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Under the free speech overbreadth doctrine,[1] a litigant is allowed to bring a facial challenge to a statute despite the fact that the application of the statute to the litigant under the facts of the case does not violate the Constitution.[2] The litigant argues that the entire statute should be struck down because the statute could be applied unconstitutionally in certain hypothetical fact patterns.

The overbreadth doctrine is a dramatic departure from "the traditional rules governing constitutional adjudication."[3] The Supreme Court has repeatedly held that "constitutional rights are personal and may not be asserted vicariously."[4] However, under the overbreadth doctrine a litigant is allowed to challenge the constitutionality of a statute even if the application of the statute to the litigant does not violate the litigant's personal constitutional rights.[5] Furthermore, courts typically avoid, if possible, considering the constitutionality of a statute on its face.[6] Yet, under the overbreadth doctrine courts aggressively

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1 The doctrine is often referred to as the First Amendment overbreadth doctrine. However, because the doctrine applies only to the Free Speech Clause and not the other provisions of the First Amendment, this Article will use the label "free speech overbreadth doctrine" or simply "overbreadth doctrine."

2 *See* Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973) ("Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.").

3 *Id.* at 610.

4 *Id.*

5 *See id.* at 610–12.

6 *See, e.g,* Tennessee v. Lane, 541 U.S. 509, 531 (2004) ("Because we find that Title II unquestionably is valid § 5 legislation as it applies to the class of cases implicating the accessibility of judicial services, we need go no further."); *see also* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 580 (1998) ("Facial invalidation 'is, manifestly, strong medicine' that 'has been employed by the Court sparingly and only as a last resort.'" (quoting Broadrick v. Oklahoma, 413 U.S. at 613)); FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 223 (1990) (noting that facial invalidation of a statute is disfavored); New York v. Ferber, 458 U.S. 747, 773 (1982) ("[T]he Court's practice when confronted with ordinary criminal laws that are sought to be applied against protected conduct is not to invalidate the law *in toto*, but rather to reverse the particular conviction."). *But see* Richard Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1322 (2000) (claiming that facial invalidation is more common than previously thought); Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U. L. REV. 359, 421–56 (1998) (noting that the doctrine used by the courts in considering equal protection

pursue the opportunity to consider whether the statute in question should be struck down in its entirety, even though the case could theoretically be decided by ruling that the litigant's constitutional right to freedom of speech was not violated. Finally, although there is presently much discussion over the proper standard for a court to apply when it considers a facial attack on a statute,[7] it is clear that the standard used by the courts in considering a facial attack under the overbreadth doctrine is substantially different than the normal standard for facial challenges.[8]

Since the relatively recent adoption of the free speech overbreadth doctrine, the Supreme Court has struggled to apply the doctrine, often attempting to limit the doctrine by enacting various limitations on when it should be applied.[9] Meanwhile, academic commentators have generally applauded the doctrine;[10] some have even proposed that the doctrine be extended to cases involving other constitutional rights beyond freedom of speech.[11] There is extensive debate, both in the courts and by commentators, over whether the Supreme Court has already extended the overbreadth doctrine to abortion cases.[12] Recently, the Court seemed to concede that it has applied an overbreadth analysis in contexts outside the Free Speech Clause.[13] There has been no academic discussion calling for the Supreme Court to abandon the overbreadth doctrine. That is the purpose of this Article.

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challenges to statutes often requires the courts to consider the constitutionality of the statute on its face).

7 *See, e.g.*, Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 239 (1994) ("[C]ontrary to what *Salerno* proclaims, no single legal standard controls the judgment of facial challenges in practice.").

8 *See* Virginia v. Hicks, 539 U.S. 113, 118 (2003) ("The First Amendment doctrine of overbreadth is an exception to our normal rule regarding the standards for facial challenges.").

9 *Cf.* Massachusetts v. Oakes, 491 U.S. 576, 587 (1989) (Scalia, J., concurring) (accusing the plurality of attempting to limit the overbreadth doctrine by illegitimate means).

10 *See, e.g.*, Dorf, *supra* note 7, at 261 (explaining that the overbreadth doctrine has been applied outside the context of the Speech Clause and applauding this extension).

11 *See, e.g.*, John F. Decker, *Overbreadth Outside the First Amendment*, 34 N.M. L. REV. 53, 92 (2004) (advocating the use of the overbreadth doctrine in cases involving rights other than speech rights).

12 *See id.* at 92 (stating that the *Casey* Court extended the overbreadth doctrine into the abortion context); Kevin Martin, Note, *Stranger in a Strange Land: The Use of Overbreadth in Abortion Jurisprudence*, 99 COLUM. L. REV. 173, 173 (1999) (also stating that the *Casey* Court extended the overbreadth doctrine into the abortion context).

13 *See* Sabri v. United States, 541 U.S. 600, 610 (2004) (citing cases in which an overbreadth analysis was used).

For the most part, the arguments herein are pragmatic. The central thesis of this Article is that the overbreadth doctrine fails to achieve the goals to which it aspires and that the doctrine simply does not work. Moreover, the doctrine has unintended and undesirable consequences regarding the contemporary understanding of the judicial function. Despite the pragmatic approach taken in this Article, there exist more fundamental objections to the overbreadth doctrine. It is easy to conceive of convincing arguments that the overbreadth doctrine extends beyond the judicial power, described in Article III of the Constitution, to decide "cases" and "controversies."[14] However, approximately sixty years of jurisprudence recognizing the overbreadth doctrine dictates that the time for those arguments has passed. There is simply too much water under the bridge for the Supreme Court to now consider the constitutionality of the doctrine, even if both the Court and commentators have failed to explore and consider the compelling arguments against its constitutionality.[15] Conversely, there does not seem to be a legitimate argument that the free speech overbreadth doctrine is *required* under the Constitution. The Supreme Court has never intimated as much,[16] and although one commentator has attempted to portray the overbreadth doctrine as a constitutional

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[14] *See, e.g.*, City of Chicago v. Morales, 527 U.S. 41, 74 (1999) (Scalia, J., dissenting) (suggesting that the power to declare a statute facially unconstitutional is inconsistent with the role of courts articulated in *Marbury v. Madison*, 5 U.S. 137 (1803)); New York v. Ferber, 458 U.S. 747, 767 n.20 (1982) (stating that the"traditional rule [] that a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court," which the overbreadth doctrine is an exception to, reflected the personal nature of constitutional rights, prudential limitations on constitutional adjudications, and "Art. III limits on the jurisdiction of federal courts to actual cases and controversies"); Lewis v. City of New Orleans, 415 U.S. 130, 137 (1974) (Blackmun, J., dissenting) ("The result [of the overbreadth and vagueness doctrines] is that we are not merely applying constitutional limitations, as was intended by the Framers, and, indeed, as the history of our constitutional adjudication indicates, but are invalidating state statutes in wholesale lots because they 'conceivably might apply to others who might utter other words.'" (quoting Gooding v. Wilson, 405 U.S. 518, 535 (1972)).

[15] *See* Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1, 144 (1998) ("But the dispute about the scope of overbreadth—among the Justices and among constitutional scholars writing in this area—has generally taken for granted the permissibility of *some* such doctrine, under Article III.").

[16] Indeed, language used in some Supreme Court opinions discussing the doctrine seems to foreclose any argument that the doctrine is constitutionally required. *See, e.g.*, Massachusetts v. Oakes, 491 U.S. 576, 584 (1989) (O'Connor, J., plurality opinion) ("Overbreadth is a judicially created doctrine designed to prevent the chilling of protected expression."); *cf.* Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973) (stating the overbreadth doctrine is "strong medicine" and "has been employed by the Court sparingly").

requirement,[17] the Court has rejected this effort.[18] Thus, the doctrine is best understood as a discretionary tool used by the judiciary pursuant to its power to decide cases and controversies. As such, it seems entirely proper to consider whether the doctrine's continued viability is warranted, which is the purpose of this Article.

Part I of this Article attempts to precisely describe the overbreadth doctrine. To do this, I first introduce a general framework for considering First Amendment cases. This framework is necessary to understand the contributions of the overbreadth doctrine to First Amendment jurisprudence. I advance the claim that courts typically use two basic models or methods in deciding free speech cases, and I have termed these two models the Statutory Model and the Speech Model. Having established this general framework, the analysis proceeds to delineate the characteristics, or contributions, of the overbreadth doctrine. There are two: (1) the overbreadth doctrine allows litigants to assert the constitutional rights of others not before the court and (2) the overbreadth doctrine permits a court to consider a facial challenge to a statute by using a method of analysis previously reserved for as-applied challenges.

Part II of this Article examines whether the overbreadth doctrine achieves the dual goals to which it aspires: (1) preventing the chilling of constitutionally protected speech and (2) encouraging the legislative branch to be cognizant of free speech issues when drafting legislation. I present two conclusions: (1) that the overbreadth doctrine rarely prevents the chilling of constitutional speech and (2) that the doctrine is unnecessary to encourage the legislative branch to operate with an awareness of free speech rights.

In Part III, I explore the negative consequences of the overbreadth doctrine. I advance the claim that the overbreadth doctrine is largely responsible for the current confusion on the Supreme Court concerning when facial challenges are appropriate and what standard to apply when considering a facial challenge to a statute. The Court has recently

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[17] *See generally* Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1 (1981). Professor Monaghan argues that the overbreadth doctrine should not be thought of as an exception to the normal rules regarding the personal nature of constitutional rights and the prohibition on the assertion of others' rights, but as an application of the principle that a litigant has a right to be judged by a constitutionally valid rule of law. *See id.* at 1–14.

[18] *See* Sabri v. United States, 541 U.S. 600, 608 (2004) (reaffirming that facial challenges to statutes are disfavored); Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 871–75 (1991) (explaining that Monaghan's account of the overbreadth doctrine fails to "hold up" to existing Supreme Court case law).

struggled with several questions that require a clear understanding of the judicial function because the overbreadth doctrine has injected confusion into the common understanding of the proper role of courts and judges. The argument continues that, in order to resolve this controversy, the Supreme Court should abandon the overbreadth doctrine before the doctrine is applied to other areas of constitutional rights and the proper understanding of the judicial function is further blurred.

I. WHAT IS THE OVERBREADTH DOCTRINE?

A. First Amendment Doctrinal Background

In order to understand exactly what the overbreadth doctrine is and how it operates, it is necessary to have a general framework for the methods that courts use to decide free speech cases. Unfortunately, it is impossible to identify a unified theory for how courts decide free speech cases. Freedom of speech issues arise in so many different and unique circumstances that it is impossible to simplify this area of the law into a few easy rules and tests that can be mechanically applied to different factual scenarios.[19] Any professor who has taught a First Amendment course, or any student who has taken such a course, is aware of this complexity.

Fortunately, this Article requires only a general framework. The framework I suggest involves two models for constitutional cases involving free speech rights.[20] The models are a descriptive account of the two methods by which courts adjudicate cases involving free speech rights. Under one model, the court is primarily concerned with the statute in question; under the other model, the court focuses upon the particular speech involved in the case.

The first model will be labeled the "Statutory Model." Under the Statutory Model, the court first determines whether the defendant engaged in expressive activity that is protected under the First Amendment. In almost all instances, this initial inquiry will be brief and

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[19] *See, e.g.*, Russell W. Galloway, *Basic Free Speech Analysis*, 31 SANTA CLARA L. REV. 883, 883 n.3 (1991) ("Free speech is an exceptionally complicated field of law.").

[20] Of course, the application of statutes or regulations is not the only manner in which free speech issues are raised. However, because the overbreadth doctrine deals specifically with statutes, the background framework I propose likewise focuses solely on statutes and regulations.

elementary.[21] The Statutory Model analysis then turns to the statute in question. The court broadly analyzes the ends sought to be achieved by the legislature and whether the means employed by the statute are sufficiently tied to the legitimate goals of the legislature. The importance of the government interest asserted and the "fit" between the means employed in the statute to achieve that goal varies.[22] If either the end to be achieved or the means employed is not sufficient, the court strikes down the statute in its entirety as a violation of the First Amendment. In effect, the court places itself in the position of the legislature, weighing the importance of the policy objective to be achieved and asking whether that goal could have been achieved by a statute drafted with more care for free speech rights. The defendant's speech is almost inconsequential to the analysis once the court answers the initial question regarding whether there has been expressive activity that is protected by the First Amendment.[23]

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[21] The only expressive activities not protected by the First Amendment involve fighting words, obscenity, certain types of libel, and pornographic material featuring minors. In addition, the Court's opinion in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), casts doubt on whether these categories of speech are completely outside the First Amendment.

[22] For instance, when the government prohibits speech on the basis of content or viewpoint discrimination, the restriction must be necessary to the achievement of a compelling government interest. *See R.A.V.*, 505 U.S. at 395. However, content-neutral regulations concerning the time, place, and manner of speech in public parks need only be narrowly tailored to serve a significant government interest. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

[23] In some Court opinions using the Statutory Model, there is terminology that might suggest that the overbreadth doctrine is being employed. *See* Arcara v. Cloud Books, Inc., 478 U.S. 697, 701 (1986) ("[We] determined that the closure remedy failed the fourth part of the *O'Brien* test, which requires that the statute incidentally restricting speech be no broader than necessary to achieve its purpose."). However, as this Article demonstrates, the overbreadth doctrine is conceptually distinct from the Statutory Model even though the terms "overbroad" or "broad" might show up in cases decided under either analysis. Under the Statutory Model, the court places itself in the position of the legislature to determine whether it could have achieved the legislature's goals while doing less harm to freedom of speech by writing a different statute. The analysis is focused solely on the language of the statute and whether the language is "too broad" in light of assumed legislative objectives. In addition, only those who have engaged in constitutionally protected speech can bring a challenge to a statute using the Statutory Model. As this Article subsequently explains, under the overbreadth doctrine, a court focuses not on whether the statute could have been better written but on the ratio of constitutional applications of the statute versus the number of unconstitutional applications of the statute. The court does not hypothesize about how it might have drafted the statute. Rather, it ascertains whether the statute, as written, fails to meet a certain ratio between constitutional and unconstitutional applications. In addition, under the overbreadth doctrine the court will consider challenges to a statute even if the litigant has not herself engaged in constitutionally protected speech. Thus, although courts might sometimes use

There are numerous examples where the Supreme Court uses the Statutory Model to strike down or uphold a statute. In *Watchtower Bible and Tract Society v. Village of Stratton*,[24] Jehovah Witnesses brought a challenge to a village ordinance prohibiting door-to-door advocacy without first applying for and receiving a permit from the village's mayor.[25] After establishing that the Jehovah Witnesses' speech was a constitutionally protected expression under the First Amendment,[26] the Court proceeded to analyze the three interests asserted by the town justifying the statute: (1) protection of residents' privacy, (2) prevention of crime, and (3) prevention of fraud.[27] Although the Court conceded that each of these interests was important, the Court nevertheless struck down the statute because it determined that either the government interest was not advanced by the regulation or there were less restrictive means available to the village to achieve its goals.[28]

The Statutory Model was also used in the famous case of *United States v. O'Brien*,[29] but with different results. In *O'Brien*, the Supreme Court considered the conviction of an anti-war protestor who had burned his draft card in violation of a federal law prohibiting the destruction or mutilation of draft cards.[30] After assuming that the defendant's act of burning a draft card constituted expression protected by the First Amendment, the Court proceeded to examine the supposed objectives of Congress in passing the law.[31] The Court determined that these objectives were substantial and that the law furthered these objectives in a precise and narrow manner.[32] Thus, the statute and conviction were upheld.

These examples should sufficiently illustrate the Statutory Model. Those familiar with First Amendment law, Equal Protection law, and

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the term "overbroad" in either analysis, it is important to distinguish these two different analyses.

24 536 U.S. 150 (2002).

25 *See id.* at 153.

26 *See id.* at 164.

27 *See id.* at 168–69.

28 *See id*.

29 391 U.S. 367 (1968).

