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Federal Courts, Overbreadth, and Vagueness: Guiding Principles for Constitutional Challenges to Uninterpreted State Statutes

Stuart Buck[*] and *Mark L. Rienzi*[**]

I. INTRODUCTION

When a state statute is challenged in federal court as unconstitutionally overbroad or vague, the federal court is caught between two fundamental principles of constitutional law. On the one hand, federal courts have been instructed numerous times that they should invalidate a state statute only when there is no other choice. The Supreme Court has noted that it is a "cardinal principle" of statutory interpretation that a federal court must accept any plausible interpretation such that a state statute need not be invalidated. Moreover, the doctrines of abstention, certification, and severance all exist in order to show deference to a state's power to interpret its own laws and to allow as much of a state law to survive as possible. With these doctrines in mind, a federal court might view its role as deferential, circumspect, and even reverent towards state law.

On the other hand, federal courts are the chief guarantors of individual constitutional rights under the Federal Constitution. As such, they have a duty to protect citizens from state laws that criminalize or chill constitutionally protected activity (overbroad laws), or that subject citizens to unclear or arbitrary exercises of state power (vague laws). With these doctrines in mind, a federal court might view itself as the last bulwark of protection against overreaching state legislatures, and therefore decide that only complete invalidation will suffice.

The result is a clash between overbreadth and vagueness doctrines on one side and the principles of avoidance, abstention, and severance on the other. This conflict is exacerbated by the fact that federal courts are not the authoritative interpreters of state law. Because of this, even if a federal court were to adhere to the "cardinal principle" and adopt a narrow interpretation of a state statute (or sever an application or provision), there is no guarantee that subsequent state courts would follow that federal interpretation. Thus, a federal court that rejects

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a constitutional challenge simply because it can conjure a plausible narrowing interpretation of the state law risks exposing citizens to unconstitutional prosecutions under the far reaches of the statute because state courts are not bound by the narrowing federal interpretation *qua* interpretation.

The recent spate of litigation over partial-birth abortion laws—most of which were challenged on overbreadth grounds—shows this tension quite starkly. In overturning the partial-birth abortion laws of numerous states, federal courts have often refused to interpret those statutes narrowly so as to save their constitutionality; to abstain to allow a state court to give a narrowing interpretation; or to sever the unconstitutional applications of those statutes. Furthermore, federal courts usually enjoined the enforcement of those statutes so that states effectively had no way of ever getting a narrowing interpretation from state courts, despite the principle that only state courts can make a binding interpretation of state law. As we have said, this result is understandable from the federal courts' perspective. Precisely because of the canon that only state courts can authoritatively interpret state law, federal courts fear that giving a narrowing interpretation to a state law would be pointless. Being risk averse where fundamental constitutional rights are concerned, federal courts chose to void the entire law as overbroad.

Viewed from the state's perspective, such actions by federal courts seemed to interfere unjustifiably with the state's prerogative to interpret and apply state law. When the federal court strikes down a state law as overbroad *based on its own interpretation of that law*, the federal court appears[1] to foreclose the state's right to seek a narrowing interpretation from a state court. This is troublesome, because a state court alone has the right to interpret its own state's law and, indeed, a federal court should welcome a narrowing interpretation rather than foreclosing the possibility that it can ever be given.

Consider, for example, an overbreadth challenge to an uninterpreted state statute prohibiting "all public nudity." Suppose that the federal court is persuaded by the argument that while most public displays of nudity may be proscribable, artistic or expressive displays of nudity are protected by the First Amendment. Such a court obviously has a constitutional obligation to protect the artistic or expressive conduct. What is less obvious is that the court has several different means of protecting that liberty. The court might, after examining the statute, abstain on the ground that the statute's interpretation involves a matter of state law that could moot the federal decision. Alternatively, the court might sever the application of the statute to expressive displays. Further, the court might look at the statute and interpret it to cover only those instances of nudity that are non-expressive. To ensure that this interpretation will actually take effect, the court

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[1]As we discuss in Part V.A., *infra*, state courts actually do retain some power to narrow the statute, but rarely see the opportunity to exercise it.

can issue an injunction against any prosecution for expressive displays of nudity. Finally, the court could simply enjoin all prosecutions under the statute.

In deciding among these alternatives, federal courts often behave as if they have no power to control future prosecutions in state court. This leads them to enjoin all prosecutions under the statute lest constitutionally protected conduct be chilled. The premise of this argument, however—that federal courts, through their injunctive power, can prohibit prosecutors from taking certain actions—gives rise to a less drastic solution: in this case, an injunction only against prosecutions for expressive nudity. A court that has the power to enjoin *all* applications of a statute certainly also has the power to enjoin *some* applications of that statute. Thus, if it can enjoin all nudity prosecutions, it can likewise enjoin only those prosecutions that threaten constitutional rights. This more-limited injunction still protects constitutional rights (if drafted appropriately), but it allows the state the freedom to seek a narrowing interpretation of the statute, and to use the statute against perfectly proscribable behavior. While this solution offers the best balance between individual and state rights—it fully protects individual rights while allowing room for the state's own prerogatives—it has been used, to our knowledge, in only one recent case.[2] We believe that the failure to use limited injunctions like this one is directly attributable to confusion about the effect of federal court rulings.

The confusion in the federal courts results from the tension between the overbreadth and vagueness doctrines on one hand, and the federalist doctrines of avoidance, severance, and abstention on the other. Here, it is important to distinguish between facial and as-applied challenges. In an as-applied challenge, the plaintiff challenges a statute as applied to his own conduct or circumstances, and federal courts routinely hold that a state statute cannot apply to a certain realm of conduct. Such a holding leaves open the possibility that a state could apply the statute to *other* conduct. But with the overbreadth or vagueness doctrines, the challenge is almost always *facial*.[3] In such cases, federal courts often forget that they have the power to use an injunction to limit the range of conduct to which a statute applies.[4] They mistakenly think that the choice is between wholesale facial invalidation, or upholding the statute entirely.

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[2]The case of *Hope Clinic v. Ryan*, 195 F.3d 857, 861 (7th Cir. 1999), grew out of challenges to the Wisconsin and Illinois partial-birth abortion bans. As will be discussed throughout this Article, the disagreement between Judge Easterbrook's majority opinion and Chief Judge Posner's dissent offers valuable insight into the powers (and, at times, misconceptions about those powers) held by the federal courts.

[3]As we discuss *infra* notes 11–14, this is because the typical plaintiff's own conduct is not constitutionally protected, and therefore proceeds through *jus tertii* standing to challenge the statute on its face rather than as applied to him.

[4]As noted above, one fascinating exception was the Seventh Circuit's decision in *Hope Clinic*.

Indeed, both state and federal courts often are confused in this messy doctrinal area: Federal courts often *underestimate* the range of actions they might take to protect individual rights, and incorrectly believe that their only means of protecting individual rights is to void an entire statute. On the other hand, state courts and state governments often *overestimate* the effects of such a federal court ruling on their own future actions, forgetting that they always retain the power to seek or issue declaratory judgments narrowing the scope of a state law.

In this Article, we aim to dissipate some of this confusion and offer federal courts, state courts, and litigants a fuller understanding of the ways in which a federal court can both protect individual liberty and respect the power of states to interpret their own laws. In Part II we will examine the doctrines that create the tension described above—overbreadth and vagueness—and review the principles of adjudication designed to protect state interests. To illustrate these tensions and how federal courts respond to them, in Part III, we will describe in detail the many recent challenges to partial-birth abortion laws. This section is not intended to imply any opinion whatsoever about the constitutional validity of those laws, but rather to examine how several different federal courts handled overbreadth and vagueness challenges aimed at laws that were almost uniformly drafted on the same model. In Part IV, we will review the variety of remedies available to a federal court and the consequences of these remedies for individual rights and state sovereignty. Here, we discuss just what makes a federal court's judgment or injunction binding, on whom it is binding, and to what extent. We reach the surprising—but correct—conclusion that a declaratory judgment has practically no effect at all, and that this lack of effect has driven federal courts to enjoin the operation of statutes. In Part V, we will discuss how, with a proper understanding of federal court powers, states might themselves remedy the problem of interference with their prerogative to interpret state laws. State courts can issue declaratory judgments interpreting a state law, no matter what a federal court has previously said or done with regard to that law. Also in Part V, we will set forth our recommendation for how an expanded understanding of federal court power offers a wider range of solutions to courts faced with this doctrinal tension. Specifically, we will explain how the problems courts seek to remedy in overbreadth and vagueness challenges can often be effectively resolved through rulings that do not rise to the level of total invalidation. Further, we will propose some guiding principles to assist courts in determining when overbreadth or vagueness challenges require total invalidation to protect individual rights and when they do not.

II. DOCTRINAL SUMMARY

Let us begin with a brief summary of the overbreadth and vagueness doctrines, and the adjudicative principles that come into play when federal courts

hear such challenges to uninterpreted state laws. Many of these principles are closely interrelated, serving similar purposes and functions, but all of them are in tension with the remedy of facial invalidation called for by the overbreadth and vagueness doctrines.

A. Overbreadth and Vagueness Doctrines

1. Overbreadth

The overbreadth doctrine[5] is usually traced to *Thornhill v. Alabama*,[6] in which the Supreme Court held unconstitutional on its face a law that prohibited picketing "for the purpose of hindering, delaying, or interfering with" business.[7] The Court noted that a chilling effect on protected conduct might occur with a statute which "does not aim specifically at evils within the allowable area of state control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press."[8] Since *Thornhill*, the overbreadth doctrine has been applied mainly in First Amendment cases[9] (although it has been used in abortion cases as well).[10]

Overbreadth is a specialized doctrine that allows so-called facial challenges, as opposed to the typical "as-applied" challenge.[11] In an overbreadth challenge,

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[5]One of the best works on this doctrine in general is Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853 (1991).

[6]310 U.S. 88 (1940).

[7]*Id.* at 91.

[8]*Id.* at 97.

[9]So much so that a typical academic commentary refers simply to the "First Amendment Overbreadth Doctrine." *See* Alfred Hill, *The Puzzling First Amendment Overbreadth Doctrine*, 25 HOFSTRA L. REV. 1063 (1997). By First Amendment, we include freedom of association cases as well. *See, e.g.*, Keyishian v. Bd. of Regents, 385 U.S. 589 (1967) (reviewing requirement that university faculty members certify they were not Communists); United States v. Robel, 389 U.S. 258 (1967) (concerning Communist Party member indicted for working at shipyard). Freedom of religion, however, is peculiarly excluded from the overbreadth doctrine, for reasons that are beyond the scope of this Article.

[10]*See infra* notes 110–13, 130–41 and accompanying text (discussing overbreadth doctrine in abortion cases).

[11]In a facial challenge, the plaintiff must make one of two assertions: that a statute is "unconstitutional in every conceivable application," *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 796 (1984); *United States v. Salerno*, 481 U.S. 739, 745 (1987), or that the statute "seeks to prohibit such a broad range of protected conduct that it is unconstitutionally 'overbroad.'" *Taxpayers for Vincent*, 466 U.S. at 796; *see also* Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 895 (1992) (holding that abortion law is facially unconstitutional if "in a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion"). In an as-applied challenge, however, the plaintiff merely asserts that he himself cannot constitutionally be punished (i.e., that the law is unconstitutional as applied to him), whether or not the statute may be constitutionally applied to anyone else. *See, e.g.*,

the challenger is typically someone whose conduct (whether it be the use of obscene language or the performance of partial birth abortion) is constitutionally punishable, and who therefore challenges a statute on its face, rather on the grounds that the particular application is unconstitutional.[12] Because the challenger's own conduct is unprotected by the Constitution, the overbreadth doctrine is an exception to the doctrine that a person to whom a statute may be constitutionally applied cannot challenge the statute on the ground that it might be unconstitutionally applied to others.[13] This expanded standing—known as "*jus tertii*"—is necessary because the "First Amendment needs breathing space," and plaintiffs "therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because . . . the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression."[14] Overbreadth thus functions as a prophylactic doctrine, invalidating statutes that prohibit too much constitutionally protected conduct; *jus tertii* standing facilitates this prophylactic purpose by allowing a non-protected person to sue to protect the rights of others who for whatever reason have not chosen to sue on their own behalf.

United States v. Raines, 362 U.S. 17, 20–24 (1960) (discussing that constitutional challenges generally only apply to facts and parties of particular dispute).

For further enlightenment on these two types of challenges, see generally Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235 (1994) (analyzing distinction between as-applied and facial challenges); Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321 (2000) (same); Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U. L. REV. 359 (1998) (same); Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 4–14 (same).

[12]The Court has on occasion allowed facial overbreadth challenges without regard to whether the plaintiff's own speech was constitutionally unprotected. *See, e.g.*, N.Y. State Club Ass'n v. New York City, 487 U.S. 1, 13–15 (1988) (proceeding to overbreadth analysis without first deciding if speech was constitutionally protected); Boos v. Barry, 485 U.S. 312, 329–32 (1988) (same); *see also* Nat'l Treasury Employees Union v. United States, 990 F.2d 1271, 1275 (D.C. Cir. 1993) (noting that Supreme Court has allowed "federal over-inclusiveness claims by parties whose conduct may well be constitutionally protected").

This is not the normal course, however. As the Court noted in *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985), where the plaintiff engages in constitutionally protected conduct, there is "no want of a proper party to challenge the statute, no concern that an attack on the statute will be unduly delayed or protected speech discouraged. The statute may forthwith be declared invalid to the extent that it reaches too far, but otherwise left intact."

[13]The longstanding rule in most contexts is that "one who would strike down a state statute as violative of the Federal Constitution must show that he is within the class with respect to whom the act is unconstitutional." Plymouth Coal Co. v. Pennsylvania, 232 U.S. 531, 544 (1914); *see also* Massachusetts v. Oakes, 491 U.S. 576, 581 (1989) (citing same general rule); Broadrick v. Oklahoma, 413 U.S. 601, 610 (1973) (same); Dombrowski v. Pfister, 380 U.S. 479, 487 (1965) (same).

[14]*Broadrick*, 413 U.S. at 611–12.

The above explanation is the one typically given by the Court. The Court, however, has never adequately explained why prophylactic standing for non-protected plaintiffs is necessary to protect those individuals whose conduct is constitutionally protected. This gives rise to an anomaly—the plaintiff whose conduct is not constitutionally protected is given a stronger weapon (overbreadth) to use against a given law than is the plaintiff whose conduct is protected. For example, a plaintiff who publishes child pornography might be able to bring a facial challenge to an obscenity statute, thus invalidating it wholesale, even though a publisher of non-obscene material would be limited to an as-applied challenge that would leave the remainder of the statute in place. As we discuss below, there is no reason why a court could not engage in the same as-applied analysis in the unprotected plaintiff's case, simply enjoining the statute as to protected applications (or construing it narrowly) and allowing the prosecution of the unprotected plaintiff. Second, it is odd that this disparity is justified on the grounds that the non-protected plaintiff's challenge serves to protect the rights of the protected plaintiff. Why, exactly, do non-protected plaintiffs need to be encouraged to sue on behalf of protected plaintiffs? Is there a mysterious lack of plaintiffs in free speech and abortion cases (but not, say, free exercise of religion) whose own conduct is constitutionally protected? The Court has never satisfactorily explained itself on these points.

Due to the stark nature of facial invalidation, the Court has said that the overbreadth doctrine is "strong medicine," to be employed "sparingly and only as a last resort."[15] Thus, an overbreadth challenge will not succeed unless the statute "is not readily subject to a narrowing construction by the state courts."[16] Moreover, the "deterrent effect" must be "both real and substantial."[17] The requirement of substantial overbreadth means that the litigant must "demonstrate from the text of [the challenged law] and from actual fact that a substantial number of instances exist in which the Law cannot be applied constitutionally,"[18] and that the "mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge."[19]

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[15]*Id.* at 613. Just how strong the medicine must be is one of the questions this Article attempts to address.

[16]Erznoznik v. City of Jacksonville, 422 U.S. 205, 216 (1975); *see also Dombrowski*, 380 U.S. at 497 (allowing for "benefit of limiting construction").

[17]*Erznoznik*, 422 U.S. at 216; *see also* New York v. Ferber, 458 U.S. 747, 769 (1982) (requiring overbreadth to be substantial).

[18]*N.Y. State Club Ass'n*, 487 U.S. at 14; *cf. Salerno*, 481 U.S. at 745 (noting that if "overbreadth" were available, unconstitutional operation of criminal statute may be sufficient to render it invalid).

[19]*Taxpayers for Vincent*, 466 U.S. at 800.

2. Void for Vagueness

The void-for-vagueness doctrine[20] has its roots in the ancient Roman phrase *Nulla crimen sine lege*, or no crime without law.[21] According to Blackstone, in every law "the rights to be observed, and the wrongs to be eschewed, are clearly defined and laid down."[22] Sir Edward Coke stated that "all laws, especially penall, and principally those that are penall in the highest degree ought to be so plainly and perspicuously penned, as every member of both houses may understand the same, and according to his knowledge and conscience give his voice."[23] Montesquieu wrote that laws should be "concise," "simple," and without "vague expressions."[24]

Early American commentators and judges reiterated the importance of clearness in criminal statutes. In Federalist 62, Madison wrote that if the laws are "so incoherent that they cannot be understood," the effect would be "calamitous."[25] One scholar noted that legislatures were supposed to write criminal statutes with "terms reasonably plain and explicit," not with "mere doubtful inference" or "cloudy and dark words."[26] In an 1810 decision, a federal court noted: "It should be a principle of every criminal code . . . that no person be adjudged guilty of an offence unless it be created and promulgated in terms which leave no reasonable doubt of their meaning."[27] Another federal court in 1815 stated: "Laws which create crimes, ought to be so explicit in themselves, or by reference to some other standard, that all men, subject to their penalties, may know what acts it is their duty to avoid."[28]

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[20]For a classic article, see Anthony G. Amsterdam, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

[21]For a historical discussion of this principle, see JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 19–60 (1947).

[22]1 WILLIAM BLACKSTONE, COMMENTARIES *53–*54. Blackstone, in fact, mentions a man who stole *one* horse, and was therefore not penalized under a statute which forbade "stealing horses." *Id.* at *88.

[23]COKE, THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 42 (1817). In a side note on this page, Coke says: "Acts of parliament ought to be plainly, and clearly, and not cunningly and darkly penned, specially in criminall causes." *Id.*

[24]MONTESQUIEU, THE SPIRIT OF THE LAWS BOOK XXIX, ch. 16, at 263–64 (Thomas Nugent trans., 1892).

[25]THE FEDERALIST NO. 62, at 421 (James Madison) (Jacob E. Cooke ed., 1961).

[26]SIR PETER BENSON MAXWELL, ON THE INTERPRETATION OF STATUTES 237 (1875). Maxwell also says: "It is a well settled rule of law that all charges upon the subject must be imposed by clear and unambiguous language, because in some degree they operate as penalties." *Id.* at 259.

[27]The Enterprise, 8 F. Cas. 732, 734 (C.C.D.N.Y. 1810) (No. 4,499).

[28]United States v. Sharp, 27 F. Cas. 1041, 1043 (C.C.D. Pa. 1815) (No. 16,264); *see also* Brown v. State, 119 N.W. 338, 339 (1909) ("It is a most fundamental canon of criminal legislation that a law which takes away a man's property or liberty as a penalty for an offense must so clearly define the acts upon which the penalty is denounced that no ordinary person can fail to understand

In *Grayned v. City of Rockford*,[29] the modern Supreme Court offered three reasons that overly vague statutes are unconstitutional.[30] First, as a matter of due process, the law should provide fair warning, providing a "person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly."[31] Second, the law must provide "explicit standards" to law enforcement officials, judges, and juries so as to avoid "arbitrary and discriminatory application."[32] Third, where First Amendment freedoms are involved, a vague statute can "inhibit the exercise of [those] freedoms," leading citizens to "steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked."[33]

The latter point is important to note—the Court has consistently said that the void-for-vagueness doctrine will be applied with greater strictness where First

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his duty and the departure therefrom which the law attempts to make criminal.").

For reasons similar to those that support the vagueness doctrine, the doctrine of strict construction of penal statutes also arose. *See* BLACKSTONE, *supra* note 22, at *88 ("Penal statutes must be construed strictly."); *see also* SIR FORTUNATUS WILLIAM LILLEY DWARRIS, A GENERAL TREATISE ON STATUTES 245 (1874) ("Penal statutes receive a strict interpretation."); ROSCOE POUND, CRIMINAL JUSTICE IN AMERICA 144 (1930) ("It was a common-law maxim of statutory interpretation that penal statutes were to be strictly construed."); United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820) ("The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself."). In *Schooner Paulina's Cargo v. United States*, 11 U.S. (7 Cranch) 52, 61 (1812), Justice Marshall stated: "It is the province of the legislature to declare, in explicit terms, how far the citizen shall be restrained . . . and it is the province of the court, to apply the rule to the case thus *explicitly* described—not to some other case which judges may conjecture to be equally dangerous." *Id.* at 61 (emphasis added). As one commentator said:

> The effect of the rule of strict construction might almost be summed up in the remark, that where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of interpretation fail to solve, the benefit of the doubt should be given to the subject, and against the Legislature which has failed to explain itself.

G.A. ENDLICH, A COMMENTARY ON THE INTERPRETATION OF STATUTES § 339, at 471 (1888).

[29]408 U.S. 104 (1972).

[30]*Id.* at 108–09.

[31]*Id.* at 108.

[32]*Id.* This goal of the vagueness doctrine—to eliminate the possibility of arbitrary and discriminatory enforcement—strikes us as somewhat misplaced. While arbitrary and discriminatory enforcement is certainly undesirable, it is not at all a harm unique to vague laws. To the contrary, under every law, no matter how clear, prosecutorial and police discretion may result in arbitrary or discriminatory enforcement. Consider, for example, a law imposing a speed limit of sixty-five miles per hour. While such a law could never be deemed vague (in fact, it could not be more clearly defined) it is still susceptible to arbitrary enforcement. *See generally* Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333 (1998) (discussing racial differences in discretionary traffic stops by police). Because these problems pervade vague and clear statutes alike, the Court's focus on arbitrary enforcement as a factor motivating the vagueness doctrine seems misplaced.

[33]*Grayned*, 408 U.S. at 109 (internal citations omitted).

Amendment freedoms are concerned.[34] As the Court has explained:

> [S]tandards of permissible statutory vagueness are strict in the area of free expression. . . . The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application.[35]

One theoretical difference between overbreadth and vagueness challenges is the availability of *jus tertii* standing. As noted above, the overbreadth challenger is typically someone whose own conduct is constitutionally unprotected, and who is allowed to challenge the statute on its face so as to provide protection for others whose conduct may be chilled.[36] But the Supreme Court has repeatedly said that a void-for-vagueness challenge *cannot* be brought by a plaintiff whose conduct is clearly within the statute. "A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others."[37] Thus, one would imagine that in many instances, a given plaintiff would be able to raise an overbreadth challenge but not a vagueness challenge, if the statute was allegedly overbroad but his conduct was clearly within the range of the statute.

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[34]*See, e.g.*, Coates v. Cincinnati, 402 U.S. 611, 614 (1971) (holding ordinance "unconstitutionally vague because it subjects the exercise of the right of assembly to an unascertainable standard"); Smith v. California, 361 U.S. 147, 151 (1959) ("[S]tricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser."); Winters v. New York, 333 U.S. 507, 509 (1948) ("It is settled that a statute so vague and indefinite, in form and as interpreted, as to permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech is void, on its face, as contrary to the Fourteenth Amendment.").

[35]NAACP v. Button, 371 U.S. 415, 432–33 (1963).

[36]*See supra* notes 11–14 and accompanying text.

[37]Hoffman Estates v. Flipside, 455 U.S. 489, 495 (1982); *see also* Parker v. Levy, 417 U.S. 733, 756 (1974) ("One to whose conduct a statute clearly applies may not successfully challenge it for vagueness."); United States v. Harriss, 347 U.S. 612, 618 (1954) ("[I]f the general class of offenses to which the statute is directed is plainly within its terms, the statute will not be struck down as vague, even though marginal cases could be put where doubts might arise.").

B. Avoidance

A canonical principle of constitutional law is that of constitutional avoidance.[38] According to this principle, "it is the duty of the federal courts to avoid the unnecessary decision of constitutional questions."[39] One of the primary ways to avoid unnecessary constitutional decisions is to "construe a statute, whenever reasonably possible, so that it may be constitutional rather than unconstitutional."[40] This principle has been called, at various times, a "cardinal principle,"[41] and an "axiom of statutory interpretation."[42] The avoidance doctrine has evolved over the years, and is now quite different from what it was in the past. To use terminology introduced by Adrian Vermeule, we may distinguish between "classical avoidance" and "modern avoidance."[43]

1. Classical Avoidance

The classical avoidance doctrine holds that "'as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, [a federal court's] plain duty is to adopt that which will save the [statute].'"[44] Put another way, "where two interpretations of a statute are in reason admissible, one of which creates a repugnancy to the Constitution and the other avoids such repugnancy, the one which makes the statute harmonize with

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[38]And the canonical exposition of the various avoidance doctrines is found in Justice Brandeis's concurrence in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346–48 (1936) (Brandeis, J., concurring).

[39]Ala. State Fed'n of Labor v. McAdory, 325 U.S. 450, 470 (1945); *see also* Blair v. United States, 250 U.S. 273, 279 (1919) (noting that court should avoid ruling on constitutionality of act of Congress if practicable); Light v. United States, 220 U.S. 523, 538 (1911) (same); Siler v. Louisville & Nashville R.R. Co., 213 U.S. 175, 191 (1909) (same).

[40]*McAdory*, 325 U.S. at 470; *see also* Screws v. United States, 325 U.S. 91, 98 (1945) ("This Court has consistently favored that interpretation of legislation which supports its constitutionality."); *Ashwander*, 297 U.S. at 348 n.8 (Brandeis, J., concurring) (citing cases); Moore Ice Cream Co. v. Rose, 289 U.S. 373, 379 (1933) (noting statute must be construed to avoid conclusion that it is unconstitutional); Stephenson v. Binford, 287 U.S. 251, 277 (1932) (same); United States v. Jin Fuey Moy, 241 U.S. 394, 401 (1916) (same).

[41]Crowell v. Benson, 285 U.S. 22, 62 (1932); *see also* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937) ("The cardinal principle of statutory construction is to save and not to destroy.").

[42]Pub. Citizen v. United States Dep't of Justice, 491 U.S. 440, 466 (1989).

[43]Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1949 (1997).

[44]*Id.* (quoting Blodgett v. Holden, 275 U.S. 142, 148 (1927) (Holmes, J., concurring)). Vermeule also cites Hooper v. California, 155 U.S. 648, 657 (1895); Presser v. Illinois, 116 U.S. 252, 269 (1886); and Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 69, 118 (1804). Vermeule, *supra* note 43, at 1949 n.22. A virtually identical formulation of the avoidance doctrine can be found in *Plymouth Coal Co. v. Pennsylvania*, 232 U.S. 531, 546 (1914).

the Constitution must be adopted."[45] In applying classical avoidance, a federal court makes a definite determination that a particular application of a statute would be unconstitutional, and construes the statute so as not to include that application.[46]

For an example of classical avoidance, in *Arkansas Natural Gas Co. v. Arkansas Railroad Commission*,[47] the Court heard a challenge to the Arkansas Railroad Commission's refusal to order new natural gas rates (the old rates were allegedly insufficient to be worth the company's business).[48] The natural gas company contended that the state statute setting out the Railroad Commission's authority violated the Fourteenth Amendment, because it imposed restrictions upon the Commission's rate-making power with regard to certain contracts, but not "in the case of contracts of other utility corporations."[49] Thus, argued the company, the statute "singles out the appellant for special restraint in this respect and is, therefore, unequal."[50] The Supreme Court responded to this argument with the following holding:

> While its meaning is not free from doubt, we do not so construe the act. The rule is fundamental that if a statute admits of two constructions, the

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[45]The Abby Dodge, 223 U.S. 166, 175 (1912).

[46]*See* St. Louis Southwestern R.R. Co. v. Arkansas, 235 U.S. 350, 369 (1914) (noting canon to construe statute to be within Constitution); Grenada County Supervisors v. Brogden, 112 U.S. 261, 269 (1884) (same); Ala. & Chattanooga R.R. Co. v. Jones, 1 F. Cas. 275, 277 (C.C.S.D. Ala. 1871) (No. 126) (same).

Because of the nature of classical avoidance—avoiding a construction that would definitely be unconstitutional—the Court has often tied avoidance to a clear statement rule. In one case, for example, the Court used the following justification for classical avoidance:

> And again, if the section admits of two interpretations, one of which brings it within, and the other presses it beyond, the constitutional authority of congress, it will become our duty to adopt the former construction; because a presumption never ought to be indulged, that congress meant to exercise or usurp any constitutional authority, unless that conclusion is forced upon the court by language altogether unambiguous.

United States v. Coombs, 37 U.S. (12 Pet.) 72, 76 (1838); *see also* The Japanese Immigrant Case, 189 U.S. 86, 101 (1903) ("[S]uch interpretation ought to be adopted as, without doing violence to the import of the words used, will bring them into harmony with the Constitution. An act of Congress must be taken to be constitutional unless the contrary plainly and palpably appears.").

The Court continues to apply a clear statement rule in exercising modern avoidance. *See, e.g.*, Solid Waste Agency v. United States Army Corps of Eng'rs, 531 U.S. 159, 174 (2001) (analyzing whether Congress made a "clear statement" that statute was to cover certain lands).

[47]261 U.S. 379 (1923).

[48]*Id.* at 380–81.

[49]*Id.* at 383.

[50]*Id.*

> effect of one being to render the statute unconstitutional and of the other to establish its validity, the courts will adopt the latter.[51]

Thus, in this paradigmatic example of classical avoidance, the Supreme Court clearly considered the constitutional consequences of a particular construction of the statute—interpret it one way, and it would be unconstitutional; therefore it must be interpreted (if possible) so as to avoid that result.

