void for Vagueness Doctrine in the Supreme Court*, 109 U. OF PENN. L. REV. 67, 68 (1960). See also United States v. National Dairy Product Corp., 372 U.S. 29, 31–33 (1963), and United States v. Powell, 423 U.S. 87, 92–94 (1975), rejecting vagueness attacks to federal statutes "as applied." *Cf.* Palmer v. City of Euclid, 402 U.S. 544 (1971), where the Court sustained a vagueness attack as applied, while a concurring opinion, *id.* at 546, "would go further and hold that the ordinance is unconstitutionally vague on its face." See generally Brache v. Co. of Westchester, 658 F.2d 47 (2d Cir. 1981).

[24] 226 U.S. 217 (1912).

quired settlement of frivolous claims and thus violated the due-process clause. The Court rejected the contention in these terms:[25]

> As applied to [this] case, we think the statute is not repugnant to [the Fourteenth Amendment] . . . .
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> Although seemingly conceding this much, counsel for the railway company urges that the statute is not confined to cases like the present, but equally penalizes the failure to accede to an excessive or extravagant claim; in other words, that it contemplates the assessment of the penalty in every case where the claim presented is not settled within the time allotted, regardless of whether, or how much, the recovery falls short of the amount claimed. But it is not open to the railway company to complain on that score. It has not been penalized for failing to accede to an excessive or extravagant claim, but for failing to make reasonably prompt settlement of a claim which upon due inquiry has been pronounced just in every respect. Of course, the argument to sustain the contention is that, if the statute embraces cases such as are supposed, it is void as to them, and, if so void, is void *in toto*. But this court must deal with the case in hand, and not with imaginary ones. It suffices, therefore, to hold that, as applied to cases like the present, the statute is valid. How the state court may apply it to other cases, whether its general words may be treated as more or less restrained, and how far parts of it may be sustained if others fail, are matters upon which we need not speculate now [citations omitted]. . . .

Yazoo, it should be noted, came to the Supreme Court without any authoritative construction of the statute by the state courts. In these circumstances, the Supreme Court will presume that the state statute is separable; that is, that the state court *has* fixed the statute's boundary at or within a clearly ascertainable line separating legitimate from illegitimate exercises of state power.[26] This means that, in subsequent cases, the state court is expected to excise any invalid applications. Just last term, for example, the Court applied the separability presumption to reject an overbreadth challenge to a statute requiring parental notification of a minor's decision to have

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[25] *Id.* at 219–20, See also Smily v. Kansas, 196 U.S. 447, 454–55 (1905).

[26] Indeed, the state court's decision is unintelligible on any other premise. If, for example, in the *Yazoo* context the state court subsequently holds the statute inseparable, the initial application of the statute to the railroad in *Yazoo* cannot be justified. See Metromedia, Inc. v. City of San Diego, note 17 *supra*, at 2899 n.26. Perhaps, however, in a civil context notions of finality and reliance by the plaintiff might operate so as to bar restitutionary recovery by the railroad; such notions support a holding that the decision with respect to inseparability is to have prospective application only.

an abortion. In *H. L. v. Matheson*,[27] the minor argued that the statutory requirement was impermissibly "overbroad"[28] insofar as it required a notification for "mature and emancipated" minors. Despite a broad class certification by the trial court, the state supreme court, consistent with the pleadings and the evidence, considered the statute only insofar as it reached unemancipated minors living with their parents, and it upheld the statute. The Supreme Court affirmed, stating that: "We cannot assume that the statute, when challenged in a proper case, will not be construed also to exempt demonstrably mature minors."[29]

Quite plainly, the more a statute is cut down to state a permissible subrule general enough to cover the facts of the litigant's case, the more the substance of the litigant's claim becomes that of a fact-dependent claim of constitutional privilege. But this is not invariably so. A fundamental principle of our system of constitutional law lies behind the proclivity of courts to narrow the sweeping reach of statutory language. The operative rule, either as enacted or construed, must conform to the Constitution. Thus, in addition to a claim of privilege, a litigant has always been permitted to make another, equally "conventional" challenge: He can insist that his conduct be judged in accordance with a rule that is constitutionally valid.[30] In sharp contrast to a fact-dependent privilege claim, a challenge to the content of the rule applied is independent of the specific facts of the litigant's predicament. Rather, it speaks to the relationship between the facial content of the rule being applied to the facts and the applicable constitutional law, and it insists that the rule itself be valid.

Considerable decisional law demonstrates that a sanction imposed under a facially invalid rule cannot be saved by fact-dependent references to the nonprivileged character of the litigant's

[27] 101 S.Ct. 1164 (1981).

[28] *Id.* at 1169.

[29] *Ibid.*

[30] A "defendant in a coercive proceeding . . . always has standing to challenge the validity of the statute in the terms in which it is applied to him." HART & WECHSLER'S 1981 Supplement at 88. But the position of a prospective defendant bringing an action for declaratory relief need not be assimilated to that of an actual defendant. To be sure, any litigant is entitled to be free from the application of an unconstitutional rule of law if the court reaches the merits of the case and its judgment has preclusive effect. See Federated Department Stores, Inc. v. Moitie, 101 S. Ct. 2424 (1981); Shapiro, *State Courts and Federal Declaratory Judgments*, 74 NW. L. REV. 759 (1979). But that right does not mean that he can *insist* on the scope of the rule being adjudicated in advance of its actual application. See text at pp. 33–36.

conduct. (To be sure, many of the cases involve judicial efforts to avoid deciding the ultimate question of whether the litigant's conduct is constitutionally privileged. But fact-independent evaluation of the rule employed is available to the litigant even if it be assumed, *ex ante*, that no constitutionally privileged conduct is involved.) Vagueness cases illustrate the point. A litigant can challenge the terms of the rule applied without showing that his own conduct is privileged against conviction under a statute giving better notice of what constitutes the offense.[31] Similarly, one could not be denied equal protection of the laws simply because the conduct at issue is not independently privileged.[32]

The same principle is applicable with respect to right-based claims. The validity of the rule invoked is at issue, wholly apart from the character of the litigant's conduct. Suppose, for example, that dancing by oneself in a barroom is constitutionally privileged activity, unless the dancer has bare feet. Even if the evidence showed that the defendant was dancing in his bare feet, a conviction could not be sustained under a statute which, as construed, makes criminal *only* the act of barroom dancing *per se*.[33] A litigant has always had the right to be free from being burdened by an unconstitutional rule, whatever the state of the evidence.[34] This is

[31] See the cases cited in note 23 *supra*. Bouie v. City of Columbia, 378 U.S. 347 (1964), is a particularly apt illustration of the point that facial attacks are not dependent on the quality of defendant's conduct. The Court there reversed a "sit-in" conviction of black defendants for violating a state's trespass statute prohibiting "entry" without the owner's consent. In so doing, the Court did not rule that defendant's conduct was constitutionally privileged; it simply held that the rule actually applied was rendered impermissibly vague when statutory prohibition of unconsented "entry" was judicially enlarged to include remaining after consent has been withdrawn. *Id.* at 352–55.

[32] *Cf.* Michael M. v. Superior Court of Sonoma County, 101 S. Ct. 1200 (1981) (by implication). Few cases of selective enforcement of criminal statutes are accompanied by a meaningful independent claim of constitutional privilege. See generally Note, *The Right to Nondiscriminatory Enforcement of State Penal Law*, 61 COLUM. L. REV. 1103 (1961); Givelber, *The Application of Equal Protection Principles to Selective Enforcement of the Criminal Law*, 1973 U. Ill. L. F. 88.

[33] See Thompson v. City of Louisville, 362 U.S. 199 (1960), discussed in HART & WECHSLER at 615: ". . . *Thompson* . . . does not say that Kentucky could not prohibit a person from dancing alone publicly in a cafe." As will be apparent from the discussion that follows, the state court's decision that the statute makes criminal *only* the act of dancing may, in effect, be a holding that the statute is inseparable; as a matter of state law, it cannot be truncated to constitutionally accepted limits. If the state court is clear about that, no room for the *Yazoo* presumption exists.

[34] *E.g.*, Williams v. North Carolina, 317 U.S. 287, 292 (1942); Bachellar v. Maryland, 397 U.S. 564, 569–71 (1970). See also New York R.R. v. White, 243 U.S. 188, 197 (1917); Illinois Cent. R.R. v. McKendree, 203 U.S. 514, 528–30 (1906); United States v. Ju Toy, 198 U.S. 253, 262–63 (1905); Montana Co. v. St. Louis Mining and Milling Co., 152 U.S.

made particularly clear by the "inseparability" cases. Many statutes are susceptible to both valid and invalid applications. Sometimes, as a matter of construction, the statute is held to be "inseparable"—that is, a nullity unless good in all its reasonable and foreseeable applications. This occurs, most typically, where the court concludes that, given the nature or range of the act's invalid applications, the legislature would not want the statute to stand, or that the court simply cannot sever the valid from the invalid applications. In *United States v. Reese*,[35] for example, the Supreme Court sustained a demurrer to an indictment against a state official for a racially discriminatory refusal to receive and count a vote in a state election contrary to a Congressional enactment. While application of the act to the defendant was clearly valid given the Fifteenth Amendment's prohibition of such state action, the Court stressed that, facially, the act also prohibited racially motivated private interference with voting in state elections. The Court said: "We are not able to reject a part [of the statute] which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not."[36]

Salient examples of direct challenges to the constitutional adequacy of rules impinging on rights without regard to the quality of defendant's conduct appeared in First Amendment adjudication long before the flowering of overbreadth doctrine in the 1960s. These decisions, it should be noted, cannot fairly be viewed as

160, 169–70 (1894); Trade-Mark Cases, 100 U.S. 82, 98–99 (1879). See also Ulster County Court v. Allen, note 1 *supra*, at 160 (. . . the Court has held it irrelevant in analyzing a mandatory presumption, . . . that there is ample evidence in the record other than the presumption to support a conviction"). See generally Note, *Supreme Court Judgment of State Statute as Unconstitutional on Its Face*, 31 NOTRE DAME LAWYER 684 (1956).

