NEW MEXICO LAW REVIEW

Volume 34
Issue 1 *Winter 2004*

Winter 2004

Overbreadth outside the First Amendment

John F. Decker

OVERBREADTH OUTSIDE THE FIRST AMENDMENT

JOHN F. DECKER*

I. INTRODUCTION

Assume a state legislature, in response to threats of a major terrorist attack in its jurisdiction, enacted the following flurry of laws designed to identify the sources of the threats and prevent any such attack from occurring. Immediately after the governor signed these enactments into law, the State Civil Liberties Union initiates, in federal court, a pre-enforcement challenge of this legislation as well as immediate injunctive relief on the theory that each of the measures violates the U.S. Constitution because it is unconstitutionally *overbroad.*[1]

Enactment A provides that it is illegal to "verbally express support for the policies, views or military adventures of any foreign government that does not fully support the policies of the United States government." The State Civil Liberty Union (SCLU) claims that Enactment A chills free speech as guaranteed by the First Amendment.[2]

Enactment B provides that any citizen of the State "or other person" who is "suspected in any manner whatsoever of engaging in activities that directly or indirectly threaten the ability of the State to prevent terrorism" within its jurisdiction shall be subjected to "warrantless, suspicionless monitoring of his or her activities and communications, including but not limited to any activities and communications in one's home...." The SCLU challenges Enactment B on its face as being blatantly overbroad in contravention of Fourth Amendment rights.[3]

Enactment C provides any citizen of the State "or other person" who is "suspected in any manner whatsoever of possessing information that is personally incriminating" or that incriminates others may be compelled to reveal such information to appropriate authorities when requested to do so. The SCLU attacks Enactment C as being a per se violation of affected citizens' rights under the Fifth Amendment[4] privilege against self-incrimination.

Enactment D provides that any citizen of the State "or other person" who has been indicted for "any offense that directly or indirectly may have threatened the security of the State" may be tried and convicted "in a forum not open to the public and without the benefit of a [traditional] jury." The SCLU further asserts that Enactment D is facially overbroad when weighed against affected citizens' Sixth Amendment rights to a public trial and trial by jury.[5]

Enactment E provides that any citizen of the State "or other person" convicted of "any offense that directly or indirectly may have threatened the security of the State

---

* Professor of Law, DePaul University College of Law. The author wishes to acknowledge the superb research assistance of Chris Kelleher, J.D., Class of 2002, as well as Amy C. Chambers, Class of 2004, and Elizabeth A. Condron, Class of 2004. The author would also like to acknowledge the thoughtful, constructive suggestions of a faculty colleague, Professor Mark Weber.

1. Overbreadth simply means a statutory enactment is in conflict with a fundamental constitutional right.

2. U.S. CONST. amend. I (challenging the language in Enactment A that prohibits a citizen from "verbally express[ing] support for the policies, views, or military adventures of any foreign government that does not fully support the policies of the United States government").

3. U.S. CONST. amend. IV.

4. U.S. CONST. amend. V.

5. U.S. CONST. amend. VI.

shall be executed by hanging." The SCLU claims that the sanction provided in Enactment E amounts to a clear violation of the Eighth Amendment prohibition against cruel and unusual punishment.[6]

At first blush, it might be assumed that each of these rather draconian measures would be struck down as unconstitutionally overbroad. Yet, if one considers the U.S. Supreme Court's view of the overbreadth doctrine, only Enactment A is a clear candidate for invalidation under this doctrine. Preposterous? Consider the following.

Broadly speaking, the "overbreadth doctrine" is a concept that courts utilize in determining if legislation intrudes upon a constitutional right.[7] However, the overbreadth doctrine originated within the context of the First Amendment, and it has, generally speaking, remained in that context.[8] Indeed, starting in 1984, the U.S. Supreme Court has even expressly denied that the overbreadth doctrine enjoys any existence outside the First Amendment.[9] Fortunately, to some extent the Court's actions speak louder than words. There are a limited number of cases in which various courts, including the Supreme Court, have explicitly used the overbreadth doctrine, or an analysis that parallels overbreadth, to strike down statutes that were infringing on fundamental rights other than the First Amendment.[10] Though these cases are scattered and few, enough exist to indicate that overbreadth may indeed have life outside the First Amendment. This article argues that, historically, overbreadth has appeared outside of the First Amendment context and, more importantly, advocates the contemporary use of the overbreadth doctrine beyond the First Amendment arena.

Part II of this article discusses the overbreadth concept generally and the distinction between overbreadth and vagueness, because many challenges to the validity of certain laws involve both a claim of vagueness and a claim of overbreadth. In addition, sometimes these concepts are confused with one another and, thus, they will be contrasted. Part III covers the Court's recognition of overbreadth within the context of the First Amendment and the Court's recent insistence that the concept has no application where a petitioner's claim is based on a constitutional protection other than the First Amendment. Part IV examines several earlier cases decided by the Court in which the Court, in fact, used the overbreadth doctrine outside of the First Amendment context. Also, it discusses a few more recent Court cases where the Court flirted with, if not relied on, overbreadth outside of the First Amendment. Part V first discusses examples of lower court usage of overbreadth before the U.S. Supreme Court claimed the doctrine has no vitality aside from First Amendment. Part V goes on to illustrate the extent of the confusion within the lower courts regarding the availability of overbreadth outside the First Amendment context as a result of the Court's proclamation that overbreadth does not exist outside of the First Amendment and the Court's inconsistent application

---

6. U.S. CONST. amend. VIII.

7. Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973) (discussing overbreadth doctrine).

8. New York v. Ferber, 458 U.S. 747, 768–69 (1982) (discussing "[w]hat has become known as the First Amendment overbreadth doctrine"). *Compare* Zwickler v. Koota, 389 U.S. 241, 250 (1967) (stating government proscriptions may not utilize "means which sweep unnecessarily broadly and thereby invade the area of '*protected freedoms*'") (quoting NAACP v. Alabama, 377 U.S. 288, 307 (1964) (emphasis added)).

9. Schall v. Martin, 467 U.S. 253, 268 n.18 (1984).

10. *See infra* notes 249–501 and accompanying text.

of the doctrine in decisions not concerning the First Amendment. Finally, Part VI posits that there is no legitimate reason to limit the use of overbreadth to the First Amendment and recommends that courts should rely on the overbreadth doctrine to protect other fundamental rights.

II. BACKGROUND

A. *The Overbreadth Doctrine Generally*

A statute is struck down for "overbreadth"[11] if it "does not aim specifically at the

---

11. Scholarly treatments of this subject almost invariably offer that it is confusing or misunderstood. *See, e.g.*, Laurence A. Alexander, *Is There an Overbreadth Doctrine?*, 22 SAN DIEGO L. REV. 541, 542 (1985) (stating that the overbreadth doctrine is confusing); Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 2 (stating that the overbreadth doctrine is confusing); Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 853 (1991) (stating that the overbreadth doctrine is misunderstood). Some deny its relevant significance while others applaud its great importance. *See, e.g.*, Fallon, *supra*, at 854–56 ("overbreadth doctrine is far weaker potion than either its champions or its critics have appreciated"); Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 845–46 (1970) [hereinafter HARVARD Note] ("overbreadth doctrine is...highly protective of first amendment interests").

Most argue that overbreadth is, and should be, confined to the First Amendment. *See, e.g.*, HARVARD Note, *supra*; Martin H. Redish, *The Warren Court, the Burger Court and the First Amendment Overbreadth Doctrine*, 78 NW. U. L. REV. 1031, 1069–70 (1983); Alexander, *supra*, at 553 (asserting overbreadth doctrine is meant to protect "constitutionally protected expression"). Professor Redish argues against the U.S. Supreme Court's view of overbreadth and its reliance on "unbending categorical rules" (*e.g.*, "conduct" versus "expression," "overbroad" versus "substantially overbroad") and in favor of "directing the court to ask whether the state's goal could be achieved by means less invasive of free speech interests." Redish, *supra*, at 1069–70. Professor Alexander's overbreadth test would ask "whether and to what extent protected expression will be chilled by the words of the law and whether such chilling effect is a fair price to pay for the interests served by those words as opposed to other words." Alexander, *supra*, at 554.

While most scholars, *e.g.*, Fallon, *supra*, at 863, agree that the overbreadth doctrine is unique in constitutional adjudication in not insisting on traditional standing, *i.e.*, that the petitioner is directly affected by the overreaching legislation, Professor Monaghan insists the overbreadth doctrine is not at odds with conventional standing principles by allowing a petitioner to rely on an enactment's unconstitutional application to others not before the court when, in reality, the petitioner's only real concern is that a law is unconstitutional as applied to him or her. Monaghan, *supra*, at 4. He posits that "overbreadth analysis is concerned with the substance of constitutional review; it does not rely on any distinctive standing component." *Id.* at 39. He states that a court facing such a petitioner is simply examining the "merits of the substantive constitutional claim" and determining whether the enactment at issue was "a constitutionally valid rule of law." *Id.* at 3. In other words, Monaghan is basically saying that standing is not required.

Professor Fallon believes the "First Amendment overbreadth doctrine consists of two components": (1) "the ideal of the rule of law" and (2) a "prophylactic" aspect. Fallon, *supra*, at 907–08. The first component is somewhat akin to Monaghan's point that a litigant has a right to be judged in accordance with a constitutionally valid rule of law, which is the litigant's "personal" right. *Id.* at 868–74. The more sweeping "prophylactic" component focuses on the extent to which the challenged law will have a "chilling effect," the effect of deterring constitutionally protected speech or conduct, on the free expression of the litigant or of *third parties*. *Id.* at 907–08.

Meanwhile, Professor Dorf argues that the overbreadth doctrine should not be confined to the First Amendment. Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 264–71 (1994). However, he does not believe, for example, that it should extend to the "litigation rights" contained in the Fifth through the Eighth Amendments. *Id.* at 269. He concludes that "overbreadth analysis applies only to First Amendment rights and the relatively few unenumerated nonlitigation fundamental rights, such as those stemming from a general right to privacy." *Id.* Dorf believes overbreadth is particularly appropriate in regard to the right to abortion. *Id.* at 269–71. Dorf relies heavily on the "chilling effect" as a justification for the employment of overbreadth, which he sees as valid in both First Amendment and abortion cases. *Id.* at 265–71.

The idea that overbreadth is necessary to address chilling effect may be fallacious. As Professor Redish points out, such "reasoning...is not premised on any empirical basis, and the extent to which people actually base their conduct on knowledge of statutory content may be questioned." Redish, *supra*, at 1040–41. This author agrees. More importantly, whether such a law chills a basic human right is beside the point because the two concepts justifying overbreadth explored below are overriding considerations.

evils within the allowable area of state control but...sweeps within its ambit other [constitutionally protected] activities...."[12] That is, if a statute's language, given its normal meaning, is so broad that the statute's sanctions may unnecessarily apply to conduct that the state is not entitled to regulate, it is *overbroad*.[13] The overbreadth doctrine only applies if it "reaches a *substantial* amount of constitutionally protected conduct."[14] A claim of overbreadth must establish "something more than a mere possibility" that the law may be unconstitutionally applied.[15] While "substantial overbreadth" does not lend itself to "an exact definition," there must be a "realistic danger" the enactment will "significantly compromise" fundamental rights.[16] While "overbreadth" broadly defined would arguably arise where legislation is inconsistent, even to a small extent, with fundamental freedoms or rights, "substantial overbreadth" requires the law in question to be sufficiently intrusive on fundamental rights either qualitatively, quantitatively, or both that its negative impact on free exercise outweighs the positive social benefits that flow from its application to conduct that is constitutionally unprotected.[17] Also, overbreadth is only available if there exists no way to sever the law's potentially unconstitutional

---

I believe two interacting concepts justify overbreadth analysis. First, every *person's* conduct must be *measured* by a valid rule of law. This is different than Monaghan's every *litigant* has a right to be *judged* by a valid rule of law. *See infra* notes 550–566 and accompanying text. Second, recognizing that some may not have the capacity to challenge a law to test its validity, the third party standing offered by the overbreadth doctrine assures broader vindication of fundamental rights. The reality is that a human condition or circumstance may discourage, if not prevent, individuals from asserting their basic rights. Whether it is indigence, ignorance, illness, disability, immaturity, old age, imprisonment, isolation, timidity, or fear, the condition or circumstance may be a barrier to enjoyment of essential human rights. Unlike the position taken by the U.S. Supreme Court as well as most legal theorists and commentators, this author believes that the fruits of the overbreadth doctrine ought to be available to a petitioner asserting *any* fundamental right, not merely those guaranteed by the First Amendment or, as Dorf might add, the right to privacy. Specifically, so long as a petitioner can establish that an enactment gives rise to a *realistic danger* of reaching a *substantial amount* of constitutionally protected conduct, or that it *significantly impairs* the exercise of a fundamental right of his own or those of other parties not before the court, the petitioner is entitled to facial invalidation of the enactment. *See infra* notes 560–566 and accompanying text.

12. Thornhill v. Alabama, 310 U.S. 88, 97 (1939).

13. Schwartzmiller v. Gardner, 752 F.2d 1341, 1346 (9th Cir. 1984) ("A law is overbroad if it prohibits not only acts the legislature may forbid, but also constitutionally protected conduct.").

14. Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494 (1982) (emphasis added). *See also* Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 503 (1985); New York v. Ferber, 458 U.S. 747, 770–73 (1982).

15. Gannet Satellite Info. Network, Inc. v. Berger, 894 F.2d 61, 66 (3d Cir. 1990) (Port Authority Rule that prohibits the distribution at Newark Airport of written expression "relating to commercial activity" without the consent of the Port Authority held facially invalid when weighed against First Amendment).

16. Members of City Council of City of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 800–01 (1984) (municipal ordinance prohibiting posting of signs on public property challenged by group of supporters for election to city council held not unconstitutionally overbroad in violation of group's First Amendment rights of free expression).

17. Virginia v. Hicks, 539 U.S. ____, ____ (2003).

> [T]here comes a point at which the chilling effect of an overbroad law, significant though it may be, cannot justify prohibiting all enforcement of that law—particularly a law that reflects "legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct." For there are substantial social costs *created* by the overbreadth doctrine when it blocks application of a law to constitutionally unprotected speech, or especially to constitutionally unprotected conduct. To ensure that these costs do not swallow the social benefits of declaring a law "overbroad," we have insisted that a law's application to protected speech be "substantial," not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications before applying the "strong medicine" of overbreadth invalidation.

Id. (citations omitted).

reach from its proper reach.[18] Likewise, an overbreadth claim will not succeed where "a satisfactory limiting construction" can be placed on the stricture.[19] The overbreadth doctrine has been described as "strong medicine," to be used "sparingly": and, then, only as a matter of "last resort."[20]

Additionally, the concept of overbreadth is unique from ordinary constitutional adjudication, as it does not require the traditional requirements of standing.[21] Therefore, an individual may allege that a statute is unconstitutionally overbroad and deprives either himself or herself *or another person* of his or her constitutional rights.[22] Inasmuch as an overbroad enactment has the capacity to "deter privileged activit[ies]," an overbreadth petitioner need not demonstrate his or her own activities were directly impacted by the law.[23] Overbreadth analysis permits a claim where the law "threatens others not before the court" who might wish to engage in certain protected activity or speech "but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid."[24] In other words, an overbreadth petitioner is relieved of the usual constitutional adjudicatory obligation of attacking unconstitutional applications of a statute case by case because an overbroad statute "hangs over [affected persons'] heads like a sword of Damocles," which is a specter not tolerable in the overall constitutional scheme.[25] The U.S. Supreme Court ruled:

> [T]here are situations where competing considerations outweigh any prudential rationale against third-party standing, and...this Court has relaxed the prudential-standing limitation when such concerns are present. Where practical obstacles prevent a party from asserting rights on behalf of itself, for example, the Court has recognized the doctrine of *jus tertii* standing. In such a situation, the Court considers whether the third party has sufficient injury-in-fact to satisfy the Art. III case-or-controversy requirement, and whether, as a prudential matter,

---

18. Parker v. Levy, 417 U.S. 733, 760 (1974) ("[E]ven if there are marginal applications in which a statute would infringe on First Amendment values, facial invalidation is inappropriate if the 'remainder of the statute...covers a whole range of easily identifiable and constitutionally proscribable...conduct....'") (quoting U.S. Civil Service Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 580–81 (1973)). *See also Brockett*, 472 U.S. at 501–07 (upholding obscenity law while striking down the portion of the law that defined "lust" in overly broad manner).

19. Plummer v. City of Columbus, 414 U.S. 2, 3 (1973) (per curiam) (quoting Gooding v. Wilson, 408 U.S. 518, 521 (1972)). *See also* Osborne v. Ohio, 495 U.S. 103, 118–22 (1990) (stating that a state court may construe statute in manner to avoid reach of overbreadth doctrine).

20. Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973).

21. *Id.* at 612.

22. *Id. See also Osborne*, 495 U.S. at 112 n.8 (finding overbreadth claim may be advanced where law impacts defendant or others).

23. Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 66 (1981) (holding adult bookstore operators allowed to advance claim that zoning ordinance criminalizing nude dancing restricted First Amendment rights of expression of others as well as their own).

24. *Brockett*, 472 U.S. at 503 (holding Washington's moral nuisance statute not facially invalid in its entirety where statute reached material that incited normal as well as unhealthy interest in sex and statute contained severability clause permitting partial invalidation).

25. Arnett v. Kennedy, 416 U.S. 134, 231 (1974) (Marshall, J., dissenting). *See also* Dombrowski v. Pfister, 380 U.S. 479, 487 (1965) ("If the rule were otherwise, the contours of regulation would have to be hammered out case by case—and tested only by those hardy enough to risk criminal prosecution to determine the proper scope of the regulation.").

> the third party can reasonably be expected properly to frame the issues and present them with the necessary adversarial zeal.[26]

In a fashion, then, "[f]acial challenges to overly broad statutes are allowed not primarily for the benefit of the litigant, but for the benefit of society...."[27]

While there are other types of facial attacks to statutes, overbreadth is perhaps the most dramatic, in that a "person whose activity may be constitutionally regulated may nevertheless argue that the statute under which he is convicted or regulated is invalid on its face."[28] Generally, a "facial" challenge means an enactment is "invalid *in toto*—and therefore incapable of any valid application."[29] A typical facial attack is "the most difficult challenge to mount successfully,"[30] because, to achieve its desired result, the *restrictive* view of facial invalidity demands that the "challenge...be rejected unless there exists *no set of circumstances* in which the statute can constitutionally be applied."[31] Meanwhile, a more moderate view of facial invalidation exists, at least in regard to the right to an abortion, and follows a standard akin to insisting the statute is a "substantial obstacle" to the exercise of a fundamental right in a "large fraction" of cases.[32] In contrast, facial invalidity *based on overbreadth* may render "a statute invalid in all its applications (*i.e.*, facially invalid) if it is invalid in any of them."[33]

---

26. Sec'y of State of Md. v. Munson, 467 U.S. 947, 956 (1984).

27. *Id.* at 958. *But see* Monaghan, *supra* note 11, at 39 (asserting that in reality a litigant is only vindicating his own interest and, as such, "overbreadth analysis...does not rely on any distinctive standing component").

28. New York v. Ferber, 458 U.S. 747, 768 n.21 (1982).

29. *Vill. of Hoffman Estates*, 455 U.S. at 494 n.5 (quoting Steffel v. Thompson, 415 U.S. 452, 474 (1974)).

30. United States v. Salerno, 481 U.S. 739, 745 (1987).

31. Ada v. Guam Soc'y of Obstetricians & Gynecologists, 506 U.S. 1011, 1012 (1992) (Scalia, J., dissenting) (disagreeing with Court's denial of certiorari). Justice Scalia, in his *Ada* dissent, was referring to the "no set of circumstances" test articulated in *Salerno*, 481 U.S. at 748, which upheld the facial validity of the federal Bail Reform Act's preventive detention scheme. While Justice Scalia is the strongest proponent of this view of facial invalidity, Justice Stevens has been perhaps its most ardent critic. In *Janklow v. Planned Parenthood, Sioux Falls Clinic*, 517 U.S. 1174, 1175 (1996) (Stevens, J., Memorandum opinion respecting denial of certiorari), Justice Stevens ripped apart the jurisprudential basis of the "no set of circumstances" standard. After agreeing with the "long established principle" articulated in *Salerno* that an enactment is not entirely void because it "might operate unconstitutionally under some conceivable set of circumstances," Justice Stevens insisted the *Salerno* statement that a facial challenge fails unless "no set of circumstances" could lend itself to valid application of the enactment was plain wrong. *Id.* (quoting *Salerno*, 481 U.S. at 745). This statement, according to Justice Stevens, reflected a "rhetorical flourish" and, more importantly, "was unsupported by citation or precedent." *Id.* Justice Stevens condemned the *Salerno* statement as mere "dicta," said it did not reflect the true standard of measuring facial claims, and insisted that "*Salerno*'s rigid and unwise dictum has been properly ignored in subsequent cases...." *Id.* Indeed, Justice Stevens said the test had so little integrity that it was not even necessary for the Court to "disavow that unfortunate language" until such time as a lower court employs this "draconian...dictum to deny relief in a case in which a facial challenge would otherwise be successful." *Id.* at 1175–76.