2. Modern Avoidance

When using modern avoidance, on the other hand, the federal court does not make any definite determinations as to unconstitutional applications; it merely ventures a guess that some application might raise constitutional problems, and construes the statute narrowly so as to avoid having to rule on that issue altogether.[52] Thus, in one formulation of modern avoidance: "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such

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[51] *Id.*

[52] Vermeule traces the transition from classical to modern avoidance to the case of *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366 (1909), wherein the Court said:

> unless [the classical version of avoidance] be considered as meaning that our duty is to first decide that a statute is unconstitutional and then proceed to hold that such ruling was unnecessary because the statute is susceptible of a meaning, which causes it not to be repugnant to the Constitution, the rule plainly must mean that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.

Vermeule, *supra* note 43, at 1958 (quoting *Delaware & Hudson Co.*, 213 U.S. at 408).

By referring to "modern" avoidance, we do not mean to imply that "classical" avoidance is dead. Modern courts still at times cite old cases providing for classical avoidance. *See, e.g.*, Va. Soc'y for Human Life, Inc. v. Caldwell, No. 95-1042-R, slip op. at 5 (W.D. Va. Feb. 19, 1997) (holding "that where a 'statute [is] reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that a [sic] construction which will save the statute from constitutional infirmity'" (quoting *Delaware & Hudson Co.*, 213 U.S. at 407)), *quoted in* Va. Soc'y for Human Life, Inc. v. Caldwell, 152 F.3d 268, 270 (4th Cir. 1998).

Similarly, old cases sometimes employed modern avoidance. *See, e.g.*, Knights Templars' & Masons' Life Indem. Co. v. Jarman, 187 U.S. 197, 205 (1902) ("We do not wish to be understood, however, as expressing an opinion upon the constitutionality of the act of 1887, if it were applied to prior policies, but simply as holding that, in view of the language of the act, and the doubtfulness of its constitutionality as applied to prior policies, it should only be given effect in cases of policies thereafter issued.").

construction is plainly contrary to the intent of Congress."[53] As Vermeule puts it, "[t]he basic difference between classical and modern avoidance is that the former requires the court to determine that one plausible interpretation of the statute *would* be unconstitutional, while the latter requires only a determination that one plausible reading *might* be unconstitutional."[54]

An example of modern avoidance can be found in *Jones v. United States*,[55] in which the Court considered a federal arson statute that made it a crime to "damage or destroy 'by means of fire or an explosive, any . . . property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce.'"[56] The question was whether this statute could apply to arson committed on "property occupied and used by its owner not for any commercial venture, but as a private residence."[57] The Court first construed the statute so as *not* to apply to such arson, and then explained why:

> Our reading of § 844(i) is in harmony with the guiding principle that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." . . .
>
> Given the concerns brought to the fore in *Lopez*, it is appropriate to avoid the constitutional question that would arise were we to read § 844(i) to render the "traditionally local criminal conduct" in which petitioner Jones engaged "a matter for federal enforcement."[58]

Thus, while the Court hinted at constitutional problems in its discussion of the Commerce Clause issue, what it avoided was precisely the necessity of deciding a "constitutional question that would arise"[59] otherwise.

The difference between the two types of avoidance cannot be overstated. In fact, calling both types "avoidance" can be misleading. Classical avoidance and

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[53]Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (citing NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 499–501, 504 (1979)). Another formulation is found in Justice Brandeis's concurrence in *Ashwander*:

> When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.

Ashwander v. TVA, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring) (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932)).

[54]Vermeule, *supra* note 43, at 1949.

[55]529 U.S. 848, 850–51 (2000).

[56]*Id.* at 850 (quoting 18 U.S.C. § 844(i) (1994 ed., Supp. IV)).

[57]*Id.* at 854.

[58]*Id.* at 857–58 (internal citations omitted).

[59]*Id.* at 858.

modern avoidance avoid very different things. In classical avoidance, the court is trying to avoid *holding the statute unconstitutional*, and it explicitly makes a constitutional determination as to one application in order to narrow the statute. In modern avoidance, the court tries to avoid *making any constitutional determination whatsoever*. Thus, modern avoidance avoids the precise action that classical avoidance demands. As we suggest later, the evolution from classical to modern avoidance may be an unnoticed contributor to the problems that are the focus of this Article.

C. Pullman *Abstention and Certification*

The doctrine of *Pullman* abstention[60] suggests that federal courts should abstain from deciding a challenge to a state law where the case involves both an unsettled issue of state law in a "sensitive area of social policy" and a "substantial constitutional issue," and where the constitutional issue could plainly be "avoided if a definitive ruling on the state issue would terminate the controversy."[61] Because the federal court's ruling on the state law issue would be merely a "forecast rather than a determination,"[62] the rule of law is served by avoiding the "waste of a tentative decision as well as the friction of a premature constitutional adjudication."[63]

To a great extent, the actual practice of *Pullman* abstention has been displaced by certification.[64] Certification allows a federal court to pose or "certify" a question of state law to a state's highest court, which can then provide an authoritative construction at its discretion.[65] Certification serves the same

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[60]R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496 (1941).

[61]*Id.* at 498. The Court has recently said that it would be more appropriate to speak of "*Pullman* deferral," because the federal court is not abstaining from deciding a case forever, but merely postponing its action until the state court has had the chance to pass upon the statute in question. Growe v. Emison, 507 U.S. 25, 32 n.1 (1993).

[62]*Pullman*, 312 U.S. at 499.

[63]*Id.* at 500.

[64]*See e.g.*, Arizonans for Official English v. Arizona, 520 U.S. 43, 75 (1977) ("Certification today covers territory once dominated by a deferral device called '*Pullman* abstention'. . . .").

[65]Most states do in fact provide for certification. The state certification statutes and rules include: ALA. R. APP. P. 18; ALASKA R. APP. P. 407; ARIZ. REV. STAT. ANN. § 12-1861 (West 1994); ARIZ. SUP. CT. R. 27; CAL. R. CT. 29.5; COLO. APP. R. 21.1; CONN. GEN. STAT. ANN. § 51-199b (West Supp. 2001); CONN. R. APP. P. 82-1 to –7; DEL. CONST. art. IV, § 11(9); DEL. SUP. CT. R. 41; D.C. CODE ANN. § 11-723 (2001); FLA. CONST. art. V, § 3(b)(6); FLA. STAT. ANN. § 25.031 (West 1998); FLA. R. APP. P. 9.150; GA. CODE ANN. § 15-2-9 (2001); GA. R. SUP. CT. 46–48; HAW. R. APP. P. 13; IDAHO APP. R. 12.1; ILL. SUP. CT. R. 20; IND. CODE ANN. § 33-2-4-1 (Michie 1998); IND. R. APP. P. 15(O); IOWA CODE ANN. §§ 684A.1–.11 (West 1998 & Supp. 2001); KAN. STAT. ANN. §§ 60-3201 to –3212 (1994); KY. R. CIV. P. 76.37; LA. REV. STAT. ANN. § 13:72.1 (West 1999); LA. SUP. CT. R. XII; ME. R. CIV. P. 76B; MD. CODE ANN., CTS. & JUD. PROC. §§ 12-601 to –609 (1998); MASS. SUP. JUD. CT. R. 1:03; MICH. CT. R. 7.305; MINN. STAT. ANN. § 480.065 (West Supp. 2001);

purpose as *Pullman* abstention—allowing the state court to have the first opportunity to construe a state statute, thereby possibly avoiding the necessity for a voidable[66] federal constitutional ruling.[67] The Supreme Court has recently urged lower federal courts to lean strongly towards certification in cases involving state laws whose interpretation is unclear. In *Arizonans for Official English v. Arizona*,[68] the Court noted:

> Certification today covers territory once dominated by a deferral device called '*Pullman* abstention'. . . . Designed to avoid federal-court error in deciding state-law questions antecedent to federal constitutional issues, the *Pullman* mechanism remitted parties to the state courts for adjudication of the unsettled state-law issues. . . .
>
> Certification procedure, in contrast, allows a federal court faced with a novel state-law question to put the question directly to the State's highest court, reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response.[69]

The Court emphasized that certification is necessary to vindicate the "cardinal principle" that federal courts should try to find statutory constructions

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MISS. R. APP. P. 20; MO. ANN. STAT. § 477.004 (West Supp. 2002) (held unconstitutional by *Grantham v. Mo. Dep't of Corrs.*, No. 72576, 1990 WL 602159, at *1 (Mo. July 13, 1990)); MONT. R. APP. P. 44; MONT. CODE ANN. § 25-21-Rule 44 (2001); NEB. REV. STAT. §§ 24-219 to -225 (Michie 1995); NEV. R. APP. P. 5; N.H. SUP. CT. R. 34; N.J. R. APP. P. 2; 12A-1 to -8; N.M. STAT. ANN. §§ 39-7-1 to -13 (Michie Supp. 2001); N.M. R. APP. P. 12-607; N.Y. R. CT. 500.17; N.D. R. APP. P. 47; OHIO SUP. CT. PRAC. R. XVIII; OKLA. STAT. ANN. tit. 20, §§ 1601–1611 (West Supp. 2001); OR. REV. STAT. §§ 28.200–.255 (1999); OR. R. APP. P. 12.20; PA. SUP. CT. INTERNAL OP. PRO. (internal operating procedure regarding certifications of questions of Pennsylvania Law) (Jan. 12, 2000); R.I. SUP. CT. R. art. I, 6; S.C. APP. CT. R. 228; S.D. CODIFIED LAWS §§ 15-24A-1 to -11 (Michie Supp. 2000); S.D. S. CT. R. 85-7; TENN. R. SUP. CT. 23; TEX. R. APP. P. 74 (addressing only criminal issues); TEX. R. APP. P. 58; UTAH R. APP. P. 41; VA. R. SUP. CT. 5:42; WASH. REV. CODE ANN. §§ 2.60.010–.900 (West 1998 & Supp. 2002); WASH. R. APP. P. 16.16; W. VA. CODE ANN. §§ 51-1A-1 to -13 (2000); WIS. STAT. ANN. §§ 821.01–.12 (West 1994 & Supp. 2001); WYO. STAT. ANN. §§ 1-13-104 to -107 (Michie 2001); WYO. R. APP. P. 11.01–.07.

[66]The federal decision, which would necessarily be based on the federal court's interpretation of state law, would be voidable in that a subsequent authoritative construction by a state court might overrule the federal interpretation.

[67]While certification is a different procedure from abstention, courts rely on the *Pullman* doctrine in certification cases because *Pullman* "still remains the doctrine whose purpose is most proximate to that of certification in cases concerning the federal constitutional validity of state laws." Tunick v. Safir, 209 F.3d 67, 74 (2d Cir. 2000).

[68]520 U.S. 43 (1997).

[69]*Id.* at 75–76.

that will keep the statute within constitutional bounds.[70] Thus, certification enables constitutional avoidance, by giving the state the chance to seek a narrowing construction that would save the statute.[71] A difficulty with *Pullman* abstention or certification is how to answer the question whether the statute is susceptible to a narrowing interpretation—after all, if no such interpretation is available, both abstention and certification would be futile. If the statute forbids, say, all "First Amendment activities,"[72] then it would be hard to imagine any remotely plausible way to narrow the statute so as to come within the First Amendment's requirements. Thus, the Court has indicated that although a federal court should abstain where the state law could be interpreted so as to "eliminate the constitutional issue and terminate the litigation,"[73] it should *not* abstain where the statute could be remedied only through "extensive adjudications, under the impact of a variety of factual situations."[74] On the other hand, where a statute could apply only to a few distinct and separable activities, abstention might be much more appropriate, because a state court would more readily be able to give a narrowing construction that would eliminate the possibility that the statute would apply to the given plaintiff.[75]

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[70]*Id.* at 78 (citing Ashwander v. TVA, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring)); *Id.* at 79 ("Warnings against premature adjudication of constitutional questions bear heightened attention when a federal court is asked to invalidate a State's law, for the federal tribunal risks friction-generating error when it endeavors to construe a novel state Act not yet reviewed by the State's highest court.").

[71]In fact, certification can enable *both* types of avoidance—by abstaining, the federal court practices modern avoidance (by avoiding the necessity of making a constitutional determination at all). Compare *Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101 (1944), where the Court stated:

> If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable . . . . [H]olding the litigation in the federal courts until definite determinations on local law are made by the state courts . . . heeds this time-honored canon of constitutional adjudication.

Id. at 105. In addition, the state court may well practice classical avoidance by adopting a particular construction in light of the unconstitutionality of the alternative.

[72]Bd. of Airport Comm'rs v. Jews for Jesus, 482 U.S. 569, 570 (1987).

[73]Baggett v. Bullitt, 377 U.S. 360, 377 (1964).

[74]*Id.* at 378.

[75]*See* Steffel v. Thompson, 415 U.S. 452, 474 n.21 (1974) ("Abstention . . . might be more appropriate when a challenge is made to the state statute as applied, rather than upon its face, since the reach of an uncertain state statute might, in that circumstance, be more susceptible of a limiting or clarifying construction that would avoid the federal constitutional question."). Judge Posner makes a nice contrast between the two approaches in *Waldron v. McAtee*, 723 F.2d 1348 (7th Cir. 1983). He says:

> If a statute is attacked as being excessively vague on its face, meaning that it is susceptible of being misapplied in a variety of possible situations, the state court is unlikely to be able to give it an interpretation that will prevent *any* of these possible misapplications, so probably abstention would not enable the constitutional issue to be

But whether a statute is susceptible to a narrowing interpretation is often a matter of vehement dispute. It is (by necessity) a state law question whether a state law is susceptible to a narrowing interpretation,[76] and federal courts are not empowered to revise statutes, even congressional enactments, to the same extent as state courts often are. Federal courts cannot "rewrite"[77] federal statutes, and can reinterpret federal statutes only if "readily susceptible" to such a construction.[78]

State courts, however, are often authorized to revise state statutes practically wholesale.[79] In a post-*Roe* case, for example, the Michigan Supreme Court saved that state's abortion statute by simply reading all of *Roe*'s requirements into the statute, even though the statutory text did not include the exceptions demanded by *Roe*.[80] Because of the differing powers of federal and state courts, federal courts often underestimate the possibility that a state court would give a narrowing construction, and thus underenforce the doctrines of *Pullman* abstention or certification.

D. Authority to Interpret State Statutes

Federal courts do not have final authority to interpret state statutes. This basic principle has two manifestations, one that is retrospective and one that is prospective. First, whenever federal courts hear claims that a state law is vague

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> avoided. But if the question is whether the statute forbids a specific course of conduct, the task for the state court is much more limited.

Id. at 1354–55 (citations omitted).

[76]*See Tunick*, 209 F.3d at 75–76 ("[B]ecause a state law is at play, only the state court can ultimately determine whether a saving interpretation is appropriate under the canons of interpretation of the particular state whose statutes it is called upon to construe.").

[77]Blount v. Rizzi, 400 U.S. 410, 419 (1971).

[78]Reno v. Am. Civil Liberties Union, 521 U.S. 844, 884 (1997) (citations omitted).

[79]In New York, for example, the state courts are *required* to "'avoid interpreting [a state law] in a way that would render it unconstitutional if such a construction can be avoided.'" Nat'l Ass'n of Indep. Insurers v. New York, 678 N.E.2d 465, 466 (N.Y. 1997) (quoting Alliance of Am. Insurers v. Chu, 571 N.E.2d 672, 678 (N.Y. 1991)); *see also* A Woman's Choice-East Side Women's Clinic v. Newman, 671 N.E.2d 104, 111 (Ind. 1996) (Dickson, J., concurring) (noting that Indiana courts have an "overriding obligation to construe [their] statutes in such a way as to render them constitutional if reasonably possible"); Kopp v. Fair Political Practices Comm'n, 905 P.2d 1248, 1251 (Cal. 1995) ("We also reject the view that a court lacks authority to rewrite a statute in order to preserve its constitutionality or that the separation of powers doctrine . . . invariably precludes such judicial rewriting."); *Id.* at 1267–78 (citing numerous state court cases reforming and rewriting state laws); Dep't of Law Enforcement v. Real Prop., 588 So. 2d 957, 968 (Fla. 1991) (curing "multitude of procedural deficiencies" in forfeiture statute by judicial construction).

[80]People v. Bricker, 208 N.W.2d 172, 175 (Mich. 1973) ("The central purpose of this legislation is clear enough—to prohibit all abortions except those required to preserve the health of the mother. The Supreme Court now requires other exceptions. They can properly be read into the statutes to preserve their constitutionality.").

or overbroad, the federal court will consider the state law, not as it is written, but as it has been construed by any state court.[81] The Court has said that "[i]n evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court or enforcement agency has proffered."[82] Even if the Court eventually rules that a particular law is unconstitutionally vague, it carefully considers any limiting constructions that state courts have previously given the law.[83]

The second manifestation of this principle is that federal courts often disavow having any authority to construe state statutes. The Supreme Court has said that it lacks "jurisdiction authoritatively to construe state legislation,"[84] and that "it is not within our power to construe and narrow state laws."[85] Even when a federal court does construe a state law, that construction is not binding on future state court adjudications.[86]

Thus, the lack of federal authority to interpret state statutes is often given as a reason for abstention. In abstaining from deciding an issue based on a state statute interpretation, the Supreme Court said, "to decide the constitutional question by anticipating such an authoritative construction of the state statute would be either to decide the question unnecessarily or rest our decision on the unstable foundation of our own construction of the state statute which the state

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[81] *See, e.g.*, Wainwright v. Stone, 414 U.S. 21, 22 (1973) ("The judgment of federal courts as to the vagueness or not of a state statute must be made in the light of prior state constructions of the statute."); Ward v. Illinois, 431 U.S. 767, 774–77 (1977) (giving deference to Illinois Supreme Court construction of obscenity statute); Minn. *ex rel.* Pearson v. Probate Ct., 309 U.S. 270, 273 (1940) (upholding statute which allowed commitment of anyone having "psychopathic personality," because state courts had given that term specific, "binding" definition); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) ("The state statute here challenged comes to us authoritatively construed by the highest court of New Hampshire.").

[82] Kolender v. Lawson, 461 U.S. 352, 355 (1983) (citing Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494 n.5 (1982)); *see also Minn. ex. rel. Pearson*, 309 U.S. at 273 (holding that federal court must "take the statute as though it read precisely as the highest court of the State has interpreted it").

[83] Maynard v. Cartwright, 486 U.S. 356, 360–61 (1988); Smith v. Goguen, 415 U.S. 566, 575 n.16 (1974); Coates v. Cincinnati, 402 U.S. 611, 612–14 (1971); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 504 (1952); Winters v. New York, 333 U.S. 507, 518–19 (1948); Spector Motor Serv. Co. v. McLaughlin, 323 U.S. 101, 104–05 (1944); Huddleston v. Dwyer, 322 U.S. 232, 237 (1944) ("The decision of the highest court of a state on matters of state law are in general conclusive upon us . . . ."); Vandenbark v. Owens-Ill. Glass Co., 311 U.S. 538, 541–43 (1941); Smith v. Cahoon, 283 U.S. 553, 564–65 (1931).

[84] United States v. Thirty-Seven Photographs, 402 U.S. 363, 369 (1971).

[85] Grayned v. Rockford, 408 U.S. 104, 110 (1972) (citations omitted).

[86] State courts at times make pronouncements like the following: "The decisions of federal courts other than the Supreme Court of the United States are not binding upon a state court of last resort." Ballew v. State, 296 So. 2d 206, 210 (Ala. 1974).

court would not be bound to follow."[87] In another case, the Court noted that one of the foremost reasons for *Pullman* abstention is

> that a federal court will be forced to interpret state law without the benefit of state-court consideration and therefore under circumstances where a constitutional determination is predicated on a reading of the statute *that is not binding on state courts and may be discredited at any time*—thus essentially rendering the federal-court decision advisory and the litigation underlying it meaningless.[88]

Similarly, the lack of federal authority to interpret state law is seen as a reason for modern avoidance. As the Court once said, "it is the duty of the federal courts to avoid the unnecessary decision of constitutional questions," and the "use of the declaratory judgment procedure to test the validity of a state statute for vagueness and uncertainty invites rather than avoids the unnecessary decision of the constitutional question."[89]

E. Severability

Another key doctrine that crops up in overbreadth and vagueness cases is severability.[90] According to this doctrine, when a court wishes to declare part of a statute unconstitutional, it can sever that part and leave the rest of the statute standing. A typical formulation of the doctrine reads thus:

> When a part of a statute is declared unconstitutional the remainder of the act will be permitted to stand provided: (1) the unconstitutional provisions can be separated from the remaining valid provisions, (2) the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void, (3) the good and the bad features are not so inseparable in substance that it can be said that the

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[87]Ala. State Fed'n of Labor v. McAdory, 325 U.S. 450, 471 (1945) (citations omitted).

[88]Moore v. Sims, 442 U.S. 415, 428 (1979) (emphasis added). The Court overstates its point here, of course. The interpretation *qua* interpretation can indeed be overturned by a state court, but that would not make the federal judgment purely advisory. As we discuss later, *see infra* notes 261–90 and accompanying text, the federal judgment would bind the particular parties both directly and by preclusive effect.

[89]*Ala. State Fed'n of Labor*, 325 U.S. at 470.

[90]For an extensive analysis of this doctrine, see John Copeland Nagle, *Severability*, 72 N.C. L. REV. 203 (1993).

> Legislature would have passed the one without the other and, (4) an act complete in itself remains after the invalid provisions are stricken.[91]

Severability, in this way, is the functional equivalent of classical avoidance.[92] Severance requires the court to decide whether a particular provision or application of a statute is unconstitutional, and then decide whether to sever that particular provision or application.[93] Whether the court characterizes its statutory interpretation as "severing" a provision or application of the statute, or as giving a narrowing construction to the statute, the effect is the same—the statute has been interpreted so as not to apply in an unconstitutional manner.

Worth emphasizing is that not only explicit statutory provisions may be severed; so may statutory *applications*.[94] This is because it matters very little whether a specific statutory application is written as an explicit, distinct provision. To return to our example from the Introduction, imagine a statute that penalizes public displays of nudity for lewd purposes in section A, and public displays of nudity for artistic purposes in section B. Assuming that section B is unconstitutional and section A is not, a court might sever section B and leave section A standing. If, on the other hand, the statute is simply written as a ban on public displays of nudity—without being explicitly separated into distinct provisions applying to lewd purposes and artistic purposes—the court might "sever" the application of the statute to nudity in artistic productions or the court might construe the statute narrowly to achieve the same end. The end result is the

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[91]Waldrup v. Dugger, 562 So. 2d 687, 693 (Fla. 1990) (quoting Cramp v. Bd. of Pub. Instruction, 137 So. 2d 828, 830 (Fla. 1962)).

[92]*See* Vermeule, *supra* note 43, at 1959 ("Because classical avoidance requires the decision of a constitutional question, it is *identical* to severability analysis conducted after a judgment on the constitutional merits.").

[93]*See, e.g.*, New York v. United States, 505 U.S. 144, 186 (1992) ("Having determined that the take title provision exceeds the powers of Congress, [the Court] must consider whether it is severable from the Act."); Wyoming v. Oklahoma, 502 U.S. 437, 459–61 (1992) (addressing severability of state statute containing severability clause).

[94]*See, e.g.*, Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 504–07 (1985) (severing application of obscenity statute to material inciting "lust"); Nat'l Treasury Employees Union v. United States, 990 F.2d 1271, 1279 (D.C. Cir. 1993) (severing application of honorarium ban as to employees of executive branch of government); *see also* Robert L. Stern, *Separability and Separability Clauses in the Supreme Court*, 51 HARV. L. REV. 76 (1937), stating:

> Questions of separability fall into two general classes. One relates to situations in which some *applications* of the same language in a statute are valid and other applications invalid; the other to statutes containing particular *language*—whether words, phrases, sentences or sections—which is invalid, and other language entirely constitutional.

Id. at 78–79; *see also* Vermeule, *supra* note 43, at 1950 n.26 (stating that "severability problems arise . . . also with respect to applications of a particular statutory provision when some (but not all) of those applications are unconstitutional").

same[95]—the statute now applies only to indecent exposure rather than to artistic exhibitions. A court's act of interpretation can thus be viewed as "severing" unconstitutional applications of a single statutory provision or as giving a limiting construction to that provision.[96] Either way, the overbreadth challenger loses at this point, assuming that his own conduct is constitutionally punishable.

Of course, there are limits to what any court can plausibly do. As a typical state supreme court noted, it would give a saving construction "when we can say with confidence that (i) it is possible to reform the statute in a manner that closely effectuates policy judgments clearly articulated by the enacting body, and (ii) the enacting body would have preferred the reformed construction to invalidation of the statute."[97] Likewise, as Michael Dorf puts it, the laws of 48 states presume statutory severability unless "(1) severance would leave an incoherent statute, or (2) the legislature would not have enacted the statute without the invalid portion."[98]

Many state statutes are neither readily susceptible to a narrowing construction, nor can be separated plausibly into constitutional and unconstitutional applications, at least not in a way that would leave standing a statute that served the legislature's purposes. A paradigmatic example would be the regulation in the *Jews for Jesus* case prohibiting all "First Amendment activities."[99] First Amendment activities are precisely what the First Amendment protects; hence, any construction that would "save" that regulation would have to make it mean the precise opposite—and clearly a statute's opposite would not be a plausible exercise of either interpretation or application. Not all examples are so extreme, but there are indeed numerous cases where there is no way a narrowing construction or a set of permissible applications could be carved out by a federal court.

In still other cases, though, it might be difficult to discern whether "the enacting body would have preferred the reformed construction to invalidation of the statute."[100] Quite often, a federal court might suspect that the state legislature

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[95]*See* Stern, *supra* note 94, at 83 ("Whether excision or limitation of statutory language is required, the fundamental principles are the same.").

[96]In fact, some state statutes explicitly authorize courts to sever not just statutory provisions, but applications as well. *See, e.g.*, LA. REV. STAT. ANN. § 24:175 (West 1989) ("If any provision or item of an act, *or the application thereof*, is held invalid, such invalidity shall not affect other provisions, items, or applications of the act which can be given effect without the invalid provision, item, or application." (emphasis added)); WASH. REV. CODE ANN. § 7.48A.900 (West 1992) ("If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.").

[97]Kopp v. Fair Political Practices Comm'n, 905 P.2d 1248, 1283 (Cal. 1995).

[98]Dorf, *supra* note 11, at 285; *see also id.* at 295–304 (providing citations for severability cases or statutes in all fifty states).

[99]Bd. of Airport Comm'rs v. Jews for Jesus, 482 U.S. 569, 570–71 (1987).

[100]*Kopp*, 905 P.2d at 1283.

would rather have no statute at all than have the statute with its unconstitutional applications severed. If, say, a state law forbids flag-burning, and a court construes it so as to apply only to those flag-burnings that a state can constitutionally prohibit, for example, those burnings that contribute excessively to pollution, then the legislature's primary reason for the prohibition—suppressing political demonstrations—will be frustrated. And rightfully so—but that does not solve the federal court's dilemma, namely, the decision whether to "narrow," "sever," or "enjoin" the applications of a statute such that no pre-existing legislative purpose is being served any longer. Where it is plain that the entire statute was motivated out of an improper legislative purpose, the federal court is justified in enjoining the statute as a whole; as Michael Dorf observes, an "invalid legislative purpose" often pervades an entire statute, and the "idea of severing an application of law from its purpose appears nonsensical."[101] In most cases, however, where the statute does not bear a plainly improper legislative motive on its face, the federal court should take the more modest path of enjoining impermissible applications, rather than speculating about whether the legislature would have wanted a narrowed statute. It can be hard enough to determine a legislature's actual purpose,[102] much less to determine what a legislature *would have* wanted in a situation that it probably never envisioned. Moreover, given that the vast majority of states have a presumption of severability,[103] the absence of a non-severability clause will usually indicate that the legislature *would have* wanted the statute to remain enforceable to the maximum extent possible.[104] A federal court is therefore justified in severing unconstitutional applications without entering the morass of guessing what the legislature's *specific* intent would have been for that particular situation.[105]

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[101]Dorf, *supra* note 11, at 279. The federal court should, however, indicate its reasons for enjoining the state's enforcement facially, and indicate (albeit in dicta) what sort of statute along similar lines might pass constitutional muster, thus providing guidance to the legislature on the question whether to pass a similar (but narrower) statute.

[102]*Cf.* Edwards v. Aguillard, 482 U.S. 578, 636–39 (1987) (Scalia, J., dissenting) (criticizing legislative purpose prong of Establishment Clause test).

[103]*See supra* note 98.

[104]As Michael Dorf notes, "the Court has never actually refused to sever a statute *solely* on the historical basis that Congress would not have passed it absent the invalid provision." Dorf, *supra* note 11, at 291.

[105]A deeper problem is that a statutory scheme might represent a bundle of legislative compromises, and if a court (federal or state) enjoins only some of the applications or provisions of the statute, it hands a post-enactment victory to the legislative faction that opposed those specific sections in the first place. That faction, then, will resist (and excusably so) any future attempt to redo the statute within constitutional bounds so as to resemble the previous compromise of interests. On the other hand, the legislature might well prefer to have half a loaf rather than none. That is, the legislative scheme might, as narrowed, still represent the bundle of interests that formulated the original statute. What is a court to make of this? Not much, we suspect. In most cases, it is probably a wholly intractable problem to determine whether enjoining specific applications or provisions of

Finally, severability and classical avoidance, in this sense, function like as-applied adjudications. Although as-applied challenges are not characterized in terms of statutory *interpretation*, as are severability and classical avoidance, the underlying constitutional determination by the court is the same—the statute is held unconstitutional as applied to some specific action while remaining at least potentially constitutional as applied to other actions. As we shall see later, the fact that all three operations are functionally equivalent can lead to confusion—if a federal court characterizes its action as statutory interpretation, various parties or dissenting judges can protest (with good reason) that a federal court has no authority to make a binding interpretation of a state law. If, instead, the federal court characterizes itself as performing as-applied adjudication, this objection is moot. Thus, even though the underlying constitutional determination is the same in both instances, the federal court's own characterization of the issue can cause, or eliminate, confusion.