[35] 92 U.S. 214 (1876).

[36] *Id.* at 221. See also Trade-Mark Cases, 100 U.S. 82, 98–99 (1880) (defendants were indicted for counterfeiting trademarks which, apparently, were actually used in interstate or foreign commerce; nonetheless, the Court upheld the defense that the statute was heyond Congressional power, because the act was not so limited and its language could not be narrowed by construction). In the Employers' Liability Cases, 207 U.S. 463, 500–02 (1908), the Court invalidated an employers' liability act in an action by employees engaged in interstate commerce at time of injury. The Court said that, in terms, the act applicd whenever the employer was engaged in interstate commerce regardless of the nature of the employee's activity.

See also the extensive collection of cases in Stern, note 21 *supra*. See also Note, 47 HARV. L. REV. 677, 680–81 (1934). Tbe cases cited in note 34 *supra* are all ultimately premised on a holding that the statutes involved were inseparable. See, *e.g.*, *Metromedia*, note 17 *supra*, at 2890 n.26.

unacknowledged applications of a special First Amendment standing doctrine. Quite to the contrary; the Court simply applied conventional doctrine to permit the litigant to challenge the content of the rule applied to him. In *Terminiello v. Chicago*,[37] for example, the Court reversed a disorderly conduct conviction based on a violently racist, anti-Semitic speech, even though the protected character of the speech itself was at least doubtful under the then existing constitutional doctrine.[38] Over objection that only the privilege issue was properly before it,[39] the Court focused entirely on the terms of the rule actually applied.[40] And the Court held that the state court's statutory construction, which permitted conviction for speech which "stirs the public to anger, invites dispute, [or] brings about a condition of unrest. . . ,"[41] rendered the rule constitutionally impermissible.

An even more graphic illustration is the fountainhead of the overbreadth doctrine itself, *Thornhill v. Alabama*.[42] *Thornhill* involved review of a state conviction for labor picketing. The statute prohibited anyone "without a just cause" to "go near to or loiter about" any business for the purpose of "hindering, delaying, or interfering with or injuring" the business. The state courts made no effort to narrow the sweep of the statute and sustained a conviction based on a charge framed substantially in terms of the statutory language. The Supreme Court reversed. After first concluding that peaceful picketing generally constituted "speech" within the ambit of the constitutional guarantee, the Court turned its attention to the constitutional sufficiency of the rule applied, rather than to a fact-oriented review to determine whether the circumstances of the particular picketing involved rendered it unprotected.[43] The Court advanced two justifications in defense of this approach, the second of which gave birth to the overbreadth doctrine.[44] Prior to its over-

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[37] 337 U.S. 1 (1949).

[38] Compare Beuharnais v. Illinois, 343 U.S. 250 (1952).

[39] Note 37 *supra*, at 8–12 (Frankfurter, J., dissenting).

[40] *Id.* at 5–6.

[41] *Id.* at 3.

[42] 310 U.S. 88 (1940).

[43] *Id.* at 106 n.23. ("The fact that the activities for which petitioner was arrested and convicted took place on the private property of the Preserving Company is without significance. . . .")

[44] *Id.* at 97–98. See *infra* at 44–45.

breadth discussion, however, the Court made plain that conventional analysis included a perusal of the facial validity of the rule applied:[45]

> The finding against petitioner was a general one. It did not specify the testimony upon which it rested. The charges were framed in the words of the statute and so must be given a like construction. The courts below expressed no intention of narrowing the construction put upon the statute by prior State decisions. In these circumstance[s], there is no occasion to go behind the face of the statute or of the complaint for the purpose of determining whether the evidence, together with the permissible inferences to be drawn from it, could ever support a conviction founded upon different and more precise charges. . . . The State urges that petitioner may not complain of the deprivation of any rights but his own. It would not follow that on this record petitioner could not complain of the sweeping regulations here challenged.

The foregoing cases make plain that a litigant has long possessed the right to question the validity of the rule actually applied and to insist that it "'is invalid upon its face."[46] This is but a corollary of the proposition that the "constitutional validity of the law is to be tested not by what has been done under it, but what may, by its authority, be done."[47] The doctrine is a general one, in no way limited to either First Amendment or criminal cases. In *Wuchter v. Pizzutti*,[48] for instance, the Court permitted a nonresident motorist to challenge a statutory scheme governing service of process on nonresidents. The statute imposed no requirement of notice, and the state court imposed none by way of construction. Even though the defendant had in fact received notice, the Court found a constitutional violation in these circumstances. "[Notice not] having been directed by the statute it can not, therefore, supply constitutional validity to the statute or to service under it."[49]

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[45] *Id.* at 96. See also Bachellar v. Maryland, note 34 *supra*, at 569–71.

[46] Smith v. Cahoon, note 22 *supra*, at 562.

[47] Montana Co. v. St. Louis Mining and Milling Co., note 34 *supra*, at 169–70, quoting Stuart v. Palmer, 74 N.Y. 183, 188 (1878).

[48] 276 U.S. 13 (1928).

[49] *Id.* at 24. The decision is vulnerable to criticism for ignoring the "*Yazoo* presumption." Compare National Equipment Rental, Ltd. v. Szukhent, 375 U.S. 311, 315–18 (1964).

Many of the foregoing cases may be conceptualized as testing a rule in terms of its impact on "third parties."[50] Be that as it may, the underlying reality remains: Faced with a challenge to the validity of the rule ultimately extracted from a statute, a court tests that rule, consciously or not, by imagining relatively standard instances of its application. On that basis it determines whether the content of the rule is valid.[51] Moreover, these decisions illustrate that *overbreadth doctrine cannot be viewed as uniquely concerned with the facial content of the rule applied to the litigant.*[52] Rather, as the next section shows, the core of overbreadth standing theory is elsewhere: It inheres in an assertion of constitutionally imposed limits on the power of courts to narrow statutes in the process of applying them. I will argue that, academic theorists notwithstanding, courts have refused to impose such limits; instead, they have applied conventional separability doctrine to narrow statutes in the face of overbreadth attacks. Viewed most comprehensively, therefore, overbreadth methodology is now best understood not as a special standing doctrine but as simply an expression of the underlying substantive constitutional law. Given the content of that law, how-

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[50] The Court apparently now treats these cases as "exceptions" to the various formulation of the rule that a litigant can assert only his "own" rights:

> And the rules' rationale may disappear where the statute in question has already been declared unconstitutional in the vast majority of its intended applications, and it can fairly be said that it was not intended to stand as valid, on the basis of fortuitous circumstances, only in a fraction of the cases. See Butts v. Merchants & M. Transp. Co., 230 U.S. 126. The same situation is presented when a state statute comes conclusively pronounced by a state court as having an otherwise valid provision or application inextricably tied up with an invalid one, see Dorchy v. Kansas, 264 U.S. 286, 290; or possibly in that rarest of cases where this Court can justifiably think itself able confidently to discern that Congress would not have desired its legislation to stand at all unless it could validly stand in its every application.

United States v. Raines, note 1 *supra*, at 23 (footnotes omitted).

[51] These hypothetical applications may, of course, be grounded in past examples of enforcement of the statute or in agency interpretations of the statute's reach.

[52] I express no opinion on whether facial scrutiny of the rule applied is constitutionally required—whether, for example, the Congress could restrict the Court to considering whether the conduct shown by the evidence is constitutionally privileged. I once indicated such a view. See Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 43 (1975), but I now doubt the soundness of that position. The Supreme Court has intimated that at least in the criminal context a challenge to the content of the rule cannot be foreclosed. *E.g.*, De Jonge v. Oregon, 299 U.S. 353, 362 (1937) ("Conviction upon a charge not made would be sheer denial of due process.") See also, for example, Bachellar v. Maryland, note 34 *supra*. It is hard to see any relevant differences between civil and criminal proceedings in this respect. Wuchter v. Pizutti, note 48 *supra*, and accompanying text.

ever, the conventional standing principle that a litigant can always insist on application of a valid rule takes on considerable importance.

III. Overbreadth as a Federally Mandated Inseparability Rule

Consideration of overbreadth doctrine in the First Amendment context is best prefaced by a brief, albeit oversimplified, account of the operative substantive law. First Amendment law treats content-based regulations as presumptively invalid.[53] Indeed, not long ago content-based governmental regulation appeared to be automatically invalid unless confined to one of a few narrowly defined categories of unprotected speech: incitement, fighting words, obscenity, defamation, etc.[54] Recent decisions increasingly indicate, however, that these categories may state only the minimum, not the maximum, extent of governmental regulatory power; speech not falling within an unprotected category may be regulated if the compelling state interest or some other balancing test is satisfied.[55] And, in any event, some form of balancing must be employed to assess the validity of non–content-based restrictions on expression.[56]

Thornhill v. Alabama[57] must be evaluated against this general background. In *Thornhill*, the Court suggested that, in free-speech cases, courts are shorn of their general power to narrow statutes in

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[53] By "content-based" rules, I mean, following Ely, rules that regulate speech because the evils sought to be controlled flow from the communicative content of the speech. See Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1481, 1497–98 (1975). See generally TRIBE, note 7 *supra*, § 12-2.

[54] ". . . only expression fairly assignable to one of an increasingly limited set of narrowly defined categories could be denied constitutional protection." Ely, note 53, *supra*, at 1491. See also ELY, note 10 *supra*, at 109–16.