Applying this reasoning to the hypothetical draconian legislative measures described at the beginning of this article, while each enactment would (hopefully) be totally invalid as applied to any "citizen of the State," their possible permissible application to any "other person," such as a foreign terrorist, would avoid a finding of *facial* invalidity, unless, of course, the overbreadth doctrine were applied to substantial amounts of activity protected by any constitutional right, not just free speech.

32. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 895 (1992) (state abortion restriction facially invalid).

33. *Ada*, 506 U.S. at 1012 (Scalia, J., dissenting). *Compare* Osborne v. Ohio, 495 U.S. 103, 112 (1990) ("Even where a statute at its margins infringes on protected expression, 'facial invalidation is inappropriate if the 'remainder of the statute...covers a whole range of easily identifiable and constitutionally proscribable...conduct....'" (quoting New York v. Ferber, 458 U.S. 747, 770 n.25 (1982))).

Furthermore, it has been stated, although this article will dispute the point, that overbreadth only has enjoyed vitality within the context of the First Amendment.[34] This suggestion is based on the argument that the "strong medicine" inherent in the overbreadth doctrine should be denied in other constitutional contexts because "[t]he doctrine is predicated on the sensitive nature of protected expression"[35] and the possibility that people might otherwise "refrain" from free speech if such medicine was unavailable.[36] In any event, overbreadth claims have been considered by the Court in a significant number of cases.[37] These include situations where the enactment's plain language may outlaw constitutionally protected activity other than free speech,[38] where it delegates to an administrative authority broad regulatory powers,[39] or where it extends broad investigatory powers to law enforcement agencies.[40] Substantial overbreadth claims may succeed where "applied to statutory challenges which arise in defense of a criminal prosecution as well as civil enforcement or actions seeking a declaratory judgment."[41] Inasmuch as statutes are

---

34. Schall v. Martin, 467 U.S. 253, 268 n.18 (1984).

35. *Ferber*, 458 U.S. at 768.

36. Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 634 (1980).

> In...First Amendment contexts, the courts are inclined to disregard the normal rule against permitting one whose conduct may validly be prohibited to challenge the proscription as it applies to others because of the possibility that protected speech or associative activities may be inhibited by the overly broad reach of the statute.

Id.; Gooding v. Wilson, 405 U.S. 518, 521 (1972) ("[P]ersons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression."). *See also* Keyishian v. Bd. of Regents of Univ. N.Y., 385 U.S. 589, 604 (1967) ("The danger of [the] chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools....").

37. *See, e.g.*, NAACP v. Button, 371 U.S. 415, 432–33 (1963) (finding barratry statute overbroad); Shelton v. Tucker, 364 U.S. 479, 490 (1960) (declaring statute requiring teachers to file affidavit regarding membership in organizations overbroad); Cox v. Louisiana, 379 U.S. 559, 564, 574 (1965) (holding statute prohibiting picketing "near" courthouse not overbroad although unconstitutional as applied); Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971) (rejecting overbreadth and vagueness challenges to ordinance outlawing three or more persons from congregating on any sidewalk); Colten v. Kentucky, 407 U.S. 104, 110–11 (1972) (finding disorderly conduct law not overbroad); Dombrowski v. Pfister, 380 U.S. 479, 494 (1965) (holding law requiring registration of members of "subversive organization" vague and overbroad); Gooding v. Wilson, 405 U.S. 518, 527–28 (1972) (finding "breach of peace" stricture vague and overbroad); Lewis v. City of New Orleans, 415 U.S. 130, 134 (1974) (holding statute outlawing "obscene or opprobrious" language toward police officer vague and overbroad); Parker v. Levy, 417 U.S. 733, 758–61 (1974) (finding Uniform Code of Military Justice authorization for court-martial for "conduct unbecoming of an officer or gentleman" not overbroad); Plummer v. City of Columbus, 414 U.S. 2, 2 (1973) (per curiam) (ruling ordinance prohibiting "menacing, insulting, slanderous, or profane language" overbroad and vague); Ward v. Illinois, 431 U.S. 767, 774–76 (1977) (holding obscenity statute neither vague nor overbroad); Terminiello v. City of Chicago, 337 U.S. 1, 4–6 (1949) ("breach of peace" enactment facially invalid).

38. *See, e.g.*, Thornhill v. Alabama, 310 U.S. 88, 97 (1939) (holding proscription outlawing all picketing contrary to First Amendment right of association).

39. *See, e.g.*, Kunz v. New York, 340 U.S. 290, 293–95 (1951) (finding municipal ordinance making it unlawful to hold public worship meetings on street without obtaining in advance permit from chief of police facially invalid in violation of First and Fourteenth Amendments); Cantwell v. Connecticut, 310 U.S. 296, 300–07 (1940) (ruling state statute prohibiting solicitation of money for religious, charitable, or philanthropic cause unless the Secretary of the Public Welfare Council approves such cause and determines the cause or religion is a bonafide organization violative of the First and Fourteenth Amendment right to exercise religion).

40. *See, e.g.*, Berger v. New York, 388 U.S. 41, 58–60 (1967) (holding state statute authorizing eavesdropping pursuant to court order but on less than probable cause for two-month period, with no termination provision or after-the-fact notice, is contrary to Fourth and Fourteenth Amendments).

41. New York v. Ferber, 458 U.S. 747, 772–73 (1982) (emphasis added).

often challenged on both overbreadth and vagueness grounds, this article will now explore this latter concern.

B. Overbreadth and Vagueness Dichotomy

A preliminary distinction between "overbreadth" and "vagueness" is necessary before analyzing the scope of overbreadth,[42] because some discussions of overbreadth confuse these two concepts.[43] A statute is vague if "men of common intelligence must necessarily guess at its meaning and differ to its application."[44] A citizen contemplating engaging in certain activity should be provided *fair notice* of what conduct is prohibited so he or she can avoid unwittingly engaging in criminality.[45] Also, vagueness is dangerous because it permits arbitrary enforcement of the law, violating the basic principles of the Fourteenth Amendment.[46] Without effective limits on government authority, the state could run roughshod over individual rights in the name of an indistinct law on the books. Beyond providing citizens notice of what is prohibited, the vagueness doctrine is designed to provide law enforcement authorities with necessary parameters so as to guarantee the citizenry "fair and nondiscriminatory application of the laws," a concept that finds "its roots in the Due Process Clause."[47]

The requirement of "fair notice" demands only (although no court decision acknowledges this point) that a citizen have *constructive* notice that his act is contrary to law; that is, a citizen making inquiry *could* have determined if his conduct was proscribed by the statute.[48] While "mathematical certainty" is not

---

42. For various examinations of vagueness, see generally John F. Decker, *Addressing Vagueness, Ambiguity and Other Uncertainty in American Criminal Laws*, 80 DENV. U. L. REV. 241 (2003); Robert Batey, *Vagueness and the Construction of Criminal Statutes—Balancing Acts*, 5 VA. J. SOC. POL'Y & L. 1 (1997); Jonathan Weinberg, *Vagueness and Indecency*, 3 VILL. SPORTS & ENT. L.J. 221 (1996); Francis A. Allen, *The Erosion of Legality in American Criminal Justice: Some Latter-Day Adventures of the Nulla Poena Principle*, 29 ARIZ. L. REV. 385 (1987); John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189 (1985); Anthony Amsterdam, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

43. United States v. Acheson, 195 F.3d 645, 652 (11th Cir. 1999) ("The void for vagueness and overbreadth doctrines are closely related as a less precise law may necessarily capture more protected conduct at its edges."); Cispes v. FBI, 770 F.2d 468, 472 (5th Cir. 1985) ("Some commentators have considered [vagueness and overbreadth] indistinguishable."). *Compare* City of Tacoma v. Luvene, 827 P.2d 1374, 1381 (Wash. 1992) (stating an ordinance is *vague* if it "is too indefinite to apprise citizens of the prohibited conduct and to prevent arbitrary and discriminatory law enforcement" while "[o]verbreadth analysis measures how enactments that prohibit conduct fit with the universe of constitutionally protected conduct").

44. Connally v. General Constr., 269 U.S. 385, 391 (1926).

45. City of Chicago v. Morales, 527 U.S. 41, 58 (1999) (holding municipal gang ordinance vague).

46. *Id.* at 60–64.

47. Kreimer v. Bureau of Police for the Town of Morristown, 958 F.2d 1242, 1266 (3d Cir. 1992) ("the vagueness doctrine, unlike the overbreadth doctrine,...seeks to ensure fair and non-discriminatory application of the laws").

48. *Cf.* Rose v. Locke, 423 U.S. 48, 50 (1975) ("Even trained lawyers may find it necessary to consult legal dictionaries, treatises, and judicial opinions before they may say with any certainty what some statutes may compel or forbid."); Columbia Natural Res., Inc. v. Tatum, 58 F.3d 1101, 1105 (6th Cir. 1995) (stating U.S. Supreme Court case law on vagueness "reflects the common understanding that the average citizen does not read at his leisure, every federal, state, and local statute to which he is subject"). *See also* Jeffries, *supra* note 42, at 207 ("[T]he kind of notice required is entirely formal. Publication of a statute's text always suffices; the government need make no further effort to apprise the people of the content of the penal law....In short, the fair warning requirement of the vagueness doctrine is not structured to achieve actual notice of the content of the law.").

required,[49] a statute is void for vagueness if it "fails to draw reasonably clear lines" between that activity that is illegal and that which is not such that the citizen is unable to know whether his conduct is governed by the statute.[50]

In addition, a law must provide "ascertainable standards of guilt" that guide the arm of enforcement.[51] The U.S. Supreme Court has recognized that the more important aspect of the vagueness doctrine "is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement."[52] The absence of an ascertainable standard of guilt in a given legal proscription gives police officers, prosecutors, and the triers of fact unlimited discretion to apply the law and, thus, there is a danger of arbitrary and discriminatory enforcement of such a law.[53] Consequently, the void-for-vagueness doctrine demands that these measures provide officials with "minimal guidelines" in order to avoid such arbitrary and discriminatory enforcement.[54]

Overbreadth and vagueness are distinguishable by three characteristics: (1) the nature of the concepts, (2) the scope of their application, and (3) their different standing requirements. As to their inherent difference, vagueness pertains to a *lack of clarity* in the actual content of a statute. In contrast, overbreadth is present when a statute's language is so *far reaching* that it applies to conduct the state is not entitled to regulate.

The second characteristic that distinguishes overbreadth from vagueness involves the actual application of these doctrines. While, generally, overbreadth problems arise in First Amendment cases, vagueness has a much wider scope. The vagueness doctrine is applicable to all areas of law,[55] although the stringency of this doctrine's application varies depending on the issue in question. For example, laws giving rise to civil liability are considered with more deference to the state while criminal measures are viewed more critically.[56] Similarly, the Court has noted that if a law infringes on free speech rights, "a more stringent vagueness test should apply" than if the law carried no potential for intrusion on some constitutional rights.[57] Here, the

---

49. Grayned v. City of Rockford, 408 U.S. 104, 110 (1972) (holding municipal anti-noise ordinance neither vague nor overbroad).

50. Smith v. Goguen, 415 U.S. 566, 574 (1974) (ruling Massachusetts flag misuse statute outlawing "contemptuous treatment of flag" was vague because statute failed to delineate the kind of non-ceremonial treatment that is criminal and that which is not).

51. Winters v. New York, 333 U.S. 507, 515 (1948) (holding New York Obscene Prints and Articles enactment vague).

52. *Goguen*, 415 U.S. at 574.

53. Kramer v. Price, 712 F.2d 174, 176 (5th Cir. 1983) (finding Texas harassment statute outlawing communications by telephone or in writing that "annoy" or "alarm" another was vague). *See also Columbia Natural Res.*, 58 F.3d at 1104 (stating goal of vagueness is "to provide standards for enforcement by the police, judges and juries").

54. Gresham v. Peterson, 225 F.3d 899, 907 (7th Cir. 2000) (holding Indianapolis ordinance outlawing "aggressive panhandling" not vague); City of Chicago v. Powell, 735 N.E.2d 119, 128 (Ill. App. Ct. 2000) (ruling municipal ordinance prohibiting "solicitation of unlawful business" not vague).

55. *See, e.g.*, Cline v. Frink Dairy Co., 274 U.S. 445, 453 (1927) (holding Colorado Antitrust Act vague).

56. *See, e.g.*, Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972) (finding municipal vagrancy ordinance vague); Barenblatt v. United States, 360 U.S. 109, 137–38 (1959) (Black, J., dissenting) (expressing disagreement with majority's finding that House of Representative's rule authorizing Committee to compel testimony within framework of investigative activity not vague, while stating, "it would be unthinkable to convict a man for violating a law he could not understand").

57. *Vill. of Hoffman Estates*, 455 U.S. at 498–99.

Court's insistence on more precision in statutory language is an example of the Court's consistent recognition of free speech as a constitutional right that must be given special protection. Also, a criminal measure not requiring scienter is more likely vague than one having mens rea.[58]

Lastly, these doctrines differ in relation to the standing requirement. Under the overbreadth doctrine, a party whose conduct is not constitutionally protected is always permitted to raise the First Amendment rights of third parties not before the court.[59] In contrast, a vagueness *as applied* challenge requires the movant to have traditional standing.[60] It should be noted that the Court, however, carved out an exception to instances of facial vagueness, not requiring the movant to have standing when the statute's vagueness is "real and substantial" in the context of a free speech case.[61] Thus, standing rules equally apply to overbreadth and facial vagueness challenges asserting constitutional invalidity within the First Amendment context.[62]

Village of Hoffman Estates v. Flipside, Hoffman Estates[63] is a seminal case clarifying the essential differences between overbreadth and vagueness in which the U.S. Supreme Court specified how courts are to proceed if a statute is challenged on both grounds. In that case, the Court reviewed and upheld a municipal drug paraphernalia ordinance that made it "unlawful for any person 'to sell any items, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs,...without obtaining a license therefore.'"[64] Plaintiff, Flipside, in a pre-enforcement facial challenge, alleged that the statute was unconstitutionally overbroad as well as vague.[65]

The Court in *Flipside* established that, when a statute is attacked as being both facially overbroad and vague, courts should divide overbreadth and vagueness analysis into a two-part test.[66] Overbreadth is examined first, then vagueness.[67] Initially, the reviewing court must examine whether the law reaches a "substantial

---

58. *See, e.g.*, Colautti v. Franklin, 439 U.S. 379, 390 (1979) (holding Pennsylvania Abortion Control Act provision imposing a standard of care for viable fetus vague and stating that the law's "uncertainty [was] aggravated by the absence of a scienter requirement with respect to the finding of viability").

59. Osborne v. Ohio, 495 U.S. 103, 112 n.8 (1990) (finding child pornography prohibition not overbroad); New York v. Ferber, 458 U.S. 747, 768–69 (1982) (same).

60. *See, e.g.*, Shuttlesworth v. City of Birmingham, 382 U.S. 87, 88–95 (1965) (holding municipal ordinance outlawing obstruction or loitering on a sidewalk and another barring refusal to comply with order of police officer vague as applied).

61. Young v. Am. Mini-Theaters, 427 U.S. 50, 60 (1976) (acknowledging exception to traditional standing requirement if enactment's vagueness is "real and substantial," causing "persons not before the court to refrain from engaging in constitutionally protected speech or expression"). In *Young*, the Court examined a municipal ordinance prohibiting operation of an adult movie theater within 1000 feet of any other regulated establishment or within 500 feet of any residential area. Here, the Court was "not persuaded" that the ordinances "will have a significant deterrent effect on the exhibition of films protected by the First Amendment" and felt the law's legitimate reach outweighed the "less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression...." *Id.* at 60–61. Thus, the petitioner was not allowed to invoke the exception to traditional standing and was found to fall within the constitutional reach of the statute. *Id.* at 61.

62. *See id.*

63. 455 U.S. 489 (1982).

64. *Id.* at 492 (citing ILL. MUNIC. CODE § 8-7-16).

65. *Id.* at 491–93.

66. *Id.* at 494–95.

67. *Id.* at 494.

amount of constitutionally protected conduct."[68] In making that assessment, a court must "evaluate the ambiguous as well as the unambiguous scope of the enactment."[69] Also, when assessing any facial challenge, the Court in *Flipside* noted that a reviewing court must consider any "limiting construction" that a lower court or enforcement agency has provided.[70] If the court determines that the statute does not implicate "substantial" constitutional rights, then the overbreadth challenge fails and vagueness is examined next.[71] If the statute neither "implicates...constitutionally protected conduct," nor is found "impermissibly vague in all of its applications," the court should uphold the law.[72] In other words, if the vagueness challenge does "not involve First Amendment freedoms," it "must be examined in light of the facts of the case at hand."[73]

The Court in *Flipside*, addressing whether the drug paraphernalia ordinance at issue was overbroad, examined whether the ordinance violated plaintiff's "First Amendment rights or [was] overbroad because it inhibit[ed] the First Amendment rights of other parties."[74] The Court held that the ordinance was not overbroad because it did not infringe on "noncommercial speech of Flipside or other parties."[75] Instead, it only regulated and licensed "the sale of items displayed 'with' or 'within proximity of' literature encouraging illegal use of cannabis or illegal drugs."[76] The Court added that, even assuming commercial speech was targeted by the ordinance, it is "irrelevant whether the ordinance has an overbroad scope encompassing protected commercial speech of other persons, because the overbreadth doctrine does not apply to commercial speech."[77] The Court rejected Flipside's claim that the ordinance was overbroad in that it outlawed "innocent" or "lawful" use of certain items.[78]

> If Flipside is objecting that the ordinance would inhibit innocent uses of items found to be covered by the ordinance, it is complaining of denial of substantive due process. [This] claim obviously lacks merit. A retailer's right to sell smoking accessories, and a purchaser's right to buy and use them, are entitled only to minimal due process protection. Here, the Village presented evidence of illegal drug use in the community. Regulation of items that have some lawful as well as unlawful uses is not an irrational means of discouraging drug use.[79]

Following the Court's rejection of the complainant's pre-enforcement overbreadth challenge,[80] the Court analyzed the drug paraphernalia ordinance against a

---

68. *Id.*
69. *Id.* at 494 n.5.
70. *Id.*
71. *Id.* at 494–95.
72. *Id.*
73. *Id.* at 495 n.7.
74. *Id.* at 495.
75. *Id.* at 496.
76. *Id.* (quoting municipality's "licensing guidelines").
77. *Id.* at 496–97.
78. *Id.* at 497 n.9.
79. *Id.*
80. *Id.* at 494–97.

vagueness challenge.[81] In regard to the facial vagueness argument, the Court in *Flipside* stated that the first order of business is to determine if the statute covers constitutionally protected territory.[82] If it does not, the facial vagueness challenge fails.[83] Next, the reviewing court turns to conventional vagueness analysis, which requires a showing of traditional standing.[84] Here, the Court explained that a complainant who commits acts that are "clearly proscribed" in the prohibition cannot "complain of the vagueness of the law as applied to the conduct of others."[85] In other words, a court entertaining a vagueness challenge not implicating "constitutionally protected conduct" should "examine the complainant's conduct before analyzing other hypothetical applications of the law."[86] Moreover, when the reviewing court applies the tests of whether the statute under consideration (1) provides the citizenry with *fair warning* of what it prohibits and (2) contains *explicit standards* that avoid arbitrary and discriminatory application, the court should not insist that these "standards...be mechanically applied."[87]

Here, *Flipside*'s suggestion that the language outlawing distribution of paraphernalia "designed for use" or "marketed for use" with cannabis or drugs could not withstand a facial challenge. The claim implied that the statute was vague in all its applications, was contradicted by the fact that the measure "simply regulates business behavior...."[88] Moreover, *this* petitioner's vagueness claim was belied by the language of the ordinance, which covered "at least some of the items that Flipside sold" and its co-operator's admission that the business sold items "principally used for illegal purposes."[89] The scienter requirement contained in the drug paraphernalia ordinance, which the government would have to prove in order to convict, dismissed the notion that one might be innocently entangled in the web of the enactment.[90] Thus, one could not seriously assert that this measure offered *this complainant* insufficient "fair warning" as to its reach.[91] Furthermore, regarding the arbitrary and discriminatory application claim, the petitioner failed to present evidence of such application. Absent such evidence, the Court concluded that this concern would be best addressed by reviewing claims of such discrimination, rather than forbidding application of the law in its entirety.[92]

---

81. *Id.* at 497–503.
82. *Id.* at 494 (stating that "[i]n a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail.").
83. *Id.* at 494–95.
84. *Id.* at 495 n.7.
85. *Id.* at 495.
86. *Id.* (citing Graynard v. City of Rockford, 408 U.S. 104, 108–09 (1972)).
87. *Id.* at 498.
88. *Id.* at 499.
89. *Id.* at 502.
90. *Id.*
91. *Id.* at 497–502.
92. *Id.* at 504.