30 *See id.* at 369–71.

31 *See id.* at 378–81. In *O'Brien*, the Court noted that the expressive activity by O'Brien was not pure speech but that it was expressive conduct. *See id*. at 375. Thus, the Court took a more deferential approach to the importance of the government interest and the relationship between that interest and the statute in question than the government was required to demonstrate. *See id.* at 376–75. However, for purposes of this Article, the standard of scrutiny is irrelevant. The important point is the *type* of analysis used.

32 *See id*. at 381.

many other areas of constitutional adjudication[33] will have seen it used many times by courts.[34] The same is true of the competing model of free speech analysis, which will be called the "Speech Model." Unlike the Statutory Model, which focuses upon the statute or regulation in question, the Speech Model focuses on the particular aspects of the speech under the facts before the court. This is not to say that a court deciding a free speech case under the Speech Model ignores the asserted government interests behind the statute. However, instead of broadly considering these interests in a vacuum, the court focuses on the particular facts of the case and determines whether the government's interest applies to the defendant's actual speech.

Under the Statutory Model, the issue before the court is always whether a particular statute is constitutional.[35] Under the Speech Model, courts frame the issue in several different ways. First, the court sometimes frames the issue as whether the government has a compelling interest to apply a statute to the particular speech engaged in by the defendant.[36] Second, the court may phrase the issue as whether the defendant has a constitutional right to engage in the particular speech that prompted the lawsuit.[37] Third, the court might define the issue as whether the conviction resulted in a denial of the defendant's First

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[33] *See, e.g.*, Washington v. Glucksberg, 521 U.S. 707, 735 (1997) (using the Statutory Method to uphold a Washington statute prohibiting suicide assistance); Craig v. Boren, 429 U.S. 190, 204 (1976) (using the Statutory Method to strike down an Oklahoma statute that restricted the sale of beer to minor males, finding that the sex-based distinction made in the statute was not substantially related to the achievement of the statutory objective and thus violated the Equal Protection Clause).

[34] In a very recent Supreme Court case, the Court used the Statutory Method to uphold an injunction against enforcement of the Child Online Protection Act, reasoning that the means Congress used to protect children from Internet pornography were not justified. *See* Ashcroft v. ACLU, 124 S. Ct. 2783, 2792–93 (2004).

[35] *See, e.g.*, Virginia v. Black, 538 U.S. 343, 347–48 (2003) (framing the issue as whether a Virginia statute banning cross burning with an intent to intimidate was unconstitutional and concluding that it was).

[36] *See, e.g.*, Boy Scouts of Am. v. Dale, 530 U.S. 640, 644 (2000) (concluding that New Jersey did not have sufficient interest to justify infringement of Boy Scouts' First Amendment right to exclude homosexual scout leaders); City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 816–17 (1984) (holding that Los Angeles had a substantial interest in applying its prohibition on the placement of private signs on public property to the defendants); Spence v. Washington, 418 U.S. 405, 412 (1974) (considering whether the State of Washington had persuasive reasons to apply a flag misuse statute to a college student who hung a United States flag with an attached peace symbol outside his apartment).

[37] *See, e.g.*, Adderley v. Florida, 385 U.S. 39, 48 (1966) (concluding that protestors had no constitutional right to continue protesting on jail grounds after they had been asked to leave).

Amendment rights.[38] A few examples should illustrate the Speech Model.

The Supreme Court considered the conviction of a college student for displaying a privately owned American flag outside his apartment in *Spence v. Washington*.[39] The student had attached a peace symbol on the flag using removable black tape.[40] The student was charged with violating a Washington statute that prevented a picture or design from being placed on a U.S. flag.[41] The Court first explained that the student's activity in displaying the flag with a peace symbol attached was symbolic expression protected by the First Amendment.[42] Next, the Court considered the asserted state interests. However, instead of broadly considering the justifications for the statute to determine if these interests were sufficient and properly narrowed, the Court determined whether the "various state interests . . . might . . . support the challenged *conviction*. . . ."[43] The Court concluded that Washington's interest in preventing a breach of the peace could not justify the conviction because there was no support in the record for the notion that the defendant's symbolic speech resulted in, or was likely to cause, a breach of the peace.[44] The Court did not broadly consider whether Washington's interest in preventing breaches of the peace was sufficient or whether the statute was properly limited to that goal. Instead, the Court determined that the particular speech involved in this case was not likely to cause a breach of the peace. Washington's asserted interest was not implicated on these facts. Thus, the Supreme Court reversed the conviction.[45]

The Court's opinion in *Boy Scouts of America v. Dale*[46] is another good example of the Speech Model. In *Dale*, the Court considered whether the application of New Jersey's Law Against Discrimination, which had

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38 *See, e.g.*, Street v. New York, 394 U.S. 576, 578 (1969) (stating that the issue before the Court was "whether, in light of all the circumstances, th[e] conviction denied to [the defendant] rights of free expression protected by the First Amendment . . .").

39 *See Spence*, 418 U.S. at 406.

40 *See id.*

41 *See id.* at 407.

42 *See id.* at 410.

43 *Id.* at 412 (emphasis added).

44 *See id.* at 414–15.

45 *Id.* at 415. It seems likely that if the Court had used the Statutory Model and broadly considered the Washington statute, it would have struck down the statute. Thus, the conviction in this case was going to be reversed regardless of whether the Court used the Statutory Model to strike down the entire statute or whether the Court simply reversed the conviction by using the Speech Model. However, as this Article demonstrates, sometimes the model used will affect the outcome of the case.

46 530 U.S. 640 (2000).

been interpreted by the New Jersey Supreme Court to prevent the Boy Scouts from excluding Dale based on his homosexuality, violated the Boy Scouts' First Amendment rights.[47] The Court determined that the Boy Scouts' rights had been violated under the facts of the case.[48] The Court devoted most of its opinion to determining whether the Boy Scouts engaged in expressive activity and whether the forced inclusion of a homosexual would "significantly affect" this expression.[49] After resolving this preliminary issue, the Court next turned to the asserted government interests behind the New Jersey statute, but it did not broadly consider these interests.[50] Rather, the Court specifically asked whether New Jersey's interests justified the specific intrusion on the Boy Scouts' free speech rights, and it concluded that they did not.[51] The Court did not strike down the New Jersey statute, but it held that New Jersey could not, pursuant to the state statute, force the inclusion of Dale under the specific facts of the case.[52]

The Supreme Court also used the Speech Model in *Adderley v. Florida*.[53] In *Adderley*, the Supreme Court considered the trespass convictions of thirty-two students who were arrested while protesting at the county jail.[54] In an opinion confirming the convictions, the Supreme Court recounted in great detail the facts leading to the trespass conviction. The Court described how the sheriff had asked the protestors to leave county property many times before actually arresting the protestors.[55] The Court did not examine the purported reasons for Florida's trespass law, nor did it examine whether those goals were implicated on the facts of the case.[56] The Court concluded that the protestors had no constitutional right to continue protesting on jail grounds after they had been asked to leave.[57] There are numerous other examples of the Speech Model,[58] but these three examples should suffice

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47 *See id.* at 644.

48 *See id.* at 661.

49 *See id.* at 647–56.

50 *See id.* at 656–61.

51 *See id.* at 659 ("The state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association.").

52 Of course, the reasoning and precedent established in Dale might limit future applications of the statute.

53 385 U.S. 39 (1967).

54 *See id.* at 40.

55 *See id.* at 47.

56 *See id.*

57 *See id.*

58 *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 420 (1989) (reversing Johnson's conviction for burning an American flag in violation of Texas law); Feiner v. New York, 340 U.S. 315, 321

to demonstrate its characteristics and distinguish it from the Statutory Model.

In many instances, the result in an individual case will not depend on whether the court uses the Speech or Statutory Model to decide the case. For instance, in *City Council of Los Angeles v. Taxpayers for Vincent*,[59] the Court considered whether a political candidate had a First Amendment right to post political campaign signs on public property in violation of a Los Angeles ordinance preventing the posting of signs on all property.[60] The Court used the Speech Model to determine that Los Angeles could apply the sign ordinance to Vincent's political signs without violating the First Amendment.[61]

The result in *Vincent* would likely have been exactly the same had the Court used the Statutory Model. The speech before the Court was political speech,[62] which is at the heart of the First Amendment and generally deserves more First Amendment protection than other types of speech.[63] In addition, the Court noted testimony in the record that the sign company involved did not place signs in any location that would implicate Los Angeles' safety interest in enacting the ordinance,[64] and that the sign company had developed "an expertise" in avoiding "visual blight" in the placement of the signs.[65] It is difficult to imagine that the Court in *Vincent* would have reached a different conclusion in that case had it used the Statutory Model to broadly consider the aims of the statute. The Court had before it the ideal factual scenario to hold that the First Amendment protected the speech, but it determined that Vincent's constitutional rights were not violated by the application of the statute under the facts of the case. Considering the statute broadly and generically, without reference to a specific fact pattern, would seem to require the same result in that case.

(1951) (reversing Feiner's disorderly conduct conviction for continuing to give an address on a street corner after being asked three times to stop by police who were trying to break up a crowd).

59 466 U.S. 789, 791–92 (1984).

60 *See id.*

61 *See id.* at 816–17.

62 *See id.* at 792–93.

63 *See* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 400 (2000) (Breyer, J., concurring) ("The Court's opinion does not question the constitutional importance of political speech or that its protection lies at the heart of the First Amendment.").

64 *See Taxpayers for Vincent*, 466 U.S. at 802.

65 *Id.*

However, there are instances where it appears that the Court's decision to use the Statutory or Speech Model is determinative. For instance, in *Brandenburg v. Ohio*,[66] the Supreme Court used the Statutory Model to strike down the Ohio Criminal Syndicalism Act.[67] The Court reasoned that the Act failed to distinguish between mere advocacy of unlawful action, which is constitutionally protected under the First Amendment, and direct incitement of imminent lawless action that is likely to produce such action, which is not constitutionally protected.[68] Thus, because the statute was not narrowly drafted to only reach speech that was not constitutionally protected, the Court struck down the statute. The Court's opinion devotes very little attention to the actual speech involved in this case, which was a speech made at a Klu Klux Klan rally in which the speaker indicated the possibility of "reveangeance" being taken against the President, Congress, and the Supreme Court.[69] The Court made no indication whether the speech qualified as "mere advocacy" or whether the speech constituted a direct incitement to imminent lawless action that was likely to produce such action.[70] Rather, because it was not drafted as narrowly as possible to achieve its legitimate goals, it was struck down as unconstitutional. *Brandenberg* can be compared with *Schenck v. United States*.[71] *Schenck* involved a prosecution under the Espionage Act of June 15, 1917, which prohibited obstructing "the recruiting and enlistment service of the United States" and causing "insubordination [] in the military and naval forces of the United States."[72] The defendants had printed a circular that attacked the draft and capitalism.[73] Announcing the Supreme Court's then-accepted standard for subversive speech cases, Justice Holmes asked whether "the words used are used in such circumstances and are of such a nature as to create a clear and present danger" that they will cause unlawful action.[74] Justice Holmes, using the Speech Model, determined that in this case the particular facts regarding the language of the circular and where the circular was distributed constituted a "clear

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66 395 U.S. 444 (1969).

67 *See id.* at 448–49.

68 *See id.* at 447–49.

69 *See id.* at 446.

70 The Court did comment that the trial judge's instruction to the jury failed to distinguish between mere advocacy and direct incitement likely to cause imminent lawless action. *See id.* at 449 n.3. It appears that the Court referenced the trial judge's jury instruction as an illustration that the statute had not been construed by Ohio courts to prohibit conviction for mere advocacy.

71 249 U.S. 47 (1919).

72 *Id.* at 49.

73 *See id.* at 50–51.

74 *See id.* at 52.

and present danger."[75] However, if Justice Holmes had used the Statutory Model and broadly considered whether the statute was narrowly drafted to achieve its goals, the statute and the conviction would likely have been overturned. The statute was not limited by language requiring a clear and present danger. Thus the statute in *Schenck* suffered from the same defect as the statute considered in *Brandenburg*.

It is not necessary for present purposes to attempt a descriptive account of when the Supreme Court has used the Speech Model and when the Court has used the Statutory Model. Nor is it necessary to provide a normative framework for when these two competing models should be used. It is only necessary to recognize that there are, in fact, two basic models by which the Supreme Court adjudicates constitutional free speech claims involving a statute.

By now, the discerning reader may well believe that the Statutory and Speech Models are simply new labels for facial and as-applied challenges to statutes. An as-applied challenge to a statute is, after all, simply the assertion that the statute cannot constitutionally be applied to a litigant under particular facts of a case. In this sense, an as-applied challenge is the same as the Speech Model of adjudication. Similarly, when a court uses the Statutory Model and strikes down a statute, it is holding the statute facially unconstitutional. Thus, the Statutory Model of adjudication and a facial challenge to a statute seem closely related, if not identical.

Yet, in order to truly understand the overbreadth doctrine and how it operates, it is important to understand the difference between the Statutory and Speech Models and as-applied and facial challenges. The Statutory and Speech Models are theories of adjudication. They explain how judges analyze cases involving freedom of speech issues. In other words, the Statutory and Speech Models represent two *methods* by which a court analyzes a free speech case. As-applied and facial challenges are not descriptive methods for how courts decide free speech cases. In one sense, presenting an as-applied or facial challenge is merely a litigation choice made by a party. Either the party can decide to challenge the statute's application under the particular circumstances of the case or the party can decide to challenge a statute on its face. In another sense, references to as-applied and facial challenges are merely descriptions of a court's opinion. When a court sustains a facial challenge to a statute,

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[75] *See id.*

the statute is invalid and future attempts at enforcement under any circumstances are futile. However, when a court sustains an as-applied challenge, future litigation under the statute is possible, and litigants are free to argue that their facts are similar to, or unlike, the facts under which the court upheld the as-applied challenge to the statute.

However one understands as-applied and facial challenges, either as a litigation choice made by a litigant or as terms that identify the result of a court's holding, as-applied and facial challenges tell us nothing about the *method* a court uses in resolving a case. This is the realm of the Speech and Statutory Models. These Models deal with the two approaches or methods used to decide a free speech case.

One may argue that it is not true that an as-applied challenge to a statute will always involve the Speech Model of adjudication and that a facial challenge to a statute will always involve the Statutory Model of adjudication. However, while it is true that an as-applied challenge to a statute will always involve the Speech Model of adjudication, it is *not* true that a facial challenge to a statute will always involve the Statutory Model of adjudication. A court will often use the Statutory Model of adjudication when resolving a facial challenge to a statute. However, under the overbreadth doctrine a court may also use the Speech Model to resolve a facial challenge. Indeed, this is one of the major contributions of the overbreadth doctrine, which will be demonstrated in Part I.B.

To summarize, there are two methods by which courts can resolve free speech cases. Under the Statutory Model, the court broadly examines the goals of the legislature, whether those goals are sufficient, and whether the means employed are properly related to legitimate ends. The individual facts of the case are largely irrelevant to the analysis. Under the Speech Model, the court looks at the speech in question and weighs the value of that speech against the government's interest in regulating that speech. This analysis is done only in regard to the specific facts before the court. Somewhat related with the Statutory and Speech Models of adjudication are as-applied and facial challenges. As-applied and facial challenges represent the choice a litigant has regarding whether to challenge a statute on its face or whether to challenge a statute under the particular circumstances of the litigation. Therefore, the Statutory and Speech Models are descriptive accounts of the methods used by courts in resolving free speech cases. As-applied and facial challenges refer to both the choice made by a litigant as to how to approach litigation and the effect of a court's opinion. As-applied and

facial challenges do not describe the method a court will use in analyzing a free speech case.

B. What Does the Overbreadth Doctrine Contribute to Free Speech Doctrine?

This Article now examines the two traits the overbreadth doctrine adds to free speech jurisprudence. The first trait is that it allows litigants, whose own free speech rights have not been violated, to nevertheless challenge the constitutionality of a statute on its face. The second trait is that it allows a court to consider a facial challenge to a statute on its face using the Speech Model of adjudication.