[55] *E.g.*, Haig v. Agee, 101 S. Ct. 2766 (1981); F.C.C. v. Pacifica Foundation, 438 U.S. 726 (1978); Elrod v. Burns, 427 U.S. 347, 360 (1976); Buckley v. Valeo, 424 U.S. 1, 24–25, 66 (1976); Procunier v. Martinez, note 11 *supra*, at 410–14. See also Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York, 447 U.S. 557 (1980); Metromedia, Inc. v. City of San Diego, note 17 *supra*.

[56] *E.g.*, Heffron v. International Society for Krishna Consciousness, 101 S. Ct. 2559 (1981); United States Postal Service v. Council Greenburg Civic Ass'n. 101 S. Ct. 2676, 2686 (1981) ("This Court has long recognized the validity of reasonable time, place and manner regulations on such a [public] forum so long as the regulation is content neutral, serves a signifieant governmental interest, and leaves open adequate alternative channels for communication"). ELY, note 10 *supra*, at 110–16.

[57] Note 42 *supra*, at 88.

the application process. In launching the overbreadth doctrine, the Court said,[58]

> There is a further reason for testing the [statute] on its face. . . . 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 seems to posit an extraordinary, constitutionally based limitation on the traditional judicial power to truncate statutes to constitutionally acceptable limits. It seems, in other words to create a federally mandated rule with respect to the inseparability of statutes affecting expression and thereby forces consideration of the statutory rule "as written."[59]

Any federally imposed limitation on the power of the *state* courts to narrow state statutes in the application process generates evident difficulties.[60] Constraints on separability judgments undermine the role of the state courts as expositors and shapers of state law, and thus they cut against the general grain of "Our Federalism." This objection, however, must be evaluated in light of the broader ways in which federal constitutional prohibitions confine the authority of all state institutions, including the state courts. And it is particularly clear that the constitutional guarantee of free speech generates procedural and remedial limitations on the ways in which the states structure their decision-making processes.[61] Thus, a doctrine that the Constitution imposes limits on the authority of the state courts in the construction of state statutes cannot be rejected *a priori.* Indeed, much *ius tertii* standing may, on analysis, prove to be such a doctrine; it limits, as a matter of federal constitutional law, the power of state courts to sever statutes if certain relationships exist between the litigant and identifiable third parties.[62] In an over-

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[58] *Id.* at 97–98.

[59] See Comment, *Inseparability in Application of Statutes Impairing Civil Liberties,* 61 HARV. L. REV. 1208, 1211 (1948). The assertion, Harvard Note at 894, that the inseparability point is "question begging" is both unexplained and mystifying.

[60] Apart, that is, from satisfaction of the traditional requirement of fair warning. See note 22 *supra.*

[61] Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518 (1970).

[62] This seems true at least in those cases where the statute imposes duties directly upon the third party claimant. *E.g.,* Griswold v. Connecticut, 381 U.S. 479, 481 (1965); HART & WECHSLER'S 1981 Supplement at 82–83. See also note 5 *supra.* Perhaps some *ius tertii* cases

breadth challenge, no identifiable third party and no special relationship exist. Still, it can be and has been argued that some limits on the power of state courts to truncate state statutes impinging on expression are desirable. This conception might be thought to follow from the deterrence rationale supposedly underlying the overbreadth doctrine—the statute's "very existence" may deter others.[63] Accordingly, the most sensible and refined approach is one which properly accommodates the traditional interpretive autonomy of state courts with the values promoted by the First Amendment.

Despite significant differences among overbreadth theorists, the crucial feature of overbreadth analysis can be viewed as centered on this problem of accommodation; that is, the core task becomes the identification, *ex ante*, of those situations in which, as a matter of constitutional law, truncating is not permitted. The commentator's efforts display considerable variety. Some writers interpret *Thornhill* as a "clear holding" that a statute regulating speech which "embraces permissible as well as impermissible applications is void on its face and inseparable. . . ."[64] Stated in this form, overbreadth doctrine is completely hostile to any notion of accommodation, and it constitutes a strong antiseparability doctrine. Judicial attention is, quite literally, directed to the face of the statute; having been found to include prohibited applications, the statute becomes, in effect, a dead letter, incapable of even prospective resuscitation by narrowing construction. This view of the overbreadth doctrine gives us everything but the why. No convincing explanation is proffered as to why a state statute, if acceptably narrowed, cannot be applied thereafter within its new confines. It would appear, after all, that the deterrence rationale underlying the overbreadth doc-

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can be reconceptualized as resting on a premise that the constitutional right of the third-party right holder implies a corollary constitutional right in the litigant.

[63] Broadrick v. Oklahoma, note 2 *supra*, at 612 [". . . the possibility that protected speech or assertive activity may be inhibited by the overly broad reach of the statute"]. Village of Schaumburg, note 4 *supra*, at 634 [". . . persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions by a statute susceptible of application to protected expression"]. Gooding v. Wilson, 405 U.S. 518, 521 (1972). See generally Harvard Note. For recent challenges to the deterrence rationale, see note 150 *infra*.

[64] Wormuth and Mirkin, *The Doctrine of the Reasonable Alternative*, 9 UTAH L. REV. 254, 274 (1964). See also Shaman, note 18 *supra*, at 260–61, 277–80 (judicial narrowing inconsistent with premises of overbreadth doctrine). See also Note, *Inseparability in Application of Statutes Impairing Civil Liberties*, 61 HARV. L. REV. 1208 (1948) (state courts cannot narrow statute).

trine is fully spent once a substantively acceptable narrowing construction has been provided.

Other, less sweeping but more sophisticated, versions of overbreadth have surfaced. These accounts do not deny a general authority in the state court to narrow statutes in the application process even where First Amendment interests are implicated. Rather, they seek to specify the circumstances in which that course is improper. Two general lines have emerged.

1. The mildest form of overbreadth doctrine insists that the narrowing is improper when the surviving remnants of the rule is itself unconstitutional. That form of the doctrine is saved from utter triviality only by its emphasis on the special vagueness concerns in the First Amendment area.[65] Professor Tribe rightly argues that all too frequently judicial narrowing "simply exchanges overbreadth for vagueness."[66] Tribe offers as an example a hypothetical statute which on its face makes criminal all public speech but which has been "construed" so as not to reach constitutionally protected activity.[67] The illustration reinforces his point, but it is of little analytic aid; such wholly indeterminate statutes are seldom enacted and reach the Court yet more infrequently.[68] In any event, this formulation of overbreadth doctrine draws upon no uniquely speech-based constitutional principle. It has been long clear in "conventional" constitutional challenges that an attempted saving construction may patch one constitutional difficulty while simultaneously resulting in the different but equally impermissible vice of indefiniteness.[69] Thus, the overbreadth-vagueness axis simply

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[65] See, e.g., Smith v. Gougen, 415 U.S. 566 (1974); Hynes v. Mayor of Oradell, 425 U.S. 610 (1976). See generally Harvard Note at 871–75. Professor Freund long ago emphasized this aspect of overbreadth analysis. FREUND, THE SUPREME COURT OF THE UNITED STATES, 67–68 (1961).

[66] TRIBE, note 7 *supra*, at § 12–26, p. 716.

[67] *Ibid.*

[68] Thornhill v. Alabama, note 42 *supra* and accompanying text, could have reached the Court in that posture if the state court had held that its antipicketing statute applied to bar all picketing "except where the federal constitution required otherwise."

[69] "The decision thus aims to remove the constitutional objection of invalid application only by creating another constitutional objection of lack of appropriate certainty. Had the legislature written into the statute itself that it was binding . . .' only so far as the provisions are legally applicable,' it would have transcended the permissible limits of statutory indefiniteness." Smith v. Cahoon, note 22 *supra*, at 565. It should be noted that state statutes made operative "to the extent constitutionally permissible" are not uncommon in the fields of state taxation and "long arm" services of process. Vagueness is of greater concern with respect to such statutes when criminal liability is at issue. Compare Monroe v. Pape, 365 U.S. 167 (1961), with Screws v. United States, 325 U.S. 91 (1945).

becomes expressive of the demands of the relevant substantive constitutional law, not a distinctive aspect of either free-speech or standing doctrine.

Moreover, this vagueness facet of overbreadth methodology seems to be waning. Recent Supreme Court cases illustrate a diminishing judicial enthusiasm for vagueness analysis in the First Amendment context. *Arnett v. Kennedy*[70] is the paradigm. Acting under statutory authority to dismiss employees for "such cause as will promote the efficiency of the service," the federal government discharged a civil service employee for speech critical of his superior. The Court rejected, *inter alia*, his overbreadth claim, stating, "We hold the [such cause . . .] language . . . excludes constitionally protected speech and that the statute is therefore not overbroad."[71] Perhaps the *Arnett* approach should be confined to statutes that in terms of ordinary applications are not focused on speech content; "just cause" discharges will, in the normal run, turn on the nonexpressive rather than the expressive features of the employee's conduct. But the Court evinces no disposition to so confine its holding,[72] and while vagueness challenges are, of course, still sustained in the First Amendment context, the Court seems far less inclined than formerly to find such a transgression.

2. A more intriguing form of overbreadth methodology would bar judicial narrowing of statutes even if the statute, as narrowed, would not thereby be rendered unconstitutionally vague. Narrowing would be prohibited in settings which lack a clear, bright line separating unprotected from protected expression.[73] Stated affirmatively, saving constructions would be permitted only in those contexts in which a "determinative rule of privilege"[74] exists to constrain the statute.

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[70] 416 U.S. 134 (1974).

[71] *Id.* at 162. The plurality opinion was joined on this point by other justices. *Id.* at 164 (Powell and Blackmun, J.J.); *id.* at 177 (White, J.).