III. HISTORY OF OVERBREADTH WITHIN THE FIRST AMENDMENT CONTEXT

A. *The Court's Use of the Overbreadth Doctrine prior to* Schall *and* Salerno

Overbreadth as a doctrine originated in the First Amendment context in the 1940 case of *Thornhill v. Alabama*.[93] In *Thornhill*, the petitioner was charged with violating a section of the Alabama State Code of 1923, namely, a statute that prohibited loitering for the purpose of influencing others not to associate or do trade with a particular business.[94] His arrest grew out of his picketing during a labor strike. The petitioner was arrested pursuant to this statute after he was caught loitering near a factory "with the intent or purpose of influencing others to adopt one of enumerated courses of conduct."[95] Thereafter, the defendant was convicted and sentenced to jail.[96] Following petitioner's request for review by the U.S. Supreme Court, the Court examined the loitering statute against petitioner's claim that it was unconstitutional "upon its face" when weighed against the First Amendment.[97] The Court, while not using the specific words "overbreadth" or "overbroad," was clearly concerned by the *sweeping* nature of the statute.[98] The Court noted it had been applied, amongst others,

> to prohibit a single individual from walking slowly and peacefully back and forth on the public sidewalk in front of the premises of an employer, without speaking to anyone, carrying a sign or placard on a staff above his head stating only the fact that the employer did not employ union men affiliated with the American Federation of Labor....[99]

In overturning the petitioner's conviction, it noted "the danger of injury to an industrial concern is neither so serious nor so imminent as to justify the *sweeping proscription* of freedom of discussion embodied in [the anti-loitering proscription]."[100]

Throughout the 1960s, the Warren Court began to extensively use the doctrine to strike down laws infringing upon First Amendment rights.[101] In the 1961 case of

---

93. 310 U.S. 88 (1940).

94. *Id.* at 91–92, *quoting* ALA. CODE § 3448 (1923):

> Loitering or picketing forbidden.—Any person or persons, who, without a just cause or legal excuse therefor, go near to or loiter about the premises or place of business of any other person, firm, corporation, or association of people, engaged in a lawful business, for the purpose, or with the intent of influencing, or inducing other persons not to trade with, buy from, sell to, have business dealings with, or be employed by such persons, firm, corporation, or association, or who picket the works or place of business of such other persons, firms, corporations, or associations of persons, for the purpose of hindering, delaying, or interfering with or injuring any lawful business or enterprise of another, shall be guilty of a misdemeanor; but nothing herein shall prevent any person from soliciting trade or business for a competitive business.

95. *Id.* at 92.

96. *Id.* at 91 n.1.

97. *Id.* at 95–96.

98. *Id.* at 97 (holding statute "sweeps within its ambit...activities that...constitute an exercise of freedom of speech or of the press").

99. *Id.* at 98–99.

100. *Id.* at 105 (emphasis added).

101. While the Court may have used the word overbreadth in another context, my understanding is that the

Louisiana ex rel. Gremillion v. NAACP,[102] the Court reviewed the constitutionality of two Louisiana statutes.[103] One of the statutes at issue prohibited certain associations from conducting business in the State of Louisiana if they were affiliated with "any foreign or out of state non-trading" association that had officers who were Communist or part of other subversive organizations.[104] The second statute at issue required the principal officer of various organizations, including fraternal, charitable, benevolent, literary, athletic, or social groups, to file with the Louisiana Secretary of State a list of the names and addresses of its members in the State of Louisiana.[105] Members of organizations that did not file with the State were not only prohibited from holding or attending any organization meetings, but its members and officers also faced criminal penalties.[106] An action was brought by the Attorney General of Louisiana in state court that sought to enjoin the National Association for the Advancement of Colored People (NAACP) from conducting business in the State of Louisiana.[107] After moving the case to federal court, the NAACP brought an action seeking declaratory judgment and claimed the statutes at hand were unconstitutional.[108] Eventually, the Court reviewed a temporary injunction granted by a three-judge panel from the U.S. District Court for the Eastern District of Louisiana, which enjoined the enforcement of the statutes.[109] The Court affirmed the injunction, noting that the laws were in an area where "any regulation must be highly selective in order to survive challenge under the First Amendment."[110] It went on to note as to the statutes at issue that, "even though the governmental purpose may be legitimate and substantial, the purpose cannot be pursued by means that *broadly* stifle fundamental personal liberties when the end can be more narrowly achieved."[111]

In *Baggett v. Bullit*,[112] the Court in 1966 invalidated on vagueness grounds a 1931 State of Washington statute requiring teachers to swear a loyalty oath as a condition of their employment,[113] as well as a 1955 Washington statute containing oath requirements.[114] In addition, the Court also recognized that the laws were too

---

first time the word was used in connection with the doctrine I am discussing was in *United States v. Robel*, 389 U.S. 258 (1967).

102. 366 U.S. 293 (1961).

103. *Id.* at 294 n.2 (citing LA. REV. STAT. § 14:385 (1950)); *Id.* at 295 n.3 (citing LA. REV. STAT. § 14:386 (1950)); *Id.* at 295 n.4 (citing LA. REV. STAT. §§ 12:401–409 (1950)).

104. *Id.* at 294 (citing LA. REV. STAT. § 14: 385 (1950)). The statute also provided that every "non-trading association" affiliated with an out-of-state association had to file an affidavit with the Louisiana Secretary of State acknowledging that none of the officers were affiliated with the Communist party or other subversive organizations and that failure to file or false filings would result in penalties against its officers and members. *Id.* at 294–95 (citing LA. REV. STAT. § 14: 386 (1950)).

105. *Id.* at 295 (citing LA. REV. STAT. § 12:401–409 (1950)).

106. *Id.*

107. *Id.* at 294.

108. *Id.*

109. *Id.* at 296.

110. *Id.* (citing Shelton v. Tucker, 364 U.S. 479, 488 (1960)).

111. *Id.* at 362 (quoting *Shelton*, 364 U.S. at 488) (emphasis added).

112. 377 U.S. 360 (1964).

113. *Id.* at 361–62 (citing 1931 WASH. LAWS ch. 103).

114. *Id.* (citing 1955 WASH. LAWS ch. 377, which provides, "No subversive person...shall be eligible for employment in, or appointment to any office, or any position of trust or profit in the government, or in the administration of the business, of this state, or of any county, municipality, or other political subdivision of this state").

"broad."[115] The Court stated that the statute's terms, "even [when] narrowly construed, abut upon sensitive areas of basic First Amendment freedoms."[116] Thus, the overbreadth doctrine was clearly thriving within the First Amendment context.

In the 1967 case of *United States v. Robel*,[117] a member of the Communist Party was indicted under a section of the federal Subversive Activities Control Act of 1950.[118] At the time the Subversive Activities Control Act was enacted, the appellee was employed at a shipyard designated a "defense facility," and his continued employment subjected him to prosecution under the Act.[119] Appellee was thereafter indicted for being "unlawfully and willfully engage[d] in employment," with the knowledge of the directive against defense facility employment of members of the Communist Party and the designation of the shipyard as a defense facility.[120] The U.S. District Court for the Western District of Washington subsequently granted the appellee's motion to dismiss the indictment based on the "likely constitutional infirmity" of the section of the Subversive Activities Control Act at issue.[121] The government initially appealed to the Court of Appeals for the Ninth Circuit but thereafter made a motion whereby the case was directly appealed to the U.S. Supreme Court.[122] The Court upheld the holding of the district court on the grounds that the section of the Subversive Activities Control Act at issue was an "unconstitutional abridgement of the right of association protected by the First Amendment."[123] The Court stated that the Act "contains the fatal defect of overbreadth because it seeks to bar employment both for association which may be proscribed and for association which may not be proscribed consistently with First Amendment rights."[124] While the Court held that the section at issue was invalid because its overbreadth unconstitutionally abridged the fundamental right of association protected by the First Amendment,[125] the appellee had asserted other constitutional infirmities with the statute, including one based on the substantive due process protection of the Fifth Amendment.[126] The Court remarked, "Because we agree that the statute is contrary to the First Amendment, we find it unnecessary to consider the other constitutional arguments."[127]

---

115. *Id.* at 366 (holding both statutes "unduly vague, uncertain and broad").

116. *Id.* at 372.

117. 389 U.S. 258 (1967).

118. *Id.* at 260. Section 5 (a)(1)(D) of the Subversive Activities Control Act of 1950 provided that, "when a Communist-action organization is under a final order to register, it shall be unlawful for any member of the organization 'to engage in any employment in any defense facility.'" *Id.* at 259–60 (citing 50 U.S.C. § 784 (a)(1)(D)).

119. *Id.* at 260.

120. *Id.* at 260–61.

121. *Id.* at 261.

122. *Id.*

123. *Id.* The appellee also asserted that the statute violated substantive and procedural due process, contained an unconstitutional delegation of legislative power to the Secretary of Defense, and was a bill of attainder. *Id.* n.5.

124. *Id.* at 266.

125. *Id.*

126. *Id.* at 261 n.5.

127. *Id.* Although the Court ultimately based its decision on the First Amendment claim, it is noteworthy that the Court also mentioned its earlier decision of *Green v. McElroy*, wherein it had recognized "the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment." *Id.* at 265 n.11 (quoting Green v. McElroy, 360 U.S. 474, 492 (1959)).

Of course, not every allegation of First Amendment overbreadth has succeeded. The Court has been determined to distinguish which First Amendment claims are actually worthy of overbreadth doctrine application.[128] Through a selective analysis, the Court has exhibited a reluctance to utilize this doctrine. For example, in 1968, the Court, in *Cameron v. Johnson*,[129] rejected an overbreadth claim brought by civil rights organizations that contested a Mississippi statute prohibiting, among other things, engaging in "picketing or mass demonstrations in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from any public premises,...courthouses...or other public buildings...."[130] The overbreadth argument centered on the assertion that the proscription of the statute embraced picketing employed as a vehicle for constitutionally protected protest.[131] However, the Court found that the statute was "a valid law dealing with conduct subject to regulation so as to vindicate important interests of society and...the fact that free speech is intermingled with such conduct does not bring with it constitutional protection."[132]

In *Broadrick v. Oklahoma*,[133] the U.S. Supreme Court considered and rejected another First Amendment overbreadth claim.[134] In *Broadrick*, two paragraphs of the Oklahoma Merit System of Personnel Administration Act,[135] which restricted political activity of the state's civil servants, were challenged as unconstitutional on their face.[136] Appellants, three state employees, sought to have these portions of the Act held unconstitutional based on First Amendment overbreadth and vagueness grounds, arguing that these paragraphs of the Act failed to "distinguish between conduct that may be proscribed and conduct that must be permitted."[137] The federal District Court for the Western District of Oklahoma rejected the appellants' claims and upheld the sections of the Act at issue.[138] On appeal, the U.S. Supreme Court affirmed, finding the sections were not overbroad or vague in light of the First Amendment.[139]

The Court premised its analysis by recognizing that the "First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn...."[140] The Court went on to state that

---

128. *See, e.g.*, Broadrick v. Oklahoma, 413 U.S. 601 (1973) (rejecting First Amendment overbreadth challenge).

129. 390 U.S. 611 (1968).

130. *Id.* at 612 n.1 (quoting MISS. CODE ANN. § 2318.5 (1966)).

131. *Id.* at 616–17.

132. *Id.* (quoting Cox v. Louisiana, 379 U.S. 559, 564 (1965)).

133. 413 U.S. 601 (1973).

134. *Id.* at 615–16.

135. *Id.* at 603–06, *citing* OKLA. STAT. ANN. tit. 74, § 818 (1959):

> Paragraph six, one of the contested portions, provides that "[n]o employee in the classified service...shall, directly or indirectly, solicit, receive, or in any manner be concerned in soliciting or receiving any assessment...or contribution for any political organization, candidacy or other political purpose." Paragraph seven, the other challenged paragraph, provides that no such employee "shall be a member of any national, state or local committee of a political party, or an officer or member of a committee of a partisan political club, or a candidate for nomination or election to any paid public office."

136. *Id.* at 602.

137. *Id.* at 607.

138. *Id.* at 602.

139. *Id.*

140. *Id.* at 611.

traditional rules of standing do not apply to First Amendment rights and that litigants may challenge a statute regardless of whether their rights of free expression are violated or *another* individual's rights may be violated.[141] The Court continued, "Such claims of facial overbreadth have been entertained in cases involving statutes which, by their terms, seek to regulate 'only spoken words.'"[142] The Court acknowledged that overbreadth attacks have been permitted "where the Court thought the rights of association were ensnared in statutes which, by their broad sweep, might result in burdening innocent associations."[143] The Court further noted that overbreadth claims could be entertained where legislation regulates time, place, and manner of expressive or communicative conduct.[144] However, in very forceful language, the Court stated, "Application of the overbreadth doctrine in this manner is, manifestly, *strong medicine.* It has been employed by the Court *sparingly* and only as a *last resort.*"[145] Finally, the Court added an additional caveat: "overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute."[146] The Court, in rejecting the appellant's First Amendment overbreadth claims, observed, "particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but *substantial* as well, judged in relation to the statute's plainly legitimate sweep."[147] Here, the Oklahoma statutory scheme "seeks to regulate political activity in an even-handed and *neutral* manner,"[148] restricts "partisan political *conduct* only,"[149] and, as such, is best left to case-by-case review of possible improper application.[150] *Broadrick v. Oklahoma*, then, clearly reflected the Court's determination to not extend the overbreadth doctrine to statutes that involve conduct-related activities.[151] Also, *Broadrick* is an example of how the Court rejects usage of the doctrine even in connection with certain First Amendment claims, unless they fit within the tight parameters the Court has developed.[152]

Likewise, in *Bates v. State Bar of Arizona*,[153] the Court in 1977 rejected an overbreadth claim filed by attorneys contesting an Arizona State Supreme Court disciplinary rule that prohibited attorneys from advertising in newspapers or other media.[154] The attorneys were charged in a complaint filed by the state bar's president based upon a newspaper advertisement placed by the attorneys for their "legal clinic," stating that they were offering "legal services at very reasonable fees" and listing their fees for certain services, namely, uncontested divorces, uncontested

141. *Id.* at 612.
142. *Id.* (quoting Gooding v. Wilson, 405 U.S. 518, 520 (1972).
143. *Id.* (citing Keyishan v. Board of Regents, 385 U.S. 589 (1967).
144. *Id.* at 612–13 (citing Grayned v. City of Rockford, 408 U.S. 104 (1972).
145. *Id.* at 613 (emphasis added).
146. *Id.*
147. *Id.* at 615 (emphasis added).
148. *Id.* at 616.
149. *Id.* at 617 (emphasis added).
150. *Id.* at 615–16.
151. *Id.*
152. *Id.*
153. 433 U.S. 350 (1977).
154. *Id.* at 355 (citing ARIZ. SUP. CT. R. 29).

adoptions, simple personal bankruptcies, and changes of names.[155] The Court upheld the conclusion of a bar committee that appellants had violated the rule, having rejected the attorneys' claims that the rule was overbroad and infringed their First Amendment rights.[156] The Court found that "the justification for the application of overbreadth analysis applies weakly, if at all, in the ordinary commercial context."[157] The Court further noted that there are "'commonsense differences' between commercial speech and other varieties. Since advertising is linked to commercial well-being, it seems unlikely that such speech is particularly susceptible to being crushed by overbroad regulation."[158] Moreover, the Court concluded that "concerns for uncertainty in determining the scope of protection are reduced; the advertiser seeks to disseminate information about a product or service that he provides, and presumably he can determine more readily than others whether his speech is truthful and protected."[159]

One oft-cited study of overbreadth in the realm of the First Amendment concludes that "overbreadth scrutiny" varies depending on the type of enactment that is under review.[160] First, there are "censorial" measures, which "operate to burden the advocacy of definable viewpoints on matters of public concern," a category where the Court has exhibited the "most energetic use" of the overbreadth concept.[161] The federal Subversive Activities Control Act struck down in *Robel*, discussed above, is an example.[162] Next, "inhibitory" enactments, which restrict "expressive and associational conduct but whose impact tends to be neutral as to viewpoints sought to be advocated," are the second most likely candidates for invalidation under the doctrine.[163] The case of *Plummer v. City of Columbus*,[164] where the Court ruled overbroad a municipal ordinance that outlawed "menacing, insulting, slanderous, or profane language," could fit into this grouping.[165] Finally, there are "remedial" laws, which restrict the reach of the First Amendment "for the purpose of promoting values which are within the concern of the amendment."[166] Here, the Court has a tendency to "adopt avoidance techniques and to employ less than stringent tests of overbreadth...."[167] The legislation restricting the partisan political activities of public employees examined and upheld in *Broadrick*, discussed above, is an illustration of this type of law.[168]

---

155. *Id.* at 354–56.
156. *Id.* at 380–84.
157. *Id.* at 380.
158. *Id.* at 380–81 (quoting Va. Pharmacy Bd. v. Va. Consumer Council, 425 U.S. 748, 771 n. 24 (1976) (citation omitted). *See also id.* at 775–81 (Stewart, J., concurring).
159. *Id.* at 381.
160. HARVARD Note, *supra* note 11, at 918–21.
161. *Id.* at 918–19.
162. *See supra* notes 116–126 and accompanying text.
163. HARVARD Note, *supra* note 11, at 918–20.
164. 414 U.S. 2 (1973) (per curiam).
165. *Id.* at 2–3.
166. HARVARD Note, *supra* note 11, at 918–21.
167. *Id.* at 920.
168. *See supra* notes 132–151 and accompanying text.

As these cases illustrate, the overbreadth doctrine was used relatively often in the First Amendment context throughout the Warren years.[169] The cases that follow trace the evolution of the Court's insistence that the overbreadth doctrine has no life outside the First Amendment arena.

B. The Court's Insistence That Overbreadth Is Limited to the First Amendment

Whether the Court was influenced by a number of scholarly writings suggesting that the use of overbreadth was limited to the First Amendment,[170] or whether it was influenced by the significant volume of Court cases prior to 1984 that dealt with overbreadth only in the First Amendment context, or both, the Court insisted on limiting the use of overbreadth to the First Amendment context beginning in 1982, in a series of U.S. Supreme Court cases: *New York v. Ferber*,[171] *Schall v. Martin*,[172] and *United States v. Salerno*.[173]

1. *New York v. Ferber*

In *New York v. Ferber*,[174] the Court first referred to a "*First Amendment* overbreadth doctrine"[175] when it reviewed the constitutionality of a New York statute that criminalized "knowingly promoting sexual performances by children under the age of 16."[176] Defendant, an owner of a bookstore specializing in "sexually oriented products," was prosecuted and convicted under the statute after he sold, to an undercover police officer, two films depicting young boys masturbating.[177] The New York Court of Appeals reversed defendant's conviction after deciding that the law at issue was overbroad because it "prohibited the distribution of materials produced outside the State, as well as materials, such as medical books and educational sources, which 'deal with adolescent sex in a realistic but nonobscene manner.'"[178]

However, the U.S. Supreme Court reversed the decision by the New York Court of Appeals, holding that the law at issue was "not substantially overbroad."[179] First, the Court concluded that the law, which prohibited works visually depicting sexual conduct by children below a certain age, did not restrict the production and distribu-

---

169. Louisiana *ex rel.* Gremillion v. NAACP, 366 U.S. 293, 296 (1961); Baggett v. Bullitt, 377 U.S. 360, 372 (1964); United States v. Robel, 389 U.S. 258, 266 (1967); Cameron v. Johnson, 390 U.S. 611, 616–17 (1968); Broadrick v. Oklahoma, 413 U.S. 601, 614–15 (1973); Bates v. State Bar of Arizona, 433 U.S. 350, 380–81 (1977). Chief Justice Earl Warren presided over the U.S. Supreme Court between October 5, 1953, and June 23, 1969.

170. *See, e.g.*, HARVARD Note, *supra* note 11.

171. 458 U.S. 747 (1982).

172. 467 U.S. 253 (1984).

173. 481 U.S. 739 (1987).

174. 458 U.S. 747 (1982).

175. *Id.* at 768–69 (emphasis added).

176. *Id.* at 749–52 ("A person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, he produces, directs or promotes any performance which includes sexual conduct by a child less than sixteen years of age." N.Y. PENAL LAW § 263.15 (McKinney 1980)). "Sexual performance" was defined as including any sexual conduct by a child less than sixteen years of age. N.Y. PENAL LAW § 263.00(1) (McKinney 1980).

177. 458 U.S. at 751–52.

178. *Id.* at 752–53 (quoting People v. Ferber, 422 N.E.2d 523, 526 (N.Y. 1981)).