F. Summing Up

As should be obvious from the above doctrinal summaries, several important constitutional doctrines are at war with the facial invalidation urged in overbreadth and vagueness challenges. The overbreadth doctrine in particular is premised on the idea that laws will be challenged facially, not as-applied. Yet, as we have seen, classical avoidance and severability function like as-applied challenges, and are therefore tools intended to *avoid* the facial invalidation required by an overbreadth challenge. Thus, in overbreadth challenges, a federal court is pulled in two opposite directions—the overbreadth doctrine itself requires a facial invalidation where no narrowing construction exists and the statute chills the exercise of First Amendment or abortion rights, yet the doctrines of classical avoidance and severability effectively require a court to *not* invalidate a statute facially but rather to determine those applications that are unconstitutional and enjoin them or construe the statute so as to avoid them. The related doctrines of abstention and certification are likewise at odds with the overbreadth doctrine, which is why abstention and certification are permitted only where the statute is readily susceptible to a narrowing construction. Otherwise, to abstain or to certify would be to allow the uncertainty surrounding the statute to continue to chill the exercise of constitutional rights. Add to this the doctrine that only

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a statutory scheme will undo a legislative compromise. Additionally, as noted above, various legislative factions presumedly should be aware of their state's general policy favoring severability. If one faction wants to take the chance on bargaining for a potentially unconstitutional provision in the statute's framing, and it declines to offer a non-severability provision, that faction should have to bear its losses in the event a court does enjoin the enforcement of those provisions on constitutional grounds.

state courts are the authoritative interpreters of state laws, and it is no wonder that the federal and state courts are often confused.

The Supreme Court has recognized that the above doctrines are in tension with the remedy of facial invalidation. Because a federal court's interpretation of a state statute is not binding on state courts, a premature interpretation could effectively be overruled by a state court, thus making the federal opinion merely advisory.[106] Further, federal courts are not allowed to address abstract questions of law or policy, but must be presented with a "concrete case or controversy,"[107] with two adversarial parties fighting over some specific wrong. Moreover, broad facial attacks on state statutes cause a "threat to our federal system of government posed by 'the needless obstruction to the domestic policy of the states by forestalling state action in construing and applying its own statutes.'"[108] The Court noted that "[a]lmost every constitutional challenge . . . offers the opportunity for narrowing constructions that might obviate the constitutional problem . . . . When federal courts disrupt that process . . . they prevent the informed evolution of state policy by state tribunals."[109]

The doctrines implicated in overbreadth facial challenges are thus fundamentally opposed to the overbreadth doctrine itself. While federal courts possess a broad range of powers to resolve these tensions while protecting both state and individual rights, they often fail to use these powers. Federal courts often mistakenly think that in a facial overbreadth challenge, their only option is to strike down the statute entirely, forgetting that the power to enjoin *entirely* necessarily encompasses the power to enjoin *partially* (as is done in an as-applied challenge). Next, we will illustrate these tensions—and the ways federal courts deal with them—by examining the recent spate of overbreadth and vagueness challenges to partial-birth abortion laws.

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[106]Moore v. Sims, 442 U.S. 415, 428 (1979).

[107]*Id.*

[108]*Id.* at 429 (quoting Ala. State Fed'n of Labor v. McAdory, 325 U.S. 450, 471 (1945)). This statement, by the way, shows the confusion present in most analyses of this issue. If a federal overbreadth judgment really is, in effect, merely advisory, then it should pose no danger of creating a "needless obstruction" to state policy. *Ala. State Fed'n of Labor*, 325 U.S. at 471. But as we shall see later, while the former description of a federal overbreadth judgment is perhaps closer to the truth in technical, doctrinal terms (though it does overstate the case), the latter is more accurate in real world terms. This tension arises precisely because most courts misunderstand the real nature of the overbreadth doctrine and federal court judgments, thereby creating a *de facto* obstruction to state policy where none need exist. *See infra* notes 360–61 and accompanying text (describing the *in terrorem* effect of federal judgments).

[109]*Moore*, 442 U.S. at 429–30.

III. PARTIAL-BIRTH ABORTION LAWS

In a way never before seen in our federal courts, legislative efforts to restrict partial-birth abortion gave rise to a flood of litigation challenging partial-birth abortion statutes as overbroad or vague. The states defended their statutes by arguing, almost uniformly, that the federal court should either abstain or certify the interpretive question to a state court, that it should adopt a narrowing interpretation itself, or that it should at most impose some other form of limited invalidation.

Overall, federal constitutional challenges were brought against partial-birth abortion statutes in at least fifteen different states. The litigation produced at least eighteen federal district court opinions,[110] eight federal appeals court opinions,[111] and one Supreme Court opinion.[112] Almost without exception, the federal courts that heard these challenges found the statutes to be either unconstitutionally overbroad, vague, or both. Because of the similarity and sheer volume of these decisions, the partial-birth litigation provides an unparalleled opportunity to explore how federal courts respond to the tension between overbreadth and

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[110]Women's Med. Prof'l Corp. v. Taft, 114 F. Supp. 664 (S.D. Ohio 2001); R.I. Med. Soc'y v. Whitehouse, 66 F. Supp. 2d 288 (D.R.I. 1999); Causeway Med. Suite v. Foster, 43 F. Supp. 2d 604 (E.D. La. 1999); A Choice for Women v. Butterworth, 54 F. Supp. 2d 1148 (S.D. Fla. 1998); Planned Parenthood of Cent. N.J. v. Verniero, 41 F. Supp. 2d 478 (D.N.J. 1998); Planned Parenthood of Greater Iowa, Inc. v. Miller, 30 F. Supp. 2d 1157 (S.D. Iowa 1998); Eubanks v. Stengel, 28 F. Supp. 2d 1024 (W.D. Ky. 1998); Carhart v. Stenberg, 11 F. Supp. 2d 1099 (D. Neb. 1998); Richmond Med. Ctr. for Women v. Gilmore, 11 F. Supp. 2d 795 (E.D. Va. 1998); Planned Parenthood of Wis. v. Doyle, 9 F. Supp. 2d 1033 (W.D. Wis. 1998); Planned Parenthood of Greater Iowa, Inc. v. Miller, 1 F. Supp. 2d 958 (S.D. Iowa 1998); Hope Clinic v. Ryan, 995 F. Supp. 847 (N.D. Ill. 1998); Summit Med. Assocs. v. James, 984 F. Supp. 1404 (M.D. Ala. 1998); Little Rock Family Planning Servs. v. Jegley, No. LR-C-97-581, 1998 U.S. Dist. LEXIS 22325 (E.D. Ark. Nov. 13, 1998); Planned Parenthood of S. Ariz., Inc. v. Woods, 982 F. Supp. 1369 (D. Ariz. 1997); Evans v. Kelley, 977 F. Supp. 1283 (E.D. Mich. 1997).

A district court in Missouri—without published opinion—heard a challenge to Missouri's partial-birth abortion statute in a complicated scenario described *infra* at notes 184–96 and accompanying text.

[111]Planned Parenthood of Cent. N.J. v. Farmer, 220 F.3d 127 (3d Cir. 2000); Hope Clinic v. Ryan, 195 F.3d 857 (7th Cir. 1999); Planned Parenthood of Greater Iowa, Inc. v. Miller, 195 F.3d 386 (8th Cir. 1999); Little Rock Family Planning Servs. v. Jegley, 192 F.3d 794 (8th Cir. 1999); Planned Parenthood of Wis. v. Doyle, 162 F.3d 463 (7th Cir. 1998); Richmond Med. Ctr. for Women v. Gilmore, 144 F.3d 326 (4th Cir. 1998); Women's Med. Prof'l Corp. v. Voinovich, 130 F.3d 187 (6th Cir. 1997). Additionally, the Eigth Circuit, as described *infra* at notes 184–96, issued an unpublished order, first by a panel, and then by the en banc court in a challenge to Missouri's partial birth abortion law.

[112]Stenberg v. Carhart, 503 U.S. 914 (2000). Although all of the statutes challenged were state statutes, this spate of litigation has, to our knowledge, produced only one state court opinion, as discussed *infra* at notes 194–95.

vagueness challenges and principles of limited invalidation, and, more importantly, how federal courts understand or fail to understand their own powers.[113]

A. Medical Definitions

In order to understand how these principles were implicated in the many partial-birth cases, we must first understand the medical procedures involved in various late-term abortions.

Partial-birth abortion became well-known in the early 1990s after a doctor named Martin Haskell presented a paper called "Dilation and Extraction for Late Second Trimester Abortion" at the National Abortion Federation's September 1992 Risk Management Seminar.[114] Dr. Haskell called the new procedure "dilation and extraction,"[115] a title that is often abbreviated D&X.[116] He described the D&X procedure in these terms:

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[113]Crucial to our discussion of the partial-birth abortion litigation is our assumption that banning the D&X procedure would be constitutional, while banning the far more common D&E would place an undue burden on the abortion right. In the Supreme Court's opinion in *Stenberg v. Carhart*, Justice O'Connor's concurrence indicated that as long as the statute provided for a health exception, it would be constitutional to ban D&X in statutory language that did not implicate the D&E procedure. *Stenberg*, 530 U.S. at 951 (O'Connor, J., concurring) ("Thus, a ban on partial-birth abortion that only proscribed the D&X method of abortion and that included an exception to preserve the life and health of the mother would be constitutional in my view."). As the four dissenters undoubtedly agreed with Justice O'Connor on at least this much, we conclude that a law proscribing D&X in clear terms and having a health exception would be upheld by a 5-4 majority of the Court.

Nearly all of the state partial-birth abortion statutes did *not* have a health exception, and are potentially unconstitutional on that basis alone. Most of the challenges to partial-birth abortion laws, however, claimed that the statutory language was overbroad, forbidding the D&E as well as the D&X. Many federal courts accepted this argument in holding the statutes unconstitutional. To keep things simple, we will ignore any legal arguments about the presence or absence of a health exception; for our purposes, the most relevant arguments are those made by federal courts to justify their overbreadth or vagueness holdings *vis a vis* D&E and D&X. Indeed, some federal courts struck down partial-birth abortion statutes purely on overbreadth or vagueness grounds, ignoring the health exception issue. *See, e.g.*, Carhart v. Stenberg, 192 F.3d 1142, 1146 (8th Cir. 1999) ("[T]he law was void for vagueness.").

[114]This paper has been reprinted in the Congressional Record at 139 CONG. REC. E 1092 (daily ed. Apr. 29,1993) (statement of Dr. Martin Haskell) [hereinafter Haskell Statement].

[115]*Id.*

[116]The D&X procedure has also been called "intact dilation and evacuation" or "intact D&E," which was the term used by the plaintiffs in *Stenberg v. Carhart*, 11 F. Supp. 2d 1099, 1105, 1111 (D. Neb. 1998).

> With a lower [fetal] extremity in the vagina, the surgeon uses his fingers to deliver the opposite lower extremity, then the torso, the shoulders and the upper extremities.
>
> The skull lodges at the internal cervical os. Usually there is not enough dilation for it to pass through. The fetus is oriented dorsum or spine up.
>
> At this point, the right-handed surgeon slides the fingers of the left hand along the back of the fetus and 'hooks' the shoulders of the fetus with the index and ring fingers (palm down) . . . .
>
> [T]he surgeon takes a pair of blunt curved Metzenbaum scissors in the right hand. He carefully advances the tip, curved down, along the spine and under his middle finger until he feels it contact the base of the skull under the tip of his middle finger.
>
> . . . .
>
> [T]he surgeon then forces the scissors into the base of the skull or into the foramen magnum. Having safely entered the skull, he spreads the scissors to enlarge the opening.
>
> The surgeon removes the scissors and introduces a suction catheter into this hole and evacuates the skull contents. With the catheter still in place, he applies traction to the fetus, removing it completely from the patient.[117]

Throughout partial-birth abortion litigation, the D&X procedure has been contrasted to another procedure for late-term abortion—the "dilation and evacuation" procedure, or "D&E." The D&E procedure starts when the physician dilates a woman's cervix, and then extracts the fetus by dismembering it one piece at a time.[118] More specifically, the doctor uses forceps to grab the fetus's arm or leg, and then "pulls it through the cervical os . . . tearing . . . fetal parts from the fetal body . . . by means of traction."[119] The fetus then dies gradually from blood loss; when dismemberment is achieved, the physician collapses the fetus's skull and pulls it through the cervical canal.[120]

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[117]Haskell Statement, *supra* note 114, at E 1092–93. For further discussion of late-term abortion procedures, see Janet E. Gans Epner et al., *Late-term Abortion*, 280 JAMA 724 (1998); David A. Grimes, *The Continuing Need for Late Abortions*, 280 JAMA 747 (1998); Nancy G. Romer, *The Medical Facts of Partial Birth Abortion*, 3 NEXUS 57 (1998); M. LeRoy Sprang & Mark G. Neerhof, *Rationale for Banning Abortions Late in Pregnancy*, 280 JAMA 744 (1998).

[118]*Stenberg*, 11 F. Supp. 2d at 1103–04.

[119]*Id.* at 1104.

[120]Causeway Med. Suite v. Foster, 43 F. Supp. 2d 604, 608 (E.D. La. 1999). For another court's extensive discussion of abortion procedures, see *Richmond Medical Center for Women v. Gilmore*, 55 F. Supp. 2d 441, 449–57 (E.D. Va. 1999).

Congress attempted to ban this procedure, which it deemed "partial-birth abortion," twice in the mid-1990s, but President Clinton vetoed both bills.[121] The text of the second bill defined its subject as follows:

> (b)(1) As used in this section, the term "partial-birth abortion" means an abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery.
>
> * * *
>
> (3) As used in this section, the term "vaginally delivers a living fetus before killing the fetus" means deliberately and intentionally delivers into the vagina a living fetus, or a substantial portion thereof, for the purpose of performing a procedure the physician knows will kill the fetus, and kills the fetus.[122]

Most states used similar or identical language in drafting their own partial birth abortion laws (a few states did not—including North Dakota,[123] Kansas,[124]

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[121]The Partial-Birth Abortion Ban Act of 1995, H.R. 1833, 104th Cong. (1995), was vetoed on April 10, 1996; the Senate failed to override Clinton's veto on September 26, 1996. Congress next attempted to pass the Partial-Birth Abortion Ban Act of 1997, H.R. 1122, 105th Cong. (1997), but Clinton vetoed H.R. 1122 on October 10, 1997, and the Senate failed to override on September 18, 1998. *See Clinton Vetoes Ban on Some Abortions*, WASH. POST, Oct. 11, 1997, at A11.

[122]Partial-Birth Abortion Ban Act of 1997, H.R. 1122, 105th Cong. § 1531(b) (1997).

[123]North Dakota's statute defines the procedure as follows:

> 1. "Partially born" means the living intact fetus's body, with the entire head attached, is delivered so that any of the following has occurred:
> a. The living intact fetus's entire head, in the case of a cephalic presentation, or any portion of the living intact fetus's torso above the navel, in the case of a breech presentation, is delivered past the mother's vaginal opening; or
> b. The living intact fetus's entire head, in the case of a cephalic presentation, or any portion of the living intact fetus's torso above the navel, in the case of a breech presentation, is delivered outside the mother's abdominal wall.

N.D. CENT. CODE § 14-02.6-01(1) (Supp. 2000). North Dakota also prohibits "intentionally caus[ing] the death of a living intact fetus while that living intact fetus is partially born." *Id.* § 14-02.6-02(1).

[124]Kansas's statute defines the procedure as follows:

> (1) "Partial birth abortion" means an abortion procedure which includes the deliberate and intentional evacuation of all or a part of the intracranial contents of a viable fetus prior to removal of such otherwise intact fetus from the body of the pregnant woman.
> (2) "Partial birth abortion" shall not include the: (A) Suction curettage abortion procedure; (B) suction aspiration abortion procedure; or (C) dilation and evacuation abortion procedure involving dismemberment of the fetus prior to removal from the body of the pregnant woman.

KAN. STAT. ANN. § 65-6721(b) (Supp. 2000).

Utah,[125] and New Mexico[126]—and perhaps not coincidentally, their statutes have yet to be challenged in federal court). Numerous states defined partial birth abortion as what occurs when the physician "partially vaginally delivers a living human fetus before killing the fetus and completing the delivery."[127] A few states

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[125]In an act of extraordinary prescience, the Utah legislature in 1996 explicitly excluded the D&E procedure from its statute prior to most of the federal court litigation, defining partial birth abortion as follows:

> "Partial birth abortion" or "dilation and extraction procedure" means the termination of pregnancy by partially vaginally delivering a living intact fetus, purposefully inserting an instrument into the skull of the intact fetus, and utilizing a suction device to remove the skull contents. This definition does not include the dilation and evacuation procedure involving dismemberment prior to removal, the suction curettage procedure, or the suction aspiration procedure for abortion.

UTAH CODE ANN. § 76-7-310.5(1)(a) (1999).

[126]New Mexico recently passed a partial-birth abortion ban, defining the procedure as follows: "'[P]artial-birth abortion' means a procedure in which any person, including a physician or other health care professional, intentionally extracts an independently viable fetus from the uterus into the vagina and mechanically extracts the cranial contents of the fetus in order to induce death." N.M. STAT. ANN. § 30-5A-2(C) (Michie Supp. 2001). The statute also contains a health exception. *Id.* § 30-5A-3.

[127]The state statutes using this precise phrasing include: ALA. CODE § 26-23-2(3) (Supp. 2001); ALASKA STAT. § 18.16.050(c) (Michie 2000); ARIZ. REV. STAT. ANN. § 13-3603.01(E)(1) (West 2001); FLA. STAT. ANN. § 390.011(6) (West Supp. 2002); IDAHO CODE § 18-613(2)(a) (Michie Supp. 2001); IND. CODE ANN. § 16-18-2-267.5 (Michie 1998); IOWA CODE ANN. § 707.8A(1)(c) (West Supp. 2001); KY. REV. STAT. ANN. § 311.720(7) (Michie Supp. 2001); MICH. COMP. LAWS § 333.17016(5)(c) (2001); MISS. CODE ANN. § 41-41-73(2)(a) (1999); N.J. STAT. ANN. § 2A:65A-6(e) (West 2000); OKLA. STAT. ANN. tit. 21, § 684(B)(1) (West Supp. 2002); S.C. CODE ANN. § 44-41-85(B)(1) (Law. Co-op. Supp. 2000); TENN. CODE ANN. § 39-15-209(a)(1) (1997); and W. VA. CODE ANN. § 33-42-3(3) (Michie 2000). Rhode Island used this phrasing but left out the word "partially." R.I. GEN. LAWS § 23-4.12-1(a) (2001).

Slight variants on this phrasing were adopted by the following states—Arkansas: "As used in this subchapter, 'partial-birth abortion' means an abortion in which the person performing the abortion partially vaginally delivers a living fetus before taking the life of the fetus and completing the delivery or as defined by the United States Supreme Court." ARK. CODE ANN. § 5-61-202 (Michie 1997); Georgia: "'Partial-birth abortion' means an abortion in which the person performing the abortion partially vaginally delivers a living human fetus before ending the life of the fetus and completing the delivery." GA. CODE ANN. § 16-12-144(a)(2) (1999); Illinois: "'Partial-birth abortion' means an abortion in which the person performing the abortion partially vaginally delivers a living human fetus or infant before killing the fetus or infant and completing the delivery. The terms 'fetus' and 'infant' are used interchangeably to refer to the biological offspring of human parents." 720 ILL. COMP. STAT. ANN. 513/5 (West Supp. 2001); Nebraska: "Partial-birth abortion means an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery." NEB. REV. STAT. ANN. § 28-326(9) (Michie Supp. 2001); South Dakota: "[A] partial-birth abortion is any abortion in which the person who performs the abortion causes a living human fetus to be partially vaginally delivered before killing the infant and completing the delivery." S.D. CODIFIED LAWS § 34-23A-32 (Michie Supp. 2001); and Wisconsin: "'Partial-birth abortion' means an abortion in which a person partially vaginally delivers a living child, causes the death of the partially delivered child with the intent to kill the child, and then completes the delivery of the child." WIS. STAT. ANN.

imitated the congressional bill even further by defining the phrase "vaginally delivers a living human fetus before killing the fetus" as meaning "deliberately and intentionally delivering into the vagina a living fetus, or a substantial portion thereof, for the purpose of performing a procedure the physician or other health care professional knows will kill the fetus, and the subsequent killing of the human fetus."[128] Virginia combined both these provisions into a single section.[129]

B. Federal Court Challenges by Abortion Providers

1. Overbreadth and Vagueness Arguments

In the prototypical challenge[130] to one of the partial-birth abortion laws just described, the plaintiffs argued that the law failed to specify just what abortion procedure was being proscribed, and hence was unconstitutionally overbroad or vague. The vagueness or overbreadth in the statutory language, claimed the typical plaintiff, created a potential that the common D&E procedure would be

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§ 940.16(1)(b) (West Supp. 2001).

Montana revised its statute to explicitly describe the partial-birth abortion procedure, following a state court decision holding the above definition void for vagueness. The statute now reads:

> (i)"Partial-birth abortion" means an abortion in which the person performing the abortion partially vaginally delivers a living human fetus before killing the fetus and completing the delivery.
>
> (ii) A procedure that constitutes a partial-birth abortion is one in which the following steps occur:
>
> (A) the living fetus is removed intact from the uterus until only the head remains in the uterus;
>
> (B) all or a part of the intracranial contents of the fetus are evacuated;
>
> (C) the head of the fetus is compressed; and
>
> (D) following fetal demise, the fetus is removed from the birth canal.

MONT. CODE ANN. § 50-20-401(3)(c) (2001).

[128]With slight (and irrelevant) variants in the wording, these state statutes include: IDAHO CODE § 18-613(2)(b) (Michie Supp. 2001); IOWA CODE ANN. § 707.8A(1)(d) (West Supp. 2001); KY. REV. STAT. ANN. § 311.720(8) (Michie Supp. 2001); NEB. REV. STAT. ANN. § 28-326(9) (Michie Supp. 2001); N.J. STAT. ANN. § 2A:65A-6(f) (West 2000); OKLA. STAT. ANN. tit. 21, § 684(B)(3) (West Supp. 2002); R.I. GEN. LAWS § 23-4.12-1(c) (2001); TENN. CODE ANN. § 39-15-209(a)(2) (1997); and W. VA. CODE ANN. § 33-42-3(5) (Michie 2000).

[129]Virginia defined partial-birth abortion as follows:

> "*Partial birth abortion*" means an abortion in which the person performing the abortion deliberately and intentionally delivers a living fetus or a substantial portion thereof into the vagina for the purpose of performing a procedure the person knows will kill the fetus, performs the procedure, kills the fetus and completes the delivery."

VA. CODE ANN. § 18.2-74.2(D) (Michie Supp. 2001).

[130]Although these challenges were brought across the country, most of them involved the same group of lawyers representing the plaintiffs—the Center for Reproductive Law and Policy of New York.

punished and therefore that abortion doctors would be chilled from performing D&Es.[131] For example, plaintiffs have argued that the commonly used phrase "partially vaginally delivers" could reasonably describe almost all methods of abortion, which (as one would expect) involve delivering the fetus, intact or in parts, at some point during the procedure.[132] In the words of one court, "[a]ll abortion procedures . . . could, therefore, be encompassed within this definition because during each of the procedures a fetus may be partially delivered into the vaginal canal and thereafter killed."[133]

The phrase "substantial portion," which appeared in several of the states' laws, was also accused of vagueness and overbreadth.[134] To quote the Third Circuit:

> Questions immediately arise as to whether "substantial portion" is measured in terms of size or volume . . . , length of the body, functionality, or a combination of these factors. . . . [R]easonable minds may well differ as to how much of a fetus is substantial: two limbs, four limbs, at least half of its body, all but the head?[135]

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[131]Whether this argument is empirically accurate is questionable. One commentator notes that statistics from numerous states indicate that the rate of abortion usually stayed the same or even rose after partial-birth abortion bans went into effect. Maureen L. Rurka, Comment, *The Vagueness of Partial-Birth Abortion Bans: Deconstruction or Destruction?*, 89 J. CRIM. L. & CRIMINOLOGY 1233, 1263 n.187 (1999).

[132]*See* Little Rock Family Planning Servs. v. Jegley, 192 F.3d 794, 795 (8th Cir. 1999) (holding word "partially" could refer to any part of fetus, thereby making statute overbroad); Little Rock Family Planning Servs. v. Jegley, No. LR-C-97-581, 1998 U.S. Dist. LEXIS 22325, at *52–*53 (E.D. Ark. Nov. 13, 1998); A Choice for Women v. Butterworth, 54 F. Supp. 2d 1148, 1157–58 (S.D. Fla. 1998); Hope Clinic v. Ryan, 995 F. Supp. 847, 854–55 (N.D. Ill. 1998); Planned Parenthood of Greater Iowa, Inc. v. Miller, 1 F. Supp. 2d 958, 962 (S.D. Iowa 1998); Planned Parenthood of Greater Iowa, Inc. v. Miller, 30 F. Supp. 2d 1157, 1165 (S.D. Iowa 1998); Eubanks v. Stengel, 28 F. Supp. 2d 1024, 1027–28 (W.D. Ky. 1998); Planned Parenthood of Cent. N.J. v. Verniero, 41 F. Supp. 2d 478, 491–92 (D. N.J. 1998); Richmond Med. Ctr. for Women v. Gilmore, 11 F. Supp. 2d 795, 814 (E.D. Va. 1998); Planned Parenthood of S. Ariz., Inc. v. Woods, 982 F. Supp. 1369, 1378–79 (D. Ariz. 1997); Evans v. Kelley, 977 F. Supp. 1283, 1305–06 (E.D. Mich. 1997).

Only one district court rejected this argument. *See* Planned Parenthood of Wis. v. Doyle, 9 F. Supp. 2d 1033, 1041 (W.D. Wis. 1998) (concluding that only D&X procedure "fits the language of the Act").

[133]Planned Parenthood of Cent. N.J. v. Farmer, 220 F.3d 127, 136 (3d Cir. 2000).

[134]Stenberg v. Carhart, 530 U.S. 914, 939–40 (2000); Planned Parenthood of Greater Iowa, Inc. v. Miller, 195 F.3d 386, 388–89 (8th Cir. 1999); R.I. Med. Soc'y v. Whitehouse, 66 F. Supp. 2d 288, 309–12 (D.R.I. 1999); Richmond Med. Ctr. for Women v. Gilmore, 55 F. Supp. 2d 441, 468–69, 497–98 (E.D. Va. 1999); *Miller*, 30 F. Supp. 2d at 1165; *Eubanks*, 28 F. Supp. 2d at 1027–28, 1034–35; Carhart v. Stenberg, 11 F. Supp. 2d 1099, 1127–32 (D. Neb. 1998); *Verniero*, 41 F. Supp. 2d at 493–94; *Gilmore*, 11 F. Supp. 2d at 816.

[135]*Farmer*, 220 F.3d at 137.

The very term "living" was also challenged as vague in several cases, because it was allegedly unclear whether the statutes required that the fetus be "living" as a viable entity or whether the mere presence of living tissue was enough to invoke the statute's coverage.[136]

Plaintiffs often pointed to a definition of the D&X offered by the American College of Obstetricians and Gynecologists ("ACOG"):

> 1. deliberate dilatation of the cervix, usually over a sequence of days;
> 2. instrumental conversion of the fetus to a footling breech;
> 3. breech extraction of the body excepting the head; and
> 4. partial evacuation of the intracranial contents of a living fetus to effect vaginal delivery of a dead but otherwise intact fetus.[137]

As one might expect, the state legislatures were reluctant to prohibit the D&X procedure in such specific terms, given that such precision would create numerous opportunities to circumvent the law. But in comparing the ACOG definition to the statutory language used by most states, the typical plaintiffs were often able to convince courts that the respective statute was far too vague.[138] Judge Easterbrook nicely summarized the dilemma:

> This legal definition is an imperfect match for the medical definition of D&X. It is easy to see why a legislature would be wary of the ACOG's specification: then any small variation (such as a change in the method of reducing the head size, or snipping off a toe to defeat the "otherwise

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[136]*Jegley*, 1998 U.S. Dist. LEXIS 22325, at *65–*67; *Ryan*, 995 F. Supp. at 854–55; *Miller*, 1 F. Supp. 2d at 962; *Miller*, 30 F. Supp. 2d at 1165; *Eubanks*, 28 F. Supp. 2d at 1027–28; *Verniero*, 41 F. Supp. 2d at 493–94; *Gilmore*, 11 F. Supp. 2d at 815; *Woods*, 982 F. Supp. at 1379.

As one court pointed out in a similar context, however, the phrase "living child" can only with great strain be construed as meaning "dismembered portions of a living child." *Doyle*, 9 F. Supp. 2d at 1041. Moreover, the subject of the act was "partial 'births'—a term readily applied to the partial delivery of an intact child but hardly applicable to the delivery of dismembered body parts." *Id.* at 1041. Thus, the D&E, which normally results in piecemeal delivery by dismemberment, was clearly not covered by the statute. *See* Richmond Med. Ctr. for Women v. Gilmore, 144 F.3d 326, 329 (4th Cir. 1998).

[137]American College of Obstetricians & Gynecologists, Statement on Intact Dilation and Extraction (Jan. 12, 1997), *reprinted in* 145 CONG. REC. S12954 (daily ed. Oct. 21, 1999).

[138]*See, e.g.*, *Whitehouse*, 66 F. Supp. 2d at 305 (criticizing Rhode Island Legislature for not adopting ACOG definition or phrase D&X); A Choice for Women v. Butterworth, 54 F. Supp. 2d 1148, 1155 (S.D. Fla. 1998) (criticizing Florida Legislature for not "incorporating the language set forth in the ACOG statement of policy"); *Eubanks*, 28 F. Supp. 2d at 1035–36 (criticizing legislature for "refus[ing] to adopt a more precise definition describing the D&X"). *But see Doyle*, 9 F. Supp. 2d at 1042 (holding that Wisconsin's partial-birth abortion statute clearly prohibited D&X procedure, and that legislature was reasonable in fearing that making definition too explicit would have made statute too easy to circumvent).