[72] See, *e.g.*, Hamling v. United States, 418 U.S. 87, 114–15 (1974), sustaining against a vagueness attack the federal obscenity statute as judicially restricted to accord with the requirements of Miller v. California, note 7 *supra*; Buckley v. Valeo, note 55 *supra*, at 44, 76–80, narrowing construction given to parts of the Federal Election Campaign Act; United States Civil Service Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 569–80 (1973), sustaining Hatch Act on the basis of prior administrative interpretations.

[73] TRIBE, note 7 *supra*, at § 12–26, pp. 714–16. The foundation for this approach is the much admired but, on close inspection, vague and abstract analysis of overbreadth doctrine in Harvard Note, note 6 *supra*, at 883–90.

[74] Harvard Note at 883.

A rule of privilege, it will be recalled, is simply the relevant line separating constitutionally protected from constitutionally unprotected activity. Whenever the categorization approach states the relevant substantive First Amendment law, the unprotected categories ("incitement, obscenity, fighting words, etc.") constitute the relevant privilege rules. In Section II, I have argued that, under conventional principles, a litigant could always insist on the application of a valid rule, and accordingly, statutes, to be valid, must track, either expressly or by construction, the relevant rule of privilege. Overbreadth theory would, of course, be entirely empty of *distinctive* content if it simply required conformity of the statute to the relevant First Amendment privilege rule. Sophisticated overbreadth theory is *not* empty. Emphasizing "determinative," advocates of this form of overbreadth methodology do not equate "determinative rules of privilege" with the judicially established categories delineating unprotected speech. Rather, effort is made to distinguish among the various unprotected categories.

The unprotected categories are, *ex hypothesi*, not unconstitutionally vague. Nevertheless, overbreadth theorists maintain that some of these categories involve a constellation of fact-dependent variables too numerous in range and too unpredictable in application to be regarded as sufficiently determinative for the purpose of slicing a statute to acceptable constitutional limits.[75] Professor Tribe, for example, rejects the "fighting words" exception as a satisfactory constraining limitation; it is, he says, not "precise and focused enough to give advance warning of the exact reach of the statute punishing offensive speech, since decisions under the standard turn on the facts particular to the speaker, the audience, and their interaction."[76] The result is curious: A statute prohibiting "fighting words" in the terms defined by the Supreme Court could be validly applied to any litigant, while a statute prohibiting some form of "offensive speech" but readily constrained by a court to reach identically defined "fighting words" could not be so applied, even prospectively.

Attempts to draw lines between acceptable and unacceptable constitutional privileges for purposes of allowing narrowing statu-

[75] The Harvard Note finds the Court's defamation and obscenity privilege rules "sufficient" but not the rules with respect to sedition. Compare 83 HARV. L. REV. at 883–90 with *id.* at 897–907.

[76] TRIBE, note 7 *supra*, at 714–16.

tory constructions are fundamentally flawed. The defect inheres in the impossibility of drawing principled distinctions, for these purposes, among the various rules of First Amendment privilege. The entire effort posits a sharp contrast between two types of privilege rules: (*a*) privilege rules which are subject-matter specific and which "elevate a few factors to per se status,"[77]—for example, the actual malice rule of the defamation cases and the obscenity criteria;[78] and (*b*) other First Amendment privilege standards which assertedly focus in an *ad hoc* manner on a combination of a much larger set of variables, some outside the actor's control—for example, the "fighting words" and Brandenburg[79] incitement standards which, *inter alia*, focus "on the propensity of defined conduct to bring about concrete harms. . . ."[80] This distinction between the two types of privileges seems to me to rest, in part, on a distortion of the substantive content of the "acceptable" privileges,[81] and, in part, on a thinly disguised rejection of the constitutional adequacy of the disfavored privileges.[82]

Most important, however, the asserted distinction between the two types of privilege rules cannot bear the weight placed on it. Admitting that certain kinds of harm justify some content-based regulation, the categorization approach seeks to identify those harms "at wholesale in advance, outside the context of specific

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[77] Harvard Note at 884.

[78] "It is important to notice the analytical focus of the *Sullivan* and *Roth-Memoirs* tests. The former does not aim at the amount of tangible harm wrought by defamatory statements, but at the culpability of the speaker in abstraction from consequences. *Roth-Memoirs* aims not only at any harm to social interests which obscene materials might induce but also at the supposed worthlessness—hence unprotectedness—of such materials." *Id.* at 886–87.

[79] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (". . . the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

[80] Harvard Note at 887.

[81] The characterization of obscenity, note 78 *supra*, seems to assume that obscenity is limited to hard-core pornography which is self-demonstratingly worthless material of the "I-know-it-when-I-see-it" variety. Perhaps that was accurate prior to Miller v. California, note 7 *supra*. But now more attention must be paid to such elusive matters as community standards. Jenkins v. Georgia, 418 U.S. 153 (1974).

The defamation privilege cannot be reduced to a state-of-the-mind question. The issue of truth is centrally important, both in and of itself, but also as bearing on the actor's state of mind. Moreover, inquiry into the actor's state of mind may itself involve a relatively broad-ranged, fact-dependent inquiry. Herbert v. Lando, 441 U.S. 153 (1979).

[82] *E.g.*, Harvard Note at 905–06.

cases."[83] This avoids the danger of distortion brought about by the pull of specific facts and particular litigants. But the categories having been established, *ex ante*, the problem of application occurs. At that stage, *no* privilege rule is or can be completely independent of the underlying factual circumstances to which it is applied, nor is there any reason to suppose that any adjudication under one set of privilege rules is materially more immune from the risk of speech-punishing mistake than under other privilege rules.[84] The system of privilege rules, real or imagined, varies only in degree of adjudicative predictability. No subset of these rules can be identified, *ex ante*, for purposes of distinguishing in a principled way between those privilege rules which can tolerably be utilized for statute narrowing and those which cannot. Once state court power to apply separability doctrine to statutes which touch expression is acknowledged in any form, no coherent limitation on that power can be developed.

Recent authority is completely consistent with this analysis. *Arnett* and its progeny represent a decisive rejection of any contention that overbreadth is a special separability rule requiring that overbroad statutes can be given a saving construction only if it is possible to specify some "satisfactory" category of privileged conduct. Indeed, apart from *Thornhill* itself, Supreme Court opinions provide little support for the commentators' view that the overbreadth doctrine *in any way* limits the power of state courts to narrow statutes to constitutionally specified boundaries in the application process.[85] In reviewing any case involving free expression the Court invariably accepts the gloss the highest state court has placed on a state statute.[86] To be sure, the statute, however narrowed in

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[83] ELY, note 10 *supra*, at 110.

[84] Professor Ely seems to assume that *all* privilege rules are relatively free of inquiry into audience reaction. *Id.* at 110. I think that assertion implausible (Compare Ely's treatment of *Brandenburg* in the text at 115 with *id.* 232–33 n.24.) See Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 302 (1981): ". . . 'incitement', for example, still involves an individualized assessment." But even if Ely is right, commentators like Tribe who seek to distinguish among privilege rules are wrong.

[85] The first important decision afrer *Thornhill* accepted the state court narrowing construction. Cox v. New Hampshire, 312 U.S. 569, 576–78 (1941). For the argument that the narrowing came too late, see Monaghan, note 61 *supra*, at 539–43.

[86] See Ward v. Illinois, 431 U.S. 767, 773–76 (1977) (state court construes obscenity statute in accordance with the specificity requirements of Miller v. California, note 7 *supra*); Colten v. Kentucky, 407 U.S. 104, 110–11 (1972) (disorderly conduct statute); Shuttles-

the state system, may still be constitutionally infirm;[87] but any such defect is the product of substantive First Amendment principles rather than a special nonseparability restriction imposed on the state courts by the First Amendment.

Contrary to the view of Professor Tribe, *Gooding v. Wilson*[88] is fully consistent with these principles. Georgia had convicted the defendant under a statute forbidding any person "without provocation, to use to or of another, and in his presence . . . opprobrious words or abusive language, tending to cause a breach of the peace." While defendant's speech arguably constituted unprotected "fighting words,"[89] the Supreme Court focused entirely on the terms of the rule applied:[90]

> [The statute] punishes only spoken words. It can therefore withstand appellee's attack upon its facial constitutionality only if, as authoritatively construed by the Georgia courts, it is not susceptible of application to speech, although vulgar or offensive, that is protected by the First and Fourth Amendments. . . . Only the Georgia courts can supply the requisite construction, since of course, "we lack jurisdiction authoritatively to construe state legislation." It matters not that the words appellee used might have been constitutionally prohibited under a narrowly and precisely drawn statute.

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worth v. City of Birmingham, 382 U.S. 87, 91–92 (1965) (prospective narrowing valid).

Even if the Supreme Court could insist on making its own independent determination of the content of the state law, as in Indiana ex. rel. Anderson v. Brand, 303 U.S. 95, 100 (1938), it is still state law that is being interpreted, and thus the Court must cut the state statute down to size if it concludes that was what the state law required. See Metromedia, Inc. v. City of San Diego, note 17 *supra*, at 2899, n.26.

[87] Winters v. New York, note 22 *supra*, 519–20. (State court interpretation fixes the meaning of the statute in this case, but even so constrained the statute is unconstitutionally vague.)

[88] Note 63 *supra* at 518.

[89] Justice Blackmun wrote in dissent (p. 534):

> It seems strange, indeed, that in this day a man may say to a police officer, who is attempting to restore access to a public building, "White son of a bitch, I'll kill you" and "you son of a bitch, I'll choke you to death," and say to an accompanying officer, "You son of a bitch, if you ever put your hands on me again, I'll cut you all to pieces," and yet constitutionally cannot be prosecuted and convicted under [the] state statute. . . .

The unprotected character of this speech seems very arguable even on the general premise that a policeman is under a duty to exercise greater restraint than the general members of the public in reacting to provocative language. *Cf.* Gunther, ". . . *The Case of Justice Powell*," 24 STAN. L. REV. 1001 (1972), with the Court's subsequent decision in Lewis v. New Orleans, 415 U.S. 130 (1974).