1. The Overbreadth Doctrine: An Exception to the Personal Nature of Constitutional Rights

The Supreme Court and almost all commentators identify the Court's opinion in *Thornhill v. Alabama*[76] as the origin of the overbreadth doctrine.[77] In *Thornhill*, the Supreme Court considered a conviction under an Alabama statute that prohibited loitering or picketing near or at a place of business.[78] In the opinion, the Supreme Court announced that the issue before the Court was the facial validity of the statute.[79] Alabama had argued that the specific activity engaged in by Thornhill could be proscribed and, therefore, the Court would be allowing Thornhill to assert the constitutional rights of others if it ruled that the statute was unconstitutional on its face.[80] Although the Court expressed doubt as to whether Thornhill's activity could, in fact, be prohibited by Alabama,[81] the Court nevertheless rejected the substance of Alabama's arguments:

> Proof of an abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the

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76 310 U.S. 88 (1940).

77 *See* City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 798 (1984) ("This 'overbreadth' doctrine has its source in *Thornhill v. Alabama*."); Fallon, *supra* note 18, at 853 (citing *Thornhill* as the source of the overbreadth doctrine); Brendan D. Cummins, Note, *The Thorny Path to Thornhill: The Origins at Equity of the Free Speech Overbreadth Doctrine*, 105 YALE L.J. 1671, 1671 (1996) (also citing *Thornhill* as the source of the overbreadth doctrine).

78 *See* 310 U.S. at 91.

79 *See id.* at 96 (stating that the statute "must be judged upon its face").

80 *See id.*

81 *See id.* "Even accepting the argument that one may not assert the constitutional rights of others, [i]t would not follow that on this record petitioner could not complain of the sweeping regulations here challenged." *Id.*

> dissemination of ideas. . . . An accused . . . does not have to sustain the burden of demonstrating that the State could not constitutionally have written a different and specific statute covering his activities as disclosed by the charge and the evidence introduced against him. 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.[82]

Another opinion that demonstrates the first characteristic of the overbreadth doctrine is *Gooding v. Wilson*.[83] The Supreme Court used the overbreadth doctrine in *Gooding* to strike down a Georgia statute prohibiting the use of "opprobrious" and "abusive" language.[84] The conviction had occurred when an anti-war protestor was arrested for stating the following to a police officer: "'You son of a bitch, I'll choke you to death'" and "'White son of a bitch, I'll kill you.'"[85] Under Supreme Court doctrine, language constituting "fighting words" is completely outside the scope of the First Amendment.[86] It seems clear that the racial threats involved in *Gooding* would have qualified as fighting words that did not deserve First Amendment protection. However, in *Gooding* the Court used the overbreadth doctrine to contemplate whether the statute should be struck down because it could be applied to speech that was constitutionally protected, i.e., speech that did not constitute fighting words.[87] The Court ultimately struck down the statute in its entirety.[88]

Gooding and *Thornhill* represent the first important aspect of the overbreadth doctrine: It allows a litigant whose speech is either completely outside the First Amendment's protection, such as the fighting words used in *Gooding*, or whose speech "might have been constitutionally prohibited under a narrowly and precisely drawn statute"[89] to nevertheless challenge the statute in question. Thus, under the overbreadth doctrine, there is no requirement that the litigant

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82 *Id.* at 97–98 (citations omitted).
83 405 U.S. 518 (1972).
84 *Id.* at 519.
85 *Id.* at 520 n.1.
86 *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942).
87 *See Gooding*, 405 U.S. at 520–21.
88 *See id.* at 528.
89 *Id.* at 520.

demonstrate that his own constitutional rights have been violated. Therefore, the overbreadth doctrine is an exception to the Court's traditional rules regarding standing:[90]

> In the First Amendment context, we permit defendants to challenge statutes on overbreadth ground, regardless of whether the individual defendant's conduct is constitutionally protected. "The First Amendment doctrine of substantial overbreadth is an exception to the general rule that a person to whom a statute may be constitutionally applied cannot challenge the statute on the grounds that it may be unconstitutionally applied to others."[91]

2. The Overbreadth Doctrine: Using the Speech Model of Adjudication To Resolve Facial Challenges

Another trait attributed to the overbreadth doctrine is that it requires a court to consider the constitutionality of a statute on its face. Indeed, a finding that a statute is overbroad means that the statute is unconstitutional on its face.[92] There is no such thing as an as-applied

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[90] Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973).

[91] *See* Osborne v. Ohio, 495 U.S. 103, 112 n.8 (1990) (quoting Massachusetts v. Oakes, 491 U.S. 576, 581 (1989)). At some level, the Court's statements that the overbreadth doctrine is an exception to normal rules regarding standing seem to assume that the analysis should be conducted pursuant to the Speech Model. If the analysis is done under the Statutory Model, individual assessment of the actual speech involved in each case is not necessary once the court is satisfied that the litigant engaged in expressive conduct protected by the First Amendment. Thus, under the Statutory Model, as long as a litigant has engaged in expressive conduct protected by the First Amendment, the nature of the court's analysis seems to foreclose a distinction based on different fact patterns. A litigant whose activity is at the margins of First Amendment protection and at the height of the state's interest in regulation would seem to have the same standing, assuming the court uses the Statutory Model, to challenge a statute as a litigant whose activity is at the center of First Amendment protection and whom the state has little interest in regulating. In each instance, the litigant will benefit the same if the court concludes, pursuant to the Statutory Model, that the statute is unconstitutional. *Cf.* Monaghan, *supra* note 17, at 13 (arguing that the overbreadth doctrine is not an exception to traditional standing rules and that the overbreadth doctrine is best understood as a product of the constitutional requirement that one can be punished only by a constitutionally valid rule of law). Thus, the overbreadth doctrine can only be considered an exception to "traditional rules regarding standing" if: (1) it is a case where the litigant's speech has no First Amendment protection, i.e., fighting words or obscenity, or (2) the Speech Model of analysis is used.

[92] *See, e.g.*, Bd. of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569, 570–71, 577 (1987) (holding that a Los Angeles airport resolution preventing "First Amendment activities" in the terminal area is facially unconstitutional under the overbreadth doctrine); *Gooding*, 405 U.S. at 520 (holding that a statute is unconstitutional on its face if it can be applied to

overbreadth challenge, but there are numerous examples where the Supreme Court considers a facial challenge to a statute under the First Amendment without using the overbreadth doctrine. Indeed, under the Statutory Model of adjudication, a court *necessarily* considers a statute on its face. In *Frisby v. Schultz*,[93] the Supreme Court considered a facial challenge to a town ordinance prohibiting residential picketing.[94] The Court did not mention the overbreadth doctrine in the opinion.[95] Similarly, in *Watchtower Bible*,[96] the Court struck down a village ordinance that required a permit from the mayor before going on residential property to promote a "cause."[97] The Court neither used nor referred to the overbreadth doctrine.

Thus, the ability of a court to consider the constitutionality of a statute on its face cannot be considered one of the traits or contributions of the overbreadth doctrine. Courts using the Statutory Model can examine the constitutionality of a statute on its face without regard to the overbreadth doctrine. However, the overbreadth doctrine does allow courts to examine the constitutionality of a statute using the Speech Model of adjudication. That is, the overbreadth doctrine allows a court to use a different method of analysis in deciding a facial challenge to a statute. To understand this concept, it is necessary to explore the limitation on the overbreadth doctrine that was introduced by the Court in *Broadrick v. Oklahoma*.[98]

In *Broadrick*, the Supreme Court considered portions of an Oklahoma statute limiting the partisan political activities of state employees.[99] Several Oklahoma state employees had been charged with violating the statute by actively participating in an election campaign.[100] The employees conceded that their activities would not be protected if the Court used the Speech Model of adjudication and considered the constitutionality of the statute as applied specifically to their speech.[101]

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protected speech); Thornhill v. Alabama, 310 U.S. 88, 101 (1940) (using the overbreadth doctrine to strike down on its face an Alabama prohibition on picketing).

93 487 U.S. 474 (1988).

94 *See id.* at 488 (holding that the ordinance was valid because of the state's "substantial and justifiable" interest in protecting the sanctity of the home and because the ordinance was narrowly tailored).

95 *See id.* at 476–88.

96 536 U.S. 150 (2002).

97 *See id.* at 153.

98 413 U.S. 601 (1973).

99 *See id.* at 602.

100 *See id.* at 609.

101 *See id.* at 610.

The employees argued that the statute was unconstitutional under the overbreadth doctrine because the statute had been construed to apply to the displaying of bumper stickers and wearing of political buttons.[102] The Court proceeded to give a short history of the overbreadth doctrine,[103] calling it "strong medicine" and noting that it had been employed "sparingly and only as a last resort."[104] The Court acknowledged that applying the statute to wearing buttons and displaying bumper stickers might violate the First Amendment,[105] but the Court refused to strike down the statute on its face.[106] The Supreme Court stated that in order for an overbreadth challenge to succeed, the "overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."[107]

Thus, under *Broadrick*'s "substantial overbreadth" test, it is not sufficient for a litigant to point to one or a few hypothetical fact patterns under which application of the statute would be unconstitutional.[108] *Broadrick* requires a court to attempt to estimate the relationship between the circumstances where the statute could be constitutionally applied and the circumstances where the statute would be unconstitutionally applied. At some point, if the number of unconstitutional applications, compared to the number of constitutional applications, is "substantial," the law is struck down on overbreadth grounds. The substantial

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102 *See id.* at 609–10.

103 Some of the citations offered by the Court as examples of the application of the overbreadth doctrine do not fit under the modern understanding of the overbreadth doctrine. For example, the Court cites *Cohen v. California*, 403 U.S. 15 (1971), as an illustration of the application of the overbreadth doctrine. *See* Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973). However, in *Cohen*, the Supreme Court found the actual speech used by the defendant to be constitutionally protected. *See Cohen*, 403 U.S. at 25–26. Moreover, the Court did not strike down the disturbing the peace statute at issue in *Cohen*. Rather, it simply reversed Cohen's conviction. *See id.*

104 *See Broadrick*, 413 U.S. at 613.

105 *See id.* at 618.

106 *See id.*

107 *See id.* at 615.

108 The Court's opinion in *Gooding v. Wilson* seems to suggest that one unconstitutional application was sufficient under the overbreadth doctrine to invalidate the entire statute. *See* 405 U.S. 518, 520 (1972) ("[The statute can] 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 . . . that is protected by the [First Amendment]."). *But see Broadrick*, 413 U.S. at 630 (Brennan, J., dissenting) ("We have never held that a statute should be held invalid on its face merely because it is possible to conceive of a single impermissible application, and in that sense a requirement of substantial overbreadth is already implicit in the doctrine.").

overbreadth test, then, is an empirical one.[109] The court must ponder the numerous situations in which the statute in question might be applied, weigh the speech and state interests in each fact pattern and "predict" how those competing interests would be resolved if actually litigated, and then calculate the empirical relationship between the number of applications that would be constitutional and those that would be unconstitutional.

In this respect, the substantial overbreadth doctrine is conceptually identical to the test used in *City of Boerne v. Flores*[110] for determining whether Congress has exceeded its power under Section Five of the Fourteenth Amendment to "enforce" the protections found in the Fourteenth Amendment.[111] Under the *Boerne* test, the Court identifies the nature of the substantive Fourteenth Amendment guarantee at issue, delineates the scope of the Congressional act involved, and then determines the relationship between applications of the statute under which the underlying conduct is constitutionally protected against state action and those applications of the statute under which the underlying conduct is not constitutionally protected against state action.[112] Under both the *Boerne* and substantial overbreadth tests, a court considers the constitutionality of the statute on its face based on the number of potentially permissible or constitutional applications of the statute versus the number of impermissible or unconstitutional applications of the statute.[113]

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[109] *See, e.g.*, Massachusetts v. Oakes, 491 U.S. 576, 589 (1989) (Scalia, J., concurring) (applying the substantial overbreadth test and attempting to estimate how often the statute in question could be applied unconstitutionally to family pictures of naked babies with genitals exposed).

[110] 521 U.S. 507 (1997).

[111] *See generally* Catherine Carroll, Note, *Section Five Overbreadth: The Facial Approach To Adjudicating Challenges Under Section Five of the Fourteenth Amendment*, 101 MICH. L. REV. 1026, 1034–37 (2003) (arguing that the analysis adopted by the Court in *Boerne* is identical to the substantial overbreadth analysis).

[112] *See* Bd. of Trs. v. Garrett, 531 U.S. 356, 365–66 (2001).

[113] That the substantial overbreadth test is conceptually identical to the *Boerne* congruent and proportional test might be independently sufficient for Justice Scalia to abandon the substantial overbreadth test. In a recent case considering Congress' power under Section Five to enact Title II of the Americans with Disabilities Act, Justice Scalia called for the renunciation of the *Boerne* test except in cases involving racial discrimination:

> The [*Boerne*] "congruence and proportionality" standard, like all such flabby tests, is a standing invitation to judicial arbitrariness and policy-driven decisionmaking. . . . As a general matter, we are ill advised to adopt or adhere to constitutional rules that bring us into constant conflict with a coequal branch of Government. And when conflict is unavoidable, we should not come to do battle with the United States

Thus, under the substantial overbreadth test, the court examines the constitutionality of the statute on its face but uses the Speech Model of adjudication. The court does not consider the interests supporting the statute in a vacuum, striking down the statute if it finds the statute is not supported by sufficient policy objections or that the statute might have been better drafted. Rather, the court focuses on how the statute will be applied in various hypothetical fact patterns. The court uses the Speech Model of adjudication to resolve the facial challenge to the statute. This is the second aspect or contribution of the overbreadth doctrine. Although facial challenges in First Amendment law have been ubiquitous through the use of the Statutory Model and the Court has frequently used the Speech Model to consider as-applied challenges to statutes, the overbreadth doctrine allows a court to entertain a facial challenge to the statute while using the Speech Model of adjudication.

The difference between a facial challenge under the overbreadth doctrine using the Speech Model of adjudication and a facial challenge using the Statutory Model of adjudication has been explained by commentator Marc Isserles as follows:

> [N]ot all facial challenges are alike. Facial challenges can take at least two qualitatively distinct forms. First, a facial challenge may be asserted as an "overbreadth facial challenge," which predicates facial invalidity on some aggregate number of unconstitutional applications of an otherwise valid rule of law. Second, and quite distinctly, a facial challenge may be asserted as a "valid rule facial challenge," which predicates facial invalidity on a constitutional defect inhering in the terms of the statute itself, independent of the statute's application to particular cases.[114]

Mr. Isserles's use of the term "overbreadth facial challenge" is consistent with a facial challenge using the Speech Model. His term "valid rule facial challenge" is nothing more than a facial challenge adjudicated under the Statutory Model.

> Congress armed only with a test ("congruence and proportionality") that has no demonstrable basis in the text of the Constitution and cannot objectively be shown to have been met or failed. As I wrote for the Court in an earlier case, "low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict."

Tennessee v. Lane 541 U.S. 509, 557–58 (2004) (Scalia, J., dissenting).

[114] *See* Isserles, *supra* note 6, at 363–64.