179. *Id.* at 774.

tion of material protected by the First Amendment.[180] Then, the Court considered whether the statute was unconstitutionally overbroad because it curtailed the distribution of material with "serious literary, scientific or educational value" *or* material that does not threaten to cause the harms that the law was aimed at preventing.[181] The Court observed that the "traditional rule is 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"[182] but expressly ruled that "[w]hat has come to be known as the *First Amendment overbreadth doctrine* is one of the few exceptions to this principle...."[183] The Court pointed out that "the doctrine is predicated on the sensitive nature of protected expression: 'persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions by a statute susceptible of application to protected expression.'"[184] Here, however, the New York child pornography stricture, "whose legitimate reach dwarfs its arguably impermissible applications," was not substantially overbroad, and "whatever overbreadth may exist should be cured through case-by-case analysis...."[185]

In any event, although in a majority of the cases prior to *New York v. Ferber* the Court used overbreadth to strike down statutes based on First Amendment grounds, *Ferber* is significant in expressly labeling the concept as "the First Amendment overbreadth doctrine," which later Court decisions rely on to explicitly insist on *limiting* the use of overbreadth to the First Amendment context.[186]

2. *Schall v. Martin*

In *Schall v. Martin*,[187] the Court expressly limited the use of overbreadth to the First Amendment.[188] In *Schall*, the Court reviewed a section of the New York Family Court Act, which "authorizes pretrial detention of an accused juvenile delinquent based on a finding that there is a 'serious risk' that the child 'may before the return date commit an act which if committed by an adult would constitute a crime.'"[189] Appellees brought suit in federal district court on behalf of juveniles detained pursuant to the provision.[190] The Court of Appeals for the Second Circuit affirmed the district court's decision that struck down the section of the Act that was challenged and held that the provision was "unconstitutional as to all juveniles" inasmuch as the statute was applied in such a manner that "the detention period serves as punishment imposed without proof of guilt established according to the

180. *Id.* at 764–66.
181. *Id.* at 766.
182. *Id.* at 767.
183. *Id.* at 768 (emphasis added).
184. *Id.* (quoting Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 634 (1980)).
185. *Id.* at 773–74 (quoting Broadrick v. Oklahoma, 413 U.S. 601, 615–16 (1973)).
186. *See* Schall v. Martin, 467 U.S. 253, 268 n.18 (1984) ("[O]utside the limited First Amendment context, a criminal statute may not be attacked as overbroad.") (citing *Ferber*, 458 U.S. 747).
187. 467 U.S. 253 (1984).
188. *Id.* at 268 n.18.
189. *Id.* at 255 (quoting N.Y. JUD. LAW § 320.5 (McKinney 1983)).
190. *Id.* at 255–56.

requisite constitutional standard."[191] Notwithstanding, the U.S. Supreme Court reversed the court of appeals ruling and concluded that preventive detention under the Family Court Act served a legitimate state interest and satisfied due process requirements.[192]

Among other arguments, appellees asserted that the pertinent section of the New York enactment was overbroad because it did not limit the categories of crimes that detained juveniles must be accused of having committed or being likely to commit in the future.[193] The Court did not accept the appellees overbreadth claim and noted, "discretion to delimit the categories of crimes...resides wholly with the state legislatures."[194] The Court further stated,

> More fundamentally, this sort of attack on a criminal statute must be made on a case-by-case basis....The Court will not sift through the entire class to determine whether the statute was constitutionally applied in each case. And, *outside the limited First Amendment context, a criminal statute may not be attacked as overbroad.*[195]

It is noteworthy that the dissent in *Schall*, written by Justice Marshall, found the preventive detention section of the New York Family Control Act problematic because the section "is not limited to classes of juveniles whose past conduct suggests that they are substantially more likely than average juveniles to misbehave in the immediate future."[196] The dissent observed that the juvenile preventive detention statute authorized the detention of juveniles for "trivial offenses" instead of limiting it to "dangerous" offenses or "crimes of violence."[197] After pointing out the majority's assertion that the appellees asserted their claim "too broadly" by insisting the statute was invalid "on its face" rather than by challenging detentions on a "case-by-case basis," the dissent responded by saying case-by-case scrutiny really amounted to no scrutiny at all.[198] Specifically, the dissent indicated, "by the time the suit could be considered, it would have been rendered moot by the juvenile's release or long-term detention pursuant to a delinquency adjudication."[199] Also, "no individual detainee would be able to demonstrate that he would have abided by the law had he been released. In other words, no configuration of circumstances would enable a juvenile to establish that he fell into the category of persons unconstitutionally detained rather than the category constitutionally detained."[200] Alluding to the liberal standing rules available in facial attacks on legislation, "under current doctrine pertaining to the standing of an individual victim of allegedly unconstitutional conduct to obtain an injunction against repetition of that behavior, it is far from clear that an individual detainee would be able to obtain an equitable

---

191. *Id.* at 256 (quoting Martin v. Strasburg, 689 F. 2d 365, 373–74 (2d Cir. 1982).
192. *Id.* at 256–57.
193. *Id.* at 268 n.18.
194. *Id.*
195. *Id.* (emphasis added) (citations omitted).
196. *Id.* at 295 (Marshall, J., dissenting).
197. *Id.* at 295 n.21. For example, fifteen-year-old Tyrone Parson was arrested for enticing others to play three-card monte. *Id.* After being detained for five days, the petition against him was dismissed. *Id.*
198. *Id.* at 298–99.
199. *Id.* at 299.
200. *Id.* at 300.

remedy" similar to those extended to petitioners successfully pursuing facial challenges of overbroad strictures.[201] Here, then, the dissent was implicitly making a case for recognition of facial overbreadth in a case having nothing to do with the First Amendment.[202]

3. *United States v. Salerno*

Three years later, the Court in *United States v. Salerno*[203] insisted, "we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment."[204] In *Salerno*, the defendants were arrested for various RICO (Racketeer Influenced and Corrupt Organizations)[205] violations and then detained before trial upon the federal district court's grant of a pretrial preventive detention motion made by the prosecutors.[206] The defendants challenged the pretrial detention statute,[207] claiming the Bail Reform Act's preventive detention provision was "unconstitutional on its face" to the extent that it allowed the pretrial detention of arrestees based on the likelihood of committing future crimes.[208] On appeal, the Court of Appeals for the Second Circuit found the section of the Bail Reform Act that authorized the "pretrial detention [on the ground of future dangerousness] repugnant to the concept of substantive due process, which...prohibits the total deprivation of liberty simply as a means of preventing future crimes."[209]

The U.S. Supreme Court reversed and found that the statute was not "facially" unconstitutional contrary to due process.[210] The Court insisted a typical facial attack, aside from those based on overbreadth, "must establish that no set of circumstances exists under which the Act would be valid."[211] The Court, citing *Schall v. Martin*, noted, "The fact that the Bail Reform Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment."[212] Comparing the breadth of the statute upheld in *Schall*, the Court remarked, "The Bail Reform Act, in contrast, narrowly focuses on a particularly acute problem in which the Government interests are overwhelming. The Act operates only on individuals who have been arrested for a specific category of extremely serious offenses."[213]

If one took these excerpts in *Ferber*, *Schall*, and *Salerno* at face value, there would be little need for further discussion of the true and appropriate reach of the

---

201. *Id.* at 299–300.
202. *See supra* note 188.
203. 481 U.S. 739 (1987).
204. *Id.* at 745.
205. *Id.* at 743 (referring to the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962).
206. *Id.* at 743–44.
207. *Id.* at 741 ("The Bail Reform Act of 1984...allows a federal court to detain an arrestee pending trial if the Government demonstrates by clear and convincing evidence after an adversary hearing that no release conditions 'will reasonably assure...the safety of any other person and the community.'" (quoting 18 U.S.C. § 3141)).
208. *Id.* at 744.
209. *Id.* (quoting United States v. Salerno, 794 F.2d 64, 71–72 (2d Cir. 1986)).
210. *Id.* at 745, 752.
211. *Id.* at 745.
212. *Id.* (citing Schall v. Martin, 467 U.S. 253, 269 n.18 (1984)).
213. *Id.* at 750.

overbreadth doctrine.[214] It seems quite clear that these pronouncements, standing alone, would leave little doubt that the Court not only does not currently recognize an overbreadth doctrine outside the free speech context, but that it never has. Some would say the Court's reluctance to use the doctrine in other situations makes judicial sense because the overbreadth doctrine originated in the First Amendment inasmuch as "First Amendment freedoms need breathing space to survive...."[215] On the other hand, it might be said that there are other constitutional contexts that deserve the same protection the facial overbreadth doctrine provides.[216]

4. Other Decisions by the Court Rejecting Overbreadth Claims

There are additional cases in which the Court rejected overbreadth claims outside the scope of the First Amendment. In *Village of Hoffman Estates v. Flipside, Hoffman Estates*,[217] discussed earlier,[218] the plaintiff, Flipside, was a retail business that sold a variety of merchandise including smoking accessories.[219] After being notified by the village attorney that it was in violation of the ordinance, Flipside filed a suit and argued that a village ordinance requiring businesses to obtain a license if they sold any items that are "designed or marketed for use with illegal cannabis or drugs" was overbroad.[220] When this matter reached the Court, it immediately declared any claims that this ordinance amounted to prior restraint of speech contrary to the First Amendment or was unconstitutionally overbroad amounted to "arguments [that] do not long detain us."[221] First, only commercial speech was involved, and second, "the overbreadth doctrine does not apply to commercial speech."[222]

Plaintiff asserted the alternative argument that the ordinance was overbroad because "it could extend to 'innocent' and 'lawful' uses of items as well as uses with illegal drugs."[223] The Court rejected this argument while pointing out the plaintiff was confusing the vagueness and overbreadth doctrines.[224] The Court insisted that "[i]f Flipside is objecting that it cannot determine whether the ordinance regulates

---

214. New York v. Ferber, 458 U.S. 747, 768–69 (1982); *Schall*, 467 U.S. at 269 n.18; *Salerno*, 481 U.S. at 745.

215. NAACP v. Button, 371 U.S. 415, 433 (1963).

216. *See* Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (noting that beyond the rights explicitly stated in the Bill of Rights, the Court has recognized other liberties within the context of the Fourteenth Amendment substantive due process, namely (1) the right to marry, Loving v. Virginia, 388 U.S. 1 (1967); (2) the right to have children, Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942); (3) the right to "direct the education and upbringing of one's children," Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); (4) the right to marital privacy, Griswold v. Connecticut, 381 U.S. 479 (1965); (5) the right to use contraceptives, Eisenstadt v. Baird, 405 U.S. 438 (1972); (6) the right to bodily integrity, Rochin v. California, 342 U.S. 165 (1952); (7) the right to abortion, Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992); and (8) the right to refuse lifesaving medical treatment, Cruzan v. Dir., Mo. Dept. of Health, 497 U.S. 261 (1990)).

217. 455 U.S. 489 (1982).

218. *See supra* notes 63–91 and accompanying text.

219. *Id.* at 491.

220. *Id.* at 492–93. The plaintiff in this case also argued that the statute was vague. *Id.* at 491. The Court rejected this plaintiff's claim. *Id.* The Court's analysis regarding this determination was discussed in detail at *supra* notes 63–91 and accompanying text.

221. *Id.* at 495–96.

222. *Id.* at 496–97.

223. *Id.* at 497 n.9.

224. *Id.*

items with some lawful uses, then it is complaining of vagueness," not overbreadth.[225] The Court further asserted that, if Flipside were claiming that the ordinance outlawed innocent uses of items governed by the ordinance, it was alleging a denial of substantive due process.[226] According to the Court, such a claim lacked merit because a retailer's right to sell smoking devices and a purchaser's right to buy and use such items enjoy limited due process protection.[227] Furthermore, the Court felt that restricting the sale, purchase, and use of such items was a rational means of deterring drug use.[228]

Another case that rejected application of the overbreadth doctrine outside the area of First Amendment free expression was *City of Chicago v. Morales*.[229] In *Morales*, the constitutionality of a municipal gang loitering ordinance was challenged on various grounds including that it was overbroad.[230] The ordinance defined "loitering" to mean "to remain in any one place with no apparent purpose."[231] When the Court reviewed the statute, it was ruled unconstitutional on vagueness grounds.[232] In Justice Stevens' lead opinion, he stated that

> the freedom to loiter for innocent purposes is part of the "liberty" protected by the Due Process Clause of the Fourteenth Amendment. We have expressly identified this "right to remove from one place to another according to inclination" as "an attribute of personal liberty" protected by the Constitution. Indeed, it is apparent that an individual's decision to remain in a public place of his choice is as much a part of his liberty as the freedom of movement inside frontiers that is "a part of our heritage"....[233]

This statement, with which only Justices Souter and Ginsburg would join, turned out to be mere *dictum* as Stevens continued, "There is no need, however, to decide whether the impact of the Chicago ordinance on the constitutionally protected liberty alone would suffice to support a facial challenge under the overbreadth doctrine."[234] Instead, Justice Stevens felt that "the vagueness of this enactment makes a facial challenge appropriate."[235] While agreeing with the lower Illinois courts

> that the ordinance is invalid on its face, we do not rely on the overbreadth doctrine. We agree with the city's submission that the law does not have a sufficiently substantial impact on conduct protected by the First Amendment to render it unconstitutional. The ordinance does not prohibit speech

---

225. *Id.*
226. *Id.*
227. *Id.*
228. *Id.* (citations omitted).
229. 527 U.S. 41 (1999).
230. The Illinois appellate court ruled that the statute was unconstitutionally vague: impairing citizens' First Amendment right to assembly, criminalizing status rather than conduct, and jeopardizing Fourth Amendment rights. *Id.* at 50 (citing City of Chicago v. Youkhana, 660 N.E.2d 34, 38 (Ill. App. Ct. 1995).
231. *Id.* at 51 n.14 (quoting CHI. MUNIC. CODE § 8-4-015 (c)(1) (1992)).
232. *Id.* at 64.
233. *Id.* at 53–54 (citations omitted).
234. *Id.* at 55 (citing Aptheker v. Secretary of State, 378 U.S. 500, 515–17 (1964) (addressing right to travel); Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52, 82–83 (1976) (discussing abortion); Kolender v. Lawson, 461 U.S. 352, 355 n.3, n.9 (1983)).
235. *Id.*

> [nor]...prohibit any form of conduct that is apparently intended to convey a message.[236]

Thus, because the ordinance provided "too much discretion" to police authority and "too little notice" to the citizenry to determine what constituted having "no apparent purpose," the Court limited its invalidation of the enactment to the concern of vagueness.[237]

*B. Post-*Schall *and* Salerno *Decisions considering First Amendment Claims*

Not surprisingly, the U.S. Supreme Court has continued to exhibit its willingness to rely upon the overbreadth doctrine where the reach of a proscription falls within the scope of the First Amendment.[238] For example, in *Ashcroft v. Free Speech Coalition*,[239] the Court considered whether certain provisions of the Child Pornography Prevention Act of 1996 (CPPA) abridged the freedom of speech of those involved in the production and distribution of "virtual child pornography."[240] The CPPA extended federal prohibitions against child pornography to outlaw sexually explicit images that appear to depict minors but were produced without using any real children.[241] Affected businesses sought declaratory and injunctive relief in a pre-enforcement challenge.[242] The federal District Court for the Northern District of California dismissed the overbreadth claim, believing "it was 'highly unlikely' that any adaptations of sexual works like 'Romeo and Juliet,' will be treated as 'criminal contraband.'"[243] However, the Court of Appeals for the Ninth Circuit reversed, determining that "the Government could not prohibit speech because of its tendency to persuade viewers to commit illegal acts."[244] The appellate court held "the CPPA to be substantially *overbroad* because it bans material that are neither obscene nor produced by the exploitation of real children as in *New York v. Ferber*...."[245] The U.S. Supreme Court agreed that the enactment "abridges the freedom to engage in a substantial amount of lawful speech."[246] Unlike true child pornography, virtual child pornography "records no crime and creates no victims by its production."[247] The interest in protecting children from accessing such materials or the concern that it whets the appetite of pedophiles did not justify limiting the

---

236. *Id.* at 52–53.
237. *Id.* at 64.
238. *See, e.g.*, Virginia v. Black, 538 U.S. 343, 347 (2003) (finding that although Virginia's prohibition against cross-burning with intent to intimidate is not overbroad, statutory provision as interpreted by the jury instruction stating that burning a cross in public view "shall be prima facie evidence of an intent to intimidate" was facially invalid contrary to First Amendment); Bd. of Airport Comm'rs of L.A. v. Jews for Jesus, 482 U.S. 569, 574–77 (1987) (declaring resolution of Board of Commissioners that banned all "First Amendment activities" within airport overbroad in violation of First Amendment); City of Houston v. Hill, 482 U.S. 451, 467 (1987) (holding ordinance that outlaws interrupting a police officer while acting in the course of duty facially overbroad in violation of the First Amendment).
239. 535 U.S. 234 (2002).
240. *Id.* at 239–41.
241. *Id.* (citing 18 U.S.C. § 2256(8)(B) & (D), which were the sections at issue).
242. *Id.* at 243.
243. *Id.*
244. *Id.*
245. *Id.* (citing New York v. Ferber, 458 U.S. 747 (1982)) (emphasis added).
246. *Id.* at 256.
247. *Id.* at 250.

First Amendment rights of the law abiding and, consequently, the statute was struck down as "overbroad."[248]

In *Reno v. American Civil Liberties Union*,[249] a successful overbreadth challenge was directed at certain provisions of the federal Communications Decency Act (CDA).[250] These provisions prohibited knowing transmission via the Internet of any "communication which is obscene or indecent" to a person below the age of eighteen[251] as well as any "patently offensive" communications to such a person.[252] The Court said that, "[g]iven the size of the potential audience for most [Internet] messages, in the absence of a viable age verification process," a sender of such communication would be assumed to have knowledge the communication might be received by a minor contrary to the law, a specter that "would surely burden communications among adults."[253] Recognizing that "[t]he breadth of the CDA's leverage is wholly unprecedented," reaching "discussions about prison rape or safe sexual practices, artistic images that include nude subjects, and arguably the card catalogue of the Carnegie Library,"[254] the Court concluded that the CDA suffered from "facial overbreadth" when weighed against the First Amendment right of free expression.[255]

Of course, if the Court is convinced an enactment reflects "some" overbreadth[256] rather than "substantial" overbreadth,[257] the enactment will not be invalidated on First Amendment overbreadth grounds.[258] Such was the case in *Ashcroft v. American Civil Liberties Union*,[259] where the Court rejected an overbreadth attack on the federal Child Online Protection Act (COPA).[260] The terms of the COPA prohibited commercial display of sexually explicit materials that are "harmful to minors" on the World Wide Web.[261] The Court concluded COPA's reference to "contemporary community standards" as a measuring stick to determine what is "harmful" did not alone render COPA unconstitutionally overbroad under the First Amendment.[262] The Court stated, because Congress narrowed the range of content outlawed by COPA in a manner similar to the definition of obscenity it approved in *Miller v. California*,[263] "any variance caused by the statute's reliance on community standards

248. *Id.* at 252–54, 256.
249. 521 U.S. 844 (1997).
250. *Id.* at 876–82.
251. *Id.* at 859 (citing 47 U.S.C. § 223(a)).
252. *Id.* at 860 (citing 47 U.S.C. § 223(d)).
253. *Id.* at 876.
254. *Id.* at 877–78.
255. *Id.* at 879–85.
256. Ashcroft v. Am. Civil Liberties Union, 535 U.S. 564, 584 (2002) (quoting Reno v. Am. Civil Liberties Union, 521 U.S. 844, 896 (1997) (O'Connor, J., concurring)).
257. *Id.* (quoting Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973)).
258. *Id.* at 584. *See also* Virginia v. Hicks, 539 U.S. 113, 123 (2003) (declaring petitioner-leafleter challenge of housing authority's trespass policy on overbreadth grounds unsuccessful in failing to demonstrate policy prohibited a "substantial" amount of speech as compared to its many legitimate applications).
259. 535 U.S. 564 (2002).
260. *Id.* at 585.
261. *Id.* at 569 (citing 47 U.S.C. § 231(a)(1)).
262. *Id.* at 584–85.
263. *Id.* (referring to Miller v. California, 413 U.S. 15 (1973)).

is *not substantial enough* to violate the First Amendment."[264] Here, the Court continued its pattern of not accepting any limitation on some aspect of communication as overbroad.[265]

IV. RECOGNIZING OVERBREADTH OUTSIDE THE FREE SPEECH CONTEXT

There are a limited number of cases in which the Court used overbreadth or an analysis paralleling overbreadth to strike down statutes that were infringing upon rights falling outside the scope of the First Amendment.[266] While these cases are scattered and few, these cases do exist and there has been enough language written on the subject so that an argument could be made that the overbreadth doctrine indeed exists outside the free speech context.

A. U.S. Supreme Court Cases prior to Schall *and* Salerno

1. Right to Travel: *Aptheker v. Secretary of State*

The U.S. Supreme Court has observed, "The right of interstate travel has repeatedly been recognized as a basic constitutional freedom."[267] The first case where it could be argued overbreadth was used outside the context of free speech involved the right to travel.[268] In *Aptheker v. Secretary of State*,[269] a group of U.S. citizens who were ranking officials of the Communist Party of the United States had their passports revoked under a section of the Subversive Activities Control Act of

---

264. *Id.* at 585 (emphasis added). The Court explicitly refused to express any view as to "whether COPA suffers from substantial overbreadth for other reasons." *Id.*

265. *See, e.g.*, Los Angeles Police Dep't v. United Reporting Publ'g Co., 528 U.S. 32 (1999) (finding regulation that limited access to information in hands of police department regarding arrestees' addresses not overbroad); Osborne v. Ohio, 495 U.S. 103 (1990) (ruling prohibition against possession of child pornography not vague).