> intact" specification) would take the abortion outside the prohibition, even though the reasons why the technique has been deemed objectionable would be unaffected. But, as is common with legislation, the price of avoiding loopholes is generality. [Illinois's law] captures the idea, central to the D&X procedure, that an intact fetus moves from uterus to vagina before death occurs. But it also uses the words "delivers" and "delivery," which many physicians understand to refer to any removal of fetal material from the uterus. The law might be read to prohibit the extraction of dismembered parts following a D&E, or to prohibit abortion by induction if by chance the fetus survives until it reaches the birth canal. Moreover, physicians performing a D&E sometimes do not complete the dismemberment inside the uterus, and some fear that this could lead the procedure to be characterized as a partial delivery under the statute.[139]

An additional argument that plaintiffs sometimes made was that the D&X procedure is in practice impossible to distinguish from the D&E. Some courts accepted this argument,[140] but it is inconsistent with the also-common argument that the D&X procedure cannot be proscribed because it is *safer than* the D&E. Some courts, inexplicably, accepted both arguments simultaneously.[141]

2. State Requests for Avoidance or Limited Invalidation

In response, the state defendants usually made one or more of the following arguments: (1) that even if the language were vague or overbroad, it could be construed narrowly (or severed) so as to cover only the D&X procedure; (2) that the federal court should abstain or certify the question to a state court to allow just such a narrowing construction; and (3) that the doctrine of constitutional avoidance supported the above two options. As the statutory language used by

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[139]Hope Clinic v. Ryan, 195 F.3d 857, 863 (7th Cir. 1999).

[140]*See, e.g.*, *Farmer*, 220 F.3d at 139 (noting that "there is no meaningful difference between the forbidden D&X procedure and the permissible and concededly constitutionally protected D&E"); Richmond Med. Ctr. for Women v. Gilmore, 55 F. Supp. 2d 441, 455 (E.D. Va. 1999) ("As a general proposition, the D&X is a variation of the common D&E procedure . . . .").

[141]The district court in *Gilmore*, for example, held that the "D & X is a variation of the common D & E procedure," and that "[a]ny or all of the steps that occur during the D & X procedure can occur during a D & E procedure." 55 F. Supp. 2d at 455. It thus rejected the defendants' argument that "the D & X is a completely distinct procedure." *Id.* at 455 n.21. Yet, later in the same opinion, it held that the D&X "has many advantages from a safety perspective," *id.* at 491, and that "there may be no alternative procedure that would protect the health of the mother as effectively as would the D & X procedure." *Id.* It is hard to imagine how the D&X could have "many advantages" over the D&E if it is not distinguishable from the D&E.

most states was hardly a model of clarity,[142] the plaintiffs' arguments about vagueness and overbreadth usually succeeded, persuading the federal courts not to give a narrowing construction, not to avoid the constitutional issue, and not to abstain or certify.

(a) Narrowing Constructions

Let us first consider how the federal courts handled the various state arguments on behalf of constitutional avoidance and narrowing constructions.[143] When federal courts were urged to adopt a narrowing construction of a state law or to sever any statutory language that created potential overbreadth, they almost always declined to do so.[144] The first reason offered for such refusal was the notion that the statutory language was just too vague or too broad to be given a narrowing construction at all.[145] The Supreme Court, asked to adopt a narrowing interpretation by Nebraska's Attorney General, said that to apply the statute only to the D&X procedure would "'twist the words of the law and give them a

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[142]*See generally* Ann MacLean Massie, *So-Called "Partial-Birth Abortion" Bans: Bad Medicine? Maybe. Bad Law? Definitely!*, 59 U. PITT. L. REV. 301 (1998) (arguing that federal and state statutes are unacceptably vague). *But see generally* James Bopp, Jr. & Curtis R. Cook, *Partial-Birth Abortion: The Final Frontier of Abortion Jurisprudence*, 14 ISSUES L. & MED. 3, 15–23 (1998) (noting that abortion statutes challenged as unconstitutionally vague have been upheld through narrowing constructions); Rurka, *supra* note 131, at 1233 (arguing that such statutes are readily subject to narrowing construction).

[143]In some cases, such arguments seem never to have been raised. Louisiana's statute defined partial birth abortion as follows:

> Partial birth abortion is the performance of a procedure on a female by a licensed physician or any other person whereby a living fetus or infant is partially delivered or removed from the female's uterus by vaginal means and with specific intent to kill or do great bodily harm is then killed prior to complete delivery or removal.

LA. REV. STAT. ANN. § 14:32.9(A)(1) (West 1997).

When this statute was challenged, in *Causeway Medical Suite v. Foster*, 43 F. Supp. 2d 604 (E.D. La. 1999), the plaintiffs argued that—just as with the statutes modeled on the congressional bill—the phrases "partially delivered" and "living fetus" were vague and overbroad. *Id.* at 617. The court accepted those assertions, and did not even mention the possibility of a narrowing construction or severability. *Id.* at 629.

[144]One exception was *Planned Parenthood of Wisconsin v. Doyle*, 9 F. Supp. 2d 1033, 1041 (W.D. Wis. 1998), *rev'd* 162 F.3d 463 (7th Cir. 1998), *remanded to* 44 F. Supp. 2d 975, 984 (W.D. Wis. 1999), in which the court referred to the plaintiffs' "alleged confusion" concerning the meaning of the act as a "demon of their own creation." While immoderately phrased, this language points out a basic problem with vagueness and overbreadth challenges—any plaintiff who wants to avoid any regulation whatsoever will have an incentive to claim more confusion than really exists.

[145]Recall that federal courts have different powers to construe laws narrowly than state courts often do. *See supra* notes 77–80 and accompanying text.

meaning they cannot reasonably bear.'"[146] Thus, the Court said that it was "'without power to adopt a narrowing construction of a state statute unless such a construction is reasonable and readily apparent,'"[147] and that it is "not reasonable to replace the term 'substantial portion' with the Attorney General's phrase 'body up to the head.'"[148] Similarly, the Eighth Circuit held that Arkansas's statute—which contained the familiar "partially vaginally delivers" language—could not be interpreted so as to apply only to the D&X procedure; such an interpretation, said the court, "would also do violence to the words of the statute."[149] Another court, asked to construe the phrase "substantial portion" so as to mean "more than half" of the fetus, refused, saying that it had found "no definition of 'substantial' as meaning only more than half."[150]

Second, federal courts often noted that they lacked the power to authoritatively construe state laws.[151] One district court, for example, acknowledged its duty to avoid constitutional difficulty wherever possible, but noted that "[p]rinciples of federalism also limit the effect of an overly narrow construction."[152] This meant that "when tasked with construing a state law that implicates federally protected rights, a federal court must be cognizant that an overly narrow, yet non-authoritative, interpretation does not dispel the chilling effect of the statute's plain terms."[153] Therefore, "it is necessary to interpret the Act reasonably, but not so narrowly, as to ignore plain statutory terms that apply

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[146]Stenberg v. Carhart, 530 U.S. 914, 941 (2000) (quoting Carhart v. Stenberg, 192 F.3d 1142, 1150 (8th Cir. 1999)). The Eighth Circuit employed similar reasoning in enjoining Iowa's partial-birth abortion statute. Planned Parenthood of Greater Iowa, Inc. v. Miller, 195 F.3d 386, 388–89 (8th Cir. 1999).

In construing Nebraska's statute, the Eighth Circuit held that "if [the phrase] 'substantial portion' means an arm or a leg—and surely it must—then the ban . . . encompasses both the D&E and the D&X procedures." *Carhart*, 192 F.3d at 1150. This argument is certainly mistaken; while "substantial portion" could be construed to mean an arm or a leg, that is no reason to think that it "*must*" be so construed, or that a narrower construction would be untenable.

[147]*Stenberg*, 530 U.S. at 944 (quoting Boos v. Barry, 485 U.S. 312, 330 (1988)).

[148]*Id.* at 945.

[149]Little Rock Family Planning Servs. v. Jegley, 192 F.3d 794, 795 (8th Cir. 1999); *see also* Carhart v. Stenberg, 11 F. Supp. 2d 1099, 1131 (D. Neb. 1998) ("The legislature elected to use nonmedical terms to describe surgical techniques and it must bear the consequences of that decision."); Evans v. Kelley, 977 F. Supp. 1283, 1311 (E.D. Mich. 1997) (noting that federal courts must take statute as written).

[150]Eubanks v. Stengel, 28 F. Supp. 2d 1024, 1038 (W.D. Ky. 1998). The court's point is obviously illogical. It is not necessary that the narrowing construction be the only possible meaning; indeed, the whole point of a narrowing construction is to give the words in that particular context a more narrow meaning than they might otherwise bear.

[151]*See, e.g.*, *Evans*, 977 F. Supp. at 1303 (E.D. Mich. 1997) ("[F]ederal courts lack the authority and power to give a limiting, narrowing construction to a state statute to remedy constitutional defects.").

[152]Richmond Med. Ctr. for Women v. Gilmore, 55 F. Supp. 2d 441, 464 (E.D. Va. 1999).

[153]*Id.*

to the Plaintiffs, threaten them with prosecution, and chill the fundamental right to choose."[154] As another court put it: "This Court—like all federal courts—'lack[s] jurisdiction authoritatively to construe state legislation' and bar prosecutors or plaintiffs from filing suit."[155] The federal courts' reluctance to construe state laws narrowly showed up even in a case where the state legislature itself hired a lawyer to "declare both its intent and its request for a narrowing construction,"[156] the federal court refused, saying that "it was not the role of the District Court, nor is it our role, to rewrite statutes even at the request of the Legislature."[157] One court observed that "federal courts cannot give a limiting, narrowing construction to state statutes in order to remedy constitutional defects."[158]

One exception was the Seventh Circuit's decision in *Hope Clinic v. Ryan*.[159] The court first observed that even though the statutes in question did not explicitly refer to the D&X procedure, both "medical and popular literature equate 'partial-birth abortion' (the statutory term) with the D&X procedure," and that using a "medical definition to supplement a vague lay definition does not strike us as revisionism."[160] In response to the argument that this approach would be just a show of "brute force used to save a statute," the court said, "well, courts do it all the time."[161] In one famous case, the court noted, Florida had a law forbidding "the abominable and detestable crime against nature," an exceedingly vague term.[162] The state's supreme court, however, "filled in the blank by saying that the object was sodomy—and the Supreme Court of the United States rebuffed a charge of unconstitutional vagueness, given the state court's prestidigitation."[163] The court also observed that just as the Supreme Court has approved step-by-step judicial specification of the Sherman Antitrust Act, "a statute much less precise than the partial-birth abortion laws,"[164] so too the state courts "may

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[154]*Id.* at 465.

[155]Rhode Island Med. Soc'y v. Whitehouse, 66 F. Supp. 2d 288, 303 n.4 (D.R.I. 1999) (citing Planned Parenthood v. Ashcroft, 462 U.S. 476, 502 n.8 (1983) (Blackmun, J., concurring and dissenting) (citing Gooding v. Wilson, 405 U.S. 518, 520 (1972))).

[156]Planned Parenthood of Cent. N.J. v. Farmer, 220 F.3d 127, 140 (3d Cir. 2000).

[157]*Id.*

[158]Little Rock Family Planning Servs. v. Jegley, No. LR-C-97-581, 1998 U.S. Dist. LEXIS 22325, at *37 (E.D. Ark. Nov. 13, 1998); *see also Carhart*, 11 F. Supp. 2d at 1131 ("It is not the job of this court to rewrite legislation, particularly where, as here, no one could accurately ascertain what the legislature intended to do.").

[159]195 F.3d 857 (7th Cir. 1999).

[160]*Id.* at 865.

[161]*Id.*

[162]*Id.* at 865–66 (citing Wainwright v. Stone, 414 U.S. 21 (1973)).

[163]*Id.*

[164]*Id.* at 868.

elect to apply the statute to its central core of meaning, the D&X, while working out in common law fashion its outer boundaries."[165]

(b) Abstention and Certification

Next, let us turn to how the federal courts handled the question of *Pullman* abstention or certification. When state defendants urged such a course, the federal court typically reasoned that the statutory language was not readily susceptible to a narrowing construction.[166] This meant, of course, that not only would the federal court itself not give a narrowing construction, it would also refuse to abstain and give a state court a chance to do so.[167] One court suggested, oddly, that certification would "essentially be sending the entire constitutional question to" the state supreme court.[168] In one of the most complete discussions of *Pullman* abstention, the district court of New Jersey offered the following reasoning for its decision not to abstain:

> Uncertainty of state law underlies plaintiffs' challenge to the Act on vagueness grounds. Although this uncertainty would ordinarily militate in favor of abstention, the Supreme Court has made clear that "not every vagueness challenge to an uninterpreted state statute or regulation constitutes a proper case for abstention." Procunier v. Martinez, 416 U.S. 396, 401 . . . (1974), *overruled in part on other grounds*, Thornburgh v. Abbott, 490 U.S. 401 . . . (1989). The *Procunier* Court went on to explain:
>
> > Where the case turns on the applicability of a state statute or regulation to a particular person or a defined course of conduct, resolution of the unsettled question of state law may eliminate any need for constitutional adjudication. Abstention is therefore appropriate. Where, however, as in this case, the statute or regulation is challenged as vague because individuals to whom it plainly applies simply cannot understand what is required of them and do not wish to forswear all activity arguably within the scope of the vague terms, abstention is not required. In such a case no single adjudication by a state court could eliminate the

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[165]*Id.* at 867–68.

[166]Planned Parenthood of Cent. N.J. v. Farmer, 220 F.3d 127, 135 (3d Cir. 2000).

[167]*Cf.* Stenberg v. Carhart, 530 U.S. 914, 945–46 (2000) (finding state statute unconstitutional and not susceptible to narrowing construction).

[168]Eubanks v. Stengel, 28 F. Supp. 2d 1024, 1038 n.17 (W.D. Ky. 1998). This argument makes little sense, given that the whole point of certification is to elicit a statutory interpretation that would moot the constitutional question.

> constitutional difficulty. Rather it would require "extensive adjudications, under the impact of a variety of factual situations," to bring the challenged statute or regulation "within the bounds of permissible constitutional certainty."
>
> *Id.* at 401 n.5 (citations omitted). Plaintiffs' challenge falls into the latter category, making abstention inappropriate in this case.
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> The Act is challenged as vague because plaintiffs, individuals and entities to whom the Act clearly applies, allege that they cannot understand what is proscribed. As a result, plaintiffs contend they will be required to stop performing constitutionally-permissible abortion procedures, arguably within the scope of the Act's vague terms, in order to avoid license revocation and fines. Given the array of possible factual situations in which vagueness of the Act may be an issue, no single adjudication by a New Jersey state court could eliminate the constitutional question . . . .
>
> Because the Act is not susceptible to a state court interpretation which would render unnecessary or substantially limit the federal constitutional question, it is this Court's duty to exercise its jurisdiction.[169]

The sole example of certification with regard to a partial-birth abortion statute happened when a federal district court heard a challenge to the Alabama Partial-Birth Abortion Ban Act and the Alabama Abortion of Viable Unborn Child Act.[170] The plaintiffs had argued that the laws were vague in two respects: First, it was unclear whether the definition "partially vaginally delivers a living fetus before killing the fetus and completing the delivery" referred to D&E or D&X, and second, the phrase "living fetus" was unclear (i.e., did it mean a fetus that was still viable or a fetus that contained living tissue).[171] After discussing the *Pullman* doctrine, the court decided to certify those questions to the Alabama

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[169]Planned Parenthood of Cent. N.J. v. Verniero, 41 F. Supp. 2d 478, 489 (D.N.J. 1998). This is a prime example of a federal court underestimating the likelihood that a state court might offer a narrowing construction. There was little reason to suppose that it would take a series of "extensive adjudications" in order for a state court to make the simple judgment that the statute prohibited the D&X procedure and nothing else. Rather, here as elsewhere, the issue whether the statute is susceptible to a narrowing construction is really a smokescreen for the federal court's worry that constitutional rights will be chilled in the uncertainty surrounding any exercise of abstention or certification.

[170]Summit Med. Assoc., P.C. v. James, 984 F. Supp. 1404 (M.D. Ala. 1998).

[171]*Id.* at 1437.

Supreme Court, saying that it could give narrowing constructions that would moot the vagueness challenge.[172]

(c) Severance

Finally, the question of severability did not arise very often. In one case, the state defendants suggested that the federal court sever the application of the partial-birth abortion ban as to pre-viability abortions, leaving the statute standing as to post-viability. The court refused, saying that limiting the application to post-viability abortions would be "rewriting the Act, and, thus, intruding upon the province of the legislature."[173] In a Rhode Island case, where the legislature had explicitly included a severability provision that allowed the severing of statutory applications,[174] the federal district court based its finding of vagueness/overbreadth *entirely* on the phrase "substantial portion thereof."[175] Yet it ignored the severability provision that would have allowed the severing of that phrase.[176]

In one prominent case,[177] the Sixth Circuit court held that Ohio's partial-birth abortion statute posed an undue burden by prohibiting the commonly-used D&E.[178] Noting, however, that the undue burden standard does not apply to post-viability abortions, the court addressed the question "whether the post-viability ban on the D&X procedure is severable from the pre-viability ban on the D&X procedure."[179] Although the statute itself did not contain a severability provision, Ohio does have a general severability statute, which provides as follows:

> If any provisions of a section of the Revised Code or the application thereof to any person or circumstance is held invalid, the invalidity does not affect any other provisions or applications of the section or

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[172]*Id.* at 1438. Somewhat mysteriously, however, the district court also decided that plaintiffs had stated a claim with regard to the statute's lack of a health exception, *id.* at 1455, saying that this question would *not* be mooted by the Alabama Supreme Court's answer to the certified questions. *Id.* at 1451.

[173]*Eubanks*, 28 F. Supp. 2d at 1041.

[174]R.I. GEN. LAWS § 23-4.12-6(b)(1) (1997).

[175]Rhode Island Med. Soc'y v. Whitehouse, 66 F. Supp. 2d 288, 309–312 (D.R.I. 1999).

[176]The Nebraska case is another interesting example. Although Nebraska's law did not contain an explicit severability provision, the federal district court held it void for overbreadth and vagueness purely on the basis of the phrase "substantial portion," without even considering whether that phrase was severable. Carhart v. Stenberg, 11 F. Supp. 2d 1099, 1131 n.47 (D. Neb. 1998).

[177]Women's Med. Prof'l Corp. v. Voinovich, 130 F.3d 187 (6th Cir. 1997).

[178]*Id.* at 201.

[179]*Id.* at 202.

> related sections which can be given effect without the invalid provisions or application, and to this end the provisions are severable.[180]

This provision is fairly clear—severability is to be exercised whenever the "*application . . . to any person or circumstance*" is held invalid. But the Sixth Circuit chose not to sever the application of the ban as to pre-viability abortions. Rather, the court wrote that:

> [T]he language of the ban simply makes it not susceptible to severance. Post-viability application of the ban cannot be separated from pre-viability application of the ban so that it may stand alone. There is no clause or word dealing with post-viability application of the ban. We essentially would have to rewrite the Act in order to create a provision which could stand by itself. This we cannot do. Accordingly, the entire ban on the D & X procedure must be struck down.[181]

As noted above,[182] this is an example of a federal court's underenforcement of a severability clause because it did not wish to "rewrite" a state law, even though a state court would in all likelihood have done so.[183]

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[180]OHIO REV. CODE ANN. § 1.50 (Anderson 2000).

[181]*Voinovich*, 130 F.3d at 202. For an opposite view, see *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985), where the Court severed the application of an obscenity statute to material invoking "lust," saying that the "statute may forthwith be declared invalid to the extent that it reaches too far, but otherwise left intact." *Id.* at 504.

[182]*See supra* notes 173–76 and accompanying text.

[183]Following the *Voinovich* case and the Supreme Court's decision in *Stenberg*, the Ohio legislature passed a new partial-birth abortion ban, which defined the procedure as follows:

> [T]he medical procedure that includes all of the following elements in sequence:
> (a) Intentional dilation of the cervix of a pregnant woman, usually over a sequence of days;
> (b) In a breech presentation, intentional extraction of at least the lower torso to the navel, but not the entire body, of an intact fetus from the body of the mother, or in a cephalic presentation, intentional extraction of at least the complete head, but not the entire body, of an intact fetus from the body of the mother;
> (c) Intentional partial evacuation of the intercranial contents of the fetus, which procedure the person performing the procedure knows will cause the death of the fetus, intentional compression of the head of the fetus, which procedure the person performing the procedure knows will cause the death of the fetus, or performance of another intentional act that the person performing the procedure knows will cause the death of the fetus;
> (d) Completion of the vaginal delivery of the fetus.

OHIO REV. CODE ANN. § 2919.151(A)(3).

The Act expressly excludes from its reach the "suction curettage procedure of abortion," the "suction aspiration procedure of abortion," and the "dilation and evacuation procedure of abortion." *Id.* § 2919.151(F). The Act also provides that the "'[d]ilation and evacuation procedure of abortion'

3. Missouri

The Missouri case deserves its own section, both because the law itself was drafted on a completely different model, and because the course of federal litigation was so unusual. Missouri passed an "Infant's Protection Act,"[184] which

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does not include the dilation and extraction procedure of abortion." *Id.* § 2919.151(A)(1). This definition has already been upheld against the identical vagueness/overbreadth challenges that were brought against Ohio's earlier ban, see *Women's Medical Professional Corp. v. Taft*, 114 F. Supp. 2d 664, 684–85 (S.D. Ohio 2000), but the statute was nonetheless enjoined because the health exception was not broad enough. *Id.* at 696 (preliminary injunction); 162 F. Supp. 2d 929, 932 (S.D. Ohio 2001) (permanent injunction).

[184]The full text of the bill is available online at http://www.moga.state.mo.us/statutes/c500-599/5650300.htm (visited Jan. 30, 2001), and reads as follows:

> 565.300. 1. This section shall be known and may be cited as the "Infant's Protection Act."
>
> 2. As used in this section, and only in this section, the following terms shall mean:
>
> (1) "Born", a complete separation of an intact child from the mother regardless of whether the umbilical cord is cut or the placenta detached;
>
> (2) "Living infant", a human child, born or partially born, who is alive, as determined in accordance with the usual and customary standards of medical practice and is not dead as determined pursuant to section 194.005, RSMo, relating to the determination of the occurrence of death, and has not attained the age of thirty days post birth;
>
> (3) "Partially born", partial separation of a child from the mother with the child's head intact with the torso. If vaginally delivered, a child is partially separated from the mother when the head in a cephalic presentation, or any part of the torso above the navel in a breech presentation, is outside the mother's external cervical os. If delivered abdominally, a child is partially separated from the mother when the child's head in a cephalic presentation, or any part of the torso above the navel in a breech presentation, is outside the mother's external abdominal wall.
>
> 3. A person is guilty of the crime of infanticide if such person causes the death of a living infant with the purpose to cause said death by an overt act performed when the infant is partially born or born.
>
> 4. The crime of infanticide shall be a class A felony.
>
> 5. A physician using procedures consistent with the usual and customary standards of medical practice to save the life of the mother during pregnancy or birth or to save the life of the any unborn or partially born child of the same pregnancy shall not be criminally responsible under this section. In no event shall the mother be criminally responsible pursuant to this section for the acts of the physician if the physician is not held criminally responsible pursuant to this section.
>
> 6. This section shall not apply to any person who performs or attempts to perform a legal abortion if the act that causes the death is performed prior to the child being partially born, even though the death of the child occurs as a result of the abortion after the child is partially born.
>
> 7. Only that person who performs the overt act required under subsection 3 of this section shall be culpable under this section, unless a person, with the purpose of committing infanticide, does any act which is a substantial step towards the commission of the offense which results in the death of the living infant. A "substantial step" is

penalized as infanticide the killing of an infant that was "partially born,"[185] and defined "partially born" as "partial separation of a child from the mother with the child's head intact with the torso."[186] Moreover, the Act specifically provided that the act causing the death had to be "performed prior to the child being partially born, even though the death of the child occurs as a result of the abortion after the child is partially born."[187] Presumably, this language was intended to forestall any argument that the statute could be read to ban other methods of abortion such as the D&E.

Opponents of the law immediately filed suit on overbreadth grounds, arguing that the law "could ban abortions starting in the fifth week of pregnancy."[188] A district judge issued a temporary restraining order less than 19 hours after the law became effective.[189] When the lawyers for the state, however, filed a lawsuit in state court seeking a declaratory judgment that would moot the overbreadth argument, the district court judge enjoined the state proceeding![190] The judge's order blamed the state's lawyers for "reactive and vexatious conduct," for "forum-shopping," and for being "motivated by a desire to obtain what defendants consider will be a more favorable decision in state court."[191] The state then appealed to the Eighth Circuit, a panel of which upheld the district judge's order.[192] The Eighth Circuit en banc, however, reversed and halted the federal district judge's hearing altogether until the state court case was completed.[193] The state court judge issued a fifty-four page ruling in December of 2000, holding that the statute, properly interpreted, applied only to partial-birth abortions, while

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conduct which is strongly corroborative of the firmness of the actor's purpose to complete the commission of the offense.

8. Nothing in this section shall be interpreted to exclude the defenses otherwise available to any person under the law including defenses provided pursuant to chapters 562 and 563, RSMo.

[185]MO. REV. STAT. § 565.300.2(3) (2000).

[186]*Id.*

[187]*Id.* § 565.300.6.

[188]*Federal Judge Bars Duplicate Abortion Lawsuit in State Court*, JEFFERSON CITY NEWS TRIB., Jan. 23, 2000, *available at* http://www.newstribune.com/stories/012300/sta_0123000083.asp.

[189]*Id.*

[190]*Id.* It is not clear what conceivable authority the district judge could have had for such an action. The Anti-Injunction Act, 28 U.S.C. § 2283 (2000), allows such an injunction only "as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." *Id.* Such a federal injunction could arguably be seen as "necessary in aid" of the federal court's jurisdiction, although we are aware of no authority for such an injunction where the state court proceeding is undertaken merely to give an authoritative interpretation of what a state law means. *Id.*

[191]*Federal Judge Bars Duplicate Abortion Lawsuit in State Court*, *supra* note 188.

[192]Paul Sloca, *Hearing on Missouri Infanticide Law is Postponed by Federal Appeals Court*, ST. LOUIS POST-DISPATCH, Mar. 25, 2000, at 6.

[193]*Id.*

protecting doctors who perform other types of abortion.[194] Moreover, the state judge held that the law allows any type of abortion necessary to preserve the life or health of the mother, and that the law included a scienter requirement.[195] While this may seem a somewhat ambitious exercise of judicial interpretation, it is within the right of state courts to do so with regard to their own laws. What is important here is the posture taken by the federal district judge—that allowing state courts to have the first chance to interpret their own laws was nothing more than "vexatious" "forum-shopping."[196] While this particular judge might have been a bit intemperate in his choice of language, his attitude is rooted in an all-too-common (and often justified) fear that state courts may not narrow the statute far enough, and that the exercise of constitutional rights might be chilled in the meantime.

C. Summing Up

The federal courts that heard partial-birth abortion cases with almost no exceptions refused to sever the statute (even where the statute had an express severability clause), refused to adopt narrowing constructions, refused to abstain or certify any question of state law interpretation, and in general refused to employ the doctrine of constitutional avoidance (either classical or modern). Yet these refusals appeared justifiable, given the federal courts' assumptions that (a) any narrowing constructions or severance they offered would not be binding on state courts and (b) abstention or certification would continue to jeopardize a constitutional right the Supreme Court has deemed fundamental. In the following Section, we will attempt to show that these assumptions, while plausible, are not necessarily true, and that therefore the federal courts' choice of remedies was sometimes too extreme.

IV. FEDERAL COURT POWERS

In order to properly evaluate the rulings available to federal courts, it is essential that we first understand the precise doctrinal effect of federal court judgments. In the partial-birth abortion cases, as we have seen, federal courts fall back on the choice of injunctive relief because of a fear (spoken or unspoken) that a declaratory judgment interpreting the state statute narrowly will have no

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[194]Tim Bryant, *Judge Says "Partial-Birth" Law Protects Doctors Doing Other Abortions; Ruling Also Says Any Abortion May Be Done to Save Woman's Health, Life*, ST. LOUIS POST-DISPATCH, Dec. 6, 2000, at A19.

[195]*Id.*

[196]*Federal Judge Bars Duplicate Abortion Lawsuit in State Court*, *supra* note 188.

binding power. In order to know whether this fear is justified, we have to examine what exactly federal courts are empowered to do.

One thing to clear up immediately, however, is the common misconception that federal courts have the power to "strike down" a law. We usually imagine that a statute, once declared unconstitutional, "is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."[197] But this is not technically accurate. Despite such language used by courts and commentators, there is no such thing as "striking down." A federal court has no power to erase a statute from a state's lawbooks.[198] As one prominent scholar said, "[n]o matter what language is used in a judicial opinion, a federal court cannot repeal a duly enacted statute of any legislative authority."[199]

What a federal court *can* do is one of two things: Issue a declaratory judgment under the Declaratory Judgments Act, or issue an injunction against some or all future state enforcement of the statute. In the following two subsections, we discuss these actions in further detail.

B. The Power of Declaratory Judgments

1. A Brief Background

In a declaratory judgment action, a federal court is asked to "declare" its opinion as to the constitutionality of a law. This sort of action was first authorized by the Federal Declaratory Judgment Act,[200] which was intended to provide a milder alternative to the injunction remedy.[201] The House Committee

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[197]Norton v. Shelby County, 118 U.S. 425, 442 (1886).

[198]*Cf.* Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 876 (1991) ("A federal court may hold a state statute 'overbroad,' but it cannot 'invalidate' a state statute in the sense of rendering it irredeemably null and void."); Melville B. Nimmer, *A Proposal for Judicial Validation of a Previously Unconstitutional Law: The Civil Rights Act of 1875*, 65 COLUM. L. REV. 1394, 1398 (1965) (arguing that Civil Rights Act of 1875, held unconstitutional by Supreme Court, could be revived because it had never been repealed); *see also* Kopp v. Fair Political Practices Comm'n, 905 P.2d 1248, 1258 (Cal. 1995) (holding that federal court had not "invalidated" state statute, but had merely "enjoined [its] enforcement"); Jawish v. Morlet, 86 A.2d 96, 97 (D.C. 1952) ("[A] statute declared unconstitutional is void in the sense that it is inoperative or unenforceable, but not void in the sense that it is repealed or abolished . . . .").