The Supreme Court has articulated the distinction between these two different types of facial challenges as follows:

> [T]o prevail on a facial attack the plaintiff must demonstrate that the challenged law either "could never be applied in a valid manner" or that even though it may be validly applied to the plaintiff and others, it nevertheless is so broad that it "may inhibit the constitutionally protected speech of third parties." [T]he first kind of facial challenge will not succeed unless the court finds that "every application of the statute created an impermissible risk of suppression of ideas," and the second kind of facial challenge will not succeed unless the statute is "substantially" overbroad. . . .[115]

By reading the Court's explanation of the difference between these two types of facial attacks, one might conclude that the main difference in these tests is the number of violations needed for a statute to be struck down on its face. Under a facial challenge analyzed pursuant to the Statutory Model, a litigant must prove that the statute is unconstitutional in every application, but under an overbreadth facial challenge, the litigant must prove that the statute is unconstitutional in a certain percentage of instances. This conclusion is incorrect because it assumes that a facial challenge outside the context of the overbreadth doctrine is analyzed in the same way as an overbreadth challenge.[116] This is untrue. Under the overbreadth doctrine, a court uses the Speech Model of adjudication to consider the various applications of the statute to

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[115] N.Y. State Club Ass'n v. City of New York, 487 U.S. 1, 11 (1988) (citations omitted); *see also* R.A.V. v. City of St. Paul, 505 U.S. 377, 381 n.3 (1992) (concluding that the facial attack asserted in that case was not an overbreadth challenge but a normal facial attack requiring the Court to use the Statutory Model of adjudication); *cf.* Sec'y of Md. v. Joseph H. Munson Co., 467 U.S. 947, 965 n.13 (1984) ("[T]here is no reason to limit challenges to case-by-case 'as-applied' challenges when the statute on its face and therefore in all its applications falls short of constitutional commands."). In other instances, the Court has been less articulate in describing the difference between the two types of facial challenges. *See, e.g.*, City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 796 (1984) ("There are two quite different ways in which a statute or ordinance may be considered invalid 'on its face'—either because it is unconstitutional in every conceivable application, or because it seeks to prohibit such a broad range of protected conduct that it is unconstitutionally 'overbroad.'"); New York v. Ferber, 458 U.S. 747, 768 n.21 (1982) ("Overbreadth challenges are only one type of facial attack. A person whose activity may be constitutionally regulated nevertheless may argue that the statute under which he is convicted or regulated is invalid on its face.").

[116] *See* Isserles, *supra* note 6, at 377 (stating that it has been incorrectly assumed "that all facial challenges are structured as overbreadth facial challenges").

different factual scenarios. Under a "normal" facial challenge, that is, a facial challenge other than a facial challenge under the overbreadth doctrine, a court uses the Statutory Model of adjudication and considers the statute generically and without reference to specific fact patterns.[117] It is for this reason that this Article has attempted to clearly describe and distinguish between the Speech Model of adjudication and the Statutory Model of adjudication. The difference between an overbreadth facial challenge and a normal facial challenge is not the number of violations that a litigant must prove to be successful. Rather, the difference is the method of analysis that the court uses in deciding the case. The Speech and Statutory Models describe these two different forms of analysis.

Thus, to summarize, there are two traits or contributions of the overbreadth doctrine. The first trait is that it allows litigants whose own free speech rights have not been violated to nevertheless challenge the constitutionality of a statute on its face. The other trait is that it allows a court to consider the constitutionality of a statute on its face using the Speech Model of adjudication.

C. Limitations on the Use of the Overbreadth Doctrine

In order to complete the description of the overbreadth doctrine, it is necessary to briefly note the various limitations that have been placed on the doctrine.[118] This Part briefly identifies the limitations on the overbreadth doctrine developed by the Court.

Of course, the most substantial limitation on the overbreadth doctrine is the requirement that the overbreadth be "substantial" and "judged in relation to the statute's plainly legitimate sweep."[119] The Court first intimated that the "substantial" requirement would only apply in cases where "conduct and not merely speech" was involved.[120] However, subsequent cases reveal that the "substantial" requirement

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[117] *See id*. at 382 ("[T]he classic understanding of a facial challenge—a challenge to the constitutionality of the statute 'on its face'—has no evident relationship to the overbreadth doctrine's method of aggregating unconstitutional applications of an otherwise valid rule.").

[118] *See* Fallon, *supra* note 18, at 863 ("More recently, the Burger and Rehnquist Courts have limited the doctrine in various ways . . . ."); Martin H. Redish, *The Warren Court, the Burger Court and First Amendment Overbreadth Doctrine*, 78 NW. U. L. REV. 1031, 1032 (1983) ("[T]he Burger Court—quite probably in overreaction to the unbending and unthinking protectionism of the Warren Court—introduced stringent general principles of limitation on the doctrine's use . . . .").

[119] Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).

[120] *Id.*

applies regardless of whether the statute in question regulates conduct, speech, or both.[121]

The Court has adopted other limitations on the overbreadth doctrine. In *Bates v. State Bar of Arizona*,[122] the Court held that the overbreadth analysis is inapplicable to commercial speech.[123] Additionally, the Court has stated that before an overbreadth challenge will be heard by the courts, it should first be determined whether the statute is constitutional as applied to the litigant's particular speech.[124] Only if the statute is constitutional as applied to the litigant's particular speech may the court consider an overbreadth challenge.[125] Along similar lines, the Court has refused to apply the overbreadth doctrine when the overbreadth claimant has not demonstrated that the relevant statute in question applied to speech more deserving of First Amendment protection than the claimant's speech.[126]

The Court has twice dealt with the issue of whether an overbreadth challenge should be considered when the statute in question has been amended. In *Bigelow v. Virginia*,[127] the Court "declined" to consider an overbreadth attack on a statute that was no longer in existence, reasoning that the statute could not be applied to other litigants in the future and thus did not present a chilling threat to constitutionally protected expression.[128] However, in *Massachusetts v. Oakes*,[129] a majority of the Court determined that it could consider an overbreadth challenge

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121 *See, e.g.*, Bd. of Airport Comm'rs v. Jews for Jesus, 482 U.S. 569, 574 (1987) (announcing the substantial overbreadth requirement and failing to distinguish between cases of speech and conduct); New York v. Ferber, 458 U.S. 747, 773 (1982) (also announcing the substantial overbreadth requirement and failing to distinguish between cases of speech and conduct).

122 433 U.S. 350 (1977).

123 *See id.* at 380–81.

124 Bd. of Trs. v. Fox, 492 U.S. 469, 484–85 (1989).

125 *See id.* at 485 ("[T]he lawfulness of the particular application of the law should ordinarily be decided first.").

126 *See* City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 802 (1984).

127 421 U.S. 809 (1975).

128 *See id.* at 817–18. The Court ultimately concluded that the application of the Virginia statute violated Bigelow's First Amendment rights. *See id.* at 829. Under the rule announced in *Board of Trustees of the State University of New York v. Fox*, that a court should only consider an overbreadth challenge if the statute is constitutional as applied to the claimant, the Court should not have considered the overbreadth challenge. 492 U.S. at 484–85.

129 491 U.S. 576 (1989).

to a statute that had been amended after a prosecution and conviction.[130] The Court distinguished *Bigelow* in a footnote, triggering sharp criticism from the remainder of the Court.[131] In light of the conflicting results in *Bigelow* and *Oakes*, the Court has not conclusively resolved the issue of whether an overbreadth challenge can be made to an amended statute.

Finally, the Court has placed a procedural obstacle to a successful overbreadth challenge. The Court has stated that "[t]he overbreadth claimant bears the burden of demonstrating, 'from the text of [the law] and from actual fact,' that substantial overbreadth exists."[132] This procedural standard is contrary to other litigation under the First Amendment, in which the government is generally required to justify infringement on free expression.[133]

Thus, the overbreadth doctrine has been considerably limited by Supreme Court decisions subsequent to the adoption of the doctrine. In order for a court to consider an overbreadth claim, it must first determine whether the statute in question is constitutional as applied to the claimant. If it is, the court will not consider the overbreadth challenge. A court cannot consider an overbreadth claim in the context of commercial speech. In addition, it is debatable whether a court can consider an overbreadth claim when the statute in question has been amended subsequent to the conviction at issue. If a court does consider an overbreadth challenge, it will be the claimant's burden to show that the law is substantially overbroad "'from actual fact[s].'"[134]

II. DOES THE OVERBREADTH DOCTRINE ACHIEVE ITS OBJECTIVES?

Thus far, I have attempted to demonstrate that the overbreadth doctrine makes two contributions to free speech jurisprudence. Having identified what the doctrine is, I move to the heart of this Article, that the overbreadth doctrine should be abandoned. In this Part, I examine the purported goals of the overbreadth doctrine and determine whether the overbreadth doctrine achieves those goals.

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130 *See Oakes*, 491 U.S. at 585–88. Justice Scalia wrote an opinion stating that the subsequent amendment to the statute in question did not foreclose consideration of the claimant's overbreadth argument. Four other Justices joined this portion of the opinion.

131 *See id.* at 587 n.1.

132 Virginia v. Hicks, 539 U.S. 113, 122 (2003) (quoting N.Y. State Club Ass'n v. City of New York, 487 U.S. 1, 14 (1988) (alterations in original)).

133 *See, e.g.*, Burson v. Freeman, 504 U.S. 191, 198 (1992) (explaining that it was the state's burden to justify the restriction on free speech).

134 Hicks, 539 U.S. at 122.

A. Preventing Chilling of Protected Speech

The most common contemporary justification for the overbreadth doctrine is as follows:

> We have provided this expansive remedy [of the overbreadth doctrine] out of concern that the threat of enforcement of an overbroad law may deter or "chill" constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions. Many persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech, harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas. Overbreadth adjudication, by suspending *all* enforcement of an overinclusive law, reduces these social costs caused by the withholding of protected speech.[135]

In other words, if a statute can be applied constitutionally in only certain situations and if the number of unconstitutional applications of the statute are "substantial" in relation to the number of constitutional applications, the court will strike down the statute[136] because of a fear that constitutionally protected speech will be "chilled" if the statute is not struck down.

One will not find this modern, sophisticated justification for the overbreadth doctrine in *Thornhill v. Alabama*,[137] the case that both the Court and commentators acknowledge as the birth of the doctrine.[138] In fact, closer examination of the *Thornhill* opinion indicates that the Court was probably not cognizant that it was adopting a new doctrine for deciding First Amendment cases, nor did the Court intend to do so in that case. A brief examination of the *Thornhill* case illustrates the almost accidental nature by which the overbreadth doctrine was adopted and

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135 *See id.* at 119 (citations omitted).

136 Assuming, of course, that the court is presented with a case in which application of the overbreadth doctrine is appropriate, i.e., that the statute is constitutional as applied to defendant's conduct and that the statute does not involve commercial speech. *See supra* Part I.B.

137 310 U.S. 88 (1940).

138 *See supra* note 77 and accompanying text.

how the modern chilling justification for the overbreadth doctrine is a mere post-hoc rationale.

In *Thornhill*, the Supreme Court considered a conviction under an Alabama statute that prohibited loitering or picketing near or at a place of business.[139] The Court in *Thornhill* announced that the picketing statute in question "must be judged upon its face."[140] As support for this proposition, the Court reasoned that "[p]roof of an abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas,"[141] citing to several licensing cases in which the Court had struck down ordinances requiring permits from local officials before holding public meetings or distributing literature.[142] The Court's reliance on licensing cases is dubious. Licensing schemes constitute a prior restraint on speech.[143] Prior restraints in general, particularly licensing schemes leaving broad discretion to the responsible official,[144] strike at the heart of the First Amendment.[145] A prior restraint such as a licensing scheme

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139 *See* Thornhill v. Alabama, 310 U.S. 88, 91 (1940).

140 *See id.* at 96.

141 *See id.* at 97.

142 *See id.* (citing Schneider v. State, 308 U.S. 147 (1939), Hague v. C.I.O., 307 U.S. 496 (1939), and Lovell v. City of Griffin, 303 U.S. 444 (1938)).

143 *See* Forsyth County v. Nationalist Movement, 505 U.S. 123, 131 (1992) ("'[A] law subjecting the exercise of First Amendment freedoms to the prior restraint' of a license must contain 'narrow, objective, and definite standards to guide the licensing authority.'").

144 *See* S.E. Promotions v. Conrad, 420 U.S. 546, 553 (1975). The Court commented:

> Invariably, the Court has felt obliged to condemn systems in which the exercise of such authority was not bounded by precise and clear standards. The reasoning has been, simply, that the danger of censorship and of abridgment of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum's use. Our distaste of censorship—reflecting the natural distaste of a free people—is deep-written in our laws.

Id.

145 *See* Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963) ("Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."); Lovell v. City of Griffin, 303 U.S. 444, 451 (1938). In *Lovell*, the Court stated:

> The struggle for the freedom of the press was primarily directed against the power of the licensor. It was against that power that John Milton directed his assault by his "Appeal for the Liberty of Unlicensed Printing." And the liberty of the press became initially a right to publish "*without* a license what formerly could be published only *with* one."

303 U.S. at 451; Patterson v. Colorado, 205 U.S. 454, 462 (1907) ("The main purpose of [the freedom of speech and press clauses] is 'to prevent all such *previous restraints* upon publications as had been practiced by other governments,' and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare.");

punishes or restricts speech before the speech reaches the "market place of ideas."[146] As such, licensing schemes are *always* reviewed on their face to determine their constitutionality.[147] However, *Thornhill* did not involve a prior restraint on speech because it was a case involving punishment for speech already expressed. The Court's reliance on prior restraint licensing cases does little to establish the overbreadth doctrine, which is applicable to both pre and post–publication restraints on speech.[148]

WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND No. 4 151–52 (1769) ("The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published.").

[146] Thomas I. Emerson, *The Doctrine of Prior Restraints*, 20 LAW & CONTEMP. PROBS. 648, 657 (1955). Emerson compares subsequent punishment and prior restraint:

> Under a system of subsequent punishment, the communication has already been made before the government takes action. . . . Under a system of prior restraint, the communication, if banned, never reaches the market place at all. Or the communication may be withheld until the issue of its release is finally settled, at which time it may have become obsolete.

Id.

[147] See *City of Lakewood v. Plain Dealer Publ'g.*, 486 U.S. 750, 757 (1988), where the Court justified its review of strict licensing schemes:

> At the root of this long line of precedent is the time-tested knowledge that in the area of free expression a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship. And these evils engender identifiable risks to free expression that can be effectively alleviated only through a facial challenge.

Id. (citations omitted).

[148] It seems likely the Court considered the licensing cases relevant because the statute in *Thornhill* left excessive discretion to law officers to determine whether the picketing occurred with the purpose of "hindering, delaying, or interfering with or injuring any lawful business or enterprise of another. . . ." Thornhill v. Alabama, 310 U.S. 88, 91 (1940); *see also id.* at 98 n.11 (noting that although the picketing had taken place for over a month, the statute had not been enforced against anyone besides Thornhill, who was the labor union president). Subsequent Supreme Court cases have suggested that the overbreadth challenge in *Thornhill* was permitted because of the discretion given to law enforcement officers. *See* Forsyth County v. Nationalist Movements, 505 U.S. 123, 129 (1992) (citing *Thornhill* for the proposition that "the Court has permitted a party to challenge an ordinance under the overbreadth doctrine in cases where every application creates an impermissible risk of suppression of ideas, such as an ordinance that delegates overly broad discretion to the decisionmaker"). The apparent concern is that officers will use the discretion to suppress only unpopular speech and thus engage in viewpoint discrimination. At some level this problem is unavoidable. However, officer discretion and prosecutorial discretion are legitimate function of the Executive Branch. Although this power can be abused, it is equally illegitimate for courts to strike down on its face any statute that has the potential of being enforced in a discriminatory manner. While officers and prosecutors may sometimes abuse their discretion and enforce statutes against

Besides the licensing cases the *Thornhill* Court cited in the opinion, it seems that another line of prior restraint cases influenced the Court's judgment in *Thornhill*: cases involving broad ranging injunctions against labor union activity and picketing. In the years preceding *Thornhill*, there was intense conflict regarding the right of labor unions to organize, strike, and picket. Initially, employers used suits alleging common law conspiracy to break up, punish, and deter picketers.[149] As labor became more organized and strikes became larger and more coordinated, employers discovered that a much more effective tool in combating labor was to get a court to issue an injunction against the "interference" of the employer's business.[150] Some appellate courts began striking down the injunctions if the injunctions were too broad and could be applied to legal conduct.[151] It is clear that these appellate opinions that struck down broad injunctions were influential in framing the issue and analysis within *Thornhill*,[152] but this case did not involve a broad injunction

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unpopular viewpoints, conviction and punishment takes place within the courts, which have the duty to ensure that the defendant's conduct actually constitutes a violation of the law and that the defendant's conduct is not speech entitled to First Amendment protection. Additionally, it should be noted that an officer's discretion to arrest a speaker after the speech has occurred is entirely different than a licensor's discretion to prohibit speech before it takes place. An arrest and prosecution only result in a conviction after the litigant receives an opportunity to argue that the conviction is inconsistent with the First Amendment. This discussion takes place after the speech has occurred and entered the market place of ideas. For this reason, discretion to suppress speech pre-publication is much more dangerous than discretion to punish already-spoken speech. *See* Emerson, *supra* note 146, at 657 ("Under a system of subsequent punishment, the communication has already been made before the government takes action. . . . Under a system of prior restraint, the issue of whether a communication is to be suppressed or not is determined by an administrative rather than a criminal procedure. This means that the procedural protections built around the criminal prosecution [are] not applicable to a prior restraint.").