266. *See, e.g.*, United States v. Reese, 92 U.S. 214, 221 (1876). In *H.L. v. Matheson*, 450 U.S. 398 (1981), Justice Marshall stated in his dissent, "Because of the risk that exercise of personal freedoms may be chilled by broad regulation, we permit facial overbreadth challenges without a showing that the moving party's conduct falls within the protected core." *Id.* at 427 n.2 (Marshall, J., dissenting). Among other cases he cites for support of this statement (all of which are discussed or cited in this article), *United States v. Reese*, 92 U.S. 214 (1876), is described as a "facial challenge under the Fifteenth Amendment." *Matheson*, 450 U.S. at 428 n.2 (Marshall, J., dissenting). *Reese* dealt with an indictment against two inspectors of a municipal election in Kentucky for refusing to count the vote of a black person contrary to a federal statute. *Reese*, 92 U.S. at 215. The defendant argued that, although the Fifteenth Amendment authorized Congress to punish discrimination based on race, the federal statute enacted by Congress under which defendants were indicted did not "confine its provisions to the terms of the Fifteenth Amendment" but rather exceeded the second section of the Amendment that authorized only "appropriate legislation." *Id.* at 220–22. The Court insisted that the "general language" of the statute was "broad enough to cover wrongful acts without as well as within the constitutional jurisdiction." *Id.* at 221. In other words, the Court felt this was not the type of "appropriate legislation" the Amendment could tolerate. As one constitutional scholar reported, *Reese* "nullified" the Enforcement Act of 1870, a matter that was not rectified until the passage of the Civil Rights Act of 1957. EDWIN S. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 535 (Harold W. Chase & Craig R. Ducat eds., 14th ed. 1978). In any event, *Reese* may be the first example of the overbreadth doctrine at work. Significantly, it is not a First Amendment decision.

267. Memorial Hosp. v. Maricopa County, 415 U.S. 250, 254 (1974).

268. Aptheker v. Secretary of State, 378 U.S. 500 (1964).

269. *Id.*

1950.[270] This act made it a felony for a member of a Communist organization to apply for, use, or attempt to use a passport.[271]

These individuals filed suit, seeking declaratory and injunctive relief in a U.S. district court.[272] The plaintiffs argued that the law was unconstitutional and in direct violation of the right of liberty to travel abroad guaranteed by the Due Process Clause of the Fifth Amendment.[273] Although the district court denied relief, upon review, the Court held that the section at issue of the Subversive Activities Control Act too broadly and indiscriminately restricted the right to travel and, thus, abridged liberties guaranteed by the Fifth Amendment.[274] The Court, quoting *Kent v. Dulles*,[275] stated, "The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without the due process of law under the Fifth Amendment."[276] The Court focused on the language of the act itself and stressed the fact that the act "sweeps too widely...across the liberty guaranteed in the Fifth Amendment."[277] The Court insisted, "a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms."[278] The Court recognized that the government had "less drastic" means within its power to protect national security interests and that the abridgement of liberty in this case was substantial.[279] While the Court did not explicitly state that this law was "overbroad," the Court strongly implied this through its language.[280] The Court stated that the act "is patently not a regulation 'narrowly drawn to prevent the supposed evil.'"[281] The Court considered the concerns that arose from what it had described as an *unnecessarily broad* statute and stated that laws having the potential of abridging liberty should be narrow in scope, for "precision must be the touchstone of legislation so affecting basic freedoms."[282]

Since the *Aptheker* case involved a personal liberty, the right to travel, the Court examined the law consistent with its approach in cases involving the First Amendment.[283] Ultimately, the Court said the regulation was "unconstitutional on its face."[284] This was a break from previous case law because the Court in fact relied on the overbreadth doctrine in a case that did not involve the right to free speech.[285] According to *Aptheker*, if one's "personal liberties" were being violated, the

---

270. *Id.* at 502–03, 505.
271. *Id.* at 501–02 (citing 50 U.S.C. § 785 (6)).
272. *Id.* at 503.
273. *Id.* at 503–04.
274. *Id.* at 514.
275. 357 U.S. 116 (1958).
276. *Aptheker*, 378 U.S. at 505 (quoting Kent v. Dulles, 357 U.S. 116, 127 (1958)).
277. *Id.* at 514.
278. *Id.* at 508 (quoting NAACP v. Alabama, 377 U.S. 288, 307 (1958)).
279. *Id.* at 512–14 (quoting Shelton v. Tucker, 364 U.S. 479, 488 (1960)).
280. *Id.* at 514 ("The broad and enveloping prohibition indiscriminately excludes plainly relevant considerations such as the individual's knowledge, activity, commitment, and purposes in and places for travel.").
281. *Id.* (quoting Cantwell v. Connecticut, 310 U.S. 296, 307 (1940)).
282. *Id.* (citing NAACP v. Button, 371 U.S. 415, 438 (1963)).
283. *Id.* at 517.
284. *Id.* at 514.
285. *Id.*

claimant could attack the statute as unnecessarily broad.[286] For the first time, the Court's litmus test for whether the law could be attacked under the rubric of overbreadth was whether it involved "personal liberties."[287] Obviously, this was a much more expansive reading of the doctrine than had previously been given.[288] The *Aptheker* Court explicitly decided to follow the overbreadth approach taken in *NAACP v. Button*[289] and *Thornhill v. Alabama*,[290] two free speech cases.[291] The Court thus analyzed *Aptheker* as it did in *Button*, taking into account "possible applications of the statute, in other factual contexts besides that at bar."[292] The Court concluded that, since the freedom of travel was a liberty closely related to free speech, those challenging the act should have the act "judged on its face" and "not be required to assume the burden of demonstrating that Congress could not have written a statute constitutionally prohibiting their travel."[293]

It should be noted that the issue of third-party standing did not arise in this case because the appellants were members of different Communist organizations who had their passports revoked under this law, so the petitioners did have standing.[294] Thus, the question of whether someone not directly affected by the law, but who felt their right to travel "chilled," could bring a suit was never considered. However, given the Court's citation to and application of free speech cases in their analysis of *Aptheker*, this Court had demonstrated its willingness to apply an unmodified overbreadth doctrine lifted intact from the free speech context.[295] Therefore, had the facts been different, third party standing may have been granted in *Aptheker*.[296]

2. Right to Vote: *Louisiana v. United States*

Although the overbreadth doctrine remained firmly entrenched in free speech cases, one exception was *Louisiana v. United States*.[297] In this case, the U.S. government sued the State of Louisiana and four of its voting officials for discrimination against black applicants for voting registration.[298] The federal government asserted that a long-standing plan by the state had been developed to

---

286. *Id.* at 508 (quoting Shelton v. Tucker, 364 U.S. 479, 488 (1960)).

287. *Id.*

288. All the decisions, excepting *Reese*, 92 U.S. 265, that employed the overbreadth doctrine up to this point were First Amendment cases, although it is not until *Ferber*, 458 U.S. 747, that the Court in 1982 described the doctrine as being *limited to* First Amendment cases.

289. 371 U.S. 415 (1963).

290. 310 U.S. 88 (1940).

291. *Aptheker*, 378 U.S. at 516 (citing *Button*, 371 U.S. 415; *Thornhill*, 310 U.S. 88).

292. *Id.* (quoting *Button*, 371 U.S. at 432).

293. *Id.* at 517.

294. *Id.* at 517–18 (Black, J., concurring).

295. *Id.* at 517.

296. As stated, the Court did not expressly rely on the overbreadth doctrine in striking down the act. However, the overbreadth doctrine was still in its developmental stages and the Court may have been a little wary of expanding such a doctrine too quickly, especially outside the free speech context. The Court was entering uncharted waters and perhaps was determined to proceed cautiously. The Warren Court itself was the standard bearer of the overbreadth doctrine within the context of free speech. It might have felt that extending the doctrine even further would be like trying to leap a chasm in two jumps. Notwithstanding, this hesitation may have stymied the growth of the overbreadth doctrine growing outside the free speech arena. If the Court would have actively used the test to which it alluded in *Aptheker*, the overbreadth doctrine might have become a more encompassing doctrine.

297. 380 U.S. 145 (1965).

298. *Id.* at 147.

deprive minorities in Louisiana of the right to vote.[299] Specifically, the state used an "interpretation test," which required an applicant for registration to provide a "reasonable interpretation" of any clause in the federal or Louisiana Constitution.[300] Administration of this test systematically kept blacks from voting while simultaneously permitting whites to vote.[301] The lower federal court held, and the Supreme Court affirmed, that the Louisiana Constitution and statutes requiring the "interpretation test" were invalid on their face and, as applied, in violation of the Fourteenth and Fifteenth Amendments.[302] The Court did not break much new ground in this case, spending most of the opinion referring to the findings of the federal district court[303] and noting that the lower court had invalidated the statute "[b]ecause of the virtually unlimited discretion vested by the Louisiana laws in the registrars of voters...."[304]

The Supreme Court did, however, imply that the statute was overbroad.[305] The Court noted that the state's test offered no definite standards for officials to administer the test and no avenue of appeal to rejected applicants.[306] The Court declared, "This is not a test but a trap, sufficient to stop even the most brilliant man on his way to the voting booth. The cherished right of people in a country like ours to vote cannot be obliterated by the use of laws like this...."[307] It went on to note that "[m]any of our cases have pointed out the invalidity of laws so completely devoid of standards and restraints."[308] Obviously, voting registration officials must have some power so as to enforce the proper voting laws.[309] However, giving the registrars an uncontrolled discretion as to who can and cannot vote was deemed something completely different.[310] As one commentator observed, the Louisiana law was an extreme example of being overly broad.[311] Again, the Court did not refer explicitly to overbreadth or the doctrine itself, but if one examines the Court's analysis closely, it appears the Court is greatly concerned with the broad scope of the Louisiana laws that authorized the "interpretation test."[312]

3. Right to Privacy Against Government Surveillance: *Berger v. New York*

Berger v. New York,[313] decided two years after *Louisiana v. United States*, reflected the Court's willingness to extend the overbreadth doctrine outside the

---

299. *Id.* at 147–48.
300. *Id.* at 148.
301. *Id.* at 148–49.
302. *Id.* at 150–53.
303. *Id.* at 150–51.
304. *Id.* at 150.
305. *Id.* at 151–53.
306. *Id.* at 153.
307. *Id.*
308. *Id.*
309. *See id.* at 150–54 (ruling problem is with "discriminatory" exercise of "uncontrolled discretion," not discretion itself).
310. *See id.* at 150–51.
311. *See also* M. Katherine Boychuk, Comment, *Are Stalking Laws Unconstitutionally Vague or Overbroad?*, 88 NW. U. L. REV. 769, 773 n.22 (1994) (noting Court "cases expanding overbreadth doctrine beyond free speech and association").
312. *See Louisiana*, 380 U.S. at 153.
313. 388 U.S. 41 (1967).

context of the First Amendment into the realm of the Fourth Amendment.[314] In *Berger*, during a state bribery investigation, a recording device was planted in an office by an ex parte order of a justice of the New York Supreme Court.[315] The eavesdropping order permitted monitoring for sixty days.[316] The order was made pursuant to a New York statute authorizing orders if "reasonable grounds" existed for granting an application for such a recording.[317] Portions of the recordings were later admitted in evidence and played to the jury in the state's bribery prosecution, in which the trial court upheld the validity of the statute and the accused was convicted.[318]

The U.S. Supreme Court reversed the conviction, concluding that "the language of New York's statute is *too broad* in its sweep resulting in a trespassory intrusion into a constitutionally protected area and is, therefore, violative of the Fourth and Fourteenth Amendments."[319] The Court noted that while the statute satisfied some constitutional requirements, "the broad sweep of the statute is immediately observable."[320] Here, the Court questioned whether "reasonable grounds" was the equivalent of "probable cause," which the Fourth Amendment demands, concluded the statute violated the Amendment's "particularity" requirement, said the sixty-day-authorization was too long, found it contained no termination provision that would be triggered when ample evidence was uncovered, and determined the statute had no procedure for notice as required for conventional warrants.[321]

Unlike *Aptheker* and *Louisiana*, the Court in *Berger* relied unabashedly on the overbreadth doctrine outside the First Amendment context.[322] The Court explicitly stated its distaste for such a broadly worded statute.[323] Unfortunately, however, the Court did not go into a very detailed analysis of the overbreadth doctrine, instead canvassing the history of eavesdropping and exploring the issues of probable cause and particularity.[324] Nonetheless, there is no doubt that the overbreadth doctrine was used by the *Berger* Court outside the context of the First Amendment.[325] While the Court did not belabor the fact that it was using the overbreadth doctrine, the doctrine seemed to flow naturally from the Court's analysis.[326] The Court's approach was succinct and focused: the language of the New York statute was unnecessarily sweeping and therefore the law was overbroad.[327] The Court appeared unconcerned about *which* amendment had been violated by this overly broad law.[328] The fact of the matter was that a right granted in the Bill of Rights was being blatantly violated

314. *Id.* at 54–60 (holding New York eavesdropping law violative of Fourth Amendment).
315. *Id.* at 45.
316. *Id.*
317. *Id.* at 54 (citing N.Y. CRIM. PROC. LAW. § 813-a (McKinney 1958)).
318. *Id.* at 44–45.
319. *Id.* at 44 (emphasis added).
320. *Id.* at 54.
321. *Id.* at 54–60.
322. *See id.* at 44.
323. *See id.* at 54–60.
324. *See id.*
325. *See id.* at 45–53.
326. *See id.* at 44.
327. *See id.*
328. *See id.* at 63–64.

and this needed to be addressed.[329] The overbreadth doctrine was applied because it was the most logical remedy.

4. Right to Privacy and Contraceptives: *Griswold v. Connecticut*

In the landmark case of *Griswold v. Connecticut*,[330] the Court struck down the State of Connecticut's prohibition[331] against the use of contraceptives by married couples as an unconstitutional restriction of the right to privacy.[332] The executive director of the state's Planned Parenthood League and a physician-professor at Yale Medical School had been prosecuted as accomplices for advising a married couple to use contraceptives.[333] The Court said such right to use contraceptives was found in "the zone of privacy created by several fundamental constitutional guarantees," pointing out that "specific guarantees in the Bill of Rights"—referring to the First, Third, Fourth, Fifth, and Ninth Amendments—"have penumbras, formed by emanations from those guarantees that help give them life and substance."[334] The Court concluded, "Such a law cannot stand in light of the familiar principle, so often applied by this Court" that a governmental objective cannot be accomplished "by means which sweep unnecessarily broadly...invad[ing] the area of protected freedoms."[335] Once again, an overbreadth-type of analysis was the lynchpin in a Court decision not involving speech.[336]

In *Eisenstadt v. Baird*,[337] the Court reviewed a Massachusetts stricture outlawing distribution of contraceptives to single persons.[338] In this case, the defendant had been arrested for giving a single woman a package of vaginal foam following his lecture on contraception given to a group of students at Boston University.[339] Eventually, the Court of Appeals for the First Circuit struck down the measure as unconstitutional, relying heavily on *Griswold*.[340]

When this matter reached the Court, it indicated that if the statute had the capacity to reach the activity of married persons, it would be struck down as "overbroad" and contrary to the right to marital privacy.[341] Rather than deciding the "important question" of whether the First Circuit was correct when it ruled the Massachusetts law "conflicts with fundamental human rights" of unmarried persons,[342] it instead

---

329. *See id.* at 58.

330. 381 U.S. 479 (1965).

331. *Id.* at 480 (citing CONN. GEN. STAT. §§ 53–32, 54–196 (repealed 1969)).

332. *Id.* at 485.

333. *Id.* at 480.

334. *Id.* at 484–86.

335. *Id.* at 485 (quoting NAACP v. Alabama, 377 U.S. 288, 307 (1964)).

336. *Id.* Of course, the Court in this decision was explicitly relying on substantive due process analysis; yet, that analysis was glaringly similar, if not identical, to overbreadth analysis, which the Court would later insist in *Ferber*, *Schall*, and *Salerno* is confined to the First Amendment. It is significant that the overbreadth approach to challenging legislation that conflicts with a fundamental right would free the petitioner from the constraints of strict scrutiny.

337. 405 U.S. 438 (1972).

338. *Id.* at 441 n.2 (citing MASS. GEN. LAWS ANN., ch. 272, § 21 (West 1966)).

339. *Id.* at 440.

340. *Id.* at 450–53 (citing Baird v. Eisenstadt, 429 F.2d 1398, 1401–02 (1st Cir. 1970) (citing Griswold v. Connecticut, 381 U.S. 479 (1965))).

341. *Id.* at 450–51.

342. *Id.* at 450–53 (quoting Baird v. Eisenstadt, 429 F.2d 1398, 1401–02 (1st Cir. 1970)).

said, "whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike."[343] The Court continued, "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[344] However, the Court said that *if Griswold*'s holding protecting the use of contraceptives by married persons did *not* extend to the *distribution* of contraceptives to unmarried persons, then the measure raised Fourteenth Amendment equal protection problems.[345] In other words, because any restriction on distribution of contraceptives would run afoul of marital privacy if it extended to distribution to married persons, "the State could not, consistently with the Equal Protection Clause, outlaw distribution to unmarried but not to married persons."[346] Inasmuch as such differential treatment would be "invidious" regulation, the Court decided the law was unconstitutional on Equal Protection grounds.[347] Finally, the Court had little trouble concluding that the defendant-distributor had standing to advocate the rights of persons desirous of obtaining and using contraceptives.[348]

While *Eisenstadt* did not ultimately strike down the Massachusetts law on overbreadth grounds, it relied heavily on the overbreadth concept in its analysis.[349] The unconstitutional differential treatment arose precisely because the anti-contraceptive regulation could not be extended to cover married individuals' activities, lest it infringe marital privacy.[350] Thus, the overbreadth problem that would arise if Massachusetts attempted to restrict distribution to both married and singles alike placed the law in an impossible position. If it was not discriminatory, it was overbroad. If it was not overbroad, it was discriminatory.

5. Right to Privacy and Abortion: *Roe v. Wade* and Its Progeny

With the exception of the cases discussed in the preceding four sections, the overbreadth doctrine stayed within the confines of free speech throughout the 1960s.[351] However, things changed when the issue of abortion became more prevalent and the Court struck down various abortion prohibitions or restrictions with an analysis identical to overbreadth.[352] In the late 1960s and early 1970s, abortion began to be addressed by the courts. In 1973, the Court handed down *Roe v. Wade*,[353] the landmark decision that legalized abortion across the country.[354] In *Roe*, the Court struck down a Texas statute prohibiting abortions on substantive due

343. *Id.* at 453.
344. *Id.*
345. *Id.* at 454.
346. *Id.*
347. *Id.* at 454–55.
348. *Id.* at 443–46.
349. *Id.* at 450–51.
350. *Id.* at 454.
351. *See, e.g.*, Robel, *supra* notes 116–126 and accompanying text.
352. Dorf, *supra* note 11, at 272 (noting that the Court's reference in *Roe v. Wade* that the statute was unconstitutional because of its broad sweep represented "an analysis indistinguishable from First Amendment overbreadth doctrine").
353. 410 U.S. 113 (1973).
354. *Id.* (holding Texas statute outlawing all forms of abortion violative of substantive due process).

process grounds, pointing out, among other concerns, that the Texas restriction on medically advised abortions carried out to save the life of the mother "sweeps too broadly."[355] Looking at the statute as a whole, it noted that the lower court in the case had held that the statute was "overbroad" in light of a woman's constitutional rights.[356] Specifically, the federal district court had granted declaratory relief because the abortion statutes were deemed overbroad, infringing a woman's Ninth and Fourteenth Amendment rights.[357] The Court in *Roe* then examined how other lower courts had analyzed statutes in other states regulating abortion and pointed out that many courts held state laws unconstitutional "because of vagueness or...overbreadth and its abridgement of rights."[358] For example, in the companion case to *Roe* that invalidated Georgia's abortion law, *Doe v. Bolton*,[359] the federal district court ruling (which *Roe* cited) had earlier stated that the Georgia abortion statute at issue was invalid as a "matter of statutory overbreadth."[360] In another case cited in *Roe*,[361] *Babbitz v. McCann*,[362] a federal district court in Wisconsin found the abortion restriction in question "suffer[ing] from an infirmity of fatal overbreadth."[363] While the Court in *Roe* did not specifically rely on the "overbreadth doctrine" to strike down the *entire* Texas statute, it had explicitly noted that the question of violating substantive due process rights had been presented in the form of an overbreadth argument.[364] In effect, the Court sided with those lower courts that had stated no compelling state "interest justified *broad* limitations on the reasons for which a physician and his pregnant patient might decide to have an abortion in the early stages of pregnancy."[365] Thus, the Court, in this landmark case, brought an overbreadth-type analysis in through the back door.

In 1992, Justice Scalia conceded, in a dissenting opinion in *Ada v. Guam Society of Obstetricians and Gynecologists*,[366] that *Roe* "seemingly employed an 'overbreadth' approach—though without mentioning the term and without analysis."[367] Various other commentators have agreed.[368] The *Roe* Court's

---

355. *Id.* at 164.