[199]David L. Shapiro, *State Courts and Federal Declaratory Judgments*, 74 NW. U. L. REV. 759, 767 (1979).

[200]Act of June 14, 1934, ch. 512, 48 Stat. 955 (codified at 28 U.S.C. § 2201).

[201]Injunctions that are effectively applied against state governments were traditionally disfavored. *See* Watson v. Buck, 313 U.S. 387, 400 (1941) (holding that federal injunctions against state criminal statutes "are not to be granted as a matter of course, even if such statutes are unconstitutional"). The Eleventh Amendment, for example, was famously held not to allow lawsuits against state governments. Hans v. Louisiana, 134 U.S. 1 (1890). Thus, federal courts were limited

Report stated, "[t]he principle involved in this form of procedure is to confer upon the courts the power to exercise in some instances preventive relief; a function now performed rather clumsily by our equitable proceedings and inadequately by the law courts."[202] The Senate Report was even more clear:

> The declaratory judgment differs in no essential respect from any other judgment except that it is not followed by a decree for damages, injunction, specific performance, or other immediately coercive decree. It declares conclusively and finally the rights of parties in litigations over a contested issue, a form of relief which often suffices to settle controversies and fully administer
> justice . . . . It has been employed in State courts . . . for the declaration of rights contested under a statute or municipal ordinance, where it was not possible or necessary to obtain an injunction.[203]

As the above passage indicates, the effect of a declaratory judgment can be quite different from that of an injunction.[204] As Justice Brennan noted:

> An injunction barring enforcement of a criminal statute against particular conduct immunizes that conduct from prosecution under the statute. A broad injunction against all enforcement of a statute paralyzes the State's enforcement machinery: the statute is rendered a nullity. A declaratory judgment, on the other hand, is merely a declaration of legal status and rights; it neither mandates nor prohibits state action.[205]

In the words of Justice Brennan:

> [I]t may well be open to a state prosecutor, after the federal court [declaratory judgment of overbreadth], to bring a prosecution under the statute if he reasonably believes that the defendant's conduct is not

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to enjoining state *officials*, see *Ex parte Young*, 209 U.S. 123 (1908), a fiction that accomplished the same purpose without the perceived insult to the state government.

[202]H.R. REP. NO. 73-1264, at 2 (1934).

[203]S. REP. NO. 73-1005, at 2 (1934).

[204]Thus, the Supreme Court has held that "a request for a declaratory judgment that a state statute is overbroad on its face *must be considered independently* of any request for injunctive relief against the enforcement of that statute." Zwickler v. Koota, 389 U.S. 241, 254 (1967) (emphasis added).

[205]Perez v. Ledesma, 401 U.S. 82, 124 (1971) (Brennan, J., concurring in part and dissenting in part).

> constitutionally protected and that the state courts may give the statute a construction so as to yield a constitutionally valid conviction.[206]

Yet another difference is that a declaratory judgment is "not a binding order supplemented by continuing sanctions. State authorities may choose to be guided by the judgment of a lower federal court, but they are not compelled to follow the decision by threat of contempt or other penalties."[207]

Due to the purported differences in effects, a declaratory judgment is supposed to be easier to secure than an injunction. The plaintiff seeking a declaratory judgment need not show irreparable injury, as is the longstanding rule for injunctions.[208] An injunction is usually barred if there is an alternative adequate remedy, but this restriction does not apply to declaratory judgments,[209] unless the alternative remedy was expressly created by statute.[210]

What effect does a declaratory judgment have on the rights of parties and on the possibility of future prosecution under a challenged statute? Perhaps surprisingly, the effect of a federal declaratory judgment that a statute is unconstitutional is governed by the same two doctrines that give force to any other judgment: precedent and preclusion.

2. *The Effect of Precedent*

The power of precedent is one of the most important questions affecting a federal court's judgment that a state statute is unconstitutionally overbroad. To what extent are state courts bound to respect the initial federal court judgment?

The first point to remember when a federal court purports to hold that a state statute is overbroad is that its holding is necessarily based on a particular interpretation of state law. Because state courts are the only authoritative interpreters of state law, a federal court's interpretation of state law has no precedential effect on any future state court decisions. A state court is therefore perfectly free to ignore the federal court's interpretation *qua* interpretation,

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[206]Steffel v. Thompson, 415 U.S. 452, 470 (1974) (quoting *Perez*, 401 U.S. at 125 (Brennan, J., concurring in part and dissenting in part)).

[207]*Id.* at 482 (Rehnquist, J., dissenting); *see also* Rivera Puig v. Garcia Rosario, 785 F. Supp. 278, 293 (D.P.R. 1992) (citing *Perez*, 401 U.S. at 124–26 (Brennan, J., concurring in part and dissenting in part)) ("Noncompliance is inappropriate but, nevertheless, is not contempt.").

[208]*See, e.g.*, Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 241 (1937) ("And as it is not essential to the exercise of the judicial power that an injunction be sought, allegations that irreparable injury is threatened are not required.").

[209]FED. R. CIV. P. 57 ("The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate.").

[210]Katzenbach v. McClung, 379 U.S. 294, 295–96 (1964) (stating that although Rule 57 of Federal Rules of Evidence permits declaratory relief, when another adequate remedy exists, it should not be granted where a special statutory proceeding has been provided).

although it may of course consider the federal court's reasoning for persuasive purposes.[211]

A more puzzling question is whether state courts are bound by a federal court's constitutional determination *per se*. We have grown accustomed to the idea that when plaintiffs sue in federal district court to challenge the constitutionality of a state law, the federal court can "strike down" the law by issuing a judgment that the state courts will be required to follow in any future cases. Intuitively, one might think that although the federal court's interpretation of state law is not binding, its constitutional holding (e.g., that prohibiting the D&E abortion procedure is unconstitutional) *would* be binding.[212]

This instinctive answer, however, is wrong. State courts are not bound—as a matter of precedent—by a lower federal court's constitutional holdings *per se*.[213] Numerous state courts, in fact, have held that they are not bound by federal constitutional determinations except those of the Supreme Court.[214]

This fact is due, at least in part, to the history of jurisdictional provisions relating to federal courts. For nearly one hundred years after the Constitution was ratified, lower federal courts had no general "arising under" jurisdiction, which

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[211]*See, e.g.*, Arizonans for Official English v. Arizona, 520 U.S. 43, 75–80 (1997) (holding that federal courts faced with novel questions of state law should defer to state courts through certification process).

[212]Thus, a defender of partial birth abortion statutes might have argued, federal courts should not have been so eager to enjoin the statutes wholesale; a mere declaratory judgment would have sufficed.

[213]Similarly, they are not bound by a federal court's interpretation of federal law. As Justice Thomas has explained:

> The Supremacy Clause demands that state law yield to federal law, but neither federal supremacy nor any other principle of federal law requires that a state court's interpretation of federal law give way to a (lower) federal court's interpretation. In our federal system, a state trial court's interpretation of federal law is no less authoritative than that of the federal court of appeals in whose circuit the trial court is located.

Lockhart v. Fretwell, 506 U.S. 364, 376 (1993) (Thomas, J., concurring).

In support of this proposition, Justice Thomas cites *Steffel v. Thompson*, 415 U.S. 452, 482 n.3 (1974) (Rehnquist, J., concurring), and *United States ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1075–76 (7th Cir. 1970).

Whether state courts follow a federal court's interpretation of federal law is a state law question. *See, e.g.*, Summertree Venture III v. Fed. Sav. & Loan Ins. Corp., 742 S.W.2d 446, 450 (Tex. App. 1987) (noting that under Texas precedent, Texas courts follow federal courts' constructions of federal law).

[214]An extensive list of state court citations is collected (and followed) in *State v. Coleman*, 214 A.2d 393, 403–04 (N.J. 1965). *See also* Weaver v. Pa. Bd. of Prob. & Parole, 688 A.2d 766, 772 n.11 (Pa. Commw. Ct. 1997) (collecting citations); Dean v. Crisp, 536 P.2d 961, 963 (Okla. Crim. App. 1975) (collecting citations). For a general discussion of this issue, see Note, *Authority in State Courts of Lower Federal Court Decisions on National Law*, 48 COLUM. L. REV. 943 (1948) [hereinafter *Authority of Federal Court Decisions*].

meant that most federal questions were litigated in state court.[215] Thus, state courts had the primary authority to exercise federal question jurisdiction, and there were few if any relevant lower federal court precedents for a state court to follow, even when it wished to do so.

Even in the modern era, however, state courts persist in maintaining that they are not bound by lower federal court constitutional holdings. Perhaps the best-stated rationale for this was given by the California Supreme Court in 1959:

> Where lower federal court precedents are divided or lacking, state courts must necessarily make an independent determination of federal law. Any rule which would require the state court to follow in all cases the decisions of one or more lower federal courts would be undesirable, as it would have the effect of binding the state courts where neither the reasoning nor the number of federal cases is found persuasive. Such a rule would not significantly promote uniformity in federal law, for the interpretation of an Act of Congress [or a constitutional provision] by a lower federal court does not bind other federal courts except those directly subordinate to it.[216]

For a good example of state court recognition of this principle, consider the long history of litigation surrounding Florida's law prohibiting disorderly conduct. As of the early 1970s, that law read:

> Whoever commits such acts as are of a nature to corrupt the public morals, or outrage the sense of public decency, or affect the peace and quiet of persons who may witness them, or engages in brawling or fighting, or engages in such conduct as to constitute a breach of the peace or disorderly conduct, shall be guilty of a misdemeanor of the second degree . . . .[217]

In 1970, a federal district court held (prior to any state court narrowing) that this statute was unconstitutionally vague and overbroad.[218] It declined to enjoin enforcement, however, saying that an injunction was "not within the scope of the present proceeding brought pursuant to 28 U.S.C. section 2241 et seq."[219] The court went on to say, "it is hoped, however, that the [state] courts will recognize

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[215]*See* Zwickler v. Koota, 389 U.S. 241, 245–47 (1967) (noting that such jurisdiction was not granted to federal courts until Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470).

[216]Rohr Aircraft Corp. v. County of San Diego, 336 P.2d 521, 524 (Cal. 1959).

[217]FLA. STAT. ANN. § 877.03 (West 2000).

[218]Severson v. Duff, 322 F. Supp. 4 (M.D. Fla. 1970).

[219]*Id.* at 10.

this declaration of the statute's patent unconstitutionality under the United States Supreme Court decisions."[220]

The Florida courts did not fulfill that federal court's hope. The Florida Supreme Court disagreed with the federal court's judgment in a 1972 decision,[221] although it attempted to narrow the scope of the statute in subsequent cases.[222] Thus, when a defendant prosecuted under the statute attempted to raise the defense that it had been declared unconstitutional by a federal court, the Florida Supreme Court's response was: "[I]t is axiomatic that a decision of a federal trial court, while persuasive if well-reasoned, is not by any means binding on the courts of a state. . . . Since the *Severson* decision, we have held Fla. Stat. § 877.03, F.S.A., to be constitutional in that the language meets the test of common understanding."[223] In another 1973 case, the Florida Supreme Court summarily dismissed a challenge, saying that it had "consistently upheld the validity" of the statute and that "[n]othing has occurred to warrant" a different outcome.[224]

After that case, the Fifth Circuit Court of Appeals got involved, holding that the Florida Supreme Court had failed to sufficiently narrow the scope of Section 877.03,[225] and affirming a grant of habeas corpus relief on the grounds that the statute was vague and overbroad.[226] The Florida Supreme Court, however, still allowed prosecutions under the statute, saying that it had narrowed the meaning of the statute sufficiently.[227] In response to a defendant's citation of the Fifth

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[220]*Id.*

[221]State v. Magee, 259 So. 2d 139, 141 (Fla. 1972) (holding section 877.03 "to be constitutional").

[222]In *In re Fuller*, 255 So. 2d 1 (Fla. 1971), the Florida Supreme Court reversed a conviction under the statute for a defendant who got into an argument with someone who ripped a sign off a classroom door. The court concluded that the defendant's vulgar language fell outside the statute, which was meant to prohibit commotions "creating a breach of the peace," *id.* at 3, rather than mere arguments between two individuals.

[223]Bradshaw v. State, 286 So. 2d 4, 6–7 (Fla. 1973); *see also* Brown v. City of Jacksonville, 236 So. 2d 141, 142 (Fla. Dist. Ct. App. 1970) (upholding vagrancy conviction despite federal court's declaratory judgment, on grounds that "decision of a Federal District Court, while persuasive if well reasoned, is not by any means binding on the courts of a state").

[224]Gonzales v. City of Belle Glade, 287 So. 2d 669, 670 (Fla. 1973). One justice pointed out that the now-famous Supreme Court decisions of *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), and *Smith v. Florida*, 405 U.S. 172 (1972), raised void-for-vagueness concerns regarding the statute. *Gonzales*, 287 So. 2d at 672–73 (Boyd, J., concurring in part, dissenting in part).

[225]Wiegand v. Seaver, 504 F.2d 303, 306 (5th Cir. 1974).

[226]*Id.* at 307.

[227]State v. Dwyer, 332 So. 2d 333, 335 (Fla. 1976). The narrowing construction had been given in *White v. State*, 330 So. 2d 3 (Fla. 1976), wherein the Florida Supreme Court held that section 877.03 could be applied only to words that, "by the manner of their use . . . invade the right of others to pursue their lawful activities," or to words that "by their very utterance . . . inflict injury or tend to incite an immediate breach of the peace." *White*, 330 So. 2d at 7. This narrowing construction was intended to bring the statute in line with the fighting words doctrine of *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). *White*, 330 So. 2d at 6–7.

Circuit's decision, the Florida court said that "[e]ven though lower federal court rulings may be in some instances persuasive, such rulings are not binding on state courts."[228] In 1996, a Florida appellate court reversed a lower court decision that had relied on the Fifth Circuit decision in holding that Section 877.03 could not constitutionally be applied to nude sunbathing.[229]

Numerous other state court cases respectfully decline to follow federal constitutional precedents:

- In a case involving an Arizona indecent exposure statute that a federal court had previously declared unconstitutionally vague and overbroad,[230] the state Supreme Court asserted its freedom not to follow the federal judgment: "The decision of the District Court is entitled to respectful consideration, but it is not binding on us. . . . Even with respect to federal constitutional issues, the state and lower federal courts occupy comparable positions, a sort of parallelism with each governed by the same reviewing authority—the United States Supreme Court."[231]
- In an Idaho case involving a statute prohibiting "lewd and lascivious" acts, the state court held that it was not bound by a federal district court's determination that the statute was facially vague and unconstitutional.[232]
- After a federal district court held a Texas anti-picketing statute "unconstitutional, hence null and void,"[233] a state court affirmed convictions under that statute, saying: "State courts are free to accept or reject lower federal court holdings and to set for themselves such standards as they deem appropriate . . . ."[234]

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[228]*Dwyer*, 332 So. 2d at 335. The Florida Supreme Court also upheld the statute, although overturning its application to the sale of newspapers, in *State v. Saunders*, 339 So. 2d 641 (Fla. 1976).

[229]DeWald v. Wyner, 674 So. 2d 836 (Fla. Dist. Ct. App. 1996).

[230]*See* Attwood v. Purcell, 402 F. Supp. 231 (D. Ariz. 1975). The federal court held that the statute could be interpreted so as to apply to dancing, which is expression protected by the Constitution, and therefore was overbroad. *Id.*

[231]State v. Gates, 576 P.2d 1357, 1359 (Ariz. 1978). The Arizona Supreme Court went on to hold the statute unconstitutional anyway. *Id.* It merely wished to reassert its independent judgment on that matter.

[232]State v. Harmon, 685 P.2d 814, 817 (Idaho 1984).

[233]Howard Gault Co. v. Tex. Rural Legal Aid, Inc., 615 F. Supp. 916, 957 (N.D. Tex. 1985). Another district court held the same statute unconstitutional in *Nash v. Texas*, 632 F. Supp. 951, 981 (E.D. Tex. 1986).

[234]Olvera v. State, 725 S.W.2d 400, 404 (Tex. App. 1987). An appeals court later reversed the convictions, however, and held the statute facially overbroad. Olvera v. State, 806 S.W.2d 546, 553 (Tex. Crim. App. 1991).

- In a Florida case involving an administrative search statute that had been declared unconstitutional by a federal court,[235] the Florida Supreme Court disagreed and held that the federal court's determination was not binding[236] and, based on its own interpretation of U.S. Supreme Court precedent, that the statute was constitutional.[237]
- When the Illinois Supreme Court was presented with the question whether a warrant was constitutional if it was based on an affidavit signed with a false name, it refused to follow the Seventh Circuit's holding that such a warrant was unconstitutional; rather, citing a circuit split on the issue, the court held that "[u]nder such circumstances decisions of the lower Federal courts can be held to be no more than persuasive and certainly not binding on State courts."[238]
- In one case, a federal district court held unconstitutional a Texas law requiring a preponderance of the evidence standard in cases where a child was removed from his parents; the federal court held that a clear and convincing standard was required, and enjoined the state defendant from ever using the preponderance standard again.[239] A state court refused to follow the federal court's injunction, holding that under Texas Supreme Court precedent, the preponderance standard was constitutional.[240]
- In a Tennessee criminal case involving an allegedly vague aggravating circumstance a state refused to follow a federal district court's holding that the aggravating circumstance was unconstitutional.[241] In doing so, the court stated: "The United States Supreme Court is the only federal court Tennessee courts are bound to follow."[242]

These examples are not isolated instances; many more such cases exist.[243]

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[235]Lake Butler Apparel Co. v. Dep't of Agric. and Consumer Servs., 551 F. Supp. 901, 907 (M.D. Fla. 1982). The district court also enjoined the enforcement of the search statute. *Id.*

[236]Roche v. State, 462 So. 2d 1096, 1099 n.2 (Fla. 1985).

[237]*Id.* at 1101.

[238]People v. Stansberry, 268 N.E.2d 431, 433 (Ill. 1971).

[239]Sims v. State Dep't of Public Welfare, 438 F. Supp. 1179, 1194–95 (S.D. Tex. 1977).

[240]Woodard v. Tex. Dep't of Human Res., 573 S.W.2d 596, 598 (Tex. Civ. App. 1978). Perhaps the outcome would have been different if the defendant had been the State Department of Public Welfare (as in the federal case) rather than the Texas Department of Human Resources.

[241]Rickman v. Dutton, 854 F. Supp. 1305, 1310 (M.D. Tenn. 1994).

[242]Thompson v. State, 958 S.W.2d 156, 174 (Tenn. Crim. App. 1997).

[243]*See, e.g.*, Yee v. City of Escondido, 274 Cal. Rptr. 551, 552 (Cal. Ct. App. 1990) (holding that lower federal court precedent is not binding on state courts); Summertree Venture III v. Fed. Sav. & Loan Ins. Corp., 742 S.W.2d 446, 450 (Tex. App. 1987) (same); Warrick v. Lane, No. 16034, 1979 Tex. App. LEXIS 3466, at *5 (Tex. App. Apr. 11, 1979) (same); Ballew v. State, 296 So. 2d 206, 210 (Ala. 1974) (same); Greene v. State, 273 A.2d 830, 833 (Md. Ct. Spec. App. 1971) (same); M.A.P. v. Ryan, 285 A.2d 310, 312 (D.C. 1971) (same); Iowa Nat'l Bank v. Stewart, 232 N.W. 445, 454 (Iowa 1930) (same).

Federal courts have likewise recognized this principle.[244] For example, in *Bar-Tec, Inc. v. Akrouche*,[245] the owners of a liquor establishment challenged a local referendum limiting liquor sales as violating their rights of substantive due process and equal protection.[246] They first litigated these claims in the state court system, and then, having lost on the constitutional claims, filed a section 1983 suit in federal district court.[247] There, they complained that the Ohio state courts had disregarded a Sixth Circuit case[248] holding that a liquor license was a property right under the Fourteenth Amendment.[249] The federal district court held that the state courts were "not obligated to follow a decision of the Sixth Circuit Court of Appeals."[250] Then, it held that "even assuming that the decision of the state court of appeals on the due process or other issues was erroneous, this does not provide an exception to the application of res judicata."[251] It cited a Sixth Circuit case as having held that the Full Faith and Credit Act[252] requires that even an erroneous constitutional determination by a state court must be given preclusionary effect on a subsequent action in federal court by the same parties.[253] Thus, the state court's erroneous constitutional determination (contradicting an earlier Sixth Circuit resolution of the issue) was treated as res judicata as to the parties—a stunning example of the principle that state courts can ignore the constitutional pronouncements of the lower federal courts at will.

For accuracy's sake, we note that there are state court decisions on both sides of this issue. *See* Donald H. Zeigler, *Gazing Into the Crystal Ball: Reflections on the Standards State Judges Should Use to Ascertain Federal Law*, 40 WM. & MARY L. REV. 1143, 1151–68 (1999) (describing host of state court cases discussing precedential value of lower federal court opinions). Despite the diversity of views, however, two points remain salient: Most state courts hold themselves to be bound only by the constitutional holdings of the Supreme Court, and nothing in federal law or the U.S. Constitution requires states to follow the constitutional holdings of any other court (except to the extent that a state is a party to a lawsuit and is bound directly).

[244]For the historical background, see *Authority of Federal Court Decisions*, *supra* note 214, at 943.

[245]959 F. Supp. 793 (S.D. Ohio 1997).

[246]*Id.* at 795.

[247]*Id.*

[248]Brookpark Entm't, Inc. v. Taft, 951 F.2d 710 (6th Cir. 1991).

[249]*Bar-Tec*, 959 F. Supp. at 796.

[250]*Id.* at 797.

[251]*Id.*

[252]28 U.S.C. § 1738 (2000) (providing that state court judgments "shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State").

[253]*Bar-Tec*, 959 F. Supp. at 797 (citing Osborn v. Ashland County Bd. of Alcohol, Drug Addiction & Mental Health Servs., 979 F.2d 1131, 1134–35 (6th Cir. 1992)). The court also noted a Supreme Court holding to the effect that parties who lose in state court on an erroneous constitutional determination cannot refile their case in federal court because this would undermine the Rooker-Feldman doctrine. *Id.* at 797–98 (citing ASARCO, Inc. v. Kadish, 490 U.S. 605, 622–23 (1989)).

Numerous other federal courts have also recognized that state courts are not bound to follow their constitutional holdings:[254]

- One appeals court said: "Florida officials are not bound to comply with every constitutional ruling by every federal district judge."[255]
- Another appeals court, discussing a habeas corpus petitioner's state court litigation, said: "We agree with the state that the Supremacy Clause did not require the Illinois courts to follow Seventh Circuit precedent interpreting the Fifth Amendment."[256]
- Another court said: "Though state courts may for policy reasons follow the decisions of the Court of Appeals whose circuit includes their state . . ., they are not obliged to do so."[257]
- Another federal appeals court, considering a habeas corpus claim, said that it agreed "that the Oklahoma Courts may express their differing views on the retroactivity problem or similar federal questions until we are all guided by a binding decision of the Supreme Court."[258]
- In perhaps the most-cited discussion of this principle, the Seventh Circuit noted:

> The Supreme Court of the United States has appellate jurisdiction over federal questions arising either in state or federal proceedings, and by reason of the supremacy clause the decisions of that court on national law have binding effect on all lower courts whether state or federal. On the other hand, because lower federal courts exercise no appellate jurisdiction over state tribunals, decisions of lower federal courts are not conclusive on state courts.

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[254]Only one circuit court of appeals, to our knowledge, has questioned this principle, in a passage later mentioned disapprovingly by the Supreme Court. In *Yniguez v. Arizona*, 939 F.2d 727 (9th Cir. 1991), the Ninth Circuit said that "[d]espite the authorities that take the view that the state courts are free to ignore decisions of the lower federal courts on federal questions, we have serious doubts as to the wisdom of this view." *Id.* at 736. In vacating the Ninth Circuit's decision, the Supreme Court characterized the Ninth Circuit's doubts as "remarkable." Arizonans for Official English v. Arizona, 520 U.S. 43, 58 n.11 (1997) (citing Lockhart v. Fretwell, 506 U.S. 364, 375–76 (1993) (Thomas, J., concurring)).

[255]Muhammad v. Wainwright, 839 F.2d 1422, 1425 (11th Cir. 1987).

[256]Freeman v. Lane, 962 F.2d 1252, 1258 (7th Cir. 1992); *see also* Smith v. Wis. Dep't of Agric., 23 F.3d 1134, 1139 n.10 (7th Cir. 1994) ("While we might expect our exposition of federal constitutional law to inform a state court decision addressing the point, our decision does not bind the Wisconsin state courts.").

[257]Owsley v. Peyton, 352 F.2d 804, 805 (4th Cir. 1965).

[258]Bromley v. Crisp, 561 F.2d 1351, 1354 (10th Cir. 1977). The federal court went on, however, to say that it was duty-bound to give its own opinion as to the retroactivity question (i.e., a federal question) in the case before it. *Id.* at 1354–55.

> Of course in a given factual setting when a lower federal court has jurisdiction over the subject matter and the parties, its adjudication is the law of the case and its judgment is binding on all other courts, subject only to the appellate process. But that is not the situation here. The district court's declaration that the interference ordinance is unconstitutional was made in an unrelated case and at a time when petitioner's appeal from his conviction was pending in the Supreme Court of Illinois. In these circumstances, we hold that the federal court's ruling was not binding on the state appellate tribunal.[259]

Because such federal constitutional holdings are not binding on state courts and, as we have discussed, federal interpretations of state law are likewise not binding, one is forced to the startling conclusion that a federal court's overbreadth or vagueness judgment has no legal effect in state court beyond the res judicata effects on the parties themselves and the persuasive power of the federal court's reasoning.[260] This is because of the principle that federal courts cannot interpret state law authoritatively, and because a federal court's constitutional determinations have no precedential power over state courts.

3. The Effect of Preclusion

The non-binding nature of federal constitutional holdings in state court means that the most substantial effect of a federal declaratory judgment stems

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[259]United States *ex rel.* Lawrence v. Woods, 432 F.2d 1072, 1075–76 (7th Cir. 1970). The Seventh Circuit has also noted:

> [A]n important difference between interpretation of a state statute by a federal court and by a state court is that only the latter interpretation is authoritative. If the district judge [reads the state's] statute so narrowly as to obviate all constitutional questions, it would still be possible for the state to prosecute people for violating the statute as broadly construed, because the enforcement of the statute would not have been enjoined.

Kucharek v. Hanaway, 902 F.2d 513, 517 (7th Cir. 1990).

Or, in the words of the Third Circuit denying a motion by the New Jersey attorney general to stay the lower court's declaratory judgment:

> In the absence of a class action determination the declaratory judgment is binding only between these seven individual physician plaintiffs and the defendant appellant. Between the State of New Jersey and any other persons the opinion of the three-judge district court has only stare decisis effect to be weighed against conflicting opinions in the New Jersey Courts. The State remains free to take whatever steps against others than the individual plaintiffs it deems appropriate to enforce the statute by criminal sanctions.

Y.W.C.A. v. Kugler, 463 F.2d 203, 204 (3d Cir. 1972).

[260]*Cf.* Steffel v. Thompson, 415 U.S. 452, 484 (1974) (Rehnquist, J., concurring) (arguing that lower federal court's declaratory judgment that state statute is unconstitutional might persuade state courts, but would not bind them).

from the various doctrines of preclusion.[261] There are a variety of preclusion doctrines that could arguably give effect to a federal court's judgment,[262] at least as to the state government (which will always be a party to any future enforcement action).[263] The type of preclusion most likely to apply is issue preclusion, or (as it is sometimes called) collateral estoppel.[264] If a state tried to prosecute the same person(s) who brought the federal court action, issue preclusion would be possible,[265] as the Supreme Court has noted in several Eleventh Amendment

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[261]As the Arkansas Supreme Court recognized in perhaps the clearest exposition of this distinction:

> A conflicting decision of the federal court does not constitute a precedent to be followed by the state court, but the judgment itself in a given proceeding constitutes a final adjudication of the subject-matter of the litigation so as to bind the state courts under the provision of the Constitution (art. 4, § 1) and statutes of the United States requiring full faith and credit to be given to the judgments of the federal courts. That is to say, the federal court has jurisdiction of the subject-matter to adjudicate the rights of the parties to the action and their privies. Any judgment rendered thereon will be binding on the state courts, even though the decision is found to be in conflict with the decision of the court of last resort of the state in the interpretation of the Constitution and laws of the state. There is just that distinction between the doctrine of res judicata and the doctrine of stare decisis.

State v. St. Louis-San Francisco Ry. Co., 258 S.W. 609, 611 (Ark. 1924).

For a good exposition of the problems of interjurisdictional preclusion, see generally Ronan E. Degnan, *Federalized Res Judicata*, 85 YALE L.J. 741 (1976).

[262]The Supreme Court has noted that a federal court judgment "may have some *res judicata* effect, though this point is not free from difficulty and the governing rules remain to be developed with a view to the proper workings of a federal system." *Steffel*, 415 U.S. at 470 (quoting Perez v. Ledesma, 401 U.S. 82, 125 (1971) (Brennan, J., concurring in part and dissenting in part)).

[263]*See, e.g.*, Mayor & Aldermen of Forsyth v. Monroe County, 392 S.E.2d 865, 866 n.1 (Ga. 1990) ("Of course, although the district court's decision and any Eleventh Circuit decision would be binding on the *parties*, this Court is not bound through the operation of the Supremacy Clause, U.S. Const., Art. VI, cl. 2, to follow these federal courts in a subsequent challenge to this state statute.").

[264]"Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." Montana v. United States, 440 U.S. 147, 153 (1979). The party against whom estoppel is asserted must have had a "full and fair opportunity" to defend its position in the previous action. *Id.* Collateral estoppel is sometimes referred to as "estoppel by judgment." Arizona v. California, 530 U.S. 392, 415 (2000).