149 *See* Joseph Tenenhaus, *Picketing as a Tort: The Development of the Law of Picketing from 1880 to 1940*, 14 U. PITT. L. REV. 170, 172 (1953).

150 *See* WILLIAM FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 62–97 (1991); VICTORIA C. HATTAM, LABOR VISIONS AND STATE POWER 161 (1993).

151 *See* Cummins, *supra* note 77, at 1676–79 (tracing the emergence of an "overbreadth" doctrine against broad labor injunctions). Labor activities were not originally recognized as protected First Amendment activity. *See, e.g.*, Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 439 (1911) (holding that words in furtherance of a boycott were not protected expression). However, labor activity was legal if the means and the ends were legitimate. *See* Cummins, *supra* note 77, at 1676. Thus, a judicial injunction was too broad if it prohibited activity that had legitimate ends and means. *See id.* at 1677 (discussing various appellate cases in which injunctions against labor were struck down because the injunction could be applied to labor activity with legitimate means and ends).

152 *See generally* Cummins, *supra* note 77, at 1671–95 (explaining how the previous appellate court decisions using overbreadth to strike down broad anti-labor injunctions influenced the Court's thinking when it was presented with a broad anti-labor statute). For instance, the lawyers for Thornhill cited only one case in their appellate brief, a Nevada case in which the Nevada Supreme Court had relied almost exclusively on previous

against picketing. Rather, it involved a broad *statute* against picketing. The difference between the two is substantial. An injunction prohibiting expressive conduct is considered a prior restraint,[153] which raises special constitutional concerns.[154] Engaging in speech that violates an injunction usually subjects the speaker to automatic punishment, regardless of whether the speech was protected under the First Amendment.[155]

It is clear that the *Thornhill* Court had on its collective mind both licensing and injunctions, the two recognized forms of prior restraints, when it decided the case. The Court did not appreciate the fundamental difference between the pre-speech prohibitions of prior restraints and the post-speech punishment imposed by normal statutes like the one in *Thornhill*.[156] Additionally, the Court was undoubtedly motivated by the

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appellate decisions striking down broad anti-labor injunctions in order to strike down a broad anti-labor statute. *See id.* at 1692.

153 *See generally* Near v. Minnesota, 283 U.S. 697, 701–02 (1931) (holding that an injunction against the "'malicious, scandalous and defamatory newspaper, magazine or other periodical'" known as *The Saturday Press* was unconstitutional).

154 *See* Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963) ("Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.").

155 *See* Walker v. City of Birmingham, 388 U.S. 307, 321 (1967) (holding that, unless in unusual circumstances where appellate review of an injunction is impossible, speech that violates an injunction is punishable regardless of whether the speech might have been protected by the First Amendment); *see also* GTE Sylvania v. Consumers Union, 445 U.S. 375, 386 (1980) ("[P]ersons subject to an injunctive order issued by a court with jurisdiction are expected to obey that decree until it is modified or reversed, even if they have proper grounds to object to the order.").

156 *Cf.* Cammarano v. United States, 358 U.S. 498, 514 (Douglas, J., concurring) (justifying his refusal to follow a previous Supreme Court opinion as follows: "The ruling was casual, almost offhand. And it has not survived reflection."). At some level the justifications for the overbreadth doctrine and the hostility towards prior restraints—both licensing schemes and broad injunctions—is circular. The main justification the Supreme Court has given for its skeptical attitude towards licensing prior restraints is that such a scheme chills speech: "[T]he mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused. . . . [A major First Amendment risk in such schemes is] self-censorship by speakers in order to avoid being denied a license to speak." City of Lakewood v. Plain Dealer Publ'g, 486 U.S. 750, 757–58 (1988). The same justification has been offered for injunction prior restraints. *See* ALEXANDER BICKEL, THE MORALITY OF CONSENT 61 (1975) (explaining that while "a criminal statute chills" speech, an injunction "freezes" speech). The justification offered for the overbreadth doctrine is the same: A fear that unless the statute is struck down, constitutional speech will be chilled. *See, e.g.*, Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973) ("[T]he statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression."). In the licensing cases, the fear of chilling is derived partially from the fact that the speech can be prohibited before it is spoken. *See Lakewood*, 486 U.S. at 757. Thus, the reason that a court must be concerned with chilling in licensing cases is because it is different than a scheme that punishes speech after it occurs. This makes it difficult to

particular facts and equities of the case. The Court wanted to send a message to the industry, which had responded with increased hostility towards the appellate courts regarding broad, anti-labor, trial court injunctions by shifting forums and getting anti-labor legislation passed in the states.[157] In addition, the author of the *Thornhill* opinion, Justice Murphy, had long been associated with and supportive of the labor movement, and he saw this case as an opportunity to strike a blow for labor rights.[158] Regardless, the opinion in *Thornhill* does not contain the type of detailed, thoughtful analysis that one would expect from a Supreme Court opinion identified as the origin of a doctrine that is a radical departure from traditional adjudication, nor does the opinion establish the chilling rationale as a justification for the overbreadth doctrine.[159]

In any event, contemporary justifications for the overbreadth doctrine focus primarily on the chilling rationale. This justification of the

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understand why a scheme that punishes post-speech also presents the same concerns. It suggests that the concern with licensing schemes is not simply the fact that it is a pre-speech prohibition. The *Lakewood* Court also expressed concern that the discretion given to officials in a licensing scheme might chill speech. *See id.* However, the concern with official discretion proves too much in the context of a statute punishing speech after it has occurred. *See id*. While officer and prosecutorial discretion might indeed have a chilling function on speech, this concern is a product of separating the executive, legislation, and judicial functions. Yet, if the fear of official and prosecutorial discretion justified facial invalidity of a statute, no statute that made any sort of expressive conduct a crime could survive. The fear that speech will be chilled in the licensing context is probably best explained by a combination of the discretion given to an official and the fact that the official receives discretion prior to speech occurring. Because this combination is not present for statutes that punish post-speech and the "discretion" factor, while often present in post-speech statutes, cannot be the basis of the overbreadth's concern for chilling, the concern that post-speech statutes will chill speech must be derived from other factors.

[157] *See* Cummins, *supra* note 77, at 1689 (tracing the reaction of employers to limitations on labor injunctions and the effort to pass anti-labor legislation).

[158] *See* SIDNEY FINE, SIT-DOWN: THE GENERAL MOTORS STRIKE OF 1936–37 311 (1970). Justice Murphy viewed the *Thornhill* case as an opportunity to declare the framework by which all picketing cases would be analyzed. As Justice Murphy explained in a note to fellow Justice Huddleston:

> "[O]ur job as I see it . . . is to write a reversal without serious prejudice to the police power of the state. . . . We don't want to end picketing . . . but what about its abuse? We want above all to preserve the freedoms but what about using them as a cloak for activities that are properly unlawful?"

See Cummins, *supra* note 77, at 1695. Justice Murphy was apparently satisfied that he had done his part to preserve the freedom of picketing, as he wrote "labor's magna carta" on the top of a printed copy of the *Thornhill* decision. *See id.* at 1698. One cannot help but be reminded of the old adage that "hard cases make bad law."

[159] *See Broadrick*, 413 U.S. at 610 (stating that the overbreadth doctrine is an exception to "traditional rules governing constitutional adjudication").

overbreadth doctrine is based on numerous assumptions. First, it requires that citizens have knowledge of what the law is. Second, it assumes that a citizen who does know the law will refrain from engaging in constitutionally protected speech because that speech is prohibited under the overbroad statute. Third, it requires that a citizen be aware of court decisions that strike down the law as overbroad. Fourth, it assumes that a citizen, aware of the court decision, will now engage in the constitutionally protected speech previously refrained from. When each of these assumptions is critically examined, it is clear that the overbreadth doctrine will only operate to prevent the chilling of unconstitutional speech in the rare case.

Of course, whether these assumptions are valid is ultimately an empirical question that is not easily quantifiable, but there exist some general observations. In many of the cases in which the overbreadth doctrine has been applied, it is doubtful that potential speakers know the statute in question, which is the first assumption on which the overbreadth doctrine is based. For example, in *Lewis v. New Orleans*,[160] the Supreme Court considered an overbreadth challenge to a New Orleans ordinance making it a crime to "'wantonly [] curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty.'"[161] Lewis had been arrested during the traffic stop of her husband for yelling, "you god damn m.f. police—I am going to (the Superintendent of Police) about this."[162] It is highly doubtful that Lewis, or any other citizen who was engaged in a traffic stop or was in another situation in which the ordinance might be violated, knew about the New Orleans ordinance.[163]

The same can be said for the resolution struck down by the Court in *Board of Airport Commissioners v. Jews for Jesus*.[164] The Los Angeles Board of Airport Commissioners had enacted a resolution declaring that the terminal at Los Angeles International Airport was "not open for First

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160 415 U.S. 130 (1974).

161 *Id.* at 132.

162 *Id.* at 131 n.1 (internal quotations marks omitted). The facts in *Lewis* were noted only in a footnote, which was criticized by the dissent. *See id.* at 137 (Blackmun, J., dissenting) ("[I]t is no happenstance that . . . the facts are relegated to footnote status, conveniently distant and in a less disturbing focus.").

163 *See also* City of Houston v. Hill, 482 U.S. 451, 455 (1987) (declaring unconstitutional a Houston ordinance making it unlawful to "'oppose, molest, abuse, or interrupt any policeman in the execution of his duty . . .'").

164 482 U.S. 569 (1987).

Amendment Activities. . . ."[165] After a "minister" for the nonprofit "Jews for Jesus" corporation was asked to refrain from distributing free religious leaflets, Jews for Jesus brought suit challenging the constitutionality of the resolution.[166] Noting that the resolution could be applied to such activities as "talking and reading, or the wearing of campaign buttons or symbolic clothing," the Court used the overbreadth doctrine to strike down the statute.[167]

Undoubtedly, Jews for Jesus and other organizations that desired to use the terminal as a place to distribute literate were aware of the law, either after they were told to leave by officials or after having learned of such an incident. However, these are not the category of speakers whose speech might be chilled by the terminal resolution. Jews for Jesus, and other similarly situated organizations wishing to use the terminal to distribute literature, were represented in the actual case before the Court.[168] Those speakers whose speech might presumably be chilled by the resolution, the "talkers" and "readers" mentioned by the Court, surely had no idea that there existed a resolution that could be used to suppress their activities.[169]

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165 *See id.* at 570–71.

166 *See id.* at 571.

167 *See id.* at 575.

168 The Court avoided many difficult questions, such as whether an airport terminal is a traditional public forum, by relying on overbreadth grounds. *See id.* at 573–74 ("Because we conclude that the resolution is facially unconstitutional under the First Amendment overbreadth doctrine regardless of the proper standard, we need not decide whether LAX is indeed a public forum, or whether the *Perry* standard is applicable when access to a nonpublic forum is not restricted."). By relying on overbreadth grounds, the Court violated the principle established in *Fox*, that an overbreadth analysis should not be performed if the statute is unconstitutional as applied to the overbreadth claimant. *See* Bd. of Trs. v. Fox, 492 U.S. 460, 484–85 (1989).

169 *Jews for Jesus* raises another problem with the overbreadth doctrine—the possibility that a court will strike down a statute based on hypothetical fact patterns that might technically constitute a violation of the law but would not be pursued and prosecuted. The Supreme Court encountered this issue in *Massachusetts v. Oakes*, 491 U.S. 576 (1989). Oakes had been arrested for taking "approximately 10 color photographs of his partially nude and physically mature 14-year-old stepdaughter." *Id.* at 580. Oakes was convicted under a statute making it a crime to permit a child to "pose or be exhibited in a state of nudity" and was sentenced to ten years of imprisonment. *Id.* at 579–80. One issue before the Court was whether the statute was unconstitutional under the overbreadth doctrine because it could be applied to parents who take nude pictures of their baby children. In Justice Scalia's opinion, nude photos of small children were not so common that the statute was unconstitutional under the overbreadth doctrine. *See id.* at 589. However, Justice Scalia also noted that a prosecutor would almost never prosecute a family for taking nude pictures of their small children: "We can deal with such a situation in the unlikely event some prosecutor brings an indictment." *Id.*

Thus, in *Jews for Jesus* and *Lewis*, the first assumption required under the overbreadth doctrine—that citizens are aware of the statute or ordinance in question—is not met. Although there are other cases in which it is more likely that the general population, or at least potential speakers, would be aware of a statute attacked under the overbreadth doctrine, it seems that there are many instances in which citizens will not even know the law in question. If citizens are not even aware of the statute, it cannot be said that the statute will chill constitutional speech.

The second assumption that is required for the overbreadth doctrine to actually prevent chilling of constitutional speech is that a citizen who does know the law will refrain from engaging in constitutionally protected speech because that speech is prohibited under the overbroad statute. Again, in at least some situations, this assumption seems unlikely. Consider again the fact pattern in *Lewis*. It seems highly unlikely that a person who is inclined to shout verbal insults at an on-duty police officer would refrain from doing so simply because of knowledge that such conduct is prohibited by law. Such speech is made instinctively and without reflection, often when the speaker is experiencing great emotion. Consider also the Massachusetts statute from *Oakes*,[170] which prohibited involvement in the display or production of nude photographs of children.[171] Although the statute technically applied to parents who took nude family photographs of their small children,[172] it seems highly unlikely that parents, even if they were aware of the law, would stop taking pictures of their naked babies.[173]

In contrast, knowledge of the law would surely cause others to refrain from speaking. Particularly in situations where the speaker had time to reflect on the illegality of the speech before speaking, it seems that chilling is possible if citizens are, in fact, aware of the law. For example, law-abiding citizens who knew of a ban on First Amendment activities in an airport terminal might refrain from wearing political buttons supporting a particular candidate.[174] Additionally, public employees disinclined to fall into the bad graces of their boss might

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170 491 U.S. 576 (1989).

171 *See id.* at 579.

172 *See id.* at 589.

173 Under the facts in *Oakes*, parents would not refrain from taking pictures probably because they knew that they would never be prosecuted for such activity. *See supra* note 169.