356. *Id.* at 122 (citing Roe v. Wade, 14 F. Supp. 1217 (N.D. Tex. 1970)).

357. *Id.*

358. *Id.* at 154 (citing Abele v. Markle, 342 F. Supp. 800, 804 (D. Conn. 1972) (holding Connecticut's "overreaching" exercise of police power violative of due process); Doe v. Scott, 321 F. Supp. 1385, 1389 (N.D. Ill. 1971) (ruling Illinois prohibition "too sweeping" to comport with due process); Poe v. Menghini, 339 F. Supp. 986, 994 (D. Kan. 1972) (holding Kansas abortion provision "overbroad" contrary to due process); YWCA v. Kugler, 342 F. Supp. 1048, 1076 (D.N.J. 1972) (ruling New Jersey abortion restrictions violative of right to privacy); People v. Belous, 458 P.2d 194, 204 (Cal. 1969) (declaring California abortion law is "invalid infringement" on woman's rights and vague); State v. Barquet, 262 So. 2d 431, 438 (Fla. 1972) (holding abortion prohibition vague)).

359. 410 U.S. 179 (1973).

360. *Roe*, 410 U.S. at 154 (citing Doe v. Bolton, 319 F. Supp. 1048, 1056 (N.D. Ga. 1970), *aff'd sub. nom*, Doe v. Bolton, 410 U.S. 179 (1973)).

361. *Id.* at 154–55 (citing Babbitz v. McCann, 310 F. Supp. 293 (E.D. Wisc. 1970).

362. 310 F. Supp. 293 (E.D. Wis.).

363. *Id.* at 302.

364. 410 U.S. at 122 (citing *Roe*, 314 F. Supp. 1217 (N.D. Tex. 1970)).

365. *Id.* at 156 (emphasis added).

366. 506 U.S. 1011 (1992) (Scalia, J., dissenting) (disagreeing with majority's decision to deny certiorari).

367. *Id.* at 1012.

368. *See, e.g.*, Dorf, *supra* note 11, at 272 ("[T]he *Roe* Court employed an analysis indistinguishable from First Amendment overbreadth doctrine."); Fallon, *supra* note 11, at 859 n.29 (noting Court's use of overbreadth in abortion cases as example of Court's application of doctrine outside First Amendment); Marc E. Isserles,

willingness to permit the overbreadth doctrine (or an identical twin of the doctrine) as a challenge to an infringement on a woman's right to choose would enable many petitioners in future cases to do the same.[369]

After *Roe*, there also seemed to be a trend in some of the abortion cases that a challenge to a statute restricting abortion often resulted in the enactment being first struck down by the lower courts based on overbreadth, followed by the Supreme Court's upholding the invalidation without explicitly referring to the overbreadth doctrine.[370] This occurred in *Roe* and also was the case in *Planned Parenthood v. Danforth*.[371] In *Danforth*, a challenge was made to the constitutionality of a Missouri statute that set various limitations on abortions.[372] There were seven specific provisions attacked.[373] The provision found by the lower court to be "unconstitutionally overbroad" was the provision that required a physician to "preserve" the fetus's life and health on pain of criminal penalty.[374] Specifically, the provision stated,

> No person who performs or induces an abortion shall fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted.[375]

The lower court held this particular restriction to be unnecessarily "overbroad" because it failed to exclude the pregnancy stage prior to viability.[376] The Supreme Court affirmed this aspect of the lower court's ruling.[377] It found this provision was unconstitutional because it "impermissibly requires the physician to preserve the life and health of the fetus, whatever the stage of pregnancy."[378] In addition, another section of the statute outlawed the commonly used "saline technique" following the first twelve weeks of pregnancy.[379] The Court ruled that this provision was "an unreasonable and arbitrary regulation designed to *inhibit*...the vast majority of abortions after the first 12 weeks."[380] Thus, the Court again ratified the applicability

---

Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement, 48 AM. U. L. REV. 359, 410 n.224 (1998) ("[T]he abortion cases present perhaps the strongest case that the Court has applied something resembling the First Amendment doctrine outside of the First Amendment.").

369. *See* Planned Parenthood v. Danforth, 428 U.S. 52 (1976); City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416 (1983).

370. *See* Kevin Martin, Note, *Stranger in a Strange Land: The Use of Overbreadth in Abortion Jurisprudence*, 99 COLUM. L. REV. 173, 200 (1999) (acknowledging "overbreadth doctrine has also been extended to include the substantive area of abortion law," although arguing against the extension); John Christopher Ford, Note, *The* Casey *Standard for Evaluating Facial Attacks on Abortion Statues*, 95 MICH. L. REV. 1443, 1450 (1997) (stating that "the Court *has* used the overbreadth doctrine in abortion cases before and after...*Salerno*").

371. 428 U.S. 52, 75–77 (1976).

372. *Id.* at 57–59.

373. *Id.* at 58–59.

374. *Id.* at 59 (citing *Danforth*, 392 F. Supp. at 1371).

375. *Id.* at 59, 85–86 (app.) (quoting MO. REV. STAT. § 188.035 (1974)).

376. *Id.* at 59 (citing *Danforth*, 392 F. Supp. at 1371).

377. 428 U.S. at 82–84.

378. *Id.* at 83.

379. *Id.* at 76, 86–87 (app.) (quoting MO. REV. STAT. § 188.050 (repealed 1979)) ("[T]he method or technique of abortion known as saline amniocentesis...is hereby prohibited after the first twelve weeks of pregnancy.").

380. *Id.* at 79 (emphasis added).

of the overbreadth doctrine in a case outside the context of free speech.[381] But again, the Court itself did not explicitly state that the statute was overbroad or indicate it was relying on the doctrine of overbreadth.

Like *Roe* and *Danforth*, in *Colautti v. Franklin*[382] the Court also examined a successful challenge based on overbreadth grounds but invalidated the statute on other grounds.[383] In *Colautti*, a suit was brought challenging the constitutionality of a section of the Pennsylvania Abortion Control Act,[384] which required a physician to exercise the same standard of care on a "viable" fetus as would be required if it was intended that the fetus be born alive.[385] A three-judge federal district court found the provision in question "unconstitutionally vague and overbroad and enjoined its enforcement."[386] Ultimately, the Supreme Court concluded that the portion of the statute was void for vagueness and thus found it "unnecessary to consider appellees' alternative arguments based on the alleged overbreadth of [the statute]."[387]

In 1983, in *City of Akron v. Akron Center for Reproductive Health, Inc.*,[388] the Court used an analysis similar to First Amendment overbreadth as it facially invalidated an abortion restriction.[389] In this case, the Court ruled an Ohio mandate that abortions occurring after the first trimester be performed in a hospital[390] had, quoting *Danforth*, "'the effect of inhibiting...the vast majority of abortions after the first 12 weeks.'"[391] In addition, it affirmed the lower court's facial invalidation of provisions "deal[ing] with parental consent, informed consent, a 24-hour waiting period, and the disposal of fetal remains."[392] Like the *Danforth* ruling, the *Akron Center* decision was based on the notion that a particular limitation on access to an abortion was unduly *inhibiting* the woman's right to choose, something the Court found violative of the affected persons' right to privacy.

*C. Post-*Schall *and* Salerno *U.S. Supreme Court Decisions*

After the Court's initial hint in *Ferber* and pronouncement in *Schall* that the concept of overbreadth had no life beyond First Amendment free speech cases, there continued to appear Court decisions that either (1) employed what might be described as an *overbreadth-type* analysis or, instead,[393] (2) affirmed lower court

---

381. *See id.*
382. 439 U.S. 379 (1979).
383. *Id.* at 380–81, 390.
384. *Id.* at 380–81.
385. *Id.* at 380–81 n.1 (citing PA. STAT. ANN. tit. 35, § 6605 (A) (repealed 1982)). The statute subjected a physician who performs an abortion to "potential criminal liability if he fails to utilize a statutorily prescribed technique when the fetus 'is viable' or when there is 'sufficient reason to believe that the fetus may be viable.'" *Id.* at 381.
386. *Id.*
387. *Id.* at 390.
388. 462 U.S. 416 (1983).
389. *Id.* at 438–39.
390. *Id.* at 431–38.
391. *Id.* at 438 (quoting Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52, 79 (1976)).
392. *Id.* at 452. *But see* H.L. v. Matheson, 450 U.S. 398, 407–13 (1981) (rejecting facial attack on parental notification law of Utah brought by fifteen-year-old unemancipated girl who lived with and was dependent on her parents and who had made no showing as to her maturity).
393. *See infra* notes 395–413 and accompanying text.

rulings that themselves relied on the overbreadth doctrine.[394] No better illustration of the first category of decisions exists than *Hodel v. Irving*,[395] decided rather curiously after *Schall* but only one week before *Salerno*.

1. Right to Property Interests: *Hodel v. Irving*

In *Hodel v. Irving*,[396] three American Indians filed a claim asserting that a section of the Indian Land Consolidation Act of 1983[397] was in violation of their Fifth Amendment property rights.[398] This statute was implemented as a means of ameliorating the problem of extreme fractionation of Indian lands.[399] In the nineteenth century, land was allotted to individual American Indians and held in trust by the United States in order to protect the allottees from disposing of their lands to white settlers.[400] However, the policy resulted in splintering of acreages into smaller and smaller parcels, sometimes with dozens of owners.[401] Congress responded by enacting the Indian Land Consolidation Act, which provided that "no undivided fractional interest" in such lands "shall [descend] by intestacy or devise but shall escheat to [the] tribe if such interest represents 2 per centum or less of the total acreage in such tract and has earned to its owner less than $100 in the preceding year before it is due to escheat."[402]

Petitioners, several American Indians, filed suit in the U.S. District Court for the District of South Dakota, claiming that this statute resulted in a taking of property without just compensation in violation of the Fifth Amendment.[403] "The District Court concluded that the statute was constitutional" and that petitioners had "no vested interest in the property of the decedents prior to their deaths."[404] The Court of Appeals of the Eighth Circuit reversed the district court's finding and stated, "Although it agreed that appellees had no vested rights in the decedents' property, it concluded that their decedents had a right, derived from the original Sioux allotment statute, to control disposition of their property at death."[405] Further, the federal appellate court "held that appellees had standing to invoke that right and that the taking of that right without compensation to decedents' estates violated the Fifth Amendment."[406]

The Supreme Court upheld the appellate court's determination. The Court concluded that "the regulation here amounts to virtually the abrogation of the right to pass on a certain type of property—the small undivided interest—to one's

394. *See infra* notes 414–434 and accompanying text.
395. 481 U.S. 704 (1987).
396. *Id.*
397. *Id.* at 709 (quoting Indian Land Consolidation Act of 1983, Pub. L. 97-459, Title II, § 207 (codified as amended at 25 U.S.C. § 2206 (2000))).
398. *Id.* at 710.
399. *Id.* at 707–09, 711–12.
400. *Id.* at 706–07.
401. *Id.* at 707.
402. *Id.* at 708–09 (quoting 25 U.S.C. § 207)).
403. *Id.* at 710.
404. *Id.*
405. *Id.* (citing Irving v. Clark, 758 F.2d. 1260 (8th Cir. 1985)).
406. *Id.*

heirs."[407] This "complete abolition of both the descent and devise of a particular class of property" constituted a "taking" contrary to the Fifth Amendment.[408] Notwithstanding Congress's laudible goal of addressing the "serious public problem" of "extreme fractionation of Indian land," this measure, said the Court, "*goes too far*."[409] Very significantly, Justice Stevens, in a concurring opinion, stated,

> The Court's grant of relief to [petitioners] based on the rights of the hypothetical decedents...necessarily rests on the *implicit adoption of the overbreadth analysis* that has heretofore been restricted to the First Amendment area. The Court uses the language of takings jurisprudence to express its conclusion that [the regulation] violates the Fifth Amendment, but the stated reason is that [it] "goes too far"...because it might interfere with testamentary dispositions, or inheritances, that result in the consolidation of property interests rather than their increased fractionation. That reasoning may apply to some decedents, but it does not apply to these litigated decedents.[410]

In addition, Justice Stevens felt that the overbreadth doctrine was not applicable because, "[e]ven if overbreadth analysis were appropriate in a case outside of the First Amendment area, the Court's use of it on these facts departs from precedent."[411] Stevens noted that "[t]he Court generally does not grant relief unless there has been a showing that the invalid applications of the statute represent a substantial portion of its entire coverage."[412] Thus, Justice Stevens preferred that the majority not rest what he perceived to be a correct outcome on its "novel overbreadth approach."[413]

In any event, Justice Stevens correctly recognized, proverbially, that if it "looks like a duck, walks like a duck, and quacks like a duck, it must be a duck." The entire analysis relied on by the majority, including its usage of unconventional standing allowing those not directly aggrieved to assert the interests of hypothetical parties who would be aggrieved, was undoubtedly identical to that of overbreadth.[414] Here again, the Court's actions spoke louder than its words.

2. Right to Privacy and Abortion: *Roe*'s Progeny

After *Schall* and *Salerno*, the Court continued its pattern of entertaining overbreadth claims against abortion restrictions without outright rejection of the claim due to the fact that the restriction did not involve speech. In *Webster v. Reproductive Health Services*,[415] the constitutionality of a Missouri statute[416] containing several restrictions, including restrictions on public funding of abortion, was challenged as violating the First, Fourth, Ninth, and Fourteenth Amendments.[417]

---

407. *Id.* at 716.
408. *Id.* at 717–18.
409. *Id.* at 718 (quoting Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (emphasis added)).
410. *Id.* at 724 (Stevens, J., concurring) (emphasis added).
411. *Id.* at 725 n.10.
412. *Id.*
413. *Id.* at 726.
414. *See id.* at 724–26.
415. 492 U.S. 490 (1989).
416. *Id.* at 499.
417. *Id.* at 501–02.

This attack was a facial challenge on the statute seeking declaratory and injunctive relief.[418] Several provisions, including the public funding bar, were struck down in the federal district and federal appellate courts for being vague and "inconsistent with the right to an abortion enunciated in *Roe v. Wade*."[419] While the Court upheld the statute on the grounds that each measure reflected a legitimate regulation of abortion, it did not question the framing of the overbreadth challenge presented.[420] However, it should be noted that Justice O'Connor, in her concurring opinion, stated "that appellees' facial challenge to the constitutionality of Missouri's ban...cannot succeed."[421] She based her reasoning in part on the fact that "we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment," quoting *Salerno*.[422]

The vast majority of the abortion cases that have come to the Supreme Court after *Roe v. Wade* have involved facial attacks on state statutes. Examples include *Hodgson v. Minnesota*[423] and *Thornburgh v. American College of Obstetricians and Gynecologists*.[424] Quite important was *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[425] wherein the Court reaffirmed the principles of *Roe v. Wade* and its recognition of a woman's right to choose an abortion prior to fetal viability[426] but introduced an analysis that inquires whether a particular state restriction places an "undue burden" on the woman's right to choose.[427] In this case, the Court ruled a spousal notification provision[428] would "operate as a substantial obstacle" to the right to choose "in a large fraction of...cases" and, thus, was facially invalid.[429] Also significant was the Court's denial of certiorari in *Ada v. Guam Society of Obstetricians and Gynecologists*,[430] following the Court of Appeals for the Ninth Circuit's facial invalidation of Guam's abortion prohibition,[431] wherein Justice Scalia, in dissent of the denial of certiorari, conceded *Roe* had employed an "overbreadth approach" and complained the Ninth Circuit was continuing to use "overbreadth impermissibly," a doctrine he believed should be restricted to First

---

418. *Id.* at 501.

419. *Id.* at 502–04.

420. *Id.* at 521 (noting *Roe*'s holding "that the Texas statute unconstitutionally infringed the right to an abortion derived from the Due Process Clause...and we leave it undisturbed").

421. *Id.* at 523 (O'Connor, J., concurring).

422. *Id.* at 524 (quoting United States v. Salerno, 481 U.S. 739, 745 (1987)).

423. 497 U.S. 417, 450–55 (1990) (declaring requirement that both parents be notified of minor's abortion decision was unconstitutional).

424. 476 U.S. 747, 758–72 (1986) (holding various provisions of Pennsylvania Abortion Control Act facially invalid).

425. 505 U.S. 833 (1992).

426. *Id.* at 845–46.

427. *Id.* at 879–901 (finding medical emergency definition, informed consent requirements, twenty-four-hour waiting period, parental consent provision, and reporting requirement of Pennsylvania Abortion Control Act did not impose undue burden while spousal notification provision amounted to an undue burden and, as such, was ruled invalid).

428. *Id.* at 887–95 (citing 18 PA. CONS. STAT. ANN. § 3209 (West 1989)).

429. *Id.* at 895. It is important to note that the Court did not employ *Salerno*'s "no set of circumstances" condition to a finding of facial invalidity outside the First Amendment. See *supra* notes 194–196 and accompanying text for *Salerno*'s pronouncement.

430. 506 U.S. 1011 (1992).

431. Ada v. Guam Soc. of Obstetricians & Gynecologists, 962 F.2d 1366, 1374, *cert. denied*, 506 U.S. 1011 (1992) (holding an anti-abortion statute unconstitutional in light of *Roe v. Wade*), *cert. denied*, 506 U.S. 1011 (1992).

Amendment cases.[432] In any event, each of these cases involved an overbroad statute that was alleged to be infringing upon some aspect of a woman's right to choose, which is generally considered not within the ambit of the First Amendment but rather the Ninth or Fourteenth Amendment.[433] In all of these cases, neither the majority, nor even the dissent, with the exception of Justice O'Connor's concurrence in *Webster* and Justice Scalia's dissent in *Ada*, ever questioned or doubted the form of the challenge presented.[434] While this does not necessarily infer the overbreadth doctrine could be used to invalidate the statute in the abortion context, its silence concerning the doctrine speaks volumes. In a fashion, the abortion line of cases is the most prevalent example of the Court's use of overbreadth-type analysis outside the First Amendment arena.[435]

3. Right to Raise Children: *Troxel v. Granville*

More recently, there has been an *intimation* that the overbreadth doctrine may apply to additional fundamental rights falling outside the scope of the First Amendment.[436] In *Troxel v. Granville*,[437] the Court determined that *application* of a Washington statute limiting parental rights was too "broad" and in violation of the Due Process Clause.[438] The Washington statute "permit[ted] '[a]ny person' to petition a superior court for child visitation rights 'at any time,' and authorize[d] that court to grant such visitation rights whenever 'visitation may serve the best interest of the child.'"[439] Petitioners, grandparents of two children, "petitioned a Washington Superior Court for the right to visit their grandchildren."[440] Respondent, the mother of the two children, opposed the petition.[441] The case eventually went before the Washington Supreme Court, which determined that the statute as a whole unconstitutionally interfered with the fundamental right of parents to rear their children and that it "sweeps too broadly."[442]

The U.S. Supreme Court began its analysis by pointing out that parents' interest in "the care, custody and control of their child—is perhaps the oldest of the fundamental liberty interests...."[443] The Court noted that the State of Washington statute contained no presumption that a child's best interests be served by parental decision making.[444] Also, the Court observed that the petitioners had not alleged and

---

432. 506 U.S. at 1012–13.
433. *See, e.g.*, *Roe*, 410 U.S. 113.
434. Fallon, *supra* note 11, at 859 n.29.
435. *See* Isserles, *supra* note 368, at 410 n.224 (acknowledging abortion cases are strongest evidence that overbreadth has been used outside First Amendment). However, Isserles argues that in actuality much of the Court's abortion jurisprudence does not support the "widely held view" that the overbreadth doctrine has been extended beyond the First Amendment. *Id.* at 414. Yet, later he concedes that it is "hard to quarrel with the conclusion that *Casey* employed some type of overbreadth doctrine." *Id.* at 458.
436. *See* Troxel v. Granville, 530 U.S. 57 (2000).
437. *Id.*
438. *Id.* at 67–68.
439. *Id.* at 60 (citing WASH. REV. CODE § 26.10.160(3) (West 1987)).
440. *Id.*
441. *Id.*
442. *Id.* at 63.
443. *Id.* at 65.
444. *Id.* at 67.

no court had found the parents unfit.[445] The Court stated that the statute was "breathtakingly broad" because the "language effectively permits any third party seeking visitation to subject any decision by a parent concerning visitation of the parent's children to state-court review."[446] The Court further noted that "[o]nce the visitation petition has been filed in court and the matter is placed before a judge, a parent's decision that visitation would not be in the child's best interest is accorded no deference."[447]

Notwithstanding the Court's concern about the "breathtakingly broad" reach of the statute, Justice O'Connor stated, on behalf of the Court, that it was resting its "decision on the sweeping breadth of [the statute] *and the application of that broad, unlimited power*" and, consequently, declined to rule the statute facially invalid as had the Washington Supreme Court.[448] The Court would not say the statute violated "the Due Process clause as a *per se* matter."[449] Justice Souter, in a concurring opinion, was perplexed as to why the Court did not uphold the state supreme court's facial invalidation, particularly where "specific application of the state statute by the trial court [is an issue] not before us...."[450] In his mind, "the state statute sweeps too broadly and is unconstitutional on its face."[451]