Under res judicata, or claim preclusion, "a final judgment on the merits bars further claims by parties or their privies based on the same cause of action." *Montana*, 440 U.S. at 153. This doctrine obviously does not apply in the situations we mean to discuss.

[265]*See, e.g.*, Sherman v. Cmty. Consol. Sch. Dist. 21, 980 F.2d 437, 442 (7th Cir. 1992) (stating that "[n]o interpretation we announce will bind Illinois or other school districts . . . but it will control" how the plaintiff is treated); Jones v. Am. Family Mut. Ins. Co., 489 N.E.2d 160, 164 (Ind. Ct. App. 1986) ("While it may be true that a federal opinion is merely persuasive (as opposed to binding) precedent in similar, subsequent cases involving interpretation and application of state law, it is also true that when a federal court is one of competent jurisdiction and where there is identity of subject matter and parties, a federal decision on the merits is *res judicata* and may not

cases.[266] The Court long ago noted that if a federal declaratory judgment had no res judicata effect as to the parties, it would serve "no useful purpose as a final determination of rights."[267] Thus, as to the specific party or parties challenging the state action, a federal declaratory judgment normally has a practical effect that is "virtually identical"[268] to that of an injunction.

But the crucial factor motivating federal courts in their choice of remedies is what effect their judgment will have as to non-parties. If the federal court action is not styled as a class action representing all citizens, the only preclusion doctrine that could protect non-parties is that of non-mutual collateral estoppel—and this doctrine (particularly of the offensive variety) is rarely applied against any level of government.[269] As the Court observed in one case, "neither declaratory nor injunctive relief can directly interfere with enforcement of contested statutes or ordinances except with respect to the particular federal plaintiffs, and the State is free to prosecute others who may violate the statute."[270]

Moreover, the Supreme Court held long ago that non-mutual offensive collateral estoppel does not apply at all to "pure questions of law,"[271] that is, the issue of how a given law should be interpreted. There are several good reasons

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be circumvented or undermined by a later state court judgment.").

[266]The Court has held that a declaratory judgment against a state is barred by the Eleventh Amendment when the doctrine of res judicata would give the declaratory judgment the same effect as that of an Eleventh-Amendment-forbidden injunction. *See* Green v. Mansour, 474 U.S. 64, 73 (1985); Samuels v. Mackell, 401 U.S. 66, 69–73 (1971).

[267]Public Serv. Comm'n v. Wycoff Co., 344 U.S. 237, 247 (1952).

[268]*Samuels*, 401 U.S. at 73.

[269]*See* Note, *Nonmutual Issue Preclusion Against States*, 109 HARV. L. REV. 792, 797–99 (1996) [hereinafter *Nonmutual Issue Preclusion*]; *cf.* Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, 422 (1990) ("[W]e have reversed every finding of estoppel [against the government] that we have reviewed."); *Id.* at 423 ("We leave for another day whether an estoppel claim could ever succeed against the Government."); United States v. Mendoza, 464 U.S. 154 (1984) (holding that federal government was not collaterally estopped from relitigating constitutional issue on which it had lost in another case).

[270]Doran v. Salem Inn, 422 U.S. 922, 931 (1975).

[271]United States v. Moser, 266 U.S. 236 (1924). The *Moser* Court held:

> Where, for example, a court in deciding a case has enunciated a rule of law, the parties in a subsequent action upon a different demand are not estopped from insisting that the law is otherwise, merely because the parties are the same in both cases. But a *fact, question* or *right* distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of the law.

Id. at 242; *see also* United States v. Stauffer Chem. Co., 464 U.S. 165, 170–71 (1984) ("Our cases, however, recognize an exception to the applicability of the principles of collateral estoppel for 'unmixed questions of law' arising in 'successive actions involving unrelated subject matter.'"); Burlington N.R.R. Co. v. Hyundai Merch. Marine Co., 63 F.3d 1227, 1229 (3d Cir. 1995) (recognizing, under certain circumstances, exception to issue preclusion for "questions of law"); Collins v. Alaska, 823 F.2d 329, 332 n.4 (9th Cir. 1987) (recognizing exception to collateral estoppel for questions of law).

why this should be so. First, there is the fear of giving too much power to the very first district judge who happened to address a statutory provision.[272] As one scholar has noted,

> [t]he concept that state and lower federal courts are coordinate courts on issues of federal law is one that, in my view, is deeply rooted in the federal system. If that concept can effectively be swallowed up by expanding the doctrine of res judicata—so that, for example, a lower federal court judgment in habeas corpus can effectively bind the state in its litigation with everyone in its own courts—then a small tail is wagging a very large dog.[273]

Second, the development and evolution of the law would be severely stunted by giving preclusive effects to judgments about the interpretation of a law. As the Supreme Court has said: "Unreflective invocation of collateral estoppel against parties with an ongoing interest in constitutional issues could freeze doctrine in areas of the law where responsiveness to changing patterns of conduct or social mores is critical."[274] One court similarly noted that "the interests of finality and judicial economy may be outweighed by other substantive policies, for in this circumstance 'the interests of courts and litigants alike can be protected adequately by the flexible principles of stare decisis.'"[275]

Third, non-mutual issue preclusion on questions of law would also encourage an unhealthy forum-shopping, in which special interest groups from divergent perspectives would rush to seek a declaratory judgment from a judge favorable to their side, knowing that the state would then be bound by that judge's interpretation in any future litigation or prosecutions.

Fourth, nonmutual issue preclusion on questions of *state* law would be an affront to our federalist system of government.[276] Given the principle that federal courts cannot interpret state law authoritatively, it would be unthinkable for a

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[272]*Cf.* Carreno v. Johnson, 899 F. Supp. 624, 628 (S.D. Fla. 1995) ("Absent an injunctive sanction, a district court's declaration that a statute is unconstitutional does not bar the government from continuing to apply the statute pending review by the Court of Appeals and the United States Supreme Court.").

[273]Shapiro, *supra* note 199, at 774.

[274]Montana v. United States, 440 U.S. 147, 163 (1979); *see also Nonmutual Issue Preclusion*, *supra* note 269, at 799–800 (discussing problems of issue preclusion attached to federal judgments regarding state law).

[275]Haitian Ctrs. Council, Inc. v. McNary, 969 F.2d 1350, 1356 (2d Cir. 1992) (quoting 18 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4425, at 244 (1981)).

[276]Thus, the Court has disapproved "anticipatory declarations as to state regulatory statutes," on the grounds that "state courts . . . have the first and the last word as to the meaning of state statutes." Public Serv. Comm'n v. Wycoff Co., 344 U.S. 237, 247 (1952). "Anticipatory judgment by a federal court to frustrate action by a state agency is even less tolerable to our federalism." *Id.*

federal court's interpretation (*qua* interpretation) of a *state law* to be given non-mutual issue preclusive effect.[277] Thus, any narrowing construction that a federal court might give to an allegedly overbroad state statute will have no binding effect, either as a matter of precedent or preclusion.

One might argue that another type of preclusion—judicial estoppel—could apply to the federal court's judgment. The doctrine of judicial estoppel "bars a party from adopting inconsistent positions in the same or related litigation."[278] Thus, if the state actually makes the argument in federal court that a statute should be given a narrow interpretation, it could conceivably be precluded from interpreting the statute more broadly in future state court prosecutions. There are many problems, however, with judicial estoppel. It has not been adopted in all federal jurisdictions;[279] it has been criticized as an "obscure doctrine"[280] that lacks "defined principles";[281] it rarely if ever can be applied to questions of law;[282] and most importantly, it "has apparently never been applied against the government in a criminal case."[283] Moreover, even in those jurisdictions that apply judicial estoppel, it is normally unavailable to persons who were not parties to the original proceeding.[284] Thus, a federal court probably could not count on judicial estoppel as a way to preclude a state from adopting a broad construction of a statute for future prosecutions, even after arguing for a narrowing construction in the federal court action.

There are therefore only two ways that a federal court could effectively enforce its declaratory judgment. One is by issuing an injunction based on the

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[277]*See* Kopp v. Fair Political Practices Comm'n, 905 P.2d 1248, 1259 (Cal. 1995).

[278]Rascon v. U.S. West Communications, Inc., 143 F.3d 1324, 1330 (10th Cir. 1998).

[279]As one court observed, judicial estoppel "has not been uniformly adopted by federal courts." Bates v. Long Island R.R. Co., 997 F.2d 1028, 1037 (2d Cir. 1993). Some circuits have rejected it altogether for purposes of federal law. *See* UMWA 1974 Pension v. Pittston Co., 984 F.2d 469, 477 (D.C. Cir. 1993); United States v. 162 Megamania Gambling Devices, 231 F.3d 713, 726 (10th Cir. 2000).

[280]United States v. Kattar, 840 F.2d 118, 129–30 n.7 (1st Cir. 1988).

[281]Jackson Jordan, Inc. v. Plasser Am. Corp., 747 F.2d 1567, 1579 (Fed. Cir. 1984).

[282]Sanders Brine Shrimp Co. v. Bonneville Artemia Int'l, Inc., 970 F. Supp. 892, 906 (D. Utah 1997).

[283]Nichols v. Scott, 69 F.3d 1255, 1272 (5th Cir. 1995).

[284]*See, e.g.*, Bethesda Lutheran Homes & Servs. v. Born, 238 F.3d 853, 858 (7th Cir. 2001) ("The doctrine of judicial estoppel would not apply to a new party, one that had not benefited from the judgment in the previous suit . . . ."); Reno v. Beckett, 555 F.2d 757, 770 (10th Cir. 1977) ("Kansas law is clear that a position taken by a party in one suit cannot be claimed as working an estoppel in another suit in favor of a party who was a stranger to the first suit."); *Jackson Jordan*, 747 F.2d at 1579 ("No case is cited where the doctrine was applied in favor of a total stranger to the first phase of the dispute . . . ."); Colonial Refrigerated Transp., Inc. v. Mitchell, 403 F.2d 541, 550 (5th Cir. 1968) ("[J]udicial estoppel may be invoked only by a party to the prior litigation or someone privy to a party.").

declaratory judgment[285]—but injunctive relief is precisely what the declaratory judgment remedy was intended to avoid.[286] The other is by exercising habeas corpus jurisdiction over the federal plaintiff, if he were subsequently imprisoned under the allegedly overbroad statute.[287] Indeed, a few state courts refer to this possibility as a reason for deferring in the first instance to the constitutional judgments of lower federal courts.[288] Habeas corpus jurisdiction, however, would be of limited import, because it applies only in cases involving actual imprisonment.[289] Thus, a federal court could not use it to release someone from any civil penalty attached to an overbroad law, which means that a great deal of the chilling effect of that law would likely remain in effect.

Ultimately, a declaratory judgment of overbreadth by a federal court has, in and of itself, no binding (that is, preclusive or precedential) effect on a future state court enforcement of a state law as to people who were not parties to the original federal suit. As we have shown, the near-futility of declaratory judgments—whether through direct effect or through preclusion—has motivated the way the federal courts have handled challenges to partial-birth abortion laws. Fearing that a narrow reading of partial birth abortion statutes would not have precedential effect (either as a matter of constitutional holding or particularly as a matter of interpreting state law), federal courts have chosen instead to treat the statutes as overbroad and to enjoin their enforcement.[290] Backed up by an injunction, federal court judgments have the power to bind the respective state to a future course of action.

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[285]The Supreme Court once held that injunctions could not issue on the basis of declaratory judgments, see *Toucey v. New York Life Insurance Co.*, 314 U.S. 118 (1941), but that interpretation was overruled by Congress's amendment of the Anti-Injunction Act, 28 U.S.C. § 2283 (2000), so as to allow a federal court to enjoin state court litigation in order to "protect or effectuate its judgment."

[286]Thus, then-Justice Rehnquist expressed his concern that the declaratory judgment was starting to be regarded, "not as the conclusion of a lawsuit, but as a giant step toward obtaining an injunction." Steffel v. Thompson, 415 U.S. 452, 481 (1974) (Rehnquist, J., concurring).

[287]*Cf.* Perez v. Ledesma, 401 U.S. 82, 124 (1971) (Brennan, J., concurring in part and dissenting in part) (noting that one of main effects of federal declaratory judgment holding state statute unconstitutional is that court "stands ready to reverse any conviction under the statute").

[288]*See, e.g.*, Commonwealth v. Masskow, 290 N.E.2d 154, 157 (Mass. 1972) ("It would be undesirable for us to affirm the conviction of a defendant if the inevitable consequence were that he would be released on a writ of habeas corpus."); Commonwealth v. Negri, 213 A.2d 670, 672 (Pa. 1965) ("If the Pennsylvania courts refuse to abide by [the Third Circuit's] conclusions, then the individual to whom we deny relief need only 'walk across the street' to gain a different result.").

[289]*See* 28 U.S.C. § 2241(d) (2000) (requiring that prisoners be "in custody under the judgment and sentence of a State court").

[290]*See, e.g.*, Trucke v. Erlemeier, 657 F. Supp. 1382, 1391 (N.D. Iowa 1987) (noting that federal district judge who had previously held state statute unconstitutionally vague had "expressly refused to enjoin" enforcement, thus leaving open possibility of future prosecutions).

The problem with the broad injunctive remedy is that it sometimes goes too far—in some cases, enjoining the application of the statute in its entirety can be an overreaction, and can frustrate the state's prerogative to interpret and apply its own law. In the following section, we describe more fully the nature and scope of injunctions, and suggest ways to modify the scope of injunctions so as to avoid interference with federalist values.

C. The Power of Injunctive Relief

An injunction is, of course, a direct order by the court against one of the parties,[291] and may be based on an earlier declaratory judgment.[292] If a federal court enjoins the enforcement of a state statute, then it has made an order that is binding on the named state officer as to the particular plaintiff(s), and, by unspoken implication, the state itself.[293] If the state defendant disobeys, the federal court can slap contempt sanctions on it. By the terms of the Federal Rules of Civil Procedure, an injunction can bind *only* the "parties to the action, their officers, agents, servants, employees, and attorneys, and . . . those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise."[294]

In terms of technical doctrine, an injunction against a state official keeps that official from enforcing the disputed law only as to the particular plaintiffs. As the Supreme Court observed in one case, "neither declaratory nor injunctive relief can directly interfere with enforcement of contested statutes or ordinances except with respect to the particular federal plaintiffs, and the State is free to prosecute others who may violate the statute."[295] Importantly, an injunction is made even more powerful if the plaintiffs bring their suit as a class action, with the class being all similarly situated persons who might be affected by the state law. But unless the federal plaintiffs are able to obtain class certification, any injunction

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[291]Typically, a plaintiff seeking an injunction must show that he will suffer "irreparable injury" if the statute is allowed to operate, and that an injunction is necessary in order to afford adequate protection of constitutional rights. *See* Elrod v. Burns, 427 U.S. 347, 373 (1976). "Irreparable injury" is usually presumed in First Amendment cases. *Id.*

[292]28 U.S.C. § 2202 (2000) provides: "Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment."

[293]An injunction does *not* directly bind state courts, however. As the Supreme Court held:

> [A]n injunction against a state court would be a violation of the whole scheme of our Government. If an injunction against an individual is disobeyed, and he commences proceedings before a grand jury or in a court, such disobedience is personal only, and the court or jury can proceed without incurring any penalty on that account.

Ex parte Young, 209 U.S. 123, 163 (1908).

[294]FED. R. CIV. P. 65(d).

[295]Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975).

will bind the state official(s) only as to those particular plaintiffs. As one court rightly observed, "[i]f this elementary principle were not true, there would be no need for class actions. Whenever any individual plaintiff suffered injury as the result of official action, he could merely file an individual suit as a pseudo-private attorney general and enjoin the government in all cases."[296]

In the vast majority of cases, however, an injunction will prevent enforcement as to anyone, even if the federal lawsuit is not a class action. First, an injunction's practical effect will often inure to the benefit of non-plaintiffs. Two primary examples are reapportionment and desegregation cases.[297] Where, for example, a court ordered the desegregation of transportation facilities, it noted that the "very nature of the rights appellants seek to vindicate requires that the decree run to the benefit not only of appellants but also for all persons similarly situated."[298] In other words, it would be practically impossible to order desegregation only as to the particular plaintiffs.[299] Also, defendant officials often discontinue enforcement entirely after a federal injunction, even if the injunction does not technically apply to other persons. Second, the fact that a federal court has granted an injunction against the enforcement of a law indicates that it stands

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[296]Zepeda v. United States Immigration & Naturalization Serv., 753 F.2d 719, 729–30 n.1 (9th Cir. 1983). The court in that case vacated a lower court's injunction as too broad, saying that on remand the "injunction must be limited to apply only to the individual plaintiffs unless the district judge certifies a class of plaintiffs." *Id.* at 727; *see also* McKenzie v. City of Chicago, 118 F.3d 552, 555 (7th Cir. 1997) ("Because a class has not been certified, the only interests at stake are those of the named plaintiffs. . . . A wrong done to plaintiff in the past does not authorize prospective, class-wide relief unless a class has been certified. Why else bother with class actions?").

This requirement can be applied with surprising rigidity. In one case, for example, the state of Nebraska had begun prosecution of a Dr. LaBenz for performing abortions after fetal viability. Womens Servs., P.C. v. Douglas, 653 F.2d 355, 355–56 (8th Cir. 1981). Dr. LaBenz's employer, Womens Services, and a shareholder in that enterprise filed a lawsuit in federal district court challenging the state prosecution. *Id.* The district court had abstained, holding that the interests of Dr. LaBenz and his employers were so intertwined that the doctrine of *Younger v. Harris*, 401 U.S. 37 (1971), required abstention in the face of an ongoing state prosecution. *Douglas*, 653 F.2d at 356 (quoting district court's unpublished order). The appeals court reversed and remanded, however, holding that even if the federal plaintiffs "obtain preliminary injunctive relief from the district court on remand, the protection afforded will apply only to the federal plaintiffs and Nebraska would be free to continue its prosecution of Dr. LaBenz; there would be no direct interference in ongoing state proceedings." *Id.* at 359. The court cited *Doran*, 422 U.S. at 930–31, for this point. *Douglas*, 653 F.2d at 359.

[297]*McKenzie*, 118 F.3d at 555 (noting that "in reapportionment and school desegregation cases, for example, it is not possible to award effective relief to the plaintiffs without altering the rights of third parties").

[298]Bailey v. Patterson, 323 F.2d 201, 206 (5th Cir. 1963).

[299]*See Zepeda*, 753 F.2d at 729 n.1 (noting that in some cases, "as a practical matter, injunctive relief for an individual plaintiff will lead to complete relief for the potential class because defendant will voluntarily treat all alike thereafter" (citations omitted)).

ready to vacate a conviction under habeas corpus (at least as to the particular federal plaintiff).[300]

The power of a federal court to enjoin non-party defendants is limited, however. The Supreme Court has long held that "[t]he courts . . . may not grant an enforcement order or injunction so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law."[301] Similarly, in an oft-cited opinion by Learned Hand, the Second Circuit observed that a court "cannot lawfully enjoin the world at large, no matter how broadly it words its decree."[302] Thus, plaintiffs who wish to bind, say, every prosecutor in a state by the federal court's injunction will often seek to certify a defendant class under Rule 23. This process has varying success,[303] depending on whether the court thinks that the named defendant(s) can adequately represent the interests of all local prosecutors, who are often elected independently and are granted fairly broad discretion.[304]

Outside of a defendant class, non-party defendants can be bound by an injunction only in a few narrow circumstances: where they are "successors in interest to parties named in the injunction with respect to the subject matter of the injunction,"[305] or where the non-parties "aid or abet the named parties in a concerted attempt to subvert" the injunction.[306] In the exceptional case, a court

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[300]Although imprisoned persons who were not parties to the original federal injunction will probably not be able to use the preclusion doctrines offensively to obtain habeas corpus, the federal court itself may well view its own injunction as a valid precedent enabling it to invalidate the state conviction.

[301]Regal Knitwear Co. v. NLRB, 324 U.S. 9, 13 (1945) (citations omitted).

[302]Alemite Mfg. Corp. v. Staff, 42 F.2d 832, 832 (2d Cir. 1930).

[303]*See, e.g.*, Little Rock Family Planning Servs. v. Jegley, No. LR-C-97-581, 1998 U.S. Dist. LEXIS 22325, at *85–*86 (E.D. Ark. Nov. 13, 1998); Carhart v. Stenberg, 11 F. Supp. 2d 1099 (D. Neb. 1998); Planned Parenthood of Wis. v. Doyle, 9 F. Supp. 2d 1033 (W.D. Wis. 1998); Planned Parenthood of S. Ariz., Inc. v. Woods, 982 F. Supp. 1369, 1371 (D. Ariz. 1997); Akron Ctr. for Reprod. Health v. Rosen, 110 F.R.D. 576, 577–78 (N.D. Ohio 1986).

[304]*See, e.g.*, Daniel v. Underwood, No. 2:98-0495, 1998 U.S. Dist. LEXIS 22290, at *21–*23 (S.D.W. Va. Nov. 5, 1998) (denying defendant class certification on adequacy of representation grounds).

[305]Rockwell Graphic Sys., Inc. v. Dev. Indus., Inc., 91 F.3d 914, 919 (7th Cir. 1996) (citing Golden State Bottling Co., Inc v. NLRB, 414 U.S. 168, 179–80 (1973)); *accord* Herrlein v. Kanakis, 526 F.2d 252, 253–54 (7th Cir. 1975).

[306]*Rockwell Graphic Sys.*, 91 F.3d at 919 (citing *Regal Knitwear*, 324 U.S. at 14); *accord* Chi. Truck Drivers, Helpers & Warehouse Workers Union Pension Fund v. Bhd. Labor Leasing, 207 F.3d 500, 507 (8th Cir. 2000); Doctor's Assoc., Inc. v. Reinert & Duree, P.C., 191 F.3d 297, 302–03 (2d Cir. 1999).

An additional, but rarer, circumstance is where a court makes an *in rem* injunction relating to a specific piece of property. *See, e.g.*, Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 692 n.32 (1979) (citing Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623, 641 (1977)). In such situations, a court's injunction can bind anyone who comes into contact with the property, thus necessarily having an effect on non-parties.

will invoke its broad equitable powers to issue an injunction that reaches non-parties. A famous example of such an injunction was issued in *United States v. Hall*,[307] wherein the Fifth Circuit held that because a desegregation judgment necessarily benefits a "large class of persons," and because of the strong "community passions" involved, courts must have "broad and flexible remedial powers" to prevent "disruption by an undefinable class of persons who are neither parties nor acting at the instigation of parties."[308]

So, can an injunction against one state official in his official capacity bind all officials of the state government, preventing any future prosecutions under the statute? This point, surprisingly, seems not to have been often directly addressed (or challenged) in federal appellate cases. The Supreme Court has issued several holdings, however, strongly implying that an injunction against one state official should bind others, as long as the represented official had the same interest in the litigation as the official(s) sought to be bound. In one case (albeit one involving the United States government), the Court held:

> There is privity between officers of the same government so that a judgment in a suit between a party and a representative of the United States is *res judicata* in relitigation of the same issue between that party and another officer of the government. The crucial point is whether or not in the earlier litigation the representative of the United States had authority to represent its interests in a final adjudication of the issue in controversy.[309]

Although this holding does not technically apply to state governments, there is no reason to doubt that the Court would rule similarly if presented squarely with the question. Thus, federal courts (when forced to address the issue) normally hold that officials of a given state government will be bound by an injunction,

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[307]472 F.2d 261 (5th Cir. 1972).

[308]*Id.* at 266. The court analogized its power in such a situation to its power to issue broad, *in rem* injunctions. *Id.* at 267. The court limited its holding, however, by saying that courts are not "free to issue permanent injunctions against all the world in school cases," *id.*, but that Hall could be punished for criminal contempt given that he had notice of the school desegregation order and had "resorted to conscious, willful defiance." *Id.*

[309]Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 402–03 (1940) (citation omitted). The Court also said that "[w]here a suit binds the United States, it binds its subordinate officials," *id.* at 403 (citation omitted), but this holding is not strictly applicable to the states, which (as noted above) are not subject to suits themselves except insofar as they have waived sovereign immunity. *See, e.g.*, *Ex Parte Young*, 209 U.S. at 193–94 (Harlan, J., dissenting) (noting that unless state waives its sovereign immunity, it cannot be sued in one of its courts).

In a similar spirit, the Supreme Court has held that where a State is a party, the individual citizens of a state can be bound by the judgment "in their common public rights as citizens." City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320, 340–41 (1958).

whether or not they are actually named as parties.[310] A federal district court in New York, for example, held that all of New York's local district attorneys would be bound by any injunction granted against the State Attorney General.[311] Also worth noting is that replacing the named defendant state officials with other persons will not change the effect of the injunction—an injunction binds any successors to the office of the named defendant.[312]

On the other hand, some state cases have allowed prosecution or enforcement by state agents who were not parties to the original federal lawsuit.[313] These

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[310]In one case, for example, the plaintiffs argued that interim injunctive relief would be ineffective, because it would operate only against the named defendants. Am. Booksellers Ass'n, Inc. v. Webb, 590 F. Supp. 677, 693 (N.D. Ga. 1984). The court responded by quoting Rule 65 of the Federal Rules of Civil Procedure where it is stated that an injunction binds "those persons in active concert or participation" with the parties. *Id.* It also quoted a practice manual's statement that persons could be bound if they were "so identified in interest with those named in the decree that . . . their rights and interests have been represented and adjudicated in the original injunction proceeding." *Id.* (quoting 11 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE, § 2956, at 560 (1973)). On this basis, the court held that the Georgia Attorney General, although not a party, could be bound because he was served with a copy of the proceeding and had entered an appearance through counsel to support the law in question. *Id.* Then, in a semi-bootstrapping move, the court held that because the Attorney General's "appearance in this case clearly served to represent the rights and interests of other subordinate state law enforcement officials, not named as parties to this action," those officials "also will be bound by the Court's injunction." *Id.*; *see also* United Transp. Union v. Long Island R.R. Co., 634 F.2d 19, 21–22 (2d Cir. 1980) (holding that state attorney general could be bound though not a party).

[311]Am. Libraries Ass'n v. Pataki, 969 F. Supp. 160, 163 (S.D.N.Y. 1997). The court pointed to the language in Federal Rule of Civil Procedure 65(d), which allows non-parties to be bound if they are "in active concert or participation" with the parties, and if they "receive actual notice of the order by personal service or otherwise." *Id.*

[312]*See* Mich. Coalition of Radioactive Materials Users v. Griepentrog, 769 F. Supp. 999, 1005 (W.D. Mich. 1991) (citation omitted).

[313]For example, after a federal district court in Texas had declared a sodomy statute overbroad and had enjoined its enforcement (because it could apply to the private consensual acts of married couples), *Buchanan v. Batchelor*, 308 F. Supp. 729, 736 (N.D. Tex. 1970), a Texas state court allowed a prosecution of forcible sodomy under the statute. Pruett v. State, 463 S.W.2d 191, 194 (Tex. Crim. App. 1970). The reason this prosecution was permissible was apparently because the federal court had enjoined only a "District Attorney Wade," *id.* at 193, but the action in *Pruett* had been brought by another prosecutor not bound by the federal court's judgment. *Id.* at 194.

For another example, a federal district court held that a clear and convincing evidentiary standard was constitutionally required in cases where a child was removed from his parents, and enjoined the state defendant from ever using the preponderance standard again. Sims v. State Dep't of Pub. Welfare, 438 F. Supp. 1179, 1194–95 (S.D. Tex. 1977). The Supreme Court later held in *Moore v. Sims*, 442 U.S. 415, 434–35 (1979), that the district court should have abstained from hearing the constitutional challenge under *Younger v. Harris*, 401 U.S. 37 (1971). As is obvious from the above case caption, the defendant in the federal case was the State Department of Public Welfare. In the meantime, in a state court action involving a different defendant—the Texas Department of Human Resources—a state court refused to follow the federal court's injunction, choosing instead to follow Texas Supreme Court precedent holding the preponderance standard constitutional. Woodard v. Tex. Dep't of Human Res., 573 S.W.2d 596, 598–99 (Tex. Civ. App.

state court cases are probably aberrations, however, and are not consistent with the principle invoked by the U.S. Supreme Court (and several other lower federal courts) in holding that various agents of a government can be subject to an injunction against any one agent of that government.

D. How Do Federal Courts Choose Between Declaratory Judgments and Injunctions?

Outside the overbreadth context, federal courts often attempt to show their respect and comity towards state courts by choosing a declaratory judgment remedy over an injunction. In one case, for example, a federal court had issued a declaratory judgment holding that a Puerto Rican rule barring members of the press from criminal proceedings was unconstitutional.[314] Subsequently, it was reported that the Puerto Rico Supreme Court's Chief Justice pronounced the district court's decision non-binding, and said that local judges had discretion as to whether or not to follow the rule.[315] After the plaintiff moved for injunctive relief, the district court issued an opinion refusing such relief, saying that to issue an injunction would not show a "fair appreciation of what is expected of the Puerto Rico judiciary, a traditionally responsible institution."[316] It noted that the declaratory judgment was a remedy "inherently sensitive to principles of equity, comity, and federalism," and that such a judgment "carries the moral force of an injunction without subjecting violators to further imposition and indignity."[317] The court warned, however, that "failure to comply would unnecessarily and tragically undermine the delicate balance between federal and local entities, and would ultimately embarrass those who would ignore the historically proven equilibrium."[318] Thus, because of the court's "faith in all of the institutions involved," the motion for an injunction was denied.[319]

1978).

In a Florida case involving an administrative search statute that had been enjoined as unconstitutional by a federal court, see *Lake Butler Apparel Co. v. Department of Agriculture & Consumer Services*, 551 F. Supp. 901, 907 (M.D. Fla. 1982), the Florida Supreme Court disagreed and held that the federal court's determination was not binding, *Roche v. State*, 462 So. 2d 1096, 1099 n.2 (Fla. 1985), and, based on its own interpretation of U.S. Supreme Court precedent, that the statute was constitutional. *Id.* at 1101.

[314]Rivera Puig v. Garcia Rosario, No. 92-1067, 1992 U.S. Dist. LEXIS 2011 (D.P.R. Jan. 31, 1992).