174 *See* Bd. of Airport Comm'rs v. Jews for Jesus, 482 U.S. 569, 570–71 (1987) (stating that the Los Angeles airport terminal was "not open for First Amendment activities . . .").

refrain from engaging in constitutionally protected speech, such as wearing a political button or displaying a political bumper sticker, pursuant to an overbroad state law regulating the political activities and speech of public employees.[175] In other circumstances, even if the speaker has time to reflect on the speech and the consequences from engaging in such speech, the speaker will sometimes engage in speech that he or she feels compelled to make. Gregory Johnson no doubt knew that he violated Texas law when he burned the American flag in front of the National Convention in 1984.[176] Similarly, David O'Brien surely realized that he violated a federal prohibition on the intentional destruction or mutilation of draft cards when he burned his draft card on the steps of the South Boston Courthouse.[177]

Thus, the second assumption necessary to the overbreadth doctrine—that citizens who know the law will refrain from engaging in constitutionally protected speech that violates the law—is not true in many situations. In some situations, such as the Houston ordinance in *Lewis* that prevented cursing at an officer, the emotional impulse by a speaker to express frustration with an officer will often override the speaker's knowledge that his or her conduct violates the law. In other situations, such as the Massachusetts statute in *Oakes* that could be applied to family photos of naked babies and toddlers, speakers continue to engage in the conduct because they know that they will not be prosecuted. Finally, in some instances, a speaker will engage in speech that is prohibited but that the speaker feels is important and perhaps constitutionally protected. This principle is best exemplified by the *O'Brien* and *Johnson* cases, in which the speakers felt compelled to speak despite the likely arrest, prosecution, and conviction that would follow his speech.[178]

The third assumption necessary for the overbreadth doctrine to prevent chilling is that a citizen be aware of court decisions that strike down the law as overbroad. Once again, in many circumstances this assumption seems improbable. A 2002 poll of Americans revealed that two-thirds of Americans could not name a single Supreme Court

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[175] *See* Broadrick v. Oklahoma, 413 U.S. 601, 618 (1973) ("[W]e do not believe that [the Oklahoma statute] must be discarded *in toto* because some persons' arguably protected conduct may or may not be caught or chilled by the statute.").

[176] *See* Texas v. Johnson, 491 U.S. 397, 420 (1989) (reversing Johnson's conviction under Texas law for desecrating a venerated object).

[177] *See* United States v. O'Brien, 391 U.S. 367, 386 (1968) (upholding O'Brien's conviction).

[178] *Johnson*, 491 U.S. 397; *O'Brien*, 391 U.S. 367.

Justice.[179] Even more startling was the fact that over two-thirds could not even identify the number of Justices that sit on the Supreme Court, even when given an option of "5," "7," "9," "11," or "I don't know."[180] If Americans are generally unaware of the Justices of the Supreme Court, it seems safe to say that they are not faithfully checking the Supreme Court website and anxiously waiting for the next slip opinion to be posted. This says nothing about the multitude of lower appellate courts decisions, both federal and state. If a federal court of appeals panel sitting in Denver, Colorado, strikes down an Oklahoma state law under the overbreadth doctrine, is it reasonable to assume that a citizen of Lawton, Oklahoma, will be aware of the opinion, much less understand the implications on his or her free speech rights?

My instinct is that the answer to that question will very often be *no*. The courts' assumption that citizens trace the constitutionality of statutes as they make their way through the appellate courts seems fantastical and a bit presumptuous. It is true that certain cases involve activists groups, such as the ACLU or pro-life groups, that follow the appellate disposition of state and federal statutes. However, it is more and more common for those groups to be a part of the lawsuit in which the statute in question is considered.[181] Thus, because these groups are parties to the lawsuit, they are not the type of unrepresented speaker whose speech the overbreadth doctrine is supposed to prevent from being chilled.[182]

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[179] *See* Information Clearing House, *Shocking Poll: Majority of Americans Cannot Name a Single Department in the President's Cabinet* (Nov. 4, 2003), http://www.informationclearinghouse.info/article5158.htm.

[180] *See id.*

[181] *See, e.g.*, Tennessee v. Lane, 541 U.S. 509 (2004); Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002); Reno v. ACLU, 521 U.S. 844 (1997).

[182] Other commentators have found this assumption hard to believe:

> How many people likely to be involved in this class of cases read the statutes and ordinances closely enough to be deterred from constitutionally protected speech by an over-broad law, and then follow the law reports with such care as to be reassured by a Supreme Court decision declaring the law unconstitutional on its face unless and until it is saved by a narrowing construction by the State's highest tribunal? And how many check for narrowing State court interpretations?

ARCHIBALD COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 45 (1976). Cox raises the interesting point that citizens should also be leery of relying on a federal appellate court decision striking down a state statute as overbroad because state courts can "rescue" an overbroad statute by construing it narrowly. In most cases, one would think that a narrowing state interpretation of the statute would eliminate the speaker's constitutionally protected speech that was prohibited and chilled by the original statute. Thus, the speaker would not have to worry about subsequent narrowing interpretations of

The final assumption required for the overbreadth doctrine is that a citizen, aware of a court decision striking down a statute pursuant to the overbreadth doctrine, will now engage in the constitutionally protected speech previously refrained from. Keeping in mind that this is a citizen, who was initially aware of the statute in question, refrained from speaking because of the statute and has followed the resolution of the statute through the appellate court disposition. It seems reasonable to assume that this conscious citizen will now engage in the protected speech.

There are factors that might cause the speaker to pause. Initially, there is no guarantee that the citizen will not be arrested for the speech. Although this hypothetical citizen has closely tracked the litigation of the statute and carefully read the appellate court's opinion striking down the law, there is no guarantee that local law officials responsible for implementing the law, which can still be found on the state books or in the state penal code,[183] will be as informed. Of course, the speaker is protected from an ultimate conviction, but any speaker engaging in constitutionally protected speech will always be protected from conviction even if the statute is not struck down using the overbreadth doctrine. The overbreadth doctrine is concerned only with the chilling of constitutionally protected speech, speech that could not be the basis of a conviction, regardless of whether the court had or had not previously declared the statute unconstitutional pursuant to the overbreadth doctrine. Thus, to the extent that speakers still fear arrest for their speech even after a court has struck down an overbroad statute, the application of the overbreadth doctrine has accomplished nothing in terms of preventing the chilling of speech, except perhaps to remove an ambiguity regarding the fate of the speaker in the courts following an arrest.

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the statute because those interpretations would presumably eliminate constitutionally protected speech from the parameters of the statute. However, it is possible to formulate a state court interpretation of a statute, declared overbroad by a federal court, that eliminates enough unconstitutional applications of the statute to avoid substantial overbreadth but nevertheless is applicable to some constitutionally protected speech. In that scenario, the speaker would theoretically still be "chilled" because his or her speech, while protected, is still illegal under the most recent interpretation of the statute given by a state court. If anything, the above digression exemplifies how improbable it is that normal citizens, untrained in the law, will engage in conduct that violates a state statute because some appellate court has declared the statute overbroad.

[183] *See id*. at 45 ("Of course, the declaration [that a statute is unconstitutional pursuant to the overbreadth doctrine] does not take the statute off the books.").

A good illustration of this scenario is presented in *City of Houston v. Hill*.[184] In *Hill*, the Supreme Court considered an overbreadth attack on a Houston ordinance making it unlawful to interrupt a police officer in his or her official duties.[185] The Court concluded that the ordinance was substantially overbroad and struck it down.[186] It is doubtful that this decision eliminated the chilling of constitutional speech in this arena. First, as was discussed above, someone who is as emotionally charged as the defendant in *Lewis* is likely to verbally assault the police regardless of their knowledge of a law prohibiting such conduct. The converse is also true. Anyone who prefers not to be arrested will probably refrain from verbally assaulting a policeman, regardless of whether the speaker knows that the statute prohibiting such language has been struck down as overbroad by some court and that the statute will not support an ultimate conviction. In these situations, the chilling comes not from the threat of conviction but from the threat of arrest, and the overbreadth doctrine will not prevent chilling.

Upon close inspection, it seems unlikely that the overbreadth doctrine actually prevents the chilling of constitutionally protected speech, except in rare cases. The answer is ultimately empirical and, unfortunately, not easily measurable. Because the doctrine is a dramatic departure from "the traditional rules governing constitutional adjudication,"[187] it would seem that the burden is on the proponent of the application of the doctrine. The considerable weaknesses exposed in this section advise that the chilling theory is not a valid justification for the overbreadth doctrine.

B. Encouraging the Legislature to Carefully Draft Laws

Although the "chilling" rationale is the most common justification of the overbreadth doctrine, there is another argument in favor of the doctrine. According to this argument, the overbreadth doctrine serves the valuable purpose of requiring legislators to consider First Amendment issues when drafting legislation. Further, because courts have the ability to strike down statutes that are "substantially overbroad," the legislative body will be more cognizant of First Amendment rights and will avoid making laws that can be unconstitutionally applied in certain circumstances. Justice Scalia, in a

184 482 U.S. 451 (1987).
185 *See id.* at 455.
186 *See id.* at 471–72.
187 Broadrick v. Oklahoma, 413 U.S. 601, 610 (1973).

portion of an opinion that four other Justices joined, relied on a version of this rationale in *Oakes*:

> The overbreadth doctrine serves to protect constitutionally legitimate speech not merely *ex post*, that is, after the offending statute is enacted, but also *ex ante*, that is, when the legislature is contemplating what sort of statute to enact. If the promulgation of overbroad laws affecting speech was cost free, as Justice O'Connor's new doctrine would make it—that is, if *no* conviction of constitutionally proscribable conduct would be lost, so long as the offending statute was narrowed before the final appeal—then legislatures would have significantly reduced incentive to stay within constitutional bounds in the first place.[188]

This rationale for the overbreadth doctrine relies, like the chilling rationale, on the overbreadth doctrine's effect on third parties—specifically legislatures. Like the chilling justification, the legislative-effect rationale requires numerous assumptions regarding the motivations and foundations on which legislators act.

In a general sense, active judicial review of the constitutionality of statutes undoubtedly, on occasion, causes the legislature to pause, contemplate, and restrain from enacting legislation that intrudes on the personal rights of individuals. The knowledge that the law they pass will be subject to scrutiny by the judicial branch is a good incentive for legislators to remain within constitutional bounds. However, to say that the overbreadth doctrine itself produces this restraint from the legislature might be an overstatement. As stated in Part I, the overbreadth doctrine contributes two additional tools for courts in considering the constitutionality of statutes. First, it dispenses with the normal standing requirement that litigants are only allowed to assert their own personal constitutional rights. Second, it allows a court to use the Speech Model of adjudication, empirically focusing on the way the statute will be applied in various situations. It seems doubtful that legislators are generally aware of these attributes of the overbreadth doctrine. It seems even more doubtful that they exercise additional restraint because of these attributes.

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[188] 491 U.S. 576, 586 (1989).

Of course, legislators do not necessarily have to be aware of the specific functions of the overbreadth doctrine, even of the existence of the doctrine, in order for the legislative-effect rationale to have merit. One might argue that legislators exercise greater care and precision when drafting statutes not because of a precise understanding of the attributes of the overbreadth doctrine, but because of a general awareness that courts are more frequently striking down legislation touching on free speech issues. The overbreadth doctrine has fostered a culture that is protective of speech rights, and because of this culture, legislators are generally more apprehensive to pass legislation that might intrude on the freedom of speech.

This is a plausible argument. However, it is possible to achieve a culture that is protective of free speech without the overbreadth doctrine. Indeed, I would submit that such a culture presently exists,[189] and that is has been created without the overbreadth doctrine. Most "fundamental" or "landmark" First Amendment cases have involved actual controversies in which a defendant has asserted his or her own rights. Neither *Bantam Books Inc. v. Sullivan*,[190] *Cohen v. California*,[191] *Brandenburg v. Ohio*,[192] *Texas v. Johnson*,[193] *New York Times v. United States*,[194] *Tinker v. Des Moines Independent School District*,[195] nor *Hustler Magazine v. Falwell*[196] involved the overbreadth doctrine, and these cases are considered some of the cornerstones of modern First Amendment free speech analysis. These bedrock cases have done more to create a speech-protective culture than the handful of relatively minor cases in which the Supreme Court has used the overbreadth doctrine to reach its decision. Moreover, when a difficult case involving real issues is litigated, the overbreadth doctrine often allows a court to sidestep the important constitutional question by focusing instead on an outrageous hypothetical application of the statute.[197] Thus, in some sense, the overbreadth doctrine permits

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189 *See* Floyd Abrams, *Hate Speech: The Present Implications of a Historical Dilemma*, 37 VILL. L. REV. 743, 743 (1992) ("Without doubt, American jurists afford far greater protection to free expression than exists anywhere else in the world.").

190 372 U.S. 58 (1963).

191 403 U.S. 15 (1971).

192 395 U.S. 444 (1969).

193 491 U.S. 397 (1989).

194 403 U.S. 713 (1971).

195 393 U.S. 503 (1969).

196 485 U.S. 46 (1988).

197 For example, in *Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987), the Supreme Court used the overbreadth doctrine to avoid the difficult question of whether an airport terminal is a public forum. The Court later concluded that an airport is not a

the Court to avoid difficult, real issues that could trigger landmark decisions.[198] Regardless, the litany of fundamental First Amendment cases not involving the overbreadth doctrine demonstrates that the doctrine is not absolutely necessary to create a speech-protective culture in which the legislature has incentives to avoid the most egregious First Amendment violations.

The overbreadth doctrine is not even necessary for courts to consider the constitutionality of statutes on their face. As detailed in Part I, courts have consistently considered the constitutionality of statutes on their face without the use of the overbreadth doctrine.[199] This analysis occurs through the Statutory Model of adjudication. Under the Statutory Model of adjudication, the court asks whether the legislature has pursued an appropriate goal and whether it has drafted the statute so that the means employed in the statute are adequately tied to the state interest. The analysis is familiar, but it is exclusive and independent of the overbreadth doctrine. Because courts could still review the constitutionality of statutes on their face without the overbreadth doctrine, the legislature would still have significant incentive to avoid unconstitutional litigation.

Regardless of whether the overbreadth doctrine does, in fact, encourage legislators to draft laws with the Court's interpretation of the First Amendment in mind, it is highly questionable whether courts should pursue this goal by altering the "the traditional rules governing constitutional adjudication."[200] A determination by the Supreme Court that it is to review the constitutionality of congressional statutes immediately after becoming law would, of course, provide the maximum incentive for Congress to avoid infringing the First Amendment when drafting legislation. However, Article III limits federal jurisdiction to "cases" and "controversies," which prevents the

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traditional public forum. *See* Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672 (1992).

198 In allowing a court to avoid difficult questions by hypothesizing about other fact patterns, the overbreadth doctrine puts the court in a position of making decisions based on hypothetical facts that have not occurred in the real world while ignoring the real facts that prompted the case before the court. This result is odd and is certainly no way to determine the constitutionality of statutes.

199 *See, e.g.*, Watchtower Bible & Tract Soc'y v. Stratton, 536 U.S. 150 (2002); Brandenburg v. Ohio, 395 U.S. 444 (1969).

200 Massachusetts v. Oakes, 491 U.S. 576, 587 (1989) (Scalia, J., portion of concurring opinion in which four other Justices join) ("[I]t seems to me that we are only free to pursue policy objectives through the modes of action traditionally followed by the courts and by the law."); Broadrick v. Oklahoma, 413 U.S. 601, 610 (1973).

Court from assuming this active role.[201] Although the requirement that a litigant only assert his or her own constitutional rights is not constitutionally-mandated by the "case" or "controversy" requirement of Article III,[202] there are important objectives achieved by this standing requirement:

> Th[is] principle[] rest[s] on more than the fussiness of judges. [It] reflect[s] the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws. . . . Constitutional judgments, as Mr. Chief Justice Marshall recognized, are justified only out of the necessity of adjudicating rights in particular cases between the litigants brought before the Court.[203]

It seems impossible that the overbreadth doctrine could trump these constitutional "convictions" merely to encourage the legislature to refrain from legislation that might be unconstitutional in some circumstances.[204] As the Court stated in *Broadrick*, the function of the judiciary is to decide cases and controversies. The judiciary's role is not to pursue policy objectives, but the overbreadth doctrine seems to confuse the two. Of course, it is consistent with the role of Article III courts to decide cases and controversies consistent with, and in furtherance of, the values expressed by the Bill of Rights. Yet, when the judiciary starts testing the bounds of its constitutional limitations in the name of teaching the legislature a lesson, the judiciary seems to forget its adjudicatory function and views itself as policymaker.[205]

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[201] *See* United States v. Raines, 362 U.S. 17 (1960) ("This Court, as is the case with all federal courts, 'has no jurisdiction to pronounce any statute, either of a state or of the United States, void, because irreconcilable with the constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies.'" (quoting Liverpool v. Comm'rs of Emigration, 113 U.S. 33, 39 (1885))).