[90] Note 63 *supra* at 520. On my analysis nothing of importance turns on the fact that the statute "punishes only spoken words."

The Court then concluded that, even as narrowed by the state courts, the statute still reached more than unprotected fighting words and hence was facially defective.

Professor Tribe seems in error in reading *Gooding* and other "offensive-speech" decisions as limiting the power of the state court to reconstruct statutes so as to reach only unprotected fighting words.[91] The *Gooding* Court simply emphasized the impermissibly expansive scope of the rule actually employed by the state court. Had the Georgia courts tailored the statute to a constitutionally acceptable size—that is, to fit only "fighting words"—the Supreme Court would have been compelled to face one of two very different and much thornier questions: whether defendant's speech was in fact constitutionally protected[92] or whether the fighting words category should be either abandoned or restructured.[93]

Finally, it might be argued that overbreadth's inseparability analysis is at least justified where *no* privilege rule exists to constrain the statute. The suggestion will not work. I think that analysis will show that in these situations the controlling substantive law is necessarily compelling state interest or some other balancing test. In these circumstances, overbreadth inquiry is essentially the means-focused, least restrictive alternative inquiry.[94]

IV. THE CONTOURS OF OVERBREADTH ANALYSIS

A. CONTENT-BASED RESTRICTIONS

The Court, apparently confused about the nature of the overbreadth doctrine, has formulated various limiting devices. Opportunity to press overbreadth challenges has been denied to litigants falling within the "hard core" of a statute's valid sweep,[95] to liti-

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[91] TRIBE, note 7 *supra*, at § 12–26, pp. 715–16.

[92] The relevant cases on state power to control "offensive" speech are collected in GUNTHER CONSTITUTIONAL LAW, CASES AND MATERIALS note 8 *supra*, at 1229–43. See also White, J., dissenting from the denial of certiorari in Gormley v. Director, Connecticut State Dep't of Adult Probation, 101 S. Ct. 591 (1980) (annoying telephone call).

[93] Schauer, note 88 *supra*, at 269 n.19 (1981); Gard, *Fighting Words as Free Speech*, 58 WASH. U. L. Q. 531 (1980).

[94] Sometimes, however, the relevant substantive inquiry will generate elaboration of a different set of categories, *e.g.*, whether the speech took place in a "public forum."

[95] See, Haig v. Agee, note 55 *supra*, at 2783 n.61, citing Parker v. Levy, 417 U.S. 733, 755–56 (1974). See also Dombrowski v. Pfister, note 22 *supra*, at 479, 491–92; Brown v.

gants contesting regulations of commercial speech,[96] and to litigants challenging conduct-focused statutes unlikely to generate an appreciable range of invalid applications to expressive conduct.[97] These "exceptions" are evidence of the doctrinal disorder surrounding overbreadth analysis. Quite plainly, the "exceptions" do not contradict the point that overbreadth doctrine does not restrict judicial power to truncate statutes to constitutionally prescribed boundaries. Nor, conversely, do they somehow license courts to apply substantively invalid rules because of the nature of the regulatory rule or of the litigant's conduct. Consider, for example, the suggestion that a litigant who falls within the "hard core" of a statute cannot complain of overbreadth as to others. The meaning of this statement is hardly plain as overbreadth theory now stands. To be sure, such a litigant is unlikely to be able to object on vagueness grounds to a narrowing construction. And the decision to constrain the statute by an applicable rule of privilege is a decision that the statute is separable, so that any unconstitutional applications are to be excised in the application process. But the litigant is still entitled to the application of a valid rule of law, his "hard-core" status notwithstanding.

Overbreadth simply expresses that requirement of a substantively valid rule in the context of First Amendment substantive law. That expression is, however, affected by the tension within substantive First Amendment doctrine between categorization and balancing as distinct approaches to the validity of content-based restrictions. Where the categorization approach is relevant, the statute may not reach beyond the relevant unprotected category.[98] By contrast, in cases in which the compelling state interest or other balancing test is triggered, the Court must address the weight of the governmental interest and matters of regulatory precision.[99] In cases in which a balancing approach is operative, the probability of

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Louisiana, 383 U.S. 131, 147–48 (1966) (Brennan, J., concurring). But see Gooding v. Wilson, note 63 *supra*.

[96] Bates v. State Bar of Arizona, 433 U.S. 350, 381 (1977); Village of Schaumburg, note 4 *supra*, at 634. *Cf.* Central Hudson Gas Co. v. Public Service Comm'n of New York, note 55 *supra*.

[97] Broadrick v. Oklahoma, note 2 *supra*, at 615–16.

[98] *E.g.*, Lewis v. New Orleans, 415 U.S. 130 (1974) ("opprobrious language"); Communist Party of Indiana v. Whitcomb, 414 U.S. 441 (1974) (oath).

[99] *E.g.*, Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York, note 55 *supra*. See also note 11 *supra*.

a saving construction is, perhaps, less than where the categorization approach obtains because the state court may not be in an appropriate institutional position to truncate a statute to satisfy the least restrictive alternative analysis.

Whether the categorization or the balancing approach is appropriate, the important point is that the litigant is entitled to the application of a constitutionally valid rule. *Schad v. Borough of Mount Ephraim*[100] is recent confirmation of that point. In *Schad*, the wares of an adult bookstore included a coin-operated mechanism permitting the customer to watch a live nude dancer performing behind a glass panel, and the store's owner was charged with violating a zoning ordinance prohibiting any live entertainment in a commercial zone. Some forms of nude dancing may fall with the protection of the First Amendment,[101] although my inclinations are with the dissenting opinion of the Chief Justice on this predominantly prurient variety. But I think the Chief Justice is wrong in putting the decisive question in these terms:[102]

> As applied, [the ordinance] operates as a ban on nude dancing in appellants' "adult" book store, and for that reason alone it is here. Thus, the issue *in the case that we have before us* is not whether Mount Ephraim may ban traditional live entertainment, but whether it may ban nude dancing, which is used as the "bait" to induce customers into the appellants' book store. When, and if, this ordinance is used to prevent a high school performance of "The Sound of Music," for example, the Court can deal with that problem.

Contrary to the Chief Justice's view, the defendant—whatever he did—is, as the Court recognized, entitled to a judicial evaluation of the facial constitutionality of a blanket ban against live entertainment in a commercial zone. That prohibition may or may not be valid, but the issue cannot be reduced, as the Chief Justice thought, to a question of the protected character of defendant's expression.[103]

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[100] 101 S. Ct. 2176 (1981).

[101] Indeed, I so argued as counsel in the *Hair* case, Southeastern Promotions, Ltd v. Conrad, note 1 *supra*, at 546 (1975).

[102] Note 100 *supra*, at 2191–92 (italics in original).

[103] The court framed the issue in these terms (*id.* at 2181):

> As the Mount Ephraim code has been construed by the New Jersey courts—a construction that is binding upon us—"live entertainment," including nude dancing, is "not permitted use in any establishment" in the Borough of Mount Ephraim.

Nor can the Supreme Court decline to entertain a facial challenge by itself supplying a saving construction to an otherwise impermissible state statute. The contrary suggestion of cases like *Erznoznik v. City of Jacksonville*[104] is unsound. *Erznoznik* correctly sustained a facial attack to a content-based ordinance which the state court had failed to narrow to the appropriate constitutional boundary line.[105] In so doing, however, the Court added that "the possibility of a limiting construction appears remote."[106] This concern is appropriate in the setting of a suit in the federal courts seeking to restrain enforcement of a state statute on grounds of facial invalidity.[107] But it is wholly misplaced in *Erznoznik*. That case had arisen in the state courts and the ordinance had been given an authoritative construction by the state courts—thus excluding the possibility of a "*Yazoo* presumption." Facial scrutiny by the Supreme Court in such cases does not extend beyond a consideration of whether the state rule, as authoritatively construed by the state courts, satisfies relevant constitutional standards.[108]

> By excluding live entertainment throughout the Borough, the Mount Ephraim ordinance prohibits a wide range of expression that has long been held to be within the protections of the First and Fourteenth Amendment. Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television and live entertainment such as musical and dramatic works, fall within the First Amendment guarantee. [Citations omitted.] Nor may an entertainment program be prohibited solely because it displays the nude human figure.
>
> Whatever First Amendment protection should be extended to nude dancing, live or on film, however, the Mount Ephraim ordinance prohibits all live entertainment in the Borough: no property in the Borough may be principally used for the commercial production of plays, concerts, musicals, dance or any other form of live entertainment. Because appellants' claims are rooted in the First Amendment, they are entitled to rely on the impact of the ordinance on the expressive activities of others as well as their own.

See also Doran v. Salem Inn, Inc. 422 U.S. 922, 933 (1974) upholding a grant of a preliminary injunction in a challenge by bar owners to an ordinance that prohibited females from appearing topless not just in bars but "in any public place." Compare New York State Liquor Authority v. Bellanca, 101 S. Ct. 2599, 2601 (1981) (upholding prohibition of topless dancing in a barroom).

[104] 422 U.S. 205 (1975).

[105] *Id.* at 216. The ordinance prohibited exhibition of any "motion picture . . . in which the human male or female bare buttocks, human female bare breasts, or human bare pubic areas are shown if such motion picture . . . is visible from any public street or public place." *Id.* at 206–07.

[106] *Id.* at 216.

[107] *E.g.*, Cameron v. Johnson, 390 U.S. 611, 615–16 (1968); Cole v. Richardson, 405 U.S. 676 (1972).

[108] HART & WECHSLER'S 1981 Supplement at 87–88. See also, *e.g.*, Talley v. California, 362 U.S. 60, 63–64 (1960).