[315]Rivera Puig v. Garcia Rosario, 785 F. Supp. 278, 294 (D.P.R. 1992) (Addendum "A" to Order).

[316]*Id.* at 292.

[317]*Id.* at 292–93.

[318]*Id.* at 293.

[319]*Id.*

Such solicitude for state courts is not always present, however, and with good reason. As we have seen above, state courts are not technically bound by any precedential effect of a federal court's declaratory judgment or its constitutional holdings *per se*, and the state itself will hardly ever be bound by preclusion doctrines except as to the same party or parties that brought the initial federal suit. So, many federal courts (particularly in the partial-birth abortion cases described above) choose to enjoin the operation of the entire statute, thinking that such a remedy offers the only possibility of ensuring that the state does not attempt a broader enforcement strategy that threatens constitutional values.

V. SOLUTIONS—STATE AND FEDERAL

Thus far we have considered the underpinnings of the overbreadth and vagueness doctrines, discussed the countervailing principles of abstention, certification, and other means of limited invalidation, and examined the powers of federal court judgments. As we have indicated, federal courts often fail to recognize opportunities to reconcile the constitutional interests protected by the overbreadth and vagueness doctrines with fundamental aspects of federalism. In this final section, we offer our suggestions for what courts and litigants might do with this information.

While we will ultimately set forth our recommendations for federal courts in subsection B, we will begin this Part by describing what state courts and state governments might do to relieve themselves from the federal judgments purporting to totally invalidate state laws. Even if courts and litigants were to accept our proposals for dealing with overbreadth and vagueness challenges that take place in the future, the fact remains that many federal court judgments exist (such as in the partial-birth litigation) in which the court, rightly or wrongly, enjoined enforcement of a state statute and thus appeared to foreclose all opportunity for state court interpretation. Our first task, then, is to discuss what states may do with the judgments as they have been handed down to date; our second task will be to offer suggestions that might change the judgments that issue in the future.

A. State Solutions

A common complaint from those who wish a federal court to adopt a saving construction of a state statute is that if the federal court adopts a broader interpretation instead and holds the statute unconstitutional, the federal court

forecloses any future interpretation by the state courts.[320] Such a manner of interpretation thus seems to violate two canons at once: the canon of constitutional avoidance, and the canon that only a state court can authoritatively interpret its own state's statutes and ordinances.[321] As Justice Kennedy recently wrote in a dissent:

> The United States District Court in this case leaped to prevent the law from being enforced, granting an injunction before it was applied or interpreted by Nebraska. In so doing, the court excluded from the abortion debate not just the Nebraska legislative branch but the State's executive and judiciary as well. The law was enjoined before the chief law enforcement officer of the State, its Attorney General, had any opportunity to interpret it. . . . In like manner, Nebraska's courts will be given no opportunity to define the contours of the law, although by all indications those courts would give the statute a more narrow construction than the one so eagerly adopted by the Court today. *Thus the court denied each branch of Nebraska's government any role in the interpretation or enforcement of the statute.*[322]

In a similar vein, a dissenting federal judge lamented that his colleagues had enjoined the enforcement of Wisconsin's partial-birth abortion statute, saying that by "enjoining the Act in its entirety, this court has '[d]eprived the state courts of an opportunity to save at least a part of the statute by a narrowing interpretation. As a matter of comity, states ought to have that opportunity.'"[323] Even Judge Easterbrook in *Hope Clinic* accused his dissenting colleagues of suggesting a path

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[320]This complaint has been common since at least the 1930's. *See* John E. Lockwood et al., *The Use of the Federal Injunction in Constitutional Litigation*, 43 HARV. L. REV. 426, 426–29 (1930). In fact, it was the longstanding fear of placing such power in the hands of a single federal district judge that compelled Congress to pass the Three Judge Act of 1910, ch. 155, 36 Stat. 557 (repealed 1976), which required three judges to hear a demand for a interlocutory injunction against a state statute; that Act was extended to state administrative orders by the Act of March 4, 1913, ch. 160, 37 Stat. 1013 (repealed 1976); and the Judiciary Act of 1925 extended it to permanent injunctions. 43 Stat. 938. The Three Judge Act was repealed as of August 12, 1976. Act of Aug. 12, 1976, Pub. L. No. 94-381, §§ 1, 2, 90 Stat. 1119 (repealing 28 U.S.C. §§ 2281, 2282 (1970)).

As we discussed above, discontent with the power of the injunction also led to the enactment of the Declaratory Judgment Act, Act of June 14, 1934, ch. 512, 48 Stat. 955 (codified at 28 U.S.C. §§ 2201–2202 (1994)).

[321]United States v. Thirty-Seven Photographs, 402 U.S. 363, 369 (1971).

[322]Stenberg v. Carhart, 530 U.S. 914, 978–79 (2000) (Kennedy, J., dissenting) (emphasis added) (citations omitted).

[323]Planned Parenthood v. Doyle, 162 F.3d 463, 475 (7th Cir. 1998) (Manion, J., dissenting) (quoting Kucharek v. Hanaway, 902 F.2d 513, 517 (7th Cir. 1990)).

(namely, enjoining the statutes entirely) that "would foreclose now and forever all interpretation by the state judiciary."[324]

The concern expressed in the above statements is overstated. Even if the federal court enjoins the law's enforcement, *the state can still ask a state court to issue a declaratory judgment narrowing the statute's reach.*[325] Nothing that a federal court says about a state law—even a holding that the law has been "struck down"—can prevent a state from seeking an alternative interpretation of its own law from its own courts.[326] As the Court indicated in *Dombrowski*, a state can invoke a statute even after a federal injunction has issued, as long as it obtains "a permissible narrow construction in a noncriminal proceeding" and seeks "modification of the injunction."[327] After the statute is narrowed so as to come within constitutional guidelines, enforcement is possible (although the state should return to federal court to seek a modification of the injunction).

Trucke v. Erlemeier[328] provides one example of a federal court's recognition of the solution outlined above. In *Trucke*, the court considered an Iowa compulsory education statute that provided, inter alia, that "[i]n lieu of such attendance such child may attend *upon equivalent instruction* by a certified teacher elsewhere."[329] Prior to the lawsuit in *Trucke*, another federal court had held that the term "equivalent instruction" was unconstitutionally vague under the Due Process Clause.[330] Despite this holding, the Iowa State Board of Public Instruction promulgated regulations interpreting this statute in 1986.[331] *Trucke* involved a homeschooling family's challenge to the continued application of the statute, but they did not directly challenge the administrative regulations. The

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[324]Hope Clinic v. Ryan, 195 F.3d 857, 870 (7th Cir. 1999).

[325]If a federal court adopts a reading of a state statute that results in overbreadth, a state court can (as we have seen) simply ignore any declaratory judgment that the federal court might issue. If state courts are not bound to follow a lower federal court's constitutional holdings, then they are certainly not bound to follow a federal court's interpretation of state law, or a federal court's decision (such as an overbreadth determination) that necessarily rests on a particular interpretation of state law. This means that any binding effect of a federal court overbreadth judgment comes not from precedent, stare decisis, or even preclusion (as we have seen), but solely from the power of the federal court's injunction, if any, against future enforcement by the state.

[326]One theoretical problem might be the availability of a proper party—but as we shall see in the following examples, a state might choose simply to seek a declaratory judgment against someone else who is clearly within the reach of the statute, or a state legislator might even seek a declaratory judgment in a suit against the executive agent charged with the enforcement of the statute.

[327]Dombrowski v. Pfister, 380 U.S. 479, 491 (1965); *see also id.* at 492 ("Our view of the proper operation of the vagueness doctrine does not preclude district courts from modifying injunctions to permit prosecutions in light of subsequent state court interpretation clarifying the application of a statute to particular conduct.").

[328]657 F. Supp. 1382 (N.D. Iowa 1987).

[329]*Id.* at 1384 (emphasis added) (citing IOWA CODE § 299.1 (1985)).

[330]Fellowship Baptist Church v. Benton, 620 F. Supp. 308, 318 (S.D. Iowa 1985).

[331]*Trucke*, 657 F. Supp. at 1386.

federal court held that the federal question was whether the holding of *Fellowship Baptist* "that the terms 'equivalent instruction' were unconstitutionally vague automatically deprived § 299.1 of its force as law, so as to deprive the State Board of Public Instruction of authority to cure this defect by promulgating regulations defining the terms . . . found unconstitutionally vague."[332] The plaintiffs argued that once the *Fellowship Baptist* court had held the statute unconstitutionally vague, that holding deprived the statute of all possible future applications.[333] The court disagreed, citing *Dombrowski*, *Steffel*, and *Doran*, and held that not only could the Iowa Supreme Court adopt a narrowing construction of the state statute, so could the Iowa administrative agency. To hold otherwise, said the court, would "exaggerate the role of judges in the law-making process while trivializing the role of quasi-legislative agencies like the State Board of Public Instruction."[334]

A striking recent example is *Kopp v. Fair Political Practices Commission*.[335] In that case, the voters of California had approved a campaign finance reform measure.[336] A federal district court then held certain sections of the measure unconstitutional and enjoined their enforcement by the Fair Political Practices Commission,[337] and the Ninth Circuit affirmed.[338] Then, a state senator and a state assemblyman brought a proceeding, and the California Supreme Court (despite the federal court judgments) issued an "alternative writ of mandate" to the Fair Political Practices Commission directing it to "show cause" why it should not be ordered to enforce the campaign finance provisions.[339] The issue as framed by the court: "[A]ssuming enforcement of the challenged sections as enacted would violate the federal Constitution, *may*, and if so, *should* the statutes be *judicially reformed*. . . ?"[340] The court noted that it had long recognized that "an erroneous construction by a federal court does not preclude a state court from later rejecting the federal court's conclusion."[341] To the assertion that res judicata or collateral estoppel applied to the federal court's judgment (after all, the same party was present in both cases), the court held that a "public interest" exception to those

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[332]*Id.* at 1390–91.

[333]*Id.* at 1391. The plaintiffs cited the holding of *Norton v. Shelby County*, 118 U.S. 425, 442 (1886): "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

[334]*Trucke*, 657 F. Supp. at 1392.

[335]905 P.2d 1248 (Cal. 1995).

[336]*Id.* at 1250.

[337]*Id.* at 1251 (citing Serv. Employees Int'l Union v. Fair Political Practices Comm'n, 747 F. Supp. 580, 593–94 (E.D. Cal. 1990)).

[338]*Id.* (citing *Serv. Employees Int'l Union*, 955 F.2d at 1323).

[339]*Id.* at 1251.

[340]*Id.*

[341]*Id.* at 1255 (citations omitted).

preclusion doctrines should apply.[342] This was because where the state was the losing party and was the only entity affected by the earlier judgment, "'strict application of collateral estoppel would foreclose any reexamination of the holding of that case. The state would remain bound, and no other person would have occasion to challenge the precedent."[343] To the argument that the statutes had "ceased to exist," and "hence cannot be judicially reformed because there is nothing left to reform,"[344] the court responded that the "federal appeals court did not 'invalidate' [the statute]; instead, it *enjoined enforcement* of those sections *as written.*"[345] Consequently, the court concluded that

> a state supreme court is not constrained by principles of res judicata, collateral estoppel, or comity, to keep silent on a state law statutory reformation issue, when the question is presented to it in litigation such as this. Nor does the federal appeals court's judgment affirming the injunction against enforcement [of the statute's sections] render those sections legally nonexistent and hence not susceptible to judicial reformation. Our sovereign duty as a state court of last resort consistent with principles of federalism and comity, requires that we not automatically accept the federal court's ruling on this important state law issue, but consider the reformation question afresh ourselves and reach a different conclusion if state law leads us to that result.[346]

Likewise, in *State v. Norflett*,[347] the New Jersey Supreme Court heard a case involving the prosecution of a non-physician for performing an abortion on a minor. The prosecution was based on New Jersey's general abortion law, which stated:

> Any person who, maliciously or without lawful justification, with intent to cause or procure the miscarriage of a pregnant woman, administers or prescribes or advises or directs her to take or swallow

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[342] *Id.* at 1256. In a footnote, the court quoted an earlier case as holding that the "public interest" exception to preclusion applies if "the state of the law on a matter of statewide importance would remain permanently unclear and unsettled." *Id.* at 1257 n.16 (quoting Arcadia Unified Sch. Dist. v. State Dep't of Educ., 825 P.2d 438, 442 (Cal. 1992)).

[343] *Id.* at 1256 (quoting City of Sacramento v. State, 785 P.2d 522, 529 (Cal. 1990)).

[344] *Id.* at 1257.

[345] *Id.* at 1258.

[346] *Id.* at 1259 (citations omitted). After all this reaffirmation of its own authority, however, the court declined to give a narrowing construction to the statute, saying that it could not identify a reformation that "would closely effectuate policy judgments clearly expressed by the electorate." *Id.* at 1290.

[347] 337 A.2d 609, 611 (N.J. 1975).

> any poison, drug, medicine or noxious thing, or uses any instrument or means whatever, is guilty of a high misdemeanor.[348]

The defendant argued that this statute had been wholly invalidated by the then-recent decisions of *Roe v. Wade*[349] and *Doe v. Bolton*.[350] The state court pointed out that under *Roe*, the Supreme Court had envisioned that the "woman seeking an abortion would exercise her right to privacy in making the decision only after consultation with a physician."[351] Then, performing a remarkable act of judicial surgery, the court held that the New Jersey abortion statute survived *Roe* and *Doe* "to the extent that it authorizes the criminal prosecution of laymen for performing abortions."[352] The defendant then argued that the phrase "without lawful justification," by which the statute was applied to her, was unconstitutionally vague. The court held that the phrase was not unduly vague, because the defendant "could not possibly be unaware" that the phrase "at the very least means that an abortion must be performed by a licensed physician in the exercise of his medical judgment."[353] In support of her vagueness argument, the defendant then pointed to *Y.W.C.A. v. Kugler*.[354] In that case, a federal district court, in a decision that was ultimately affirmed by the Third Circuit without opinion, had pronounced the New Jersey abortion statute to be unconstitutionally vague.[355] The New Jersey court, however, was not impressed, saying that even for federal constitutional issues, "the state courts and lower federal courts occupy comparable positions."[356] Moreover, the court observed: "The United States Supreme Court has recently indicated that a federal declaratory judgment that a state statute is unconstitutional does not necessarily foreclose all state prosecutions, at least where the statute is declared invalid on vagueness or overbreadth grounds . . . ."[357]

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[348]*Id.* at 613 n.6 (quoting N.J. STAT. ANN. § 2A:87-1 (West 1975)).

[349]410 U.S. 113 (1973).

[350]410 U.S. 179 (1973).

[351]*Norflett*, 337 A.2d at 615.

[352]*Id.* As the New Jersey Supreme Court pointed out, it was not alone in construing a pre-*Roe* abortion statute as still applying to abortions performed by people without medical training. *Id.* (citing May v. State, 492 S.W.2d 888, 889 (Ark. 1973); People v. Norton, 507 P.2d 862, 864 (Colo. 1973); People v. Bricker, 208 N.W.2d 172, 175–76 (Mich. 1973); Spears v. State, 278 So. 2d 443, 446 (Miss. 1973)).

[353]*Id.* at 618.

[354]342 F. Supp. 1048 (D.N.J. 1972), *vacated and remanded*, 475 F.2d 1398 (3d Cir. 1973), *judgment reinstated*, Civ. No. 264-70 (D.N.J. July 24, 1973), *aff'd mem.*, 493 F.2d 1402 (3d Cir. 1974).

[355]*Id.* at 1076. The district court did not, however, grant injunctive relief. *Id.*

[356]*Norflett*, 337 A.2d at 618.

[357]*Id.* at 618 n.15. North Carolina's obscenity statute provides yet another example. In 1970, a federal district court held that statute unconstitutional, in part on overbreadth grounds. Shinall v. Worrell, 319 F. Supp. 485, 490–91 (E.D.N.C. 1970). In a subsequent state court prosecution, the

As noteworthy as these examples are, what is striking is the rarity with which state courts attempt to reconstruct a statute that has been declared unconstitutionally overbroad by a federal court. Richard Fallon notes that his research "uncovered 45 cases, decided between June 1, 1985 and June 1, 1990, in which a lower federal court held state statutes unconstitutionally overbroad, but only three cases—two involving the same statute—in which state prosecutors, following federal holdings of overbreadth, brought actions to enforce the affected statutes."[358] Thus, Fallon suggests "overbreadth holdings by lower federal courts may be far more potent in practice than the surrounding legal doctrines would require them to be."[359] This may be because of the effect described by Shapiro: "the *in terrorem* effect of an injunction, no matter how artfully the injunction is phrased, may block the state courts at the threshold."[360] One of our hopes is that this Article will eliminate any such *in terrorem* effect by clarifying what federal judgments do—and do not—mean for subsequent cases. As the above discussion makes clear, state courts always retain the power to hear declaratory judgment actions in which a state statute can be construed and narrowed, even if a federal court has purport to "strike down" the statute.

B. Federal Court Solutions

1. General Principles

(a) Greater Use of Certification or Abstention

The broader use of certification or *Pullman* abstention is an obvious, but ultimately flawed solution to these problems. If a federal court believes that a broad interpretation of a state statute would lead to unconstitutionality, it could certify the question to the state supreme court, with the unspoken implication that if the state court fails to provide a satisfactory narrowing, a federal injunction will follow. This process can work well on occasion. In one case, for example, the Virginia Society for Human Life ("VSHL") challenged Virginia's election code in federal court, arguing that their free speech was chilled by certain reporting requirements for any group that attempted to "influenc[e] the outcome of any

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defendant cited the federal case as a defense. The state court of appeals noted that the federal court had *not* issued an injunction, and that even if there were a federal injunction in place, the state court could still give a "constitutionally acceptable construction to the statute involved." State v. McCluney, 180 S.E.2d 419, 421 (N.C. Ct. App. 1971), *rev'd on other grounds*, 185 S.E.2d 870 (N.C. 1972).

[358]Fallon, *supra* note 5, at 888 n.219.

[359]*Id.*

[360]Shapiro, *supra* note 199, at 770.

election."[361] The Fourth Circuit Court of Appeals noted that the district court had provided a narrowing interpretation,[362] but that the district court's ruling was "not binding upon state courts."[363] Thus, the Fourth Circuit said the district court's ruling:

> [c]ould not prevent a private party from suing to enjoin VSHL's distribution of campaign literature based on the statutes, nor could it prevent the state from prosecuting VSHL for failing to comply with the statutes. Because the scope of the statutes' applicability had not authoritatively been narrowed . . . VSHL's speech was still chilled by the statutes.[364]

The Fourth Circuit's response, however, was to certify to the Virginia Supreme Court the question of whether the statute really did apply to VSHL's activities. When the Supreme Court answered that the challenged laws do not reach advocacy groups such as VSHL,[365] the Fourth Circuit dismissed the case.[366]

Nonetheless, certification and abstention have not found great support among the federal judiciary. Certification has been criticized by a sitting federal judge as accomplishing nothing more than adding "time and expense to litigation that is already overlong and overly expensive."[367] State courts sometimes refuse to answer the certified questions,[368] at times taking the federal court's request as an insult to the state court's dignity.[369] If the state court does choose to answer the

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[361] Virginia Soc'y for Human Life, Inc. v. Caldwell, 152 F.3d 268, 270 (4th Cir. 1998) (quoting VA. CODE ANN. § 24.2-901 (Michie 2000)).

[362] *Id.*

[363] *Id.*

[364] *Id.*

[365] *Id.* at 275.

[366] *Id.*

[367] Bruce M. Selya, *Certified Madness: Ask a Silly Question . . .*, 29 SUFFOLK U. L. REV. 677, 691 (1995).

[368] *See, e.g.*, Blackburn v. Resolution Trust Corp., 627 So. 2d 915, 915 (Ala. 1993) (declining to answer certified question in two-sentence decision); Copper v. Buckeye Steel Castings, 621 N.E.2d 396, 396 (Ohio 1993) (declining to answer certified question because issue was too "factually specific"); *In re* Coleman v. Am. Red Cross, 483 N.W.2d 621, 621 (Mich. 1992) (declining to answer certified question without explanation); Glens Falls Ins. Co. v. Irion, 474 P.2d 700, 700 (Mont. 1970) (refusing to answer certified question, and expressing doubt that it needed to do so). For a fuller discussion of why various state courts refuse to answer certified questions, see Geri J. Yonover, *A Kinder, Gentler* Erie: *Reining in the Use of Certification*, 47 ARK. L. REV. 305, 323–25 (1994).

[369] In one case, the state supreme court refused to answer a certified question, solely because it apparently felt insulted at the federal court's strong implications as to the appropriate constitutional outcome. Jewell Theater Corp. v. Patterson (*In re* Cert. Question), 359 N.W.2d 513, 516 (Mich. 1984). The court's indignant language is unintentionally hilarious:

question, it might literally take years.[370] And even when an answer is finally produced, there is no guarantee that it will narrow the statute far enough to satisy the federal court's constitutional concerns. Thus, the whole process of certification can come at the expense of chilling the exercise of the constitutional right at stake—a special concern with overbroad laws. Indeed, due to the rationale for the overbreadth doctrine, the Court has indicated that where no reasonable narrowing construction is apparent, *Pullman* abstention (and by implication, certification) is inappropriate.[371] The Court has said that "abstention serves no legitimate purpose where a statute regulating speech is properly attacked on its face, and where, as here, the conduct charged in the indictments is not within the reach of any acceptable limiting construction readily to be anticipated as the result of a single criminal prosecution."[372] This is because "those affected by a statute are entitled to be free of the burdens of defending prosecutions, however expeditious, aimed at hammering out the structure of the statute piecemeal, with no likelihood of obviating similar uncertainty for others."[373] For good reason, therefore, many federal courts are reluctant to jeopardize constitutional rights during the time that

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> Thus, it is plain that the certified question procedure has not been employed to obtain an expression of this Court's opinion on a matter of Michigan law at all, or, even simply to obtain this Court's opinion "how * * * the words 'open [or] indecent exposure' as used in [M.C.L. 750.335a] should be defined." It has been employed instead to obtain a ruling from this Court on a question of First Amendment federal constitutional law with very explicit instructions from the federal court to this Court how that answer should be written to avoid federal court adjudication that the statute is unconstitutional.
>
> The rhetorical questions, of course, are by what authority does this Court tell the federal court how the litigation before it challenging the constitutionality of our statute, should be decided and by what authority does this Court "save" the statute from the probability of federal court nullification by ruling upon its constitutionality? There is no litigation before this Court challenging the constitutionality of the statute. Indeed, there is no lawsuit on the matter before this Court at all. There is a mere request for an advisory opinion not about "Michigan law" as is required by GCR 1963, 797.2, but about the constitutionality of a Michigan statute under the First Amendment of the United States Constitution, a question of federal constitutional law, thinly veiled behind a purported request to advise the federal court "how * * * the words 'open [or] indecent exposure' as used in [M.C.L. 750.335a] should be defined," accompanied by advice as to precisely how the question should be answered.

Id. at 516.

[370]In one case, for example, the Supreme Court of Puerto Rico refused to answer a certified question from the First Circuit—over two years after the question was posed. Cuesnongle v. Ramos, 835 F.2d 1486, 1490–91 (1st Cir. 1987). In another case, the Rhode Island Supreme Court took some six years to answer a certified question. Wood v. City of E. Providence, 811 F.2d 677, 678 (1st Cir. 1987).

[371]*See, e.g.*, City of Houston v. Hill, 482 U.S. 451, 467–68 (1987) (refusing to apply abstention doctrine).

[372]Dombrowski v. Pfister, 380 U.S. 479, 491 (1965).

[373]*Id.*

it might take for the state court to consider the certified question. Thus, they often err on the side of finding that the state statute is not susceptible to a narrowing construction, avoiding the necessity of certification or abstention at all.

(b) Classical Avoidance Supported by an Injunction

There is, however, a more promising solution to the federal courts' fear of making a non-binding narrowing construction of a state law—returning to the practice of classical avoidance. That is, courts should make a definite constitutional determination as to the validity of the law if broadly construed, and then construe the law narrowly[374] so as to save its constitutionality. Courts should then back up this judgment with an injunction, or, alternatively, make a "declaration specifying a limited number of impermissible applications of the statute,"[375] and enforce the declaration by an injunction against those applications. Then, if the state tries to enforce the law based on the broader interpretation,[376] the federal court should have the authority under the Anti-Injunction Act[377] to issue an

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[374]The court might also choose to characterize its action as severing an unconstitutional application of the statute. *See supra* notes 90–105 and accompanying text (discussing similarities between severability and classical avoidance doctrines).

[375]Steffel v. Thompson, 415 U.S. 452, 474 (1974).

[376]As to our suggestion that federal courts take on a broader role in enjoining specific statutory applications (or, severing/construing the statute so as to exclude those applications), an objection might be raised as follows: "What if the federal court uses this injunctive power not to enforce a narrowing construction that saves the statute's constitutionality, but to do the opposite? That is, what if the federal court makes a broad interpretation of the law, holds it unconstitutionally overbroad, and then attempts to enjoin any future state court enforcement that would be based on a narrower interpretation? Wouldn't that cause the very problem that you are trying to solve?"

To answer this counterargument, we would make an analogy to Justice Brennan's one-way ratchet theory of Section 5 of the 14th Amendment. According to that theory, Congress has the authority under Section 5 to adopt and enforce broader protections for individual rights than the Supreme Court might wish to adopt itself, but Congress can never make narrower interpretations of individual constitutional rights than the Court. *See Katzenbach v. Morgan*, 384 U.S. 641, 651 n.10 (1966). While this theory has been disavowed by the Court for purposes of the 14th Amendment's Section 5, *see City of Boerne v. Flores*, 521 U.S. 507, 529 (1997), it has a normative appeal that should help resolve the problem to which this Article is addressed.

Here's why: A federal court has a legitimate interest in making sure that a state law is not applied so broadly that it is clearly unconstitutional. Thus, the federal court can legitimately enjoin a state from enforcing its law according to the overbroad interpretation. On the other hand, a federal court has *no* legitimate interest in preventing a state court from giving a saving construction to a seemingly overbroad law. After all, if the state court does adopt a valid saving construction, then by definition constitutional rights have been protected to the extent possible.

[377]Act of June 25, 1948, ch. 646, 62 Stat. 968 (codified as enacted at 28 U.S.C. § 2283 (2000)).

injunction against any conflicting state proceedings—on the grounds that it can protect and effectuate its judgment.[378]

This seems to be the approach advocated by Professor Shapiro: "[t]he federal determination might have been limited to a declaration that certain activity was immune from state prosecution under the statute, leaving to the state courts in later proceedings the question of the severability and effect of any portion . . . whose enforcement was not thus proscribed."[379] It is also similar to the course taken in the controversial Seventh Circuit decision of *Hope Clinic v. Ryan*.[380] In that case, the court held that the partial-birth abortion statutes of Illinois, Indiana, and Wisconsin could not constitutionally be applied to the D&E procedure—and then provided the following remedy:

> On remand the district judges should enter precautionary injunctions, limited to implementing the conclusion of this paragraph that the state laws may not be applied to a normal D&E or induction until after the state has provided additional specificity, by statutory amendment, regulations, or judicial interpretation (which could arise either from civil litigation . . . or from criminal prosecutions in which the parties disagree about whether the medical procedure properly may be labeled a D&X). With that assurance in hand, plaintiffs would not face any *substantial* threat of prosecution.[381]

The dissent, written by Judge Posner, argued that the precautionary injunction was a "novel form of relief" that "violate[d] Article III of the Constitution,"[382] and protested that "[s]tate officials [would] be subject to federal contempt sanctions for failing to abide by a federal court's interpretation of the

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[378]It might also have the ability under the All Writs Act, Act of June 25, 1948, ch. 646, 62 Stat. 944 (codified as enacted at 28 U.S.C. § 1651 (2000)), to issue a writ enforcing its judgment, although this is an open question. The Court has held that "[t]he All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute. Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling." Pa. Bureau of Corr. v. United States Marshals Serv., 474 U.S. 34, 43 (1985).

[379]Shapiro, *supra* note 199, at 767.

[380]195 F.3d 857 (7th Cir. 1999).

[381]*Id.* at 869.

[382]*Id.* at 876 (Posner, J., dissenting). Judge Posner's objection to state officials being subjected to federal contempt sanctions is perplexing. His recommended solution—and indeed any facial invalidation of a state statute by a federal court—results in the same exact situation: State officials acting under a state statute are subjected to federal contempt sanctions for taking actions the federal court has deemed unconstitutional. The only difference in this regard between the majority's injunction and the one the dissent would have entered is that the majority imposed this remedy in a more limited fashion, removing some, but not all, of the state officials' ability to enforce the statute.

statutes that these officials, not federal judges, [were] charged with administering."[383] Moreover, said Posner, the precautionary injunction was wholly unprecedented: "In no case cited by the majority did a federal court impose its own narrowing interpretation on a state statute by injunction, let alone a state statute the language of which defies a saving interpretation."[384] As a result, the majority's decision curtailed the state courts' prerogative to interpret state statutes "by forbidding the states to enforce state statutes that the court has *not* found to be invalid."[385] Finally, Posner said that the "court's direction to issue 'precautionary' injunctions is a tacit acknowledgment of its inability to give the statutes a plausible narrowing interpretation."[386]

This last point would be more accurate if restated as follows—the federal court's injunction was a tacit acknowledgment of its inability to give the statutes a *binding* narrowing interpretation. As we have seen, federal courts lack such authority when a state statute is concerned. Thus, in a case of potential vagueness or overbreadth, federal courts often see themselves as facing a stark choice—either assume a narrowing interpretation (which could be overruled at any time by a state court) and uphold the statute, or assume an overbroad interpretation and "strike the statute down" entirely.