Troxel is significant in several respects. First, the Court relies on an overbreadth-type analysis in an additional constitutional arena: that of parental rights. Next, the Court resorts to an *overbroad as applied* evaluation,[452] thereby requiring traditional standing, which is an unconventional approach to overbreadth, to say the least. But finally, and most importantly, this decision dramatizes the complete absence of principled decision making that is at the heart of the Court's blind allegiance to the proposition that overbreadth only lives within the walls of the First Amendment. On the one hand, Justice O'Connor is overwhelmed by the "breathtaking" scope of the stricture when weighed against a fundamental right.[453] Yet, because of her pronouncement in her concurrence in *Webster* and the Court's insistence that the overbreadth doctrine has no vitality outside of First Amendment free speech cases, she is forced to reject the facial challenge that even Washington's highest court recognized and, instead, rely on unprecedented overbreadth *as applied* reasoning to strike down the trial court's order.[454]

In any event, the decisions before and after *Schall* and *Salerno* lend themselves to the following observations. Based on scattered U.S. Supreme Court case law, there appears to be an unspoken recognition of the overbreadth doctrine outside the First Amendment.[455] However, one must concede it is rarely used, rarely mentioned, and rarely considered. Nonetheless, while various decisions in the past twenty-five

445. *Id.* at 68.
446. *Id.* at 67.
447. *Id.*
448. *Id.* at 73 (emphasis added).
449. *Id.*
450. *Id.* at 75–76 (Souter, J., concurring).
451. *Id.* at 76–77 (Souter, J., concurring).
452. *Id.* at 66–67.
453. *Id.*
454. *See id.*
455. *See, e.g., Aptheker*, 378 U.S. 500; *Roe*, 410 U.S. 113, discussed *supra* sections VI.A.1 and VI.A.5.

years note that the Court has not recognized the overbreadth doctrine outside the First Amendment context,[456] this is not completely true.[457] Indeed, the Court has not been entirely forthright when it says it has not recognized an overbreadth doctrine outside the free speech context, especially when one considers the cases discussed above. The Court is not being entirely clear, either. In the cases where overbreadth, or an analysis that parallels overbreadth, is used outside the First Amendment, the Court has been less than explicit in whether it was in fact using the overbreadth doctrine.[458] For example, in most of the abortion cases cited, the word "overbreadth" is rarely, if at all, used, but the underlying principles of the doctrine are at work.[459] Meanwhile, *Hodel* illustrates the Court's actual use of the doctrine without, as Justice Scalia points out, any acknowledgment.[460] Finally, *Troxel* reflects the complete folly in attempting to limit overbreadth to only one constitutional right when other fundamental rights may suffer a crying need for the same protection.[461]

V. LOWER COURT CONFUSION

A. *Lower Court Cases Prior to* Schall *and* Salerno

Earlier lower court caselaw utilizing overbreadth analysis reflected little hesitancy to consider the concept in statutory challenges not based on free speech.[462] Some semblance of the overbreadth doctrine surfaced in at least one lower court even before the U.S. Supreme Court used it in *Thornhill v. Alabama*,[463] discussed earlier.[464] In *Liberty Highway Co. v. Michigan Public Utilities Commission*,[465] the federal District Court for the Eastern District of Michigan considered the claim of a plaintiff, a trucking company, that certain Michigan regulations on common carriers violated, amongst other concerns, the Interstate Commerce Clause of the federal Constitution as well as the Michigan Constitution.[466] Plaintiff insisted its transportation of freight engaged it solely in interstate business and no intrastate business, which, ostensibly, the state could regulate.[467] The Court ruled that any provisions of the enactment that "are confined in their application to regulation of common carriers in connection with the public highways [that] are not a direct burden upon interstate commerce" are acceptable, but those that are "*not so confined*" so as to "unduly burden" interstate commerce are in "contravention of the federal Constitution, and void."[468] Here, one provision that required insurance and indemnity bonds for the protection of persons and property was found to be a direct

456. *See, e.g., Salerno*, 481 U.S. 739.
457. *See, e.g., Roe*, 410 U.S. 113.
458. *See, e.g.*, Troxel v. Granville, 530 U.S. 27 (2000); Hodel v. Irving, 481 U.S. 704 (1987); *Roe*, 410 U.S. 113.
459. *See e.g., Roe*, 410 U.S. 113.
460. *See supra* notes 395–413 and accompanying text.
461. *See Troxel*, 530 U.S. 27.
462. *See supra* notes 435–460 and accompanying text.
463. 310 U.S. 88 (1940).
464. *See supra* notes 92–99 and accompanying text.
465. 294 F. 703 (E.D. Mich. 1923) (per curiam).
466. *Id.* at 706.
467. *Id.* at 704.
468. *Id.* at 708 (emphasis added).

burden on interstate commerce and void.[469] Meanwhile, another provision was "so broad" in its terms that it was deemed contrary to certain State of Michigan constitutional requirements.[470]

In *State v. Shigematsu*,[471] a Hawaii Supreme Court decision, defendants were charged with violation of a state statute that made it an offense to be "found present in a room or place barred, or barricaded, or built, or protected in a manner to make it difficult of [sic] access or ingress to police officers where gambling implements were exhibited or exposed to view."[472] The defendants attacked the enactment as vague and overly broad contrary to the Due Process Clause of the federal and Hawaii constitutions.[473] The Hawaii Supreme Court stated that "[a]ny home built with locks in the doors would come within" the reach of the statute.[474] Also, "it would appear that any person within a room of his home where cards, dice or chips are in view would be violating this statute."[475] Having "no doubt that the statute [was] vague and overly broad," the court ruled the statute violative of due process.[476]

Another earlier decision having nothing to do with free speech, but which nevertheless relied on "overbreadth" analysis, was *State v. Starks*,[477] a Wisconsin Supreme Court opinion. A Wisconsin vagrancy statute defined a "vagrant" as "[a] person found in or loitering near any structure, vehicle or private grounds who is there without the consent of the owner and is unable to account for his presence."[478] After determining that the Wisconsin vagrancy law's definition of "loiter" failed to include or imply any sinister or criminal purpose on the part of the loiterer,[479] the court considered whether it suffered "the defect of overbreadth" contrary to substantive due process, concluding that it did.[480] Operating from the premise that "[t]he [F]ourteenth [A]mendment...protects persons from incursions by the state into certain areas of their life, and [that] an overbroad statute is constitutionally defective if it extends state criminal authority beyond the proper reach of government into one of these protected private areas," the court found the Wisconsin statute's clear wording could cover "[s]ightseers, window-shoppers and persons

469. *Id.* (referring to 1923 MICH. PUB. ACTS 209, § 7).

470. *Id.* at 706, *referring to* 1923 MICH. PUB. ACTS 209, § 3, which provides that

> [a]ny and all persons, firms or corporations, now engaged, or which shall hereafter engage, in the transportation of persons or property for hire by motor vehicle, upon or over the public highways of this state, or any of them, as above described, shall be common carriers, and, so far as applicable all laws of this state now in force or hereafter enacted, regulating the transportation of persons or property by other common carriers, including regulation of rates, shall apply with equal force and effect to such common carriers of persons and property by motor.

While Sections 3 and 7 were deemed facially invalid, the provisions of both sections were separable from the remainder of the Act. *Id.* at 708.

471. 483 P.2d 997 (Haw. 1971).

472. *Id.* at 998 (citing HAW. REV. STAT. § 746-6).

473. *Id.* at 998.

474. *Id.* at 999.

475. *Id.*

476. *Id.*

477. 186 N.W. 2d 245 (Wis. 1971).

478. *Id.* at 247 (quoting WIS. STAT. ANN. § 947.02(2)).

479. *Id.* at 247–49. On this basis, the court found it to be vague. *Id.*

480. *Id.* at 249–50.

merely taking a walk" and, as such, was so "overly broad that it [was] unconstitutional on its face."[481]

The Hawaii Supreme Court, in *In the Interest of Doe*,[482] relied in part on the overbreadth doctrine to strike down a curfew ordinance that prohibited persons under the age of eighteen from loitering in a public place between 10:00 P.M. and the time of sunrise the following morning unless accompanied by a parent, legal guardian, or spouse.[483] Noting that it had ruled in 1930 that a "statute making it illegal to 'habitually loaf, loiter and/or idle upon any...public place'" was "unconstitutionally overbroad because it drew 'no distinction between conduct that is calculated to harm and that which is essentially innocent,'"[484] it found the ordinance in question violative of substantive due process because "its broad sweep has the effect of inhibiting otherwise lawful conduct."[485]

In *State v. Pilcher*,[486] an Iowa Supreme Court decision examined an "overbreadth" claim directed at a State of Iowa proscription against "sodomy."[487] In this case, the defendant was alleged to have had a woman not his wife perform fellatio upon him.[488] The defendant claimed the statute was, among other objections, unconstitutionally void for "overbreadth."[489] Noting that "the emerging right of privacy protects private sexual activity between consenting adults of the opposite sex not married to each other,"[490] the Iowa Supreme Court concluded that substantive due process required that the court rule the statute to be "an invasion of fundamental rights, such as the personal right of privacy, to the extent it attempts to regulate through use of criminal penalty consensual sodomitical practices performed in private by adult persons of the opposite sex."[491]

Of course, not all overbreadth claims have succeeded in the lower courts. For example, in *Thompson v. Lorenzo*,[492] the New York Supreme Court, Kings County, examined a claim that a New York Secretary of State's order prohibiting solicitation of real estate listings by licensed real estate brokers in certain geographical areas designed to prevent panic selling was, among other things, overbroad contrary to Fifth and Fourteenth Amendment rights to due process "because it completely prohibits [the] legitimate business endeavors" of affected brokers.[493] The New York Supreme Court disagreed, concluding "that the order is not overbroad" because it was properly motivated by the interest of prohibiting a "pernicious practice" inimical to property interest stability in the affected areas.[494] Significantly, the

481. *Id.*
482. 513 P.2d 1385 (Haw. 1973).
483. *Id.* at 1386 (citing HONOLULU REV. ORD. § 13-3A.1).
484. *Id.* at 1387 (citing Territory v. Anduha, 31 Haw. 459 (1930).
485. *Id.* at 1388. The court also determined that the Honolulu ordinance was vague. *Id.*
486. 242 N.W.2d 348 (Iowa 1976).
487. *Id.* at 352 (citing IOWA CODE ANN. § 705.1 (repealed 1976)) ("Whoever shall have carnal copulation in any opening of the body except sexual parts, with another human being, * * *, shall be deemed guilty of sodomy.").
488. *Id.* at 350–51.
489. *Id.* at 354.
490. *Id.* at 356.
491. *Id.* at 359 (holding statute invalid as applied).
492. 356 N.Y.S. 2d 760 (N.Y. Sup. Ct. 1974).
493. *Id.* at 765.
494. *Id.* at 766.

court's rejection of the overbreadth claim had nothing to do with the fact that it was not predicated on First Amendment concerns.[495]

Similarly, in *Burkhart Randall Division of Textron, Inc. v. Marshall*,[496] a U.S. Court of Appeals for the Seventh Circuit case, an employee sought declaratory and injunctive relief prohibiting an attempted inspection of its facility by an inspector of the Occupational Safety and Health Administration (OSHA).[497] In its claim, the plaintiff-employer claimed an administrative warrant issued by a federal district court authorizing OSHA's inspection of plaintiff's workplace was "overbroad in scope."[498] After a lengthy examination of Fourth Amendment caselaw addressing the "relaxed or flexible standard of administrative probable cause" found in administrative inspection situations,[499] the Seventh Circuit concluded, "There may be cases in which extraordinary circumstances would render such an inspection unreasonably broad, but this is not such a case."[500] Again, a lower court of review entertained an overbreadth claim outside of First Amendment territory here, one based on the Fourth Amendment. While the court rejected the claim, it did so on grounds other than simply because First Amendment concerns were not implicated.[501]

Naturally, some overbreadth claims prior to *Schall* and *Salerno* were based on First Amendment protections.[502] For example, in *Vogel v. County of Los Angeles*,[503] the California Supreme Court held that a provision of the California Constitution requiring an oath of public employees that they avoid membership of any organization advocating overthrow of the government violated the "cherished freedom of association protected by the First Amendment."[504] The court stated that when the "government seeks to limit those freedoms on the basis of legitimate and substantial governmental purposes, such as eliminating subversives from the public service, those purposes cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."[505] Likewise, in *State v. Regan*,[506] an opinion from the Washington Supreme Court, a construction of a state obscenity statute,[507] was found to suffer from substantial "overbreadth."[508]

As the foregoing cases illustrate, prior to *Schall* and *Salerno*, the overbreadth doctrine was not relegated to First Amendment free speech.[509] Indeed, there

---

495. *Id.* at 765.
496. 625 F. 2d 1313 (7th Cir. 1980).
497. *Id.* at 1315.
498. *Id.*
499. *Id.* at 1316–25.
500. *Id.* at 1326.
501. *Id.*
502. *See, e.g.*, Brown v. United States, 334 F.2d 488, 497 (9th Cir. 1964) (finding provision of federal Labor-Management Reporting Act making it illegal for member of Communist party to hold office in a labor union violative of First Amendment's right of association and void), *aff'd*, 381 U.S. 437 (1964).
503. 434 P.2d 961 (Cal. 1967).
504. *Id.* at 963.
505. *Id.*
506. 640 P.2d 725 (Wash. 1982).
507. *Id.* at 726–27 (citing WASH. REV. CODE § 9.68.010 (repealed 1984)).
508. *Id.* at 728.
509. *See supra* notes 461–509 and accompanying text.

appeared caselaw where a stricture was even tossed out for being "unconstitutionally overbroad" in the face of a particular *state* constitutional protection.[510]

B. Lower Court Cases after Schall *and* Salerno

The implications of the Court's pronouncements in *Schall* and *Salerno*, diluted to some extent by its peculiar analysis in cases like *Hodel*, *Troxel*, and even *Casey*, where it appears to flirt with overbreadth thinking beyond free speech, have left lower courts to decipher the Court's somewhat inconsistent line of decisions. For example, two different cases involving similar factual situations show how different courts treat the overbreadth issue. In *Joyce v. City and County of San Francisco*,[511] a class of homeless individuals challenged the constitutionality of a city ordinance and state law that prohibited, among other activities, camping or sleeping in public parks or possession of shopping carts.[512] Among the challenges to the statutes was the claim that the provisions were overbroad in violation of one's due process rights.[513] The federal district court in California rejected the overbreadth claim, stating, "Overbreadth is a challenge which may be successfully leveled only where First Amendment concerns are at stake."[514] Because no one suggested the First Amendment was applicable, the claim failed.[515]

However, in *Pottinger v. City of Miami*,[516] a group of homeless individuals challenged the City of Miami because the city had arrested thousands of homeless people for conduct such as eating and sleeping in public places under the authority of various City of Miami ordinances and State of Florida statutes.[517] Among the challenges to the various statutes was the claim that the laws were unconstitutionally overbroad.[518] The District Court for the Southern District Court of Florida stated, "Courts...have overturned vagrancy and loitering statutes on due process grounds after finding them overbroad" and then held that the ordinances in question were unconstitutionally overbroad.[519] The court, citing to *Hoffman Estates v. Flipside*,[520] noted that a statute is overbroad if "the enactment reaches a substantial amount of constitutionally protected conduct."[521] The court further noted that because the ordinance "implicate[s] constitutionally protected rights under the eighth amendment [prohibition against cruel and unusual punishment] and...the equal protection clause of the fourteenth amendment," the statute was overbroad.[522]

---

510. *See, e.g.*, City of Lakewood v. Pillow, 501 P.2d 744, 744–45 (Colo. 1972) (municipal ordinance that could be construed as prohibiting having a dangerous weapon in a place of business is contrary to COLO. CONST. art. II, § 13).

511. 846 F. Supp. 843 (N.D. Cal. 1994).

512. *Id.* at 845–47.

513. *Id.* at 862.

514. *Id.* (citing Schall v. Martin, 467 U.S. 253, 268 n.18 (1984)).

515. *Id.*

516. 810 F. Supp. 1551 (S.D. Fla. 1992).

517. *Id.* at 1553–54.

518. *Id.* at 1576.

519. *Id.*

520. *Id.* at 1577 (citing *Hershey*, 834 F.2d 937, 940 n.5 (11th Cir. 1987)) (quoting Village of Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489 (1982))).

521. *Id.* (quoting *Hershey*, 834 F.2d at 940 n.5).

522. *Id.* (as applied).

In comparing these two cases, one sees a glaring inconsistency. Here, two federal courts faced essentially the same question but approached it from different angles, using completely different case law to support their respective conclusions. It is quite interesting that, even though both courts reached completely opposite outcomes, U.S. Supreme Court precedent supports each court's analysis.[523] The more important question to consider is how the *Pottinger* court reached its conclusion that the ordinances and statutes were overbroad.[524] It appears that the court took a very broad approach to the overbreadth doctrine and cited to *Flipside* as its guidance.[525] The court's reliance on "constitutionally protected rights" allowed it to apply the overbreadth doctrine to *all rights* enshrined in the Constitution, not just those in the First Amendment.[526] The *Pottinger* court ignored *Schall v. Martin*,[527] which is the case the *Joyce* court used to throw out the overbreadth challenge.[528] This is a perfect example of what can occur when the Supreme Court's stance regarding the scope of a doctrine reflects mixed messages. The Court's inconsistent application of the overbreadth doctrine has led lower courts to apply the doctrine in an arbitrary manner, resulting in real constitutional violations to real people.

Pottinger is not alone in recognizing overbreadth beyond the First Amendment in post-*Schall-Salerno* decisions. In *State v. Hughes*,[529] the Kansas Supreme Court ruled a State of Kansas prohibition outlawing distribution of an "obscene device,"[530] which formed the basis of charges lodged against the distributor of a vibrator kit with a dildo attachment, violated constitutionally protected rights of privacy guaranteed by due process and, as such, was determined to be "overbroad."[531] Conceding that "[t]he overbreadth doctrine generally has been held to apply only in First Amendment contexts," the *Hughes* court stated, "Nevertheless, the overbreadth doctrine has been applied by the United States Supreme Court where the operation of a statute infringes on freedoms guaranteed by the Bill of Rights, where those freedoms involve privacy rights and medical matters."[532] Also, this court allowed the defendant-distributor standing to challenge this statute that "impermissibly infringes on the constitutional right of privacy in one's home and in one's doctor's or therapist's office," where such is being recommended as sexual therapy.[533] Similarly, the Colorado Supreme Court, in *People ex rel. Tooley v. Seven Thirty-*

523. *Compare* Joyce v. City and County of San Francisco, 846 F. Supp. 843, 862 (N.D. Cal. 1994) (citing *Vill. of Hoffman Estates*, 455 U.S. 489), *with* Pottinger v. City of Miami, 810 F. Supp. 1551, 1577 (S.D. Fla. 1992) (citing *Vill. of Hoffman Estates*, 455 U.S. 489.

524. *See Pottinger*, 810 F. Supp. at 1553–54.

525. *See id.* at 1577.

526. *See id.* at 1577–78.

527. 467 U.S. 253 (1984).

528. 846 F. Supp. at 862.

529. 792 P.2d 1023 (Kan. 1990).

530. *Id.* at 1026–27 (quoting KAN. STAT. ANN. § 21-4301 (1995)).

531. *Id.* at 1030–32.

532. *Id.* at 1030 (citing Eisenstadt v. Baird, 405 U.S. 438 (1972)).

533. *Id.* at 1032. *Compare* Sewell v. State, 233 S.E. 2d 187, 188–89 (Ga. 1977) (ruling statute outlawing "any device designed or marketed as useful primarily for the stimulation of human genital organs [because it] is obscene material" neither overbroad nor vague).