[202] U.S. CONST. art. III, § 2, cl. 1.

[203] *Broadrick*, 413 U.S. at 610–11.

[204] *See id*.

[205] Justice Rehnquist's dissent in *Texas v. Johnson* is relevant:

> The Court concludes its opinion with a regrettably patronizing civics lecture, presumably addressed to the Members of both Houses of Congress, the members of the 48 state legislatures that enacted prohibitions against flag burning, and the troops fighting under that flag in Vietnam who objected to its being burned: "The way to preserve the flag's special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong." The Court's role as the final expositor of the Constitution is

To summarize, the rationale that the overbreadth doctrine encourages legislators to draft with care is not particularly strong. It is highly unlikely that the particular attributes of the overbreadth doctrine actually cause legislators to be more cognizant of free speech issues. Although a general culture that promotes free speech would have a restraining effect on legislators, this culture is possible without the overbreadth doctrine. Finally, even assuming that the overbreadth doctrine does encourage legislators to consider the First Amendment, the judiciary should be very hesitant to pursue such policy goals when the means employed stretch constitutional dictates.

III. THE OVERBREADTH DOCTRINE'S EFFECT ON THE ROLE OF COURTS

Thus far, this Article has identified what the overbreadth doctrine is and whether it advances the goals that the doctrine is said to promote. My conclusion is that the overbreadth doctrine, at best, marginally achieves its goals. Now, the analysis will turn to the other side of the equation: What are the negative consequences of the doctrine?

The primary negative consequence of the overbreadth doctrine is that it has altered, or at least contributed to altering, the contemporary understanding of the role of the judiciary. More and more, courts are perceived as a place where the constitutionality of statutes are decided, rather than a place where cases and controversies are adjudicated. This shift in the perception of the judicial role, although probably indecipherable to those not intimately familiar with the American judicial system, has real-world results. As a result of this muddling of the conventional understanding of the judicial function, the Supreme Court has been unable to conclusively resolve recent issues regarding the use of facial challenges. The resolution of these issues requires a clear understanding of the judicial function. Because the overbreadth doctrine, particularly the part of the overbreadth doctrine that relaxes traditional standing requirements regarding who can bring a facial challenge to a statute, has contributed to contemporary confusion over the role of the judiciary, the Supreme Court has been unable to conclusively resolve these debates, leaving lower federal courts to guess at the appropriate solution.

> well established, but its role as a Platonic guardian admonishing those responsible to public opinion as if they were truant school-children has no similar place in our system of government.

491 U.S. 397, 434–35 (1989) (Rehnquist, C.J., dissenting) (citation omitted).

This Part begins by examining two current questions facing the Supreme Court regarding the use of facial challenges.[206] I propose that the Court has struggled with facial challenges because it lacks a clear identification of its function or role. Having explored the symptoms of the problem, I turn to the source of the problem: the overbreadth doctrine. Using the contemporary writings of Professor Matthew Adler as an example, I explain how the overbreadth doctrine has improperly altered the conventional understanding of the judicial function, leading to the current confusion in the Court's jurisprudence.

A. The Contemporary Confusion Over When To Consider the Constitutionality of a Statute on Its Face, and What the Standard should Be for a Facial Challenge to Succeed

Much attention has been given recently to the questions of when a court should consider the constitutionality of a statute on its face and, when it does so, what standard the court should apply.[207] Earlier, this Article examined the two analyses a court can use when considering a facial challenge. A court can consider a facial challenge to a statute by using the Statutory Model of adjudication, or a court can use the Speech Model of analysis to dispose of a facial challenge to a statute pursuant to the overbreadth doctrine. However, this descriptive account adds nothing to the normative question of when a court should consider a facial challenge. It is imperative to have some understanding of the current debate regarding facial challenges to comprehend the negative effects of the overbreadth doctrine.

1. When Should the Court Consider a Facial Challenge?

The Supreme Court's recent decision in *Tennessee v. Lane*[208] is a prime example of the confusion and disagreement over when to consider the constitutionality of a statute on its face. In *Lane*, the Court considered whether Title II of the Americans with Disabilities Act[209] ("ADA")

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206 By doing so, I will briefly leave the First Amendment arena.

207 *See* Fallon, *supra* note 6, at 1321 ("Both within the Supreme Court and among scholarly communities, a debate rages over when litigants should be able to challenge statues as 'facially' invalid, rather than merely invalid 'as-applied.'"); Isserles, *supra* note 6, at 362 ("Although both the Supreme Court and the lower federal courts repeatedly have applied [the] *Salerno* [standard] in adjudicating facial challenges, some Justices and commentators recently have called *Salerno*'s facial challenge standard into question, criticizing it an unnecessary dictum, lacking in precedential authority, and draconian in effect." (footnote omitted)).

208 541 U.S. 509 (2004).

209 42 U.S.C. §§ 12131–65 (2004).

"exceeds Congress' power"[210] to enforce the Fourteenth Amendment. Title II of the ADA generally requires that States make reasonable accommodations for the disabled in all public services.[211] Most lower courts that had previously confronted the question concluded that Title II, on its face, was not a congruent and proportional response to unconstitutional discrimination against the disabled, and it was thus outside Congress's power under Section Five of the Fourteenth Amendment to enforce the substantive guarantees contained in that Amendment.[212] These lower courts reasoned that, although in certain contexts Title II could be viewed as a legitimate enforcement of Fourteenth Amendment constitutional rights, in the large majority of contexts in which Title II applied, the statute required much more than what was constitutionally required.[213] The lower courts thus concluded that Title II was beyond the scope of Congress to enforce the Fourteenth Amendment.[214]

However, the Supreme Court took a different approach in considering the constitutionality of Title II in *Lane*.[215] Instead of considering the statute on its face by looking at all of the potential applications of the statute and all of the constitutional provisions the statute might be enforcing, the Court focused narrowly on the specific constitutional right the litigants claimed and asked whether Title II was a proper enforcement of that particular constitutional right.[216] Viewed in

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210 541 U.S. at 513.

211 *See* 42 U.S.C. § 12131(2) (2004).

212 *See* Timothy Cahill & Betsy Malloy, *Overcoming the Obstacles of* Garrett: *An "As-Applied" Saving Construction for the ADA's Title II*, 39 WAKE FOREST L. REV. 133, 154–56 (2004) (chronicling the appellate court decisions).

213 *See, e.g.*, Thompson v. Colorado, 278 F.3d 1020, 1034 (10th Cir. 2001) ("Title II's accommodation requirement appears to be an attempt to prescribe a new federal standard for the treatment of the disabled rather than an attempt to combat unconstitutional discrimination.").

214 Cahill & Malloy, *supra* note 212, at 154–56.

215 Although the Court framed the issue in *Lane* as whether Congress had the power to enact Title II, a compelling argument can be made that the issue in *Garrett*, based on the motions and pleadings before the Court and the lower court's judgment, was whether Title II is a valid abrogation of Eleventh Amendment immunity. *See* Tennessee v. Lane, 541 U.S. 509, 513 (2004). The Court's decision in *Garrett* to exclude, in an abrogation analysis, evidence of constitutional violations by cities and municipalities when those entities are state actors and thus part of the analysis regarding whether Congress had the power to enact the statute, as opposed to whether there has been a valid abrogation, dictates that the abrogation and Congressional power analyses are slightly different. *See Thompson*, 278 F.3d at 1032 n.7 (explaining how these analyses differ).

216 The analysis used was still an overbreadth-type analysis. However, the Court simply limited the number of statutory applications it would consider in conducting the "congruence" or "substantially overbroad" analysis.

this isolated context, the Court concluded that Title II was valid legislation, at least regarding the constitutional right at issue in that case. Justice Rehnquist, in a dissent joined by Justices Kennedy and Thomas, harshly criticized this "as-applied" approach. According to the dissenters, the proper analysis required the Court to measure "the full breadth of the statute or relevant provision that Congress enacted against the scope of the constitutional right it purported to enforce."[217]

The Court's approach in *Lane* contrasts with the Court's opinion, during the same term, in *Ashcroft v. ACLU*.[218] In *Ashcroft*, the Court considered the constitutionality[219] of the Child Online Protection Act[220] ("COPA"), which was Congress's latest attempt to protect minors from sexually explicit material found on the World Wide Web.[221] In sharp contrast to the Court's focused analysis in *Lane,* the Court analyzed the statute as a whole. The Court paid little attention to the specific facts of the case, briefly describing the plaintiffs, who were arguing against the constitutionality of COPA, as "Internet content providers and others concerned with protecting the freedom of speech."[222] It is clear from reading the Court's opinion in *Ashcroft* that the particular speech expressed by the plaintiffs over the Internet was inconsequential to the Court's analysis. The Court ultimately concluded that COPA was unconstitutional because COPA was not the least restrictive means available to Congress to achieve its compelling interest in protecting minors from sexually explicit materials.[223]

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217 *Lane,* 541 U.S. at 551–52.

218 124 S. Ct. 2783 (2004).

219 Actually, the issue before the Court was whether the statute "likely violated" the First Amendment. The case was appealed to the Court from the grant of a preliminary injunction against enforcement of COPA. *See id.* at 2790–91.

220 47 U.S.C. § 231 (2004).

221 *See Aschcroft*, 124 S. Ct. at 2790–91.

222 *Id.* at 2790.

223 *See id.* at 2792–95. Despite the sweeping breadth and effect of the *Ashcroft* decision, it is important to note that the opinion did not rely on the overbreadth doctrine in reaching its decision. The Court used the Statutory Model of adjudication to conclude that there were less restrictive means available to Congress to achieve its goal of protecting children from inappropriate Internet material. *See id.* at 2792–93. The Court did not engage in the Speech Model of adjudication, which would be applied in the overbreadth analysis, by asking how often the statute would be applied unconstitutionally compared to the number of times the statute would be applied constitutionally. Nor was it necessary to invoke the overbreadth doctrine because the litigants' personal constitutional rights were at stake. The litigants in *Ashcroft* were "a diverse group of organizations . . . which post or have members that post sexually oriented material on the Web." Ashcroft v. ACLU, 535 U.S. 564, 571 (2002). As such, the litigants had satisfied the personal standing requirement for injunction cases because they had a reasonable fear of prosecution under the statute. *See id.*

Lane and *Ashcroft* demonstrate that the question of when to analyze a statute on its face is not merely an academic question. In *Lane*, the Court narrowly viewed the legal issue as whether Congress was acting within its power to enforce the Fourteenth Amendment, and it upheld Title II of the ADA under those particular circumstances. Had the Court focused, as Justice Rehnquist suggested in his dissent, on the "full breadth of the statute,"[224] it seems highly likely that the Court would have concluded that Title II exceeded Congress' power, given that every appellate court that framed the issue broadly had struck down Title II. In *Ashcroft*, the Court focused its analysis on the face of the COPA statute in concluding that the statute was unconstitutional; no consideration was given to whether the plaintiffs' Internet speech constituted a violation of the statute or whether the plaintiff's speech was actually protected under the First Amendment. The outcomes of these two cases and, perhaps more importantly, the Congressional statutes involved, relied upon the Court's willingness to consider a facial challenge to the statute.[225]

2. What Is the Proper Standard When a Facial Challenge Is Considered?

In addition to the confusion over when to apply a facial challenge, the Supreme Court also appears conflicted over what standard to apply

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at 571. In fact, in an earlier opinion, the Court rejected an overbreadth attack on COPA. *See id.* at 584–85.

[224] Tennessee v. Lane, 541 U.S. 509, 552 (2004) (Rehnquist, C.J., dissenting).

[225] A compelling argument can be made that the Court was wrong in both cases and should have considered the constitutionality of Title II on its face while considering COPA only as-applied. In *Lane*, the issue was congressional power to enact a statute or to abrogate through a statute. When considering the constitutionality of an act of Congress, the Court should consider the statute as written. It defies logic to conclude that Congress had the power to enact a statute as applied to certain circumstances but did not have the power under different circumstances. The Court can consider the various circumstances under which a statute might apply when determining whether Congress had the power to enact the statute, but the Court's conclusion on the constitutionality of the statute should be an up-or-down, broad, facial determination. To adjudicate otherwise rewrites the statute and gives Congress the incentive to enact broad statutes, knowing that the Court's jurisprudence will require the courts to adjudicate the circumstances under which Congress can act. *See Lane*, 541 U.S. at 552.

However, in *Ashcroft*, the issue was whether First Amendment rights had been or would be violated. As the Court has repeatedly said, First Amendment rights are personal. There was no attack to Congress's power to pass COPA. The Court should show deference to Congress when Congress is acting within its powers, and it should only consider as-applied challenges to validly enacted legislation. As such, the Court will be able to vindicate personal rights in a concrete setting as cases arise without unnecessarily infringing upon Congress's power to enact legislation.

when considering a facial challenge.[226] In *United States v. Salerno*,[227] the Supreme Court purported to establish or confirm the standard courts should use when considering a facial challenge to a statute: "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."[228] Under this formulation, as long as there is one set of circumstances in which the statute could be applied constitutionally, the statute is not unconstitutional on its face.

There has been much disagreement regarding whether *Salerno* properly articulates, both descriptively and normatively, the standard to be applied when considering a facial challenge to a statute. Justice Stevens has written that the *Salerno* standard is an inaccurate description of the standard for facial challenges to statutes, that the standard was dicta in the *Salerno* case, and that it should be ignored by lower courts.[229] In contrast, Justice Scalia has stated that the *Salerno* standard is a "long established principle"[230] that has been ignored, improperly and without discussion, by the Supreme Court in recent abortion cases.[231]

Not surprisingly, commentators are as divided as the Court. Some commentators have argued that the *Salerno* standard is not a correct descriptive claim of how the Supreme Court has traditionally analyzed facial challenges, which includes the facial challenge actually considered in the *Salerno* opinion. Moreover, commentators have stated that the *Salerno* standard is a draconian test that effectively prevents successful facial challenges.[232] Others have convincingly countered that the *Salerno* standard is the correct standard to be applied when considering *most* facial challenges.[233] Nevertheless, it is apparent that confusion currently exists regarding the proper standard for a court to apply when a statute is challenged on its face.

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[226] One commentator has stated: "[I]t is tempting to say that the Justices of the Supreme Court are not only divided, but also conflicted or even confused, about when statutes should be subject to facial invalidation." Fallon, *supra* note 6, at 1323.

[227] 481 U.S. 739 (1987).

[228] *See id.* at 745.

[229] *See generally* Janklow v. Planned Parenthood, 517 U.S. 1174, 1175–76 (1996).

[230] *Id.* at 1178 (Scalia, J., dissenting).

[231] *See id.* at 1178–80.

[232] *See* Dorf, *supra* note 7, at 239.

[233] *See generally* Stuart Buck, Salerno vs. Chevron*: What to Do About Statutory Challenges*, 55 ADMIN. L. REV. 427, 443–48 (2003) (explaining that *Salerno* is the appropriate standard for most facial challenges); Isserles, *supra* note 6, at 359–405 (also explaining that *Salerno* is the appropriate standard for most facial challenges).

B. The Function of Courts in American Democracy

The confusion over when to consider a facial challenge and what standard to apply are symptoms of the lack of a clear understanding regarding the role of American courts. If courts were merely bodies in which actual disputes are to be resolved, then it would seem that statutes need only be struck down on their face if the statute could not be applied in the case before the court and the statutory defect prevented *any* constitutional application.[234] However, if the proper role of courts is to act as a constitutional evaluator of the actions of the executive and legislative branches, then a more robust and expansive review of statutes seems appropriate. Of course, a court performs both functions in many instances, but the current questions involving facial challenges require a definitive choice and an established hierarchy.

The Constitution strongly suggests that the role of courts is to decide actual cases, and the judicial power in Article III extends to "cases" and "controversies." At the constitutional convention, the framers considered the creation of reviewing courts and agencies that would have ruled on the constitutionality of statutes without regard to whether there was an actual dispute involving the law, but these proposals were ultimately rejected in favor of the "case" and "controversy" language now found in Article III.[235] The Court has extracted various justiciability requirements, such as standing, ripeness, and mootness, from the "case" and "controversy" limitations. These justiciability requirements presuppose "that a federal judge's primary function is to resolve disputes, not to declare the law."[236]

That the resolution of disputes might sometimes require a declaration on the constitutionality of a law does not change the fact that the primary function of the judiciary is to resolve disputes. As the Court itself has stated, "[t]he power and duty of the judiciary to declare laws unconstitutional is . . . derived from its responsibility for resolving

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[234] Under this view, statutes would never technically be struck down facially. Rather, they would simply be struck down in the case before the court. However, a court's analysis in reaching the results in an individual case might mean that future courts would be bound by the analysis of the previous opinion striking down the statute.

[235] *See generally* James Leonard & Joanne C. Brant, *The Half-Open Door: Article III, the Injury-In-Fact Rule, and the Framers' Plan for Federal Courts of Limited Jurisdiction*, 54 RUTGERS L. REV. 1, 57–63 (2001).

[236] Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 447–48 (1994).

concrete disputes. . . ."[237] Thus, although courts are often called upon to decide on the constitutionality of statutes, which is indeed one of the most important functions of courts, judicial review is merely one of the components of the courts' larger responsibility to resolve actual cases and controversies.

The accepted and established approach, as announced by the Supreme Court, is that the ultimate function of courts is to resolve disputes.[238] However, a competing theory exists. This competing theory is that the primary function of courts is to declare law and repeal or amend invalid statutes. This theory is best articulated in the work of Professor Matthew D. Adler. Under Adler's theory, the "function of a reviewing court is to invalidate (that is, to repeal or amend) rules that are invalid."[239] A closer look at Adler's work clearly illustrates how the overbreadth doctrine has contributed to uncertainty over the proper judicial function.

Adler arrives at his conclusion that the function of courts is to invalidate rules by first articulating what he terms the "Basic Structure" of constitutional rights:

> I will call this structure the "Basic Structure." *Constitutional rights are rights against rules*. A constitutional right protects the rights-holder from a particular rule (a rule with the wrong predicate or history); it does not protect a particular action of hers from all the rules under which the action falls. This is, I

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[237] *See* Younger v. Harris, 401 U.S. 37, 52 (1971); *see also* Massachusetts v. Mellon, 262 U.S. 447, 488 (1923). The court stated:

> The functions of government under our system are apportioned. To the legislative department has been committed the duty of making laws, to the executive the duty of executing them, and to the judiciary the duty of interpreting and applying them in cases properly brought before the courts. We have no power per se to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy.

Mellon, 262 U.S. at 488.

[238] *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1285 (1976) (stating that the "traditional conception of adjudication . . . was the resolution of disputes").

[239] Matthew D. Adler, *Rights, Rules, and the Structure of Constitutional Adjudication: A Response to Professor Fallon*, 113 HARV. L. REV. 1371, 1378 (2000).

> should emphasize, a *descriptive* claim. My claim is that the following description of the current constitutional case law, as set forth by the U.S. Supreme Court and followed by the lower federal courts, is true: constitutional rights are rights against rules. The Basic Structure is *our* official structure, as constitutional doctrine now stands.[240]

To illustrate his descriptive claim about the nature of constitutional rights, Adler uses the flag-desecration case of *Texas v. Johnson*.[241] Johnson had been prosecuted for burning an American flag during a political demonstration, which violated a Texas statute prohibiting the desecration of an American flag.[242] The Court overturned the conviction, but it implied that if Johnson had been prosecuted for trespass, disorderly conduct, or arson, the First Amendment would not have prevented conviction and punishment.[243] For Adler, the *Johnson* opinion illustrates that constitutional rights are not "shields" that "protect a particular action of hers from all the rules under which the action falls."[244] Rather, constitutional rights are simply rights against certain types of rules. If prosecution of an individual is done under an invalid rule, the law must be struck down.[245]

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240 Adler, *supra* note 15, at 3, 8.

241 491 U.S. 397 (1989).

242 *See id.* at 399.

243 *See id*. at 400.

244 Adler, *supra* note 15, at 3.

245 Adler has later admitted that his Basic Structure—that constitutional rights are rights against certain types of rules—is not universally true. *See* Adler, *supra* note 239, at 1375 ("Some kinds of constitutional challenges, even under the Bill of Rights, do not entail the existence of a particular type of rule."). Adler uses the example of a government official torturing an individual. The torture clearly violates the individual's constitutional rights even though no statute or regulation is involved. Thus, Adler concedes, not all constitutional rights can be characterized as rights against rules because in some cases there might not be a statute under which the state action occurred. *See id.* This would seem to be a major discredit to Adler's Basic Structure, but Adler apparently does not conceive it as such, stating that his Basic Structure was focused on "substantive challenges to conduct-regulating rules." *Id.*

Even given Adler's limitation on what he claims to be his focus, which seems illogical considering the wide-ranging conclusions he derives at in his Basic Structure and Derivative Account, Adler's Basic Structure is not universally true. Consider *Hustler Magazine v. Falwell*, for an example. Jerry Falwell brought suit against *Hustler Magazine* for a parody in *Hustler* belittling and humiliating Falwell. 485 U.S. 46, 48 (1988). The Supreme Court considered whether Falwell's jury verdict against *Hustler* under Virginia law for intentional infliction of emotional distress was consistent with the First Amendment. A fair reading of the Court's opinion illustrates that *Hustler*'s parody, which the Supreme Court analogized to the ubiquitous political parodies throughout American history, was

After explaining his "Basic Structure" of constitutional rights, Adler sets forth his "Derivative Account" of constitutional adjudication, in which the function of a court is to "invalidate (that is, to repeal or amend) rules that are invalid."[246] Adler compares his Derivative Account with what he terms the "Direct Account," which is basically the view that courts simply resolve disputes and overturn unconstitutional convictions.[247] Adler acknowledges that the Direct Account is the "official view"[248] that the "Court officially espouses."[249] However, Adler argues in favor of his Derivative Account because it is "morally" superior to the Direct Account.

Regardless of which account of constitutional adjudication is "morally" superior, Adler does concede that his theory regarding the role of courts must be consistent with Article III of the Constitution, and that there exists an argument that his view of the judicial function is inconsistent with Article III. Adler labels these arguments "institutional objections." In the final section of his article, *Rights Against Rules: The Moral Structure of American Constitutional Law*,[250] Adler attempts to respond to the argument that Article III of the Constitution prevents a

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constitutionally protected expression, regardless of the statute or rule regulating the speech. To use Adler's terminology, *Hustler* enjoyed a constitutional "shield" to publish ad parodies of public figures.

Adler might respond by questioning whether *Hustler*'s "shield" would protect them from "publishing" the same parody on the wall of a public building such as the Lincoln Memorial. Such an action would clearly violate prohibitions against vandalism and would not be protected by the First Amendment. However, this example demonstrates that at some level the problem becomes definitional or semantical. Adler might respond that the vandalism conviction, which would surely be upheld by a court, demonstrates that *Hustler* does not have an unfettered constitutional shield to "publish its parody." However, by shifting the semantic focus, one could say that *Hustler* had a constitutional right to publish the ad in its own magazine, but that it did not have the right to spray-paint the ad on the Lincoln Memorial. This sort of analysis shifts the focus to the actual speech involved rather than the statute in question. In fact, this analysis represents the Speech Model of adjudication rather than the Statutory Model of adjudication. Thus, Adler's descriptive claim regarding the Basic Structure—that all constitutional rights are rights against rules—is simply a claim that the Court exclusively uses the Statutory Model of adjudication. Although it is true that the Court often uses the Statutory Model, the Speech Model is often used, as Part I discussed.

246 Adler, *supra* note 239, at 1378. Adler is making a claim about the function of courts only in constitutional cases. It is important to remember this limitation on Adler's theory, particularly when one considers that a great number of cases in federal courts do not involve a constitutional challenge to a statute or regulation.

247 *See* Adler, *supra* note 15, at 39–40.

248 *Id.* at 39.

249 *Id.*

250 Adler, *supra* note 15, at 91.

theory that the primary function of courts is to repeal or amend invalid rules.

Adler presents three discernable arguments in support of his Derivative Account against the institutional objections. The first argument is based on Owen Fiss's theory that the "'function of a judge is to give concrete meaning and application to our constitutional values'"[251] rather than resolve disputes. This "custodial" view of adjudication is warranted because common law courts at the time of the framing of the Constitution were commonly involved in proceedings far afield from typical dispute adjudication:

> The late eighteenth century was the heyday for the common law, and . . . the function of courts under the common law was paradigmatically not dispute resolution, but to give meaning to *public values* through the enforcement and creation of public norms, such as those embodied in the criminal law and the rules regarding property, contracts, and torts.[252]

Thus, according to Adler, to determine the proper bounds of the power of federal courts under Article III, we should look to the function of state common law courts at the time of the adoption of the Constitution. There are numerous problems with this argument. For purposes of this Article, it is sufficient to state that it is illegitimate to compare state common law courts, which were most often called upon to determine questions of personal liability in the absence of controlling statutory or constitutional textual guidance, to modern federal courts, particularly when the modern case is one involving the claim that a specific statute violates a specific provision of the Constitution.

Adler's second argument is that his account of the judicial function should be accepted because it better implements the values found in the Bill of Rights.[253] Article III, according to Adler, should not be interpreted in a way that "compromises" the norms expressed in the Bill of Rights.[254] The argument is nearly, if not completely, circular. Responding to criticism that his theory of the function of courts violates the role for courts established in Article III, Adler responds that his theory of adjudication will better implement constitutional norms. However, that

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251 *Id.* at 140.
252 *Id.* at 140.
253 *See id.* at 139–40.
254 *Id.* at 141.

is not the question raised by his adjudicatory theory. There is little doubt that the Bill of Rights will be better protected if a court declares any statute unconstitutional on its face if it might be applied in a manner that violates the constitutional rights. Rather, the question is whether Adler's theory is consistent with Article III. That his theory better implements the Bill of Rights does not answer the critique that his model is outside the confines of Article III. Adler's argument proves too much. If his argument were true, a constitutional review court, such as the one established in Germany or considered and rejected by the founders during the constitutional convention,[255] would be constitutional because it better implements the norms found in the Bill of Rights.

Adler's final argument is that his adjudicatory model must be consistent with Article III because the First Amendment overbreadth doctrine exists. Because the overbreadth doctrine allows courts to strike down statutes even though the litigant before the court has not been deprived of his or her constitutional rights, it cannot be inconsistent with Article III for the judicial function to be defined as amending or repealing statutes:

> To be sure, [the overbreadth] doctrine is seen as an "exception" to the normal type of constitutional right—the overbreadth litigant is seen to rely, exceptionally, upon the moral claims of other persons covered by the statute she challenges, rather than upon her own moral claims—but my point here is that this purported exception must nonetheless be consistent with Article III. Exceptional or not, the overbreadth doctrine conceived the litigant as holding a legal power to secure the invalidation of the rule under which she falls, despite the absence of moral reason to protect her.[256]

Adler's last argument is sound: The overbreadth doctrine, at least the relaxed standing component of the overbreadth doctrine, *does* support his conclusion that the Derivative Account is consistent with Article III. However, it is the only argument that Adler advances that adequately justifies his judicial function. There exists an abundance of evidence against Adler's position, including the Supreme Court's direct statement that "[t]he power and duty of the judiciary to declare laws unconstitutional is . . . derived from its responsibility for resolving

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255 *See* Leonard & Brant, *supra* note 235, at 57–63.

256 Adler, *supra* note 15, at 142.

concrete [legal] disputes. . . ."[257] Therefore, to assert its validity under Article III, Adler's revolutionary claim about the judicial function rests entirely on the overbreadth doctrine. Adler admits that the overbreadth doctrine is an exception to normal constitutional adjudication. The question becomes, then, whether the exception proves the rule.

Ultimately, I believe it does not. However, as I stated at the outset of this Article, my goal is not to claim that the overbreadth doctrine is unconstitutional. Although I believe that this argument would be compelling if the Court were contemplating whether to adopt the overbreadth doctrine, such a debate is unwarranted because the doctrine has existed for over fifty years.

My main goal is to urge abandonment of the doctrine. Along these lines, it is relevant that the overbreadth doctrine allows claims, such as Adler's regarding the proper judicial function, to be advanced despite their inconsistency with the overwhelming amount of evidence to the contrary. Arguments such as Adler's confuse the contemporary understanding of the judicial function.

Additionally, it appears that the overbreadth doctrine is beginning to spread to other areas of constitutional law beyond the First Amendment. In *Planned Parenthood v. Casey*,[258] the Court held that a statute regulating abortion is unconstitutional if "in a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion."[259] Based on this language, commentators have declared that the overbreadth doctrine now applies to abortion cases.[260] Indeed, the *Casey* test, with its emphasis on the ratio of applications in which the law is a "substantial obstacle to a women's choice to undergo an abortion," appears conceptually similar to the requirement under the overbreadth doctrine that a law be "substantially" overbroad, meaning that there is an impermissible ratio of unconstitutional applications of the statute compared to constitutional applications of the statute. The academic literature has generally applauded the extension of the overbreadth doctrine into the abortion

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257 *Id.*

258 505 U.S. 833 (1992).

259 *Id.* at 895.

260 John F. Decker, *Overbreadth Outside the First Amendment*, 34 N.M. L. REV. 53, 92 (2004) (stating that the *Casey* Court extended the overbreadth doctrine into the abortion context); Kevin Martin, Note, *Stranger in a Strange Land: The Use of Overbreadth in Abortion Jurisprudence*, 99 COLUM. L. REV. 173, 173 (1999) (also stating that the *Casey* Court extended the overbreadth doctrine into the abortion context).

context[261] and even urged its use in still other areas of constitutional law.[262] The doctrine's extension to other constitutional areas will only exaggerate the confusion that the overbreadth doctrine generates.

There are direct consequences of this confusion. The Supreme Court's inability to deal with current issues regarding when facial challenges should be applied and what standard to apply when considering a facial challenge can be traced to the contemporary confusion about the judicial function. The overbreadth doctrine is partly responsible for this confusion. The abandonment of the doctrine would be the first step to clarifying the proper function of the judiciary and ending much of the contemporary confusion regarding facial challenges.

IV. CONCLUSION

The Supreme Court should abandon its use of the overbreadth doctrine. The doctrine contributes very little to current First Amendment jurisprudence. Although the doctrine is designed to prevent the chilling of speech, it will only do so in unusual circumstances. The doctrine is unnecessary to foster a political culture that is aware and protective of free speech; this goal can be achieved without the overbreadth doctrine. In addition, the overbreadth doctrine has the negative consequence of confusing the contemporary understanding of the judicial function. As such, the overbreadth doctrine has contributed to the Court's inability to conclusively resolve persistent questions regarding facial challenges that require a clear understanding of the judicial role.

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[261] *See, e.g.*, John Christopher Ford, Note, *The* Casey *Standard for Evaluating Attacks on Abortion Statutes*, 95 MICH. L. REV. 1443, 1448 (1997) (arguing that the overbreadth analysis is proper in abortion cases); Skye Gabel, Note, Casey *"Versus"* Salerno*: Determining an Appropriate Standard for Evaluating the Facial Constitutionality of Abortion Statutes*, 19 CARDOZO L. REV. 1825, 1845–48 (1998). *But see* Martin, *supra* note 261, at 208–28 (arguing that the overbreadth doctrine should be limited to the First Amendment context).