What Judge Easterbrook's majority opinion rightly points out is that the choice facing federal courts is not quite so stark. Perhaps the overbreadth doctrine's focus on facial constitutionality has, in effect, blinded the federal courts to their powers to engage in more limited invalidations and to enjoin particular applications of a statute, such as to the D&E procedure. The court's choice is not between facial validation (based on a non-binding narrowing construction) and facial invalidation. Instead, the federal court can lawfully do *exactly what it does in the as-applied mode of adjudication*, where it is unquestionably within the federal court's power to enjoin a statute's application to a particular activity without facially invalidating the statute altogether. Judge Easterbrook's response to the dissent made this point clear:

> If as plaintiffs believe the Constitution requires an injunction against everything Illinois and Wisconsin have enacted . . . then the Constitution can't simultaneously forbid an injunction against potential misuses of state power in the enforcement of these laws. Article III does not limit a federal court's choice to enjoining nothing, or enjoining

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[383] *Id.*

[384] *Id.* at 877–78. For an example of what Judge Posner described, see *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504–07 (1985) (severing application of obscenity statute to material invoking "lust").

[385] *Hope Clinic*, 195 F.3d at 878.

[386] *Id.* at 886–87.

> everything. The path we choose allows the states to interpret their laws and supply more concrete rules . . .; the path the plaintiffs (and our dissenting colleagues) prefer would foreclose now and forever all interpretation by the state judiciary. By filing suit against a novel and ambiguous law in federal court, litigants can't preclude interpretation by the state judiciary. Our precautionary approach preserves the state judiciary's role while protecting plaintiffs' (and their patients') legitimate interests in the interim.[387]

Interestingly, the majority in *Hope Clinic* did not engage in the severance inquiry as to whether the state legislature would have enacted the provision as limited.[388] Unlike severance, however, entering a limited injunction is not a matter of state law and, thus, the federal court is not required to predict whether the state would have adopted the statute as enjoined. Rather, the limited injunction is drawn strictly on constitutional lines, as opposed to the statutory lines that often drive severance, and leaves to state officials and state courts the task of any further narrowing or modification of the statute. In this regard, the limited injunction is more like an as-applied challenge than severance.[389]

2. *Specific Applications of Classical Avoidance Supported by an Injunction*

Now that we have reviewed the range of remedies available for federal courts facing overbreadth or vagueness challenges to uninterpreted state statutes, and offered our recommendation that courts employ limited injunctions to protect both state and individual interests, our final task is to offer some guidance as to *when* a federal court should utilize a limited ruling and when individual interests still demand total invalidation. In order to do this, we begin with the uncontroversial premise that when a federal court can use a narrow ruling to fully protect individual rights without imposing on legitimate state activity, it is better to do so than to needlessly impinge on state sovereignty. Indeed, as judges are sworn to uphold the Constitution, it would be fair to say that federal judges are in fact

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[387] *Id.* at 869–70 (citation omitted).

[388] Recall that when a court severs a provision or application of a statute, part of the inquiry is whether the state would have enacted the provision without the severed portion. *See supra* Part II.E. (discussing severability doctrine).

[389] Note that when a court is faced with an as-applied challenge to a statute, it simply states that certain actions either are or are not permitted under the Constitution. If the state does not like the manner in which the federal courts have resolved such challenges, the proper remedy is for the state itself to change its statute. Likewise with limited injunctions, if the state does not wish the statute to be applied to the remaining conduct, that decision is left to either the prosecutors (who, of course, can choose not to enforce the statute) or the legislature (which can repeal the statute if it is dissatisfied with the way it is enforced).

obligated, where possible, to preserve both state and individual rights. Put another way, federal courts are authorized by the Constitution and by Congress to resolve cases and controversies placed before them, not to use the occasion of such cases and controversies to weigh in on policy issues or tilt the balance of power as set forth in the Constitution. Undoubtedly, it is for these reasons that the Supreme Court has stated that facial invalidation is "strong medicine" to be used "sparingly, only as a last resort."[390]

If we begin with the premise that federal courts should issue relief against the states only as far as is necessary to protect the individual interests at stake, the next step is for the court to identify precisely which ills the case before it presents. Not all requests for facial invalidation raise the same interests. To take an obvious example, a request to facially invalidate a law allowing for segregated schools implicates individual rights to equal protection[391] (among others); also, a request to invalidate a law allowing for differential treatment of speakers in the public forum implicates individual interests in free speech and societal interests in the free exchange of ideas.[392]

Our focus in this Article has been to look at two particular reasons for facial invalidation that judges often employ in challenges to uninterpreted state laws—overbreadth and vagueness. As we discussed in Part II, these doctrines were developed to combat very specific evils. The overbreadth doctrine is intended as a tool to prevent the prosecution of constitutionally protected activity under a statute that sweeps within its reach both protected and unprotected activity.[393] In addition, overbreadth rulings are intended to prevent the chilling of protected conduct created by the threat of such prosecutions, even if they do not materialize.[394] The void-for-vagueness doctrine, on the other hand, is designed not only to prevent the chilling of constitutionally protected conduct, but also to protect citizens from arbitrary enforcement of the law and from the unfairness of being held to a law that reasonable persons cannot understand.[395]

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[390]*See* L.A. Police Dep't v. United Reporting Publ'g Corp., 528 U.S. 32, 39 (1999) ("Because of the wide-reaching effects of striking down a statute on its face at the request of one whose own conduct may be punished despite the First Amendment, we have recognized that the overbreadth doctrine is 'strong medicine' and have employed it with hesitation, and then 'only as a last resort.'" (quoting New York v. Ferber, 458 U.S. 747, 769 (1982))).

[391]*See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (holding that "such segregation is a denial of the equal protection of the laws").

[392]*See, e.g.*, Denver Area Telecomms. Consortium, Inc. v. F.C.C., 518 U.S. 727, 802–03 (1996) (Kennedy, J., concurring) (noting that "significant interchanges of ideas and shaping of public consciousness occur in mass and electronic media").

[393]*See, e.g.*, Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973) (discussing reasoning behind Court's overbreadth jurisprudence).

[394]*Id.*

[395]*See, e.g.*, Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972) (holding laws must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited").

We have described the various rulings available to federal courts faced with vagueness and overbreadth challenges and have advocated, generally, the greater use of classical avoidance enforced by a partial injunction. We do not, however, suggest the complete abandonment of total facial invalidation on overbreadth or vagueness grounds. Rather, we believe that constitutional interests can best be protected by courts which tailor their relief to the particular harm to be prevented and, after considering *all* the available rulings, selecting that which remedies the harm while doing the least damage to other interests. But how is a federal court to make this decision?

Generally, the first step for any court asked to invalidate a state statute should be to ask: "What personal constitutional rights am I trying to protect?" The second question to be asked is: "What ruling will protect those rights while doing the least harm to state interests?" Because the answer to these two questions will differ according to whether the challenge is based on the overbreadth or vagueness doctrines, we have divided our advice to federal courts to address each particular doctrine. In our concluding section, we will address how federal courts should go about resolving facial challenges that rely on both doctrines, as is often the case.

C. Deciding Overbreadth Challenges

As described above, the overbreadth doctrine was created specifically to address the harm caused by statutes that allow prosecutions for (and thus chill) constitutionally protected activity.[396] Thus courts considering total facial invalidation on overbreadth grounds should carefully consider *all* rulings which would eliminate the threatened prosecutions (and thereby eliminate the accompanying chilling effect) and seek out those which, in the particular circumstances, would eliminate these threats without imposing unnecessary burdens on state rights. In fact, while the Supreme Court has stated that combatting the threat of such prosecutions is an important constitutional interest, it has also specifically stated that as soon as this threat is removed, there is no reason to invalidate a statute's application to constitutionally proscribable activity.

In *Massachusetts v. Oakes*,[397] for example, the Supreme Court was presented with an overbreadth challenge to a state child pornography statute.[398] While citing the importance of the interest protected by overbreadth rulings, a plurality of the

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[396]*See Broadrick*, 413 U.S. at 612; Thornhill v. Alabama, 310 U.S. 88, 97–98 (1940) (criticizing overbroad statutes and their chilling effects).

[397]491 U.S. 576 (1989).

[398]*Id.* at 578.

Court stated that as soon as that interest is no longer threatened, there is no need to prevent the state from enforcing the statute in permissible ways:

> There is nothing constitutionally offensive about declining to reach Oakes' overbreadth challenge. Overbreadth is a judicially created doctrine designed to prevent the chilling of protected expression. An overbroad statute is not void *ab initio*, but rather voidable, subject to invalidation notwithstanding the defendant's unprotected conduct out of solicitude to the First Amendment rights of parties not before the court. *Because the special concern that animates the overbreadth doctrine is no longer present after the amendment or repeal of the challenged statute, we need not extend the benefits of the doctrine to a defendant whose conduct is not protected.*[399]

The Court's willingness to abandon the overbreadth doctrine once the "special concern that animates the overbreadth doctrine is no longer present" is precisely what our limited invalidation solution offers.[400] Just as the Court would not extend the protections to a defendant "whose conduct is not protected," so our solution calls on courts to not extend invalidation to such conduct whenever protected conduct can be safeguarded against prosecution.

In short, we propose that in many situations, a federal court will be able to eliminate the chilling effect by some remedy short of total facial invalidation. Whether this is possible depends on the conduct regulated by the statute.[401] If the statute is worded such that the federal court can clearly indicate what conduct can and cannot be reached by the statute under the Constitution, the federal court should use a limited solution. If the court is able to identify particular applica-

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[399] *Id.* at 584 (plurality opinion) (emphasis added) (citing Pope v. Illinois, 481 U.S. 497, 501–02 (1987)). While the remaining Justices disagreed with the plurality as to whether an amendment to the statute precludes use of the overbreadth defense, their argument still centered on fixing the law to those situations in which a chilling effect might be implicated. Compare the plurality's statement above with the statement from Justice Scalia's opinion that the chilling effect actually remains as to conduct before the amendment. *See id.* at 585–86 (Scalia, J., concurring in part and dissenting in part). The remaining dispute among the justices—whether an amendment made *after* a prosecution begins can remove the overbreadth defense—is not relevant to this argument, as we are dealing with challenges only to uninterpreted statutes. However, we would agree with Justice Scalia's opinion that it would be greatly problematic to allow a state to resuscitate a prosecution that was void for overbreadth when it began by amending the law in the middle of the game. *See id.* at 586.

[400] *Id.* at 584.

[401] In a sense, this is a parallel inquiry to the severance question concerning whether the statute is "susceptible" to severance. However, as we have discussed *supra* notes 94–96 and accompanying text, courts too often overemphasize the wording of the statute and forget that they are often explicitly empowered to sever not just words, but specific applications of the statute.

tions of the statute that would be unconstitutional, it should simply identify them as unconstitutional, enjoin any enforcement using those applications, and allow the statute to stand otherwise (classical avoidance supported by an injunction).[402] If, however, the conduct is such that the court cannot articulate a clear line or category, then it should proceed with total facial invalidation. Put another way, our limited invalidation is preferable if the court is able to fill in the blanks of the following sentence: "It would be unconstitutional to apply this statute to X and Y, but constitutional to apply it to everything else, so therefore the state is enjoined from applying the statute to X and Y, but permitted to apply it to everything else."[403] Some examples will make this paradigm more clear.

Consider overbreadth challenges in the partial-birth abortion context. We will assume, as we did before, that so long as there is an adequate exception for the life and health of the mother, it would be constitutional to prohibit D&X or partial-birth abortion and unconstitutional to prohibit D&E abortion. This presents a textbook opportunity for employing the limited invalidation we propose. Again, overbreadth challenges are animated by the fear that the statute will chill constitutionally protected activity. Thus, we should apply a limited ruling which specifically identifies that which is constitutionally protected—here D&E abortion—and then provide explicit and complete protection for that interest by issuing an injunction prohibiting enforcement of the statute as to those abortions. Therefore, citizens will not be subject to prosecution for the constitutionally (and now equitably) protected D&E abortions. Moreover, there will be no chilling effect, because the court will have provided clear notice that certain activities are, in fact, constitutionally protected, and not subject to the statute.[404]

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[402]While this might seem as if we are advocating a usurpation of state power, it is important to remember that this course only involves a federal court stating that certain applications or interpretations would be unconstitutional. The only right a state loses in this regard is the right to prosecute the first case that falls into that category; once that case is brought and the statute's reach is clarified, any other citizen with standing would be able to seek federal injunctive relief. Moreover, helping that first person to avoid prosecution is the very reason our law allows injunctions against the enforcement of laws in the first place. *See, e.g.*, *Ex Parte* Young, 209 U.S. 123, 165 (1908) ("To await proceedings against the company in a state court grounded upon a disobedience of the act, and then, if necessary, obtain a review in this court by writ of error to the highest state court, would place the company in peril of large loss and its agents in great risk of fines and imprisonment if it should be finally determined that the act was valid. This risk the company ought not to be required to take . . . .").

[403]As set forth above, because this inquiry is not one of state law and is governed solely by constitutional distinctions about what conduct is proscribable—as opposed to statutory distinctions drawn by the legislature—it should not be subject to the requirement that the court speculate as to the state legislature's opinion of the limited statute. *See supra* notes 101–05 and accompanying text (discussing severability).

[404]This is precisely the route taken by the Seventh Circuit in *Hope Clinic v. Ryan*, 195 F.3d 857 (7th Cir. 1999). *See* discussion *supra* note 388 and accompanying text (discussing federal courts' power to "engage in limited invalidations" of overbroad statutes).

This type of line-drawing between protected and unprotected conduct should not be limited only to those situations in which the conduct admits of easily ascertainable boundaries. In fact, the seminal overbreadth case of *Thornhill v. Alabama*[405] shows the Supreme Court reaching for dividing lines that are not nearly as evident as distinctions between methods of abortion. In *Thornhill*, the Court evaluated a statute which prohibited picketing "for the purpose of impeding, interfering with, or injuring [a] business."[406] Unlike the clear distinctions which can be drawn between abortion procedures, the picketing statute just refers broadly to "picketing" without any attempt at subdivision. Still, the Supreme Court made clear that, if possible, it would have selected a dividing line between protected and unprotected conduct. However, because the statute in that instance had been authoritatively interpreted by state courts, the Court found no room in which to fashion limited relief:

> [The law] has been applied by the state courts so as 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; the purpose of the described activity was concededly to advise customers and prospective customers of the relationship existing between the employer and its employees and thereby to induce such customers not to patronize the employer.[407]

Because of these authoritative interpretations, the Court found no room to parse protected from unprotected behavior, although it did make clear the various lines it might have considered:

> The statute as thus authoritatively construed and applied leaves room for no exceptions based upon either the number of persons engaged in the proscribed activity, the peaceful character of their demeanor, the nature of their dispute with an employer, or the restrained character and the accurateness of the terminology used in notifying the public of the facts of the dispute.[408]

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[405] 310 U.S. 88 (1939).
[406] *Id.* at 91.
[407] *Id.* at 98–99 (citations omitted).
[408] *Id.* at 99.

Thus, even where statutory language might not offer obvious opportunities for a federal court to distinguish between protected and unprotected activity, the Supreme Court's *Thornhill* opinion strongly suggests that such line drawing is appropriate.[409] Because of the Court's expressed willingness to seek out dividing lines between protected and unprotected activity even when they are not obvious from the face of the law, one might question when, if ever, a state statute should be totally invalidated based on overbreadth. The *Thornhill* opinion provides one example—when authoritative state constructions of the statute have foreclosed a federal court's ability to interpret the statute at all.

A second situation might arise from statutes regulating conduct that can be judged only on a case-by-case basis and, thus, are susceptible to no clear dividing line. Consider, for example, a statute that banned all anti-war protests on the grounds that they present a clear and present danger to the nation. While a federal court might try to find a clear line to separate protected from unprotected activities, the Supreme Court has repeatedly stated that whether a given speech or assembly of people presents a threat to public safety must be assessed on a case-by-case basis.[410]

In such circumstances, a federal court will be unable to articulate a clear line on which to fashion injunctive relief. If such a line existed, presumably the Court would not require case-by-case determinations. Total invalidation of overbroad statutes would therefore be appropriate because the constitutionally protected conduct could only be protected (and the accompanying chill on constitutional rights only dissipated) by striking the statute in its entirety.

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[409]Of course, not all such lines would be permissible. For example, neither a court nor a legislature would be able to distinguish among pickets based on their subject matter. As the Court pointed out in *Police Department of Chicago v. Mosley*, 408 U.S. 92, 100–01 (1972):

> Predictions about imminent disruption from picketing involve judgments appropriately made on an individualized basis, not by means of broad classifications, especially those based on subject matter. Freedom of expression, and its intersection with the guarantee of equal protection, would rest on a soft foundation indeed if government could distinguish among picketers on such a wholesale and categorical basis.

Id.

[410]*See, e.g.*, Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 844 (1978) (noting lower court's responsibility to "examine for itself the particular utteranc[e] here in question and the circumstances of [its] publication to determine to what extent the substantive evil of unfair administration of justice was a likely consequence, and whether the degree of likelihood was sufficient to justify [subsequent] punishment") (internal quotation marks omitted); Whitney v. California, 274 U.S. 357, 378–79 (1927) (Brandeis, J., concurring) (requiring: "enquiry into the question whether, at the time and under the circumstances, the conditions existed which are essential to validity under the Federal Constitution. . . . Whenever the fundamental rights of free speech and assembly are alleged to have been invaded, it must remain open to a defendant to present the issue whether there actually did exist at the time a clear danger; whether the danger, if any, was imminent; and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by the legislature.").

Likewise, the Court has also indicated that certain Fourth Amendment considerations must be made on a case-by-case basis. "The Fourth Amendment does not require that a lawfully seized defendant be advised that he is 'free to go' before his consent to search will be recognized as voluntary."[411] Furthermore, the court has noted that "the touchstone of the Fourth Amendment is reasonableness," which is "measured in objective terms by examining the totality of the circumstances. In applying this test, [the Court] ha[s] consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry."[412] Thus, a state statute which sought to authorize a broad range of searches or sought to establish the precise criteria for voluntariness would likely be struck down as overbroad because the Supreme Court has indicated that such determinations are not susceptible to bright-line rules and therefore the federal court would be unable to draw a line on which to fashion limited relief.

To sum up, because the harm to be avoided is the prosecution or threat of prosecution for constitutionally protected activity, the proper inquiry for a federal court faced with an overbreadth challenge to a state statute is to consider whether it can articulate any clear dividing line between constitutionally protected and unprotected activity. If the federal court can articulate such a dividing line, its ruling should reach no further than that dividing line because no more is needed to vindicate individual rights; if it cannot, total invalidation is appropriate.

D. Deciding Vagueness Challenges

As discussed above, there are three concerns animating the vagueness doctrine. First, courts are rightly concerned that citizens be fairly warned of what behavior is being outlawed; second, courts are concerned because vague laws provide opportunities for arbitrary enforcement and put the enforcement decisions in the hands of police officers and prosecutors instead of legislatures; finally, where vague statutes regulate behavior that is even close to constitutionally protected, courts fear a chilling effect will impinge on constitutional rights.[413]

While the Supreme Court has indicated that these are all important interests—indeed often important enough to justify total invalidation of a state statute—it has also stated that when these concerns are resolved through some action short of total facial invalidation, such complete relief is no longer appropriate. In the case of *Roberts v. Jaycees*,[414] for example, the Court considered a statute which prohibited discrimination on the basis of sex in places of public accommodation. The Court held that while the void-for-vagueness

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[411]Ohio v. Robinette, 519 U.S. 33, 35 (1996).

[412]*Id.* at 39.

[413]Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972).

[414]468 U.S. 609 (1984).

doctrine protected important interests, the Minnesota Supreme Court's construction of the Act by use of "objective criteria" ensures that the Act's reach is "readily ascertainable," and therefore should not be rejected as vague.[415] Likewise in *Ginsberg v. New York*,[416] the Court held that the New York Court of Appeals' construction of a child pornography statute was sufficient to give citizens "adequate notice of what is prohibited" and therefore does not pose a threat to the interests usually protected by the void-for-vagueness doctrine.[417] Thus, as with the overbreadth doctrine, it is clear that the Supreme Court only deems invalidation for vagueness necessary when the statute actually threatens the asserted interests. If some intervening act has eliminated the threat to those interests, the statute should not be held void.

The task for a federal court facing a vagueness challenge, then, is to determine whether there are rulings short of complete invalidation that will suffice to meet all of the concerns of the vagueness doctrine. If there are, then these rulings should be preferred because further disruption of state interests is thereby unnecessary.

As with overbreadth, a clear line articulated by a federal court and enforced by an injunction would likely resolve most of the problems caused by vague statutes. A clear line, for example, would: eliminate the problem of citizens not receiving fair warning (the decision itself would provide the required warning); reduce the possibility of arbitrary enforcement (by setting more precise bounds on prosecutions); and limit any chill to constitutional liberties by stating that they are protected.

However, unlike the overbreadth inquiry, in which any line-drawing is justified by constitutional considerations, the vagueness inquiry does not focus on sorting protected from unprotected conduct. Rather, a vague statute is problematic even if *none* of the conduct which it reaches is constitutionally protected; the flaw is in the absence of fair warning rather than the substantive conduct restricted. Thus the classical avoidance we suggested for overbreadth challenges—which requires a determination that certain applications would be unconstitutional might not appear to have any place in the vagueness inquiry.

Absent a constitutional determination, can the federal court just pick a line then and issue an injunction so as to save the statute from being void for vagueness? Our answer is a qualified yes. As a general matter, federal courts should not use their equitable powers to impose interpretations that are not dictated by the Constitution. To do so unilaterally would create precisely the problem we aim to redress, namely, undue federal court interference with a state's prerogative to interpret its own laws.

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[415] *Id.* at 629–30.

[416] 390 U.S. 629, 643 (1968).

[417] *Id.* at 643 (quoting Roth v. United States, 354 U.S. 476, 492 (1957)).

However, in those cases in which a state (or its representative, such as the governor or attorney general) affirmatively *requests* that the federal court engage in such line-drawing to save the statute, such action is warranted. After all, it would make little sense to ignore the expressed wishes of a state's chosen representatives and claim to be doing so in order to respect that state's interests.[418] Thus, when and if a state official proposes some interpretation or line-drawing that would actually alleviate the vagueness concerns, federal courts should be willing to let the statute escape total facial invalidation; indeed, because any clear line would obviate the usual vagueness concerns, no reasons to invalidate the statute would remain. In such cases, the federal court should state that it accepts the interpretation offered by the state actors and that it is imposing an injunction against any broader application of the statute to effectuate its ruling. In this way, the court can know that it has imposed a solution which eliminates the concerns of fair warning, arbitrary enforcement, and chilling, without invalidating the statute so as to prevent future state interpretations.

In the vagueness context, when is total invalidation still called for? First, if the state is unwilling or unable to propose a line of demarcation along which equitable relief might issue, then the court will have little choice but total facial invalidation. Absent a state representation of its belief as to the meaning of the law, a federal court would be dangerously close to legislating if it simply mandated that certain activities be covered and others not.[419]

For example, in the partial-birth abortion context, even without the constitutional element, the states were often asking the courts to accept a narrow interpretation of the law so that it was only applicable to a defined set of abortions. When faced with such state requests, federal courts should have used their injunctive powers to require the state enforcement authorities to remain true to their own representations in court.

In other situations, however, a state might be unwilling or unable to propose a limiting principle that will eliminate the vagueness concerns. There, total facial invalidation will remain the only remedy that can adequately address the vagueness concerns. For example, in the classic vagueness case of *Papachristou v. City of Jacksonville*,[420] the city's vagrancy statute was defended as a whole, in

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[418]When drawing distinctions based on the representations of state officials, federal courts should probably also perform the severance inquiry concerning whether the legislature would have enacted the law as limited. If the federal court does not perform this inquiry, it risks altering the balance of power within state government by allowing the executive branch to trump the legislative.

[419]Because the overbreadth context requires a judgment from the court that is based on the Constitution, the same concern is not present. Only in the vagueness context, in which the line may have no particular federal significance other than as a saving mechanism, does this problem present itself.

[420]405 U.S. 156 (1972).

part because it broadly facilitated "crime . . . being nipped in the bud."[421] The Court, however, deemed that such vagrancy laws show "the scales of justice are so tipped that even-handed administration of the law is not possible."[422] In such a situation, it is likely that the state would not be able to (and perhaps would not have been willing to) propose a narrowing principle.

E. Deciding Mixed Challenges Invoking Both Overbreadth and Vagueness

Thus far, we have articulated principled means for a federal court to decide whether a limited invalidation will satisfy the purposes of either the overbreadth doctrine or the vagueness doctrine, depending on the basis for the challenge. We have recommended that overbreadth challenges can usually be resolved through limited invalidation via classical avoidance enforced by an injunction. We have also observed, however, that the concerns underlying the vagueness doctrine may be more difficult to alleviate short of total facial invalidation, simply because the federal court may lack a principled basis for its injunction. Where, then, does that leave courts faced with joint overbreadth and vagueness challenges? Are such challenges like overbreadth, where the concerns can usually be alleviated through classical avoidance and injunction? Or are they more like vagueness challenges, which may lack a principled basis for federal court line-drawing?

We think mixed challenges pose both types of problems, but should usually be resolved more like overbreadth questions rather than vagueness questions. Why? Recall that the main problem with our solution as to vagueness challenges was that, while a clearly articulated and enforced line would usually alleviate the doctrinal concerns, vagueness challenges may not present any principled basis for federal courts' line-drawing. When the vagueness challenge is combined with an overbreadth challenge, however, the overbreadth challenge actually provides the principled basis for federal court interpretation that is often absent in pure vagueness challenges.

Thus, when faced with a mixed challenge, the court should use this sequence: Begin with the overbreadth issues and, using classical avoidance, attempt to articulate a line between protected and unprotected conduct; then, the court should consider the vagueness challenge in light of the overbreadth line—given the existence of the overbreadth line, are the fears inherent in vagueness challenges still present? Often the drawing of a clear line—any clear line—will suffice to eliminate the harms that vague statutes may produce. For this reason, federal courts often accept the existence of any state court interpretation of a statute as eliminating vagueness concerns. However, the answer will vary with the case. In some cases, drawing the overbreadth line (and enforcing it with

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[421] *Id.* at 171.
[422] *Id.*

an injunction) will eliminate the indeterminacy that gave rise to the vagueness challenge in the first place. In other cases, however, the indeterminacy may still exist even after the court has imposed its overbreadth line. Consider the following examples.

First, we return to the partial-birth abortion statutes. The alleged vagueness of these statutes usually involved an inability on the part of physicians to know which procedures were banned and which were permitted. An overbreadth ruling stating that the law applies to D&X abortions but not to D&E abortions should at the same time eliminate the vagueness concerns by providing a clear path for citizens to follow.

Consider, however, the concerns raised by the classic example of a vague "loitering" statute. Such a statute is clearly susceptible to challenges both for its vagueness,[423] and for its overbreadth.[424] In such cases, it is entirely possible that the line drawn by a court to address the overbreadth problem will not alleviate the overall vagueness of the statute.[425] For example, the court could, through classical avoidance, address overbreadth concerns by determining that it would be unconstitutional to apply the loitering statute to picketing and demonstrations. Such a ruling, however, would not resolve the vagueness problems. A person faced with the law after the court's ruling might know that she can engage in picketing without fear of prosecution, but the statute would still be impermissibly vague because persons of ordinary intelligence would not be able to determine whether other activities—such as waiting for a friend on the corner—would be subject to the statute. In such a situation, the federal court has little choice but to either engage in total facial invalidation or to rely on an interpretation offered by the state.

VI. CONCLUSION

As we have seen, both state courts and federal courts have misunderstood the scope of the federal courts' powers. Federal courts have wrongly feared that their judgments in overbreadth and vagueness cases will not be observed, and have reached out to completely enjoin the enforcement of statutes that may be valid at

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[423] *See, e.g.*, *Papachristou*, 405 U.S. at 162 (citations omitted) (explaining vagueness doctrine).

[424] *See, e.g.*, Kolender v. Lawson, 461 U.S. 352, 358 (1983) (noting that loitering statute raised concerns about "potential for arbitrarily suppressing First Amendment liberties" (quoting Shuttlesworth v. City of Birmingham, 382 U.S. 87, 91 (1965))); Sawyer v. Sandstrom, 615 F.2d 311, 317–18 (5th Cir. 1980) (deeming loitering statute unconstitutionally overbroad because it impinged on First Amendment right of free association).

[425] It is also possible, of course, that the reverse will be true—that line drawing which eliminates vagueness concerns will fail to remedy overbreadth problems. In *Sawyer*, for example, the Fifth Circuit stated that while subsequent state court interpretations may have eliminated the vagueness concerns, the overbreadth problem remained. 615 F.2d at 315.

least in part. State courts, on the other hand, have wrongly feared that when a federal court has done just that, there was no future recourse because the law had been "struck down." Both fears are misplaced. A federal court has the same power to partially limit the scope of a state statute by injunction that it has to enjoin enforcement entirely. Moreover, a state court always retains the power to issue a declaratory judgment narrowing the scope of the challenged state statute, no matter what the federal court does.

The federal courts' misconception is due to the very nature of the overbreadth and vagueness doctrines, which are in tension with otherwise unchallenged principles of deference and limited invalidations. Overbreadth and vagueness challenges often seek *facial* resolution of a constitutional challenge; the latter doctrines, however, are the equivalent of *as-applied* resolution. But because those doctrines are characterized in terms of *interpretation* of a state law—which federal courts are not empowered to do—federal courts are reluctant to issue an opinion that would be non-binding. Thus, facial invalidation becomes the order of the day.

As we have shown, however, the remedy of facial invalidation by injunction is not always necessary. *In as-applied adjudication, a federal court can enjoin specific applications of a statute. There is no obstacle to using this very power—under other names such as severance, avoidance, or a narrowing construction—in cases that are self-styled as overbreadth or vagueness facial challenges.* In fact, in most overbreadth challenges and some vagueness challenges, a federal court will be able to enforce a limited construction of the statute that will simultaneously eradicate any chilling, fair warning, or arbitrariness problems, yet allow state actors to (1) continue to enforce the law against proscribable conduct, and (2) seek authoritative interpretations from state courts. By considering the full range of their powers and actively seeking such a solution short of total invalidation, federal courts can protect individual liberties while respecting those powers the Constitution reserves for the states. Clearing up these misconceptions about the nature of federal courts' power is essential to the health of our federal system.