B. OVERBREADTH AND NON-CONTENT-BASED STATE STATUTES

If facial challenges are permissible with respect to any rule impinging on constitutionally protected speech, what facial review methodology is appropriate for ordinary criminal statutes, such as prohibitions against trespass and theft? While generally regulating "nonspeech," these statutes will on occasion be applied to "speech," a term which, substantively, embraces a diverse range of activities with many different qualities: solicitation and contribution of money, picketing, mass demonstrations, expressive conduct, etc.[109] In *Broadrick v. Oklahoma*,[110] the Court, in the course of an elaborate effort at restating the overbreadth standing doctrine,[111] sought to confine facial condemnation of statutes of this sort. Positing a general distinction between "pure speech" and conduct, including "expressive conduct," the Court said that overbreadth concerns attenuate[112]

> as the otherwise protected 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. . . . 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.

The analytic framework suggested in *Broadrick* contained considerable ambiguity and uncertainty, including, *inter alia*, whether the focus of the Court's distinction between "pure speech" and conduct relates to the terms of the statute or to the litigant's activity;[113] whether the "exceptions" recognized by the Court to its general distinction are potentially engulfing;[114] and, finally, whether a dis-

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[109] *E.g.*, Village of Schaumburg, note 4 *supra* (solicitations); Buckley v. Valeo, note 55 *supra* (contributions); Cox v. Louisiana, 379 U.S. 559 (1965) (mass demonstration); United States v. O'Brien, 391 U.S. 367 (1968) (expressive conduct).

[110] Note 2 *supra*, at 601.

[111] *Id.* at 609–16.

[112] *Id.* at 615.

[113] Professor Tribe apparently reads the Court's language as focusing on the statute. TRIBE, note 7 *supra*, at § 12–25, p. 713, referring to the Court's "troublesome distinction between 'pure speech' regulations and 'conduct' regulations." For a heroic effort to explicate the decision, see Note, *Overbreadth Review and the Burger Court*, 49 N.Y.U.L. REV. 532, 538–43 (1974).

[114] Note 2 *supra*, at 612–13:

> Such claims of facial overbreadth have been entertained in cases involving stat-

tinction between "pure speech" and conduct has any useful content.[115] However these questions are resolved, the core point remains—the Court will be hostile to facial condemnation of statutes whose central focus is prohibition of tangible harms unrelated to the content of the expression generated by the production of those harms. This hostility, moreover, is not mitigated merely because such statutes can be applied to a rather disparate variety of constitutionally protected expression.[116]

Although the Court's general conclusion is sound, its underpinnings are, I think, quite different from those advanced by the Court. The question is *not* whether a defendant can raise an overbreadth challenge to an "ordinary" criminal statute; the facial validity of the rule actually invoked is always theoretically open to challenge. General criminal statutes, however, are potentially applicable in a wide variety of settings which, in turn, implicate a correspondingly wide range of First Amendment principles. No single determinative First Amendment privilege rule exists for the purpose of statutory narrowing; nor is the compelling state interest test a meaningful litmus test against which to evaluate the statute. Consider, for example, the wide range of applications of an ordinary trespass statute in the context of expression: leafletting in a company town, interruption of a judicial proceeding to make a protest, demonstrating in the curtilage of a jail, etc. Plainly, the statute cannot be evaluated, *ex ante*, in a vacuum, as it sits on the statute books. Nor should it. "The pinch of the statute is in its

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utes which, by their terms, seek to regulate 'only spoken words.' Gooding v. Wilson, 405 U.S. 518, 520 (1972). . . . 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. . . .

[115] See Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1. See also Henkin, *Foreword: On Drawing Lines*, 82 HARV. L. REV. 63, 79–80 (1968): "The meaningful constitutional distinction is not between speech and conduct, but between conduct that speaks, communicates, and other kinds of conduct. If it is intended as expression, if in fact it communicates, especially if it becomes a common comprehensible form of expression, it is 'speech.'" See also Ely, note 53 *supra*, at 1495.

[116] "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." Note 2 *supra*, at 613.

application."[117] Thus the point at which to determine whether any statute is facially defective is *at the time and in the terms in which it is applied to a litigant.* But when a trespass statute is in fact applied to anything embraced within the constitutional definition of speech, the contextually specific construction given to the statute must be valid.[118] If it is not, the statute is to that extent—and to that extent only—invalid as a matter of constitutional law.

The requirement of an acceptable, contextually specific construction ordinarily will mean that the relevant constitutional principles must be sufficiently elaborated by the state court to ensure that the statute's reach is sufficiently constrained.[119] An elaboration requirement leaves little scope for application of the *Yazoo* separability "presumption"[120] in the First Amendment context. If, for example, the state court simply holds that its general trespass statute validly applies to the expression shown by the evidence, the decision is vulnerable. In this context, the decisive question is whether any plausible basis exists for a fear that the state court failed to apply a permissible rule in sustaining the conviction. This inquiry will require some inspection, however cursory, of the evidence, because the evidence will enable the reviewing court to categorize the case properly among the potentially relevant First Amendment contexts. In *Coates v. City of Cincinnati*,[121] for example, the sparse record showed little more than that the defendants had been involved in activities frequently, albeit not invariably, constitutionally privileged: a student demonstration and labor dispute picketing. They had been convicted under an ordinance which

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[117] Terminiello v. Chicago, note 37 *supra*, and accompanying text.

[118] *E.G.*, Cox v. Louisiana, note 109 *supra*. The cases cited by the Court in Broadrick, note 2 *supra*, at 613–14, show this. Cantwell v. Connecticut, 310 U.S. 296 (1940), for example, involved a conviction for the common law crime of inciting a breach of the peace. The Court noted that this offense "embraces a great variety of conduct destroying or menacing public order and tranquility." *Id.* at 308. Whether this definition suffices for a conviction for throwing beer cans at windows, it is not sufficient in the area of freedom of speech.

[119] In this context, elaboration will often be in a negative form, for example: "Defendant's trespass conviction is affirmed because the first amendment does not include a right to interrupt a judicial proceeding to make a protest."

If the court held, however, that "defendant's trespass conviction is affirmed because the first amendment does not include a right to talk in any public place," the result would be different. That rule of state law is inconsistent with the constitutional guarantee of free speech.

[120] See the text and notes at pp. 6–8 *supra*.

[121] 402 U.S. 611 (1971).

made it unlawful "for three or more persons to assemble, . . . on any of the sidewalks, street corners . . . and there conduct themselves in a manner annoying to persons passing by. . . ."[122] It may be, as the dissent argued, that this is like an "ordinary criminal statute"[123] and that, as the Court recognized, it "is broad enough to encompass many types of conduct clearly within the city's constitutional power to prohibit."[124] Nevertheless, the Court correctly sustained a facial attack for overbreadth (and vagueness). The judgment of the state court amounted to little more than a conclusion that the ordinance applied, and validly so, to defendants' conduct.[125] Once it appeared from the record that defendants' conduct arguably fell within a category of First Amendment concern, the judgment was properly reversed, since the Court could not safely conclude that a constitutionally sufficient rule has been applied by the state court. And, as a matter of substantive First Amendment law, the state bears the duty to make precisely that showing.[126]

C. OVERBREADTH AND FEDERAL STATUTES

In situations in which a federal statute or regulation touching expression can be authoritatively construed to accord with an applicable rule of constitutional privilege, the function of overbreadth standing is significantly limited.[127] To be sure, institutional constraints exist on the Court's authority to restructure federal statutes; at some point, such judicial efforts will exceed the bounds of what legitimately can pass as statutory "construction."[128] But the case law makes plain that this limitation, rooted in the separation-of-powers concepts, is not a significant inhibition.[129] The Court

[122] *Id.* at 611 n.1.

[123] *Id.* at 620 (White, J., dissenting).

[124] *Id.* at 614.

[125] *Id.* at 613–14.

[126] *E.g.*, Speiser v. Randall, 357 U.S. 513, 525–26 (1958); see also Cooper v. Mitchell Bros.' Santa Ana Theatre, 102 S. Ct. ___ (1981). Justice White's dissent in *Coates* overlooks this point when in the penultimate sentence of the dissent he argues that the ordinance is not invalid on its face and the deficiencies in the record leave the Court "in no position" to judge the ordinance as applied. 402 U.S. at 620–21.

[127] HART & WECHSLER at 212.

[128] "It is true . . . that it is for Congress, not this Court, to rewrite the statute." United States v. Thirty-seven Photographs, 402 U.S. 363, 369 (1971). See generally TRIBE, note 7 *supra*, at § 12–27.

[129] United States v. Thirty-seven Photographs, note 128 *supra*, provides a particularly apt illustration that this limitation does not impose serious constraints. The Court there

now seems thoroughly committed to truncating federal statutes in light of the applicable rules of constitutional privilege.[130] Thus, overbreadth holdings of facial invalidity should disappear in cases challenging federal authority, save for those instances involving unreconstructible statutes, rules, or orders[131] or where the Court is plainly condemning the statute on the merits because of its failure to satisfy the least restrictive alternative requirement.

Argument can be mounted that overbreadth methodology should have a larger, rather than a smaller, role in review of federal enactments. So long as fair-warning requirements have been satisfied, the Court cannot oversee the interpretive ingenuity of state courts in their efforts to confine state statutes to the area of constitutionally unprotected activity.[132] But the Court labors under no similar disability with respect to federal statutes, and the deterrence rationale underlying the overbreadth doctrine might therefore dictate a special canon of federal statutory construction counseling against judicial narrowing. Such a canon might be justified on either institutional or substantive grounds. The institutional argument would contend that the Court has a unique responsibility to educate the other federal branches in the need for sensitivity to free-speech interests. A holding of invalidity for overbreadth would, in effect, "remand" the problem to the relevant branch for more finely tuned attention to speech concerns and a judgment about whether the governmental interest being pursued demanded regulation of speech to the constitutional limit, a place beneath that limit, or not at all. Forcing attention to these matters by the nonjudicial branches, moreover, might generate sensitivity to speech interests in a more generalized and systematic way, reducing thereby the

upheld a federal statute prohibiting importation of obscene materials and providing for their seizure. In so doing, the four-member plurality rejected on the merits an objection that the statutory standard was substantively overbroad but went on to note that in any event "the proper approach . . . was not to invalidate the section in its entirety, but to construe it narrowly. . . ." *Id.* at 375 n.3. And a majority of the Court then proceeded to read in constitutionally required procedural safeguards. *Id.* at 368–75 (plurality opinion); *id.* at 377, 378 (concurring opinions).