Five East Colfax, Inc.,[534] had ruled in 1985 that distribution of an "obscene device"[535] was unconstitutional because it violated the right of privacy.[536] Here, the court determined that the distributor of such devices had standing to challenge these restrictions that "sweep too broadly in their blanket proscription," which impermissibly burdened the rights of those seeking to use such items for medical or therapeutic purposes.[537]

Meanwhile, the Supreme Court of Louisiana, in *State v. Brenan*,[538] also evaluated the constitutionality of legislation banning the "promotion of obscene devices."[539] The Louisiana Court of Appeals had determined the statute was "overly broad," contrary to the Fourteenth Amendment Due Process Clause.[540] However, the Louisiana Supreme Court concluded that overbreadth analysis was not appropriate because the First Amendment was not involved.[541] Thus, the court did *not* rely on the overbreadth doctrine in their final determination that the statute was unconstitutional because the "right to speak" was not involved.[542] Also, they refused to find the right to privacy extended to the use of these devices.[543] Instead, the court concluded that the enactment "bears no rational relationship to a legitimate state interest and is, therefore, violative of the Due Process Clause of the Fourteenth Amendment."[544] The court's refusal to apply overbreadth analysis in this case was supported by previous determinations that "[o]verbreadth invalidations of statutes are generally inappropriate when the allegedly impermissible applications of the challenged statute affect conduct rather than speech."[545]

Other lower court cases have grappled with the use of overbreadth in the area of procedural rights.[546] These cases often acknowledge the U.S. Supreme Court's assertion that overbreadth is limited to the First Amendment and then either accept,[547] reject,[548] or simply ignore the Court in its application of overbreadth.[549] In *In re Grand Jury Proceedings*,[550] the District Court for the District of Hawaii reviewed the constitutionality of six grand jury subpoenas duces tecum that were issued to Center Art Galleries in an investigation of alleged art fraud.[551] The art gallery challenged the government's subpoenas based on numerous deficiencies, one being that they were "unconstitutionally" overbroad in violation of the Fourth

534. 697 P.2d 348 (Colo. 1985).
535. *Id.* at 358–59 (citing COLO. REV. STAT. § 18-7-102(3) (1984)).
536. *Id.* at 370.
537. *Id.*
538. 772 So. 2d 64 (La. 2000).
539. *Id.* at 66–67 (citing LA. REV. STAT. ANN. § 14:106.1 (1986)).
540. *Id.* at 66 (quoting Russel v. State, 739 So. 2d 368, 369 (Ala. Crim. App. 1999).
541. *Id.* at 69 n.3 (citing Schall v. Martin, 467 U.S. 253, 268 n.18 (1984)).
542. *Id.*
543. *Id.* at 70–72.
544. *Id.* at 76.
545. *Id.* at 69 n.3 (citing State v. Greco, 583 So. 2d 825, 828–29 (La. 1991); Broadrick v. Oklahoma, 413 U.S. 601, 614 (1973)).
546. *See infra* notes 549–569 and accompanying text.
547. *See infra* notes 549–554 and accompanying text.
548. *See infra* notes 566–569 and accompanying text.
549. *See infra* notes 555–559 and accompanying text.
550. 707 F. Supp. 1207 (D. Haw. 1989).
551. *Id.* at 1208–09.

Amendment.[552] The district court noted, "motions to quash can be granted on the basis of unconstitutional overbreadth only if the government subpoenas are 'far too sweeping in [their] terms to be regarded as reasonable' under the Fourth Amendment."[553] Here, then, the district court quashed four of the subpoenas on the basis of Fourth Amendment overbreadth.[554] In its ruling, the district court discussed various other opinions that involved overbreadth claims in the subpoena context and noted the lack of uniformity in decision making reflected in these rulings analyzing Fourth Amendment overbreadth claims.[555]

In the 1990 case of *American Federation of Government Employees, AFL-CIO v. Sullivan*,[556] plaintiffs, two employee unions, brought an action in the U.S. District Court for the District of Columbia for declaratory and injunctive relief from a Department of Health and Human Services (HHS) drug testing plan.[557] The plaintiffs challenged sections of the HHS Drug-Free Workplace Plan as violating privacy rights under the Fourth Amendment.[558] The federal district court granted the injunction and found that a section of the plan allowing "reasonable suspicion testing" was "overbroad" and in violation of the Fourth Amendment.[559] Specifically, the district court noted, "The standard [in the HHS regulation] which provides for reasonable suspicion testing based upon 'a pattern of abnormal conduct or erratic behavior,' is both unduly broad and ambiguous."[560] These cases illustrate not only the lower court's application of overbreadth in the context of privacy rights but also reflect the confusion within the lower courts in light of the U.S. Supreme Court's declaration that the use of the overbreadth doctrine is limited to the First Amendment.

In addition to the lower court cases in which the overbreadth doctrine is cited in constitutional areas totally removed from the context of the free speech, there are cases in which courts have examined an overbreadth attack on a statute's constitutionality where the stricture reflects a hybrid nature, with one aspect arguably triggering a First Amendment concern and other aspects clearly not involving the First Amendment. While many of these cases take place in the criminal context, they often involve offenses that have an element of the First Amendment interwoven in them.[561] For example, offenses that incriminate "loitering," arguably activity that itself may be protected by the First Amendment freedom of expression, are often aimed at curbing activities such as prostitution and drug dealing, which are activities obviously not protected by the First

552. *Id.* at 1210–11.

553. *Id.* at 1215 (citing United States v. Calandra, 414 U.S. 338, 346 (1974) (quoting Hale v. Henkel, 201 U.S. 43, 76 (1906))).

554. *Id.* at 1219.

555. *Id.* at 1215–16.

556. 744 F. Supp. 294 (D.D.C. 1990).

557. *Id.* at 296.

558. *Id.*

559. *Id.* at 304.

560. *Id.*

561. *See, e.g.*, City of Tacoma v. Luvene, 827 P.2d 1374, 1382 (Wash. 1992) ("First Amendment activities are implicated by the Tacoma drug loitering ordinance, including freedom of expressive association and freedom of movement.") (citing Dallas v. Stanglin, 490 U.S. 19 (1989); Papachristou v. Jacksonville, 405 U.S. 156 (1972)).

Amendment.[562] How a defendant packages his arguments and, of course, the reviewing court's predilection may affect the outcome.[563] Thus, in some cases, a defendant could be attacking a criminal statute as overbroad, but the claim will fail because of the court's refusal to find that the stricture steps on any fundamental right.[564] Also, if the loitering statute under review requires specific intent to engage in criminal behavior or overt, illegal acts, the law will likely be considered outside the reach of the First Amendment.[565]

Finally, it is significant that at least one state supreme court has had occasion to dig into the state's constitution and find it demands a wider view of overbreadth.[566] The Colorado Supreme Court, in *People v. Shepard*,[567] noted, "In Colorado, we have extended [the] rule of standing to raise third party claims on a facial challenge from the First Amendment to all fundamental constitutional rights."[568] Although it pointed out that Colorado's Constitution is "more protective of certain rights of privacy than the Fourth Amendment,"[569] it was unconvinced that the state's wiretapping statute's potential reach on constitutionally protected conduct was "real and substantial..." and, as such, the overbreadth claim based on the state's constitutional protection was rejected.[570]

VI. CLOSING ARGUMENT

A. *Life without* Schall-Salerno*: An Illustration*

Let us return to my earlier hypothetical.[571] Assume Citizen has the misfortune of being confronted by each of the new Enactments. Citizen violates Enactment A by expressing support for a particular foreign government's condemnation of American military policy in the Mideast. State authorities are determined to make an example out of Citizen in order to discourage further criticism of American military policy by citizens of the state. Under the authority of Enactment B, state law enforcement agents inform Citizen of their intention to place Citizen and all members of his family under "heavy surveillance" and periodically search his home without a warrant. Meanwhile, Citizen is subpoenaed before a state grand jury and asked numerous questions about his past, including whether he ever smoked marijuana in college. Citizen knows that, if he answers the question truthfully, he could be opening himself up to criminal liability. However, he is advised that Enactment C

562. *See* Robert C. McConkey, *"Camping Ordinances" and the Homeless: Constitutional and Moral Issues Raised by Ordinances Prohibiting Sleeping in Public Areas*, 26 CUMB. L. REV. 633, 654–56 (1996) (stating that overbreadth issue should be rejected because the camping ordinances outlawing camping in public places are not overbroad).

563. *See, e.g.*, *Luvene*, 827 P.2d 1374 (holding Tacoma drug loitering ordinance violative of the First Amendment, including the freedom of expressive association and freedom of movement).

564. *See, e.g.*, City of Chicago v. Morales, 527 U.S. 41, 58 (1999).

565. *See, e.g.*, *Luvene*, 827 P.2d at 1380–84 (upholding drug loitering ordinance); City of Seattle v. Slack, 784 P.2d 494, 496–97 (Wash. 1989) (upholding prostitution loitering ordinance).

566. People v. Shepard, 983 P.2d 1 (Colo. 1999).

567. *Id.*

568. *Id.* at 3 n.3 (citing Ferguson v. People, 824 P.2d 803, 807 (Colo. 1992)).

569. *Id.* at 5 (citing COLO. CONST. art. II, § 7).

570. *Id.* at 3–4.

571. *See supra* Part I.

requires a response to all grand jury questions, whether his response will incriminate him or not, and his failure to answer any question will be followed by a contempt citation. Citizen refuses to answer. Citizen is found in contempt of court and ordered to jail. Citizen learns he has been indicted for violation of the state prohibition against treason and will be tried in a closed tribunal without the benefit of a jury as provided by Enactment D. He is also informed that it is the intention of the state to seek the death penalty as authorized by Enactment E.

Assume further that Citizen is your brother. You visit Citizen in jail. While an armed guard monitors your conversation with Citizen, Citizen tells you he is "scared to death" for the safety of his wife and children. He states that he does not wish to personally challenge any of these enactments in court for fear of reprisal against his family. To complicate matters, you believe Citizen now suffers from severe paranoia. You consult with counsel from the state's Civil Liberties Union. Counsel informs you that a declaratory judgment based on facial invalidity as well as an injunction against enforcement of each Enactment is possible if (1) it can be established that each Enactment is invalid because each "is unconstitutional in every conceivable application"[572] or (2) "because it seeks to prohibit such a broad range of protected conduct that it is unconstitutionally 'overbroad.'"[573] Counsel surmises that the various Enactments will *not* be successfully challenged on the theory that "every conceivable application" would invariably prove unconstitutional because at least some, if not all, of the Enactments might be legitimately employed against a suspected foreign terrorist found in the state. Thus, counsel turns to the overbreadth doctrine. Counsel observes that, when weighed against the constitutional guarantees of citizens of the state (who enjoy all fundamental rights) and the "other persons" contemplated by each Enactment (who may not), one would have little difficulty asserting each Enactment's overly broad reach is "not only real...but *substantial* as well, judged in relation to the statute's plainly legitimate sweep."[574] Now, the only question that remains is whether the overbreadth doctrine is the sole province of the First Amendment or, instead, a protector of every constitutional right. If counsel is compelled to report that the state's courts stubbornly adhere to the *Schall-Salerno* approach, you, as Citizen's next of kin, might succeed in invalidating Enactment A, but not B, C, D, or E. If, however, the state adopts the broad view of overbreadth advocated by this author, you may also effectively vindicate Citizen's Fourth, Fifth, Sixth, and Eighth Amendment right to be free of *each* of the draconian Enactments, even if Citizen is too timid or paranoid when threatened by an oppressive government to do so himself.

Professor Monaghan's observation before the *Schall-Salerno* pronouncement was correct in asserting that "a litigant has always the right to be judged in accordance with a constitutionally valid rule of law."[575] Moreover, as noted earlier,[576] this author believes *every citizen's conduct and rights* must be measured by a valid rule of law. To assure vindication of not only one's personal rights but also the rights of others

572. Members of City Council of City of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 796 (1984).
573. *Id.*
574. Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973) (emphasis added).
575. Monaghan, *supra* note 11, at 3.
576. *See supra* note 11.

whose rights are *substantially* threatened but whose condition or circumstance does not permit their personal challenge, an overbreadth doctrine that reaches the contours of all fundamental rights is a necessity. Requiring an enactment to have a chilling effect on speech,[577] or even one's ability to procure an abortion[578] or some other fundamental right, before the overbreadth doctrine is allowed to show its head, misses an essential point. Human conditions or circumstances—indigence, ignorance, illness, disability, immaturity, old age, imprisonment, isolation, timidity, fear, and the like—often prevent a patently unconstitutional law from being challenged by one directly affected by the law.[579] Third-party standing is the prophylactic that vindicates the rights of those not before the court.[580] Simply put, the prophylactic minimizes application of enactments that do not measure up to a constitutionally valid rule of law but instead impede exercise of fundamental rights to a substantial degree.

Further, a broad view of overbreadth should not be interpreted as leading to the destruction of traditional standing. *Broadrick*'s demand for "substantial" overreach before the doctrine is triggered is one possible way to protect the standing requirement.[581] *Casey*'s condition that the statute amounts to a "substantial obstacle" to the exercise of a fundamental right in a "large fraction of the cases" is another, which may be nothing more than another way to say the same thing. [582] Lest the test for employment of the overbreadth doctrine be attacked as so lenient that it will allow the exception to swallow the rule, the author would borrow from (1) *Secretary of State of Maryland v. Munson*,[583] which indicates that, where "practical obstacles" prevent a person from asserting their own rights, a third party who has some type of "injury-in-fact to satisfy the [Article] III case-or-controversy requirement" is allowed to vindicate the rights of the person most directly affected by the overbroad law[584] and (2) *Members of City Council of City of Los Angeles v. Vincent*,[585] which defines "substantial overbreadth" as arising where there exists a "realistic danger" that a law will "significantly compromise" fundamental rights of persons "not before the Court."[586] Thus, where (1) a significant obstacle prevents a person from vindicating their own rights, (2) a third-party has suffered some type of injury-in-fact, and (3) a realistic danger exists that a substantially overbroad law will

---

577. Sec'y of State of Md. v. Munson, 467 U.S. 947, 956 (1984).

578. *See* Dorf, *supra* note 11, at 265–71.

579. The inability of many persons to fend for themselves was vividly explained in Matthew's writings in the *Bible*, when he discusses the "Final Judgment" and how the "King" assesses whether humankind have properly supported one another:

> Then the King will say to the people on his right, "Come, you that are blessed by my Father! Come and possess the kingdom which has been prepared for you ever since the creation of the world. I was hungry and you fed me, thirsty and you gave me a drink; I was a stranger and you received me in your homes, naked and clothed me; I was sick and you took care of me, in prison and you visited me."

Matthew 25:34–37 (*Good News Bible*).

580. *Broadrick*, 413 U.S. 601.

581. *Id.* at 615.

582. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 895 (1992).

583. 467 U.S. 947 (1984).

584. *Id.* at 956 (discussing right to privacy and abortion).

585. 466 U.S. 789 (1984).

586. *Id.* at 800 (discussing First Amendment).

significantly compromise a fundamental right of the person not before the court, a court has the power, as a prudential matter, to allow a third party who "can reasonably be expected properly to frame the issues and present them with the necessary adversarial zeal"[587] to proceed and, if warranted, facially invalidate the substantially overbroad enactment.

Here, you, as Citizen's next of kin, could point to the following: (1) Citizen's incarceration, his fear for his family, and his mental instability; (2) the immediate family relationship with Citizen as well as the fear of facing the wrath of Enactments A through E personally;[588] and (3) the reality that Citizen's basic constitutional rights under the Fourth, Fifth, Sixth, and Eighth Amendments are being trampled by actual application of the various enactments against him. Citizen's rights would be vindicated unless, of course, *Schall-Salerno* is alive and well.

B. A Plea for a Common Sense Approach to Overbreadth

Overbreadth should not be limited to the First Amendment arena. Instead, it should be recognized in other areas as well. Overbreadth is a doctrine that has historical roots in various fields of constitutional law.[589] Moreover, allowing it to have life beyond free speech makes good judicial sense. There is no reason to limit such an important and powerful tool to a certain area only because that is where it originated. The *Schall-Salerno* dichotomy that distinguishes between those claims that are worthy of overbreadth consideration (ones based on First Amendment free speech)[590] and those that are not worthy (other fundamental rights)[591] smacks of judicial reliance on a distinction without a principled difference. A statute that substantially erodes *any* constitutionally protected activity because its language is not more narrowly tailored should be struck down. Only recently, the U.S. Supreme Court in *Lawrence v. Texas*[592] ruled that a Texas statute that outlawed persons of the same sex from engaging in certain intimate sexual conduct[593] "further[ed] no legitimate state interest which can justify its intrusion into the personal and private life of the individual" and, as such, was violative of the Due Process Clause of the Fourteenth Amendment."[594] Although *Lawrence* involved a challenge to such legislation by two individuals who had been arrested for violation of this stricture[595] and, consequently, was not challenged on overbreadth grounds, the overbreadth

---

587. *Munson*, 467 U.S. at 956.

588. Injury-in-fact does not mean that you have to be someone's relative in order to meet this test. It means that you have to fear application of the unconstitutional law to you personally or someone else, which application will affect the petitioner as well in some significant fashion, such as economically.

589. *See, e.g.*, Troxel v. Granville, 530 U.S. 57 (2000) (protecting parental rights); Hodel v. Irving, 481 U.S. 704 (1987) (protecting property rights); Roe v. Wade, 410 U.S. 113 (1973) (protecting freedom of choice and right to privacy); Berger v. New York, 388 U.S. 41 (1967) (protecting the right to be free from unreasonable searches and seizures); Aptheker v. Secretary of State, 378 U.S. 500 (1964) (protecting the right to travel).

590. *See* Salerno v. United States, 481 U.S. 739 (1987) (considering overbreadth claims based on First Amendment free speech).

591. *See, e.g.*, *Roe*, 410 U.S. 113 (considering freedom of choice and right of privacy).

592. 539 U.S. 558; 123 S. Ct. 2472 (2003).

593. *Id.* at 516, 123 S. Ct. at 2476 (citing TEX. PENAL CODE ANN. § 21.06(a) (2003)).

594. *Id.* at 525, 123 S. Ct. at 2484. The charges were lodged against two adult males who were engaging in a consensual sexual encounter in the privacy of a home.

595. *Id.* at 517, 123 S. Ct. at 2477.

doctrine gives courts the *additional* ability to invalidate this type of overreaching enactment, where practical obstacles prevent a party from asserting rights on behalf of itself.

While this is a call for the overbreadth doctrine to be extended, it is not a call for overbreadth to be casually employed. Overbreadth is indeed "strong medicine" that should be administered only in necessary cases.[596] However, our nation's courts have the capacity to find a balance between applying it when needed and overusing it.

Is the First Amendment more important than other rights? Or more important to the degree that it demands its own doctrines and protection of its rights? Most would argue that it is. When citizens think about the most important freedoms and the rights they most cherish, the First Amendment immediately comes to mind. After all, the rights enshrined in the First Amendment are those that permit a democracy to flourish. But the issue of overbreadth outside the First Amendment context need not be entangled with the importance of the First Amendment and how it compares vis-à-vis other rights. Instead, one should consider the importance and value of the overbreadth doctrine and how a doctrine of its magnitude should not be limited to one specific context.

The Court should focus on the question of overbreadth from the standpoint of the benefits of the overbreadth doctrine and the protection of other rights enshrined in the Constitution, rather than limiting itself to the applying the doctrine in cases involving the First Amendment. Extending the overbreadth doctrine to other contexts would generate consistency and better protect the rights of citizens.[597] This should include procedural as well as substantive rights. For example, if draconian legislation completely abrogated Fourth Amendment rights to be free of an unreasonable search or seizure in one context or eliminated the right to a public trial in another, the courts should use *all* of their judicial powers to address this invalid area of law.

The law and the legal field constantly evolve. While stare decisis is necessary to generate consistent outcomes and apply the law fairly to all, ideas and doctrines evolve over time, reflecting a changing society and changing ideals.[598] If one examines the caselaw reviewed above, it is impossible to ignore the fact that there is some vitality to overbreadth outside the First Amendment context. Thus, the proposition that the doctrine should be extended is not something that would require developing law out of thin air. Any accusation that overbreadth is totally lacking of precedent beyond the First Amendment would be off the mark because there already exists a sound, albeit slim, base of overbreadth decisions for courts to build upon. Admittedly, it is impossible to ignore the explicit language cited in various cases that proclaim, "we have not recognized an 'overbreadth' doctrine outside the limited

596. Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973).

597. *See* Ford, *supra* note 370, at 1451 (noting that "[i]f the Court had been using a *Salerno* no-set-of-circumstances test in these cases, it would have been forced to uphold [most of] the statutes. Even the most restrictive abortion laws, after all, can be applied constitutionally to a woman in the post-viability stage of her pregnancy and not facing a grave threat to her health").

598. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 123 S. Ct. 2472 (2003).

context of the First Amendment."[599] Often these points go unchallenged by others not in the majority opinion, adding fuel to the contention that, indeed, no overbreadth doctrine exists outside the First Amendment.[600] However, as the thorough analysis of the several cases that were decided during the Warren era and the majority of the Burger and Rehnquist Court's abortion jurisprudence above illustrates, one must recognize that an overbreadth doctrine enjoys life outside the First Amendment.[601]

There is no compelling reason[602] why the doctrine should be limited solely to First Amendment rights. An overbreadth doctrine beyond the First Amendment is needed for the same reasons it was needed inside the First Amendment context.[603] The benefits of third-party standing, which is at the heart of overbreadth, should not be monopolized by the First Amendment. Most importantly, overbreadth analysis clearly advances the interest of insisting that the conduct and rights of all persons be squared with a valid rule of law, a concept that should apply equally to all fundamental rights; therefore, these other constitutional rights should be afforded the same.

599. Salerno v. United States, 481 U.S. 739, 745 (1987).

600. *See, e.g., id.*

601. *See, e.g.,* Troxel v. Granville, 530 U.S. 57 (2000) (protecting parental rights); Hodel v. Irving, 481 U.S. 704 (1987) (protecting property rights); Roe v. Wade, 410 U.S. 113 (1973) (protecting freedom of choice and right to privacy); Berger v. New York, 388 U.S. 41 (1967) (protecting the right to be free from unreasonable searches and seizures); Aptheker v. Secretary of State, 378 U.S. 500 (1964) (protecting the right to travel).

602. After all, the technical reason that the First Amendment is where the doctrine originated is not a compelling reason.

603. These reasons were to protect the citizenry from being discouraged in fully exercising each and every constitutional right without fear of reprisal.