[130] See the text and notes at p. 18 *supra*.

[131] Aptheker v. Secretary of State, 378 U.S. 500 (1964) might be rationalized on this ground. The principal kind of statute that probably cannot be rehabilitated in the application process is a scheme that was administered in an open-ended, unbridled fashion. Shuttleworth v. City of Birmingham, 394 U.S. 147 (1969). See Monaghan, note 61 *supra*, at 518, 539–43.

[132] United States v. Thirty-seven Photographs, note 128 *supra*, at 369–70.

need for future judicial interventions. The substantive justification for such a canon of federal statutory construction is that discussed in Section II above, that is, that certain privilege rules provide inadequate guidance to enforcement officials and speakers[133] and hence should not be judicially "penciled in" to save federal statutes from holdings of unconstitutionality.

The substantive argument is no more potent here than it was in relation to the constitutional limits on separability of state statutes. If a privilege rule is constitutionally adequate to guide a legislature in drafting a statute, it is equally adequate to guide a court in creating a saving construction. Only on the assumption that the privilege rules running against the federal government should be different from those against the states could the substantive case be made for special limitations on the power of federal courts to rescue federal statutes by construction. Any such assumption seems to me implausible, and, not surprisingly, it has never been one embraced by the Court.

The institutional argument is somewhat more difficult to meet but is vulnerable, on inspection, to powerful institutional counterarguments. Although increasing sensitivity to speech interests across the federal branches is no doubt a constitutional "good," fostering that goal by way of a judicial refusal to save overbroad federal statutes generates serious countervailing costs. First, invalidation of a federal statute would leave some unprotected and presumably harmful speech or conduct wholly unregulated while Congress or the executive struggles to formulate a valid rule.[134] Given the heavy agenda of government, the matter might remain without attention for a substantial time period, a particularly serious matter with respect to matters subject to exclusive federal authority. Second, "remands" to other branches for a more speech-

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[133] *E.g.*, TRIBE, note 7 *supra*, at § 12–26, p. 715 (advocating overbreadth approach "where the validity of the first amendment privilege must be decided in terms of the factual circumstances in which the claim is raised. . . ." Professor Tribe, it should be noted, does not distinguish here between federal and state statutes in this respect.

[134] State statutes held defective on overbreadth grounds can be rehabilitated by the state courts prospectively. *E.g.*, Dombrowski v. Pfister, note 22 *supra*, at 491; Shuttlesworth v. Birmingham, note 86 *supra*, at 153–55; Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L. J. 1363, 1387 (1973). By contrast, if a federal statute is found facially defective it "is void *in toto*, barring all further actions under it, in this, and every other case." United States v. Petrillo, 332 U.S. 1, 6 (1947). Perhaps this point has more theoretical than practical significance—given the fact that someone will have to invoke the state court's jurisdiction and questions of issue preclusion will arise. See Shapiro, note 30 *supra*.

sensitive response may produce little future speech sensitivity. The nonjudicial branches respond to various political pressures, and little evidence exists that judicial refusals to tolerate repression are likely to produce substantially more refined political responses to the need to accommodate speech when future censorial urges develop. To the extent that this is true, it is not evident that the present hiatus costs in the exercise of federal power are justified by any countervailing gain in future speech sensitivity within the political branches of the federal government.

Finally, both the substantive and institutional arguments for a special canon of federal statutory construction leave me with the suspicion of a "double counting" of speech values. The premise of the Court's obscenity holdings, for example, is that the boundary separating obscene and nonobscene material is sufficient so as not to deter protected speech at an unacceptable level. It is hard to see why this premise should be completely abandoned at the level of statutory construction. Invocation of inseparability principles as a canon of federal statutory construction is, therefore, tantamount to a direct attack on the adequacy of what has been adjudicated to be a constitutionally sufficient dividing line.[135]

V. BROADRICK V. OKLAHOMA: THE COMPLEXITIES OF OVERBREADTH ANALYSIS

Broadrick v. Oklahoma[136] is a graphic illustration of the difficulties inherent in thinking about overbreadth as a special inseparability doctrine. *Broadrick* involved a statute specifically directed at activity within the general ambit of the First Amendment—partisan political activity by state civil service employees.[137] The Court assumed that the statutory provisions, though generally valid,[138] embraced some constitutionally protected acts, such as wearing campaign buttons and displaying bumper stickers.[139] On the premise that the overbreadth of statutes

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[135] Herbert v. Lando, 441 U.S. 153, 175–77 (1979) (constitutionally prescribed limits on defamation suits do not justify an additional evidentiary privilege for press).

[136] Note 2 *supra*.

[137] The statute is set out in note 1 of the Court's opinion, *id.* at 603–04.

[138] A companion case, United States Civil Service Commission v. National Association of Letter Carriers, note 72 *supra*, had sustained similar federal legislation.

[139] 413 U.S. at 609–10.

regulating expressive conduct "must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep,"[140] the Court upheld the statute against facial attack. *Broadrick*'s holding, albeit not all of its language, squares with a view that the overbreadth doctrine does not restrict judicial authority to narrow statutes to appropriate constitutional boundary lines.

Broadrick arose in the district court as a suit to enjoin proceedings before a state administrative agency charging the plaintiffs with various violations of the state statute. The charges did not include wearing buttons or displaying bumper stickers. In fact, no state court had authoritatively concluded that the Oklahoma statute reached those acts.[141] Ignoring the obvious abstention possibilities,[142] the Court focused on the facial challenge. Even if, however, the Court correctly assumed that the act reached this protected expression, plaintiff's suit should fail. The act was not being enforced in these respects against the plaintiffs. Plaintiffs could only prevail on a demonstration that the invalid applications could not be severed from the valid ones—an issue, I have argued, controlled by state law. The state supreme court could not rationally be expected to invalidate the entire act on inseparability grounds simply because of a few marginal invalid applications. Thus the Court was right in not permitting the offending aspects of the statutory scheme to condemn the statute in its entirety.

Broadrick is particularly instructive in illustrating the need to think clearly about the meaning of overbreadth analysis. The conventional setting for overbreadth theorists usually involves a test of the facial sufficiency of a "single" prohibition—for example, a statute prohibiting "offensive or indecent language"—judicially evaluated by viewing it in terms of some obvious, standard instances of its application. *Broadrick* demonstrates the unusual difficulty of comprehending the focus of a "facial" attack when its subject is a

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[140] *Id.* at 615. For the argument that the decision is incorrect, even on its own terms, see Note, note 113 *supra*, at 542: ". . . the wearing of buttons and bumper stickers would appear to merit the same consideration as pure speech. . . ."

In effect, the Court "treated the state's regulation of political activity the way an ordinary trespass or theft statute might be treated." TRIBE, note 7 *supra*, at § 12–25, p. 713.

[141] The state administrative agency charged with enforcement of the act had so held. 413 U.S. at 610 n.10. Compare Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 154, 162–63, 165 (1971) (agency construction "entitled to respectful consideration").

[142] The state act expressly exempted from its reach the employee's right to vote and his right to express privately his political beliefs (expansively defined). 413 U.S. at 617–18.

complex, interrelated statutory scheme (or administrative regulation or order) that impinges on a wide range of expressive behavior. It illustrates, too, the particular difficulties of such a challenge in the context of a suit for *anticipatory* relief in the federal district courts. There is need for adequate integration of overbreadth doctrine with the constitutional and prudential doctrines, particularly ripeness and abstention, which govern the timing and scale of constitutional challenges. Surely conventional doctrines governing access to the federal courts have a function in the free-speech context, as elsewhere. Abstention doctrine has a legitimate role to play in defining the contours of the statute.[143] Moreover, the lack of a concrete threat of enforcement of various discrete provisions of a broad, complex act gives rise to concerns as to whether a challenge to them is ripe either constitutionally or prudentially.[144]

If overbreadth is viewed as a special First Amendment standing doctrine—or, to be more precise, a special inseparability doctrine—it renders unintelligible much of the theorizing underlying the constitutional and prudential restrictions on federal "judicial power." If, by contrast, overbreadth is simply understood as a disposition on the merits, it can be fitted into these conventional notions. Thus, for example, a court might decline to pass on the overbreadth challenge in a declaratory judgment action brought by a litigant whose clearly unprotected expression falls within the hard core of a statute readily constrained by an applicable rule of privilege.[145] This is true even though the same litigant could insist on his overbreadth challenge being decided if he were a defendant in an enforcement proceeding. In the declaratory judgment action, the litigant would, in substance, be asking whether the courts will, as a matter of statutory construction, refuse to narrow the statute to constitutional boundaries, thereby rendering the statute invalid. If the litigant's expression is clearly unprotected and within the hard

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[143] See, *e.g.*, Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 308–12 (1979). Not surprisingly, the ascendancy of overbreadth methodology was accompanied by a corresponding decline of abstention doctrine. Harvard Note at 901–07.

[144] See Babbitt v. United Farm Workers Nat'l Union, note 43 *supra*, at 298–305; Socialist Labor Party v. Gilligan, 406 U.S. 583, 586–88 (1972). See generally HART & WECHSLER at 133–49; 1981 Supplement at 45–52; Shapiro, note 30 *supra*.

[145] Consider, *e.g.*, a suit by the publisher of a book clearly constituting hard-core pornography challenging a state obscenity statute on the ground that it is invalid for failure to comply with the specificity requirements of Miller v. California, note 7 *supra*, a defect which can be cured by judicial construction. Ward v. Illinois, note 86 *supra*.

core of the statute, it is at least arguable that "Our Federalism" might warrant a denial of such an advance determination without any consideration of "Pullman abstention" possibilities.[146]

Most important, *Broadrick* illustrates that simply because one or several provisions of a complex act or regulation are involved in litigation, that cannot mean that every potential subsection of the act or regulation is thereby implicated on some constitutionally based inseparability premise. Any such result would wreak havoc with complex regulatory schemes, some small part of which might be constitutionally infirm. More generally, I submit that overbreadth simply cannot be sensibly understood to denote a special rule against restructuring complex regulatory provisions to accord with applicable constitutional rules of privilege. *Metromedia, Inc. v. City of San Diego*[147] is a recent illustration of this point. At issue was the validity of a complex, partially content-based ordinance that imposed substantial prohibitions on the erection of outdoor advertising displays within the city. The state supreme court had sustained the entire ordinance against a facial attack. A divided Supreme Court affirmed in part and reversed in part. The prevailing four-man plurality opinion remanded the case to the state court to determine whether, as a matter of state law, the entire ordinance was now void on inseparability grounds or was to be applied in accord with the limiting constitutional restrictions.[148] No suggestion was advanced in any of the opinions that the ordinance was void in toto as a matter of federal constitutional law simply because part of its prohibitions were invalid.

VI. Conclusion

Advocates of a special overbreadth "standing" rule in free-speech cases have developed an elaborate theory, one that purports

[146] Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941). See Shapiro, note 30 *supra*, at 768–70. Chapters 7 of HART & WECHSLER and its 1981 Supplement collect the relevant materials on the range of issues open to a prospective state defendant who initiates a federal court suit for anticipatory relief. My own general bias is to permit a prospective defendant to raise by way of anticipatory challenge an issue properly open to him in an enforcement proceeding. See Note, *Declaratory Relief in the Criminal Law*, 80 HARV. L. REV. 1490 (1967). Moreover, in the First Amendment context, there may be some constitutional requirement of anticipatory relief. See Monaghan, note 61 *supra*, at 543–51. But I hope that I am not insensitive to appropriate federalism barriers to federal anticipatory relief. Monaghan, *The Burger Court and "Our Federalism,"* 43 LAW AND CONTEMPORARY PROBLEMS 39, 43–49 (1980).

[147] 101 S. Ct. at 2882.

[148] *Id.* at 2899 n.26.

to be grounded in special First Amendment concerns. Its premises are that overbroad statutes deter protected speech at an unacceptable rate, and that the conventional judicial technique of excising unconstitutional applications is insufficient to cure that defect.[149] These premises have become the subject of increasing skepticism, both off and on the Court.[150] Recent Supreme Court decisions seem to provide little support for viewing overbreadth as a special, speech-protective standing doctrine. Rather, viewed in standing terms, overbreadth methodology simply applies the conventional principle that any litigant may insist on not being burdened by a constitutionally invalid rule. What is different from the conventional run-of-the-mill case is not standing but the substantive content of the applicable constitutional law.

As an expression of substantive constitutional principles, overbreadth is, of course, concerned with the weight of the governmental interest justifying any regulation.[151] But the dominant idea it evokes is serious means scrutiny. Wherever that law mandates strict or intermediate scrutiny, a requirement of regulatory precision is involved; a substantial congruence must exist between the regulatory means (the statute, as construed) and valid legislative ends.[152] Thus the Court has reacted interchangeably to "overbreadth" and "least restrictive alternative" challenges both inside[153] and outside[154] the First Amendment context. This observation would be particularly unsurprising to writers who have focused on the long and varying use of least restrictive alternative analysis in Supreme Court adjudication; without exception, their surveys include a discussion of First Amendment overbreadth cases.[155] This

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[149] The major theoretical piece is the elaborate Harvard Note, note 6 *supra*. The main lines of that analysis appear in summary form in TRIBE, note 7 *supra*, at §§ 12–24 to 12–28.

[150] Professor Cox asserts that the deterrence rationale rests on pretense. COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT (1976). On the increasing judicial skepticism toward the doctrine, see TRIBE, note 7 *supra*, at § 12–25; GUNTHER, note 8 *supra*, 1189–95 (1980).

[151] See note 11 *supra*.

[152] The issue generally is framed in terms of the availability of less restrictive alternatives; whenever the necessary congruence is lacking, the statute is overbroad. In the First Amendment area we speak of overbreadth, but fashions in the use of language cannot disguise the substantive identity of the two inquiries, as the Court occasionally explicitly recognizes. Cameron v. Johnson, note 107 *supra*, at 616–17.

[153] *E.g.*, Cameron v. Johnson, note 107 *supra*.

[154] *E.g.*, Jones v. Helms, 101 S. Ct. 2434, 2442–43 (1981). South Carolina v. Katzenbach, 383 U.S. 301, 331 (1966).

[155] *E.g.*, Wormuth & Mirkin, note 64 *supra*, at 270–86, characterizing "the excessive

is as it should be;[156] wherever the Supreme Court is serious about judicial review—wherever, that is, the minimum rationality standard does not prevail—the Court will be concerned with the matter of least restrictive alternatives, with overbreadth.[157] By contrast, whenever the rational basis standard governs, substantive constitutional scrutiny is virtually nonexistent. Despite occasional judicial and academic protestations to the contrary,[158] that review is essentially "toothless." In all cases subject to that standard, statutory "overbreadth" is not a meaningful objection as a matter of substantive constitutional doctrine. A central feature of rational basis review is that it accords wide latitude to the states to structure their social and economic programs as they see fit. As long as the legislative scheme can be perceived as designed to promote some common good, the overbreadth of the statutory scheme does not render it constitutionally infirm.[159]

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breadth of the statute" as the equivalent of "the doctrine of the reasonable alternative." *Id.* at 278. See also, Note, *The Less Restrictive Alternative in Constitutional Adjudication: An Analysis, a Justification, and Some Criteria*, 27 VAND. L. REV. 971, 1011–16 (1974), stating that "the principle of less drastic means has found its most frequent application due primarily to the popularity of the overbreadth technique. *Id.* at 1011. For the argument that overbreadth analysis has its historical roots in the tightening of the clear-and-present danger test, see Strong, *Fifty Years of "Clear and Present Danger": From Schenck to Brandenburg—and Beyond*, 1969 SUP. CT. REV. 41, 68–69.

[156] But see Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York, note 55 *supra*, at 565 n.8, attempting to distinguish between the two concepts. See also Moose Lodge No. 107 v. Irvis, 4076 U.S. 168 (1972) (overbreadth challenges restricted to First Amendment).

[157] We ordinarily do not consider the least restrictive alternative cases as presenting any departure from conventional standing principles. Nor should we when that same concept appears in the First Amendment context. Judicial conclusions of overbreadth or of the availability of less restrictive alternatives are equivalents. They are simply different statements that other, more finely tuned means exist to vindicate any presumably valid state policies. Cameron v. Johnson, note 107 *supra;* Note, *Less Drastic Means and the First Amendment*, 78 YALE L. J. 464, 470 (1969). Overbreadth analysis plays a different role when the relevant First Amendment law focuses on whether the regulated speech is within an unprotected category. It is frequently clear, *ex ante*, that defendant's speech is unprotected. But this is by no means invariably true. *E.g.*, Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975). In either event, the litigant simply invokes the traditional right to insist on application of a valid regulating rule. Here, too, overbreadth simply expresses the applicable substantive First Amendment law, not a special First Amendment rule of standing.

[158] See, for example, Bice, *Rationality Analysis in Constitutional Law*, 65 MINN. L. REV. 1 (1980); Bennett, *Abortion and Judicial Review: Of Burdens and Benefits, Hard Cases and Some Bad Law*, 75 NW. L. REV. 978, 980–89 (1981).

[159] Williamson v. Lee Optical Co., 348 U.S. 483 (1955). See also, *e.g.*, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976); New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979); Minnesota v. Clover Leaf Creamery Co., 101 S. Ct. 715, 722–27 (1981); Schweiker v. Wilson, 101 S. Ct. 1074, 1080–85 (1981). In the "old days" things may have been different. Struve, note 11 *supra*, at 1479–80.

Jones v. Helms[160] provides a recent illustration of these principles. At issue was the validity of a Georgia statute that set harsher criminal penalties for parents who abandon children and leave the state than for those abandoners who remain within it. After rejecting a claim that the statute infringed on the defendant's constitutionally protected right to travel, the Court addressed the equal protection claim:[161]

> The characterization by the Court of Appeals and appellee of the Georgia statute as "overbroad" does not affect our conclusion. Appellee contends, and the Court of Appeals found, that Georgia has available less restrictive means to serve the legitimate purposes furthered by the felony [statute]. . . . However, because we have concluded that [the statute] does not infringe upon appellee's fundamental rights, this reasoning is inapplicable. In the context of this case, the State need not employ the least restrictive, or even the most effective or wisest, means to achieve its legitimate ends.
>
> . . . [T]he statute may well be unnecessarily broad. This is a matter, however, that relates to the wisdom of the legislation. It raises no question with respect to the uniform and impartial character of the State's law. It therefore does not implicate the fundamental principle embodied in the Equal Protection Clause of the Fourteenth Amendment.

In sum, overbreadth analysis is concerned with the substance of constitutional review; it does not rely on any distinctive standing component.

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[160] 101 S. Ct. at 2434.

[161] *Id.* at 2442